

**REPARATIONS UNDER INTERNATIONAL LAW: A CASE
STUDY OF THE HERERO AND NAMA CLAIMS FOR
REPARATIONS FOR GENOCIDE COMMITTED BY THE
GERMAN GOVERNMENT**

A THESIS SUBMITTED IN FULFILMENT OF THE
REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS OF
THE UNIVERSITY OF NAMIBIA

BY

CHRISTIAN HARRIS

200403338

2014

Supervisor: Professor John Baloro, University of Namibia

External Examiner: Professor Melvin Mbao, University of the North,
Republic of South Africa.

Internal Examiner: Professor Boyce Phillip Wanda, University of
Namibia

Table of Contents

Abstract.....	vii
Acknowledgements.....	ix
Dedication.....	x
Supervisors' certificate	xi
Declaration.....	xii
List of Acronyms	xiii
CHAPTER 1: INTRODUCTION	1
1.1 Orientation of the Study.....	1
1.2 Statement of the Problem.....	2
1.3 Objectives of the Study	2
1.4 Significance of the Study.....	3
1.5 Limitations of the study	4
1.6 Literature Review.....	6
1.7 Research Methodology	18
1.8 Legal Literature and the Internet.....	23
1.9. Ethical issues.....	23
1.10. Structure of the thesis.....	24
2. CHAPTER 2: HISTORICAL CONTEXT OR BACKGROUND	26
2.1 Introduction.....	26
2.2 A Brief History of Namibia	26
2.3 The pre-colonial History of the Herero and Nama people of Namibia.....	32
2.3.1 The Hereros.....	33
2.3.2 The Namas	37
2.3.3 The Berlin-Africa Conference and the beginning of German colonialism	39
2.3.4 Genocide	44

2.4	CONCLUSION.....	61
3.	CHAPTER 3: THE SCOPE, NATURE AND HISTORY OF THE ORIGINS OF THE PROHIBITION OF THE CRIME OF GENOCIDE.....	63
3.1	Introduction.....	63
3.2	Defining Genocide.....	63
3.3	Early developments in the prosecution of genocide.....	66
3.4	Versailles and the Leipzig trials.....	67
3.5	The treaty of Sevres of 1920 and the Armenian genocide.....	69
3.6	Inter-war developments.....	69
3.7	Genocide as a New Crime.....	70
3.8	Axis rule in Occupied Europe.....	74
3.9	Prosecuting the Nazis.....	76
3.10	The United Nations War Crimes Commission.....	76
3.11	London Conference.....	78
3.12	The Nuremberg trial.....	78
3.13	From the General Assembly Resolution 96 (1) to the Adoption of the Genocide Convention.....	79
3.14	Genocide prosecutions after the Nuremberg Trial of the Major War Criminals.....	83
3.15	Does the UN Genocide Convention have retrospective effect?.....	84
3.16	Genocidal intent.....	96
3.17	Did the German atrocities committed during the Herero/Nama war amount to genocide?	101
3.18	The History of the Development of the laws of war.....	105
3.19	The Historical and Conceptual Development of International Human Rights and Humanitarian law.....	113
3.20	Wars of annihilation as violations of contemporaneous International law.....	115
3.21	Alleged war crimes perpetrated on the Herero as violations of International law at the time.	

3.22. CONCLUSION	127
4. CHAPTER 4: LEGAL BASIS FOR HERERO REPARATIONS AGAINST THE GERMAN GOVERNMENT UNDER INTERNATIONAL LAW	129
4.1 Introduction.....	129
4.2 Sources of the law of reparations.....	129
4.3 Does Humanitarian law apply to reparation?.....	132
4.4 The Alien Tort Claims Act (ATCA) of 1789, United States of America	138
4.5 The Hereros' cause of action under the Third-Party Beneficiary Doctrine	143
4.6 Third-party Beneficiary Doctrine under International Law	143
4.7 Third State in the 1969 and the 1986 Vienna Conventions.....	144
4.8 The Herero Nation as a third-Party Beneficiary	146
4.9 The potential liability of German multinational companies in the commission of the Herero/Nama genocide?.....	148
4.10 Comparative study of other cases of reparation claims for historical injustices.	159
4.10 Pending reparation claims	169
4.11 Pandora's Box?	173
4.12 Other possible avenues that the Herero/Namas can approach to seek redress	176
4.13 Doctrine of state immunity as a barrier to reparation claims	203
4.14 The doctrine of statutory limitations and the Herero/Nama reparation claims	209
4.15 Doctrine of State Succession.....	213
4.16 Arguments for and against reparation payments for Historical Injustices	220
4.17 CONCLUSION.....	226
5. CHAPTER 5: POTENTIAL MODES OF REPARATIONS AVAILABLE TO THE HERERO AND NAMAS	228
5.1 Introduction.....	228
5.2 Claims by the Hereros and Namas as non-state Actors under the Rules of State Responsibility	228

5.3	Different forms of reparations.....	231
5.4	CONCLUSION.....	243
6.	CHAPTER 6: THE LEGACY OF THE GENOCIDE IN CONTEMPORARY NAMIBIA	245
6.1	Introduction.....	245
6.2	Linking Namibia’s complex land issue to the 1904-1907 genocide	248
6.3	The potential impacts of the Herero/Nama claims on the so-called “cordial relationship” between the Namibian and German government	262
6.4	The Official Namibian government position	271
6.5	The impact of the Herero/Nama genocide on the present German state.....	278
6.6	CONCLUSION.....	279
7.	CHAPTER 7: CONCLUSIONS AND RECOMENDATIONS.....	281
7.1	Findings.....	284
7.2	Recommendations.....	287
	BIBLIOGRAPHY.....	290
	BOOKS.....	290
	JOURNALS	298
	ONLINE JOURNAL ARTICLES AND OTHER INTERNET SOURCES	303
	LEGISLATION	306
	Britain	306
	Germany.....	307
	Namibia.....	307
	South Africa.....	307
	United States of America	307
	INTERNATIONAL TREATIES AND/OR AGREEMENTS	307
	OTHER INTERNATIONAL LEGAL INSTRUMENTS GOVERNING THE RULES OF WAR	308
	INTERNATIONAL STATUTE (S).....	309

DECLARATIONS.....	309
WORKING PAPERS AND OTHER RELEVANT PUBLICATIONS.....	309
DISSERTATIONS/THESES.....	310
NEWSPAPER ARTICLES AND OTHER PRINT AND ONLINE MEDIA SOURCES.....	311
List of people interviewed.....	314
TABLE OF CASES.....	315
List of table(s), maps and figures.....	321
Map of early settlements in Namibia.....	321
The colonial Map of German South West Africa.....	322
Emaciated Hereros after coming out of the Omaheke.....	323
Captured Herero and Nama soldiers.....	324
Nama Heads sent to Germany for pseudoscientific experiments.....	325
Herero Hangings.....	326
Shark Island Concentration Camp.....	327
Elements of the crime of genocide.....	329
Namibia-German total trade Statistics.....	333
Land allocations in Namibia (1902).....	334
Land use in Namibia.....	335

Abstract

The Herero and Nama genocide perpetrated by the German colonial authorities, under the command of General Von Trotha has left a controversial legacy in Namibia. It was during the period of 1904-07 when an estimated 80 percent of Hereros and 50 percent of Namas perished in their quest to reclaim their lands from German settlers. Due to the political situation of that period before Namibia's independence in 1990, little was said about the genocide until the descendants of the genocide victims petitioned the German Government and companies of that era to pay reparations for colonial injustices. They subsequently filed a claim in Washington D.C. in 2001 to force the German government to make reparation payments totaling over two billion American dollars.

In his first visit to Namibia, in 1998, the then President of the Federal Republic of Germany, His Excellency Roman Herzog, expressed regret about the genocide, but stopped short of offering reparation payments. Moreover, in 2004, another German diplomat, Heidemarie Wiczorek-Zeul was dispatched to Namibia, to coincide with the Herero commemoration of the genocide at Okahandja and in the process apologized for the genocide, but also stopped short of discussing the issue of reparations.

As such the purpose of this research was to discuss the merits and demerits of the Herero/Nama claims against the German government, and provide a comparable assessment of other claims, most notably the success of Jewish claims against the current German government.

Qualitative method of research was utilized in this research. Personal interviews were also conducted during the course of this research. The interviewees were members of the OvaHerero ethnic group as well as several high profile politicians and government officials.

I came to the conclusion that under the existing international legal instruments, namely, the 1948 Genocide Convention and the Vienna Convention on the Law of Treaties of 1969, it will be a challenge for the OvaHerero and Nama claimants to successfully sue the German Government for the crime of genocide and crimes against humanity. However, in the same vein, I also concluded that the OvaHerero and Nama claimants' have potential remedies in international legal instruments of the time which proscribed acts of genocide and crimes against humanity. These instruments are The Hague Conventions of 1899 and 1907 respectively, the Lieber Code, the Brussels Conference Act of 1890 among others, had provisions protecting the so-called "natives" from acts of genocide and crimes against humanity, including slavery.

In light of the above, I recommend in the dissertation that in order to deal with the reparation issue amicably, a "Reparations Commission" should be established between the Governments of the Republic of Namibia and the Federal Republic of Germany. The commission will initiate dialogue between the parties and discuss ways of finding a lasting solution to this issue. This Reparations commission should be modeled along the lines of the "Luxembourg Agreement" of 1952 signed between the Federal Republic of Germany and the Jewish State of Israel.

Acknowledgements

I would like to extend my heartfelt gratitude to my supervisor, Professor John Baloro, the Dean of the Faculty of Law at the University of Namibia for his mentorship. I am grateful to the emotional support and encouragement rendered to me by the following individuals: Ms. Melanie Whitney Lion, Mr. Sinvula Lukubwe and Mr. Muhuluma Lubanda. Furthermore, I would like to thank Mr. Festus “Garvey” Muundjuaa of the OvaHerero Reparations Committee for providing me with a plethora of reading materials and important contacts for my research.

Special thanks to all the people who agreed to be interviewed for this piece of academic work.

Your assistance in this regard is highly appreciated.

Dedication

To my late Brother Cecil “Kamudimu” Harris

“Lale Kenkonzo Mwanchangu”.

Supervisors' certificate

I, Professor John Baloro, hereby certify that the research and writing of this
Thesis was carried out under my supervision.

Professor John Baloro

Date

Declaration

I, the undersigned, hereby declare that this study is a true reflection of my own research, and that this work, or part thereof has not been submitted for a degree in any other institution of higher education. No part of this thesis may be reproduced, stored in any retrieval system, or transmitted in any form, or by any means (e.g. electronic, mechanical, photocopying, recording or otherwise) without the prior permission of the author, or the University of Namibia in that behalf.

I, the undersigned, grant the University of Namibia the right to reproduce this thesis in whole or in part, in any manner or format, which the University may deem fit, for any person or institution requiring it for study and research; providing that the University of Namibia shall waive this right if the whole thesis has been or is being published in a manner satisfactory to the University.

Christian Harris

Date

List of Acronyms

APP: All Peoples Party

ATCA: Aliens Torts Claims Act

CARICOM: Caribbean Community

DRC: Democratic Republic of Congo

DTA: Democratic Turnhalle Alliance

ECOSOC: Economic and Social Council

EECC: Employment Equity Coordinating Committee

ECtHR: European Court of Human Rights

ECHR: European Court of Human Rights

GSWA: German South West Africa

ICJ: International Court of Justice

ILC: International Law Commission

ICCPR: International Covenant on Civil and Political Rights

ICTY: International Criminal Tribunal for the former Yugoslavia

ICTR: International Criminal Tribunal for Rwanda

IHL: International Humanitarian Law

IMT: International Military Tribunal

IMIs: Italian Military Internees

MNCs: Multinational Companies

MPLA: People's Movement for the Liberation of Angola – Labour Party (Portuguese: Movimento Popular de Libertação de Angola – Partido do Trabalho)

NGOs: Non-governmental Organizations

NEPRU: Namibia Economic Research Unity

NUDO: National Union Democratic Organization

OCD: OvaHerero and Ovambanderu Council for the Dialogue

RDP: Rally for Democracy and Progress

SWAPO: South West Africa People's Organization

TNEs: Transnational Enterprises

UK: United Kingdom

UN: United Nations

UNO: United Nations Organizations

US: Unites States

UNTAG: United Nations Transitional Assistance Group

WCAR: World Conference Against Racism

CHAPTER 1: INTRODUCTION

1.1 Orientation of the Study

It has been stated over and over again by legal experts in the field of Public International Law, that there is a strong case for every claim for historical injustices committed by one state to another, by one people to another. The successful cases of the Jewish claims against the German government for the holocaust immediately after the Second World War were also extensively discussed in the dissertation. This study aims at assessing the importance of reparation payments to the descendants of the genocide victims, their relevance to the modern era, and their effects on the current German-Namibian relations. The study also aimed at examining the effects of the Herero lawsuit in the ATCA against Germany, in the event of it being successful on the other pending claims against the former colonial regimes in some other parts of the world, particularly in Africa, in which ethnic groups have attempted to initiate lawsuits against their former colonial rulers. Notable examples are potential claims for reparations against multinational companies that are alleged to have done business with the then apartheid South Africa as well as the descendants of the victims of brutality of the colonial authorities in the former Belgian Congo.

On many occasions, the German government has avoided the issue of reparation payments to the Hereros and Namas in Namibia, claiming that, Namibia receives more German development aid than any other country in the developing world. However, some Hereros claim that this development aid is meant for the entire Namibian nation and not meant to benefit Hereros and other ethnic groups who bore the brunt of the genocide.

1.2 Statement of the Problem

The research was aimed at shedding light on what international law instruments say about genocide and remedies available to the victims of genocide. Another important aspect in this regard is whether there exists a law domestically in both Namibia and the Federal Republic of Germany on reparations for colonial injustices. The research investigated the laws of wars of the time that proscribed acts of genocide, war crimes and crimes against humanity. It is in this vein that the content of the Second Hague Convention of 1899 and other international human rights and humanitarian law on the laws of war to which Germany was a party was scrutinized to determine as to whether the reparation claims have merit or not. The research also aimed to exploring what modes of reparations are available for the Hereros and Nama claimants against the Federal Republic of Germany. In addition, the research also investigated the procedures for claiming reparations under international law. Finally, the study explored the link between the 1904-08 genocide and the complex land issue in independent Namibia today.

1.3 Objectives of the Study

The study on reparation claims against the German Government for genocide committed against the Herero/Nama ethnic groups had the following objectives: To discuss the merits and demerits of Herero/Nama reparations claims against the German government. The study also aimed at examining the impact of the genocide on the descendants of Herero and Nama population group in post-independence Namibia.

To sum up the objectives of this study are as follows:

- To discuss the nature, scope and history of the crime of genocide in international law;

- To examine the nature, criteria and scope of claims for reparations for historical injustices under international law;
- To analyze the ramifications of the genocide on the German-Namibian economic and political relations;
- To examine the effect of these claims on the politics of the Namibian State;
- Whether the Herero/Nama claims, in the event of it being successful can open a “pandora’s box” of similar claims in Africa?
- To investigate whether Multinational Companies can be held liable for historical injustices?
- To investigate the extent to which Namibia’s complex land issue is linked to the 1904-1907 genocide?
- To find out whether Humanitarian Law applies to reparation claims?

1.4 Significance of the Study

The research on the Herero and Nama reparation claims comes at a crucial time in the history of post-independence Namibia, where there is debate from all sectors of society on this burning issue. The debate has permeated both the political and academic circles with arguments for and against reparation payments. The case has also brought on to the spotlight the possibility of other nations following suit to institute claims for past injustices against their former colonial masters. Minimal research has been done on the subject matter with regard to the Herero reparation claims against the German government. In comparison, a great deal of research has

been done on other claims against historical injustices such as the Jewish holocaust. Little research has also been done on the impact of the reparation claims on the German-Namibian relations which is very beneficial to both states at this moment. The study was intended to contribute a great deal of knowledge on the subject of claims for reparations under national and international law. The study also aimed to make Namibians aware of the socio-economic, legal and political impact of the 1904-08 genocide on the country.

1.5 Limitations of the study

As it is customary for every academic research, it was inevitable to encounter some shortcomings. The research topic on the Herero>Nama reparation claims against Germany for genocide, war crimes and crimes against humanity alleged to have been committed by the latter is a very sensitive issue to the communities concerned. Several members of the community viewed my research in their community with great suspicion. This is due to the fact that there exists a great deal of enmity between rival OvaHerero clans. It is worth noting that the entire OvaHerero community is fragmented along several political and traditional authorities who are in most instances hostile to each other. Opposition members did not fare well either when interviewed. Some took this opportunity to throw jabs at either the ruling party or other rival opposition parties. They all claimed ownership of the entire “reparations debate”. The age-old rivalry and mistrust between the OvaHerero tribe and the majority Aawambo people also came into play, though indirectly. One anonymous Otjiherero interviewee lashed out at the “Aawambo” led government for paying lip service to the plight of the Hereros in their quest to claim reparations against Germany. He stated “the Namibian government has spent billions of dollars since independence on victims of the bush war fought against apartheid South Africa and it had taken care of the war veterans, honoured the war dead by constructing a multi-million-

dollar Heroes Acre. All of these were done because the majority of people who fought and perished during the bitter bush war were members of the Aawambo tribe”. Why is there is no genocide museum in Namibia? He lamented.

Despite repeated calls and correspondences, I failed to get any positive feedback from members of the Nama traditional authorities. Those who agreed to be interviewed later withdrew, citing various reasons.

It is disturbing to note that many members and leaders of the Nama community were not that enthusiastic or are not enthusiastic about the reparation claims. Equally disturbing was some comments from the OvaHerero community who argued that there is little evidence that Namas were ever earmarked for extermination by the German colonial authorities.

Furthermore, I was hoping to meet representatives of the German Federal government in Namibia through their Embassy but this endeavour bore no fruit. I was told that they were not obliged to answer any questions related to the Genocide and reparation claims. They thus referred me to the website of the German Bundestag to get my answers. It is in this vein that I could not interview any representatives of the German government to hear their side on the matter. Moreover, I also unsuccessfully attempted to interview visiting members of the opposition Left Party in the German Bundestag, a party which is very sympathetic to the OvaHerero cause. This was due to scheduling issues and the short nature of their visit to the country.

My inability to interview some of the key informants forced me to rely almost exclusively on the literature available on the matter, newspaper reports and internet sources to mention but a few.

And finally, the fact that I have a full-time job also partly hindered my ability to conduct more field visits to some other areas of the country. I thus had to strike a balance between the needs of my job and those of the dissertation which put enormous pressure on me to satisfy both.

1.6 Literature Review

The claims for reparations for historical injustices have gained prominence in recent years. Formerly oppressed and colonized peoples of the world are now using a variety of means to demand reparations for atrocities committed by their erstwhile colonial masters. The Herero and Nama claims for reparations for the 1904-07 genocide is among the hundreds currently being pursued by formerly colonized peoples of the world. Traditionally, it is often said that international law has paid little attention to victims. This is a gap in literature.

Victims are generally given scant recognition in the exploration of purposes of punishment; however, in some judgements retribution is described as “the expression of condemnation of grave violations of fundamental human rights [...] it is also recognition of the harm and suffering caused to the victims”.¹

The right to reparation and in particular to rehabilitation, in international law is complex and usually refers to the obligation of the state responsible for torture to provide this as part of the compensation to victims.² But ensuring rehabilitation to victims of torture depends on many different premises related both to state obligations and to the receivers themselves. The

¹ Prosecutor v. Furundzija, Case No.: IT-95-17/1-T, Judgement, 10 December 1998, para. 288.

² Sveaass N. (2013) Gross human rights violations and reparation under international law: approaching rehabilitation as a form of reparation, *European Journal of Psychotraumatology*. pp.1-9.

willingness of the state to provide services and the criteria they set for access to such services are important if effective redress and rehabilitation is to happen.³

However, there are a number of theories justifying the right to reparations for historical injustices. As stated by Collste⁴ “If the history of colonialism implied*in Aristotle’s words inflicting wounds, there is a prima facie argument for global rectificatory justice. But what does rectificatory justice imply if the wrong is done a long time ago?” A theory of global rectificatory justice can also draw from more recent work in philosophy. According to John Locke, justice implies a right of reparation. Someone who is injured has a right to seek reparation from the injurer.⁵ Building on Locke, Robert Nozick’s entitlement theory is an example of a historical, backward-looking theory of justice. According to Nozick, a person is entitled to his or her property provided that it is acquired in a just way. Hence, property rights depend on justice in acquisition and justice in transfer.⁶

Echoing Locke and Nozick’s theories of rectifactory justice, Bedau⁷ advances the case for reparations for black Americans as follows:

³ Ibid.

⁴Collste, G. (2010) ‘... restoring the dignity of the victims. Is global rectificatory justice feasible? Ethics & Global Politics Vol. 3, No. 2, 2010, pp. 85-99.

⁵ John Locke, Two Treatises of Government (London: Dent, 1977 (1690)).

⁶ Nozick, R. (1974) Anarchy, State and Utopia (Oxford: Basil Blackwell, 150f.

⁷ Bedau, H. A. (1972) Compensatory Justice and the Black Manifesto. The Monist Vol. 56, No. 1, Philosophy and Public Policy. Oxford University Press. pp. 20-42.

The labor of generations of blacks has created surplus profits of slight or no benefit to them, and this labor was originally stolen and thenceforth made captive under conditions of structured injustice which a Hume, a Mill, or a Rawls would be able to recognize as such. The slave and Jim Crow heritage, therefore, constitutes both a moral and an economic exploitation. Blacks in America have been doubly exploited, so their argument for compensation is entitled to take this into account and it does. To put it another way, we might view The Black Manifesto as attempting to invoke not merely one or another version of conventional Liberal principles of justice, nor of Marxist justice – if there is such a thing – but what might be called *socialist justice*.

According to Bridgewater⁸ modern proponents of black reparations have consistently looked to other successful reparations movements in the United States to establish precedence for federal and state governments paying, apologizing, and providing a remedy for wrongs of the past. Focusing only on the successful claims for reparations, proponents are well versed in the theories used and obstacles encountered on the road to attaining reparations for slavery.

Supplementing Bridgewater's argument for black reparations, Sepinwall⁹ argues that the twentieth century ended with the vindication of many of its most mistreated victims' cries for reparation. Holocaust survivors retrieved over \$8 billion in assets frozen in bank accounts or looted by the Nazis; Japanese Americans interned during World War II received compensation from the U.S. government; Chile compensated descendants of Pinochet's victims; Japan

⁸ Bridgewater, P.M. (2005) Ain't i a Slave: Slavery, Reproductive Abuse, and Reparations. *UCLA Women's Law Journal*. pp. 90-161.

⁹ Sepinwall, A. J. (2006). Responsibility for Historical Injustices: Reconceiving the Case for Reparations. *Journal of Law & Politics*, 22(3), 183-229. Retrieved from https://repository.upenn.edu/lgst_papers/66; see also Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 696-98 (2003) (presenting a very helpful overview of reparations movements in table form); Irma Jacqueline Ozer, *Reparations for African Americans*, 41 How. L.J. 479, 480 (1998). Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* (2003), Civil Liberties Act, Pub. L. No. 100-383, 102 Stat. 903 (1988) (codified at 50 App. U.S.C. §1989b-1); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477 (1998).

redressed Korean "comfort women"; and Canada paid damages to Aboriginals for forced assimilation of their children. Absent from the list was the longest suffering and most visible of groups seeking repair - African Americans.¹⁰

In relation to the Herero and Nama claims for reparations, Sarkin,¹¹ posits that very little has been written in the field of law about the events in GSWA, today's Namibia, from a legal point of view. This is also a gap. Instead, most studies have emanated from an historical or sociological standpoint. Similarly, until quite recently, there has been limited evaluation of historical human rights issues from a reparation and claims point of view. While the literature has grown in recent years, much work remains to be done, especially by those directly affected by the legacy of abuse. Because there are often few survivors, victims are generally neglected in genocide studies.¹² They are hardly ever primary subjects in these studies and rarely share equal subject status with perpetrators. Despite his observations, Sarkin has failed to dwell much on the political and economic impact of the reparations on the German-Namibian relations. It must also be pointed out that Professor Sarkin is also one of the legal scholars currently advising and representing the Herero Reparation Committee with regard to their claims against the German government in Washington D.C. As such it might be assumed that he is biased towards Herero. It is thus imperative for me to give a fair and a balanced view of the reparations debate without taking any sides. Sadly, only a handful of materials with regard to the Herero genocide have been researched by Namibian authors. Most works on the subject matter are of foreign origin.

¹⁰ Sepinwall, *ibid*, p.1.

¹¹ Sarkin, J. (2009) *Colonial Genocide and Reparations Claims in the 21st Century: the socio-legal context of Claims under International Law by the Herero Against Germany for Genocide in Namibia, 1904-1908*. London. Praeger Security International.pp. 7-10.

¹² Sarkin, *ibid*.

The question whether the atrocities committed by the German colonial authorities amounted to acts of genocide, is also a very polarizing issue among many scholars. For example, Lau argues in her book '*certain uncertainties*' that most of the literature on the 1904-08 genocide was grossly misrepresented and mystified, as there is no credible evidence to suggest that the German colonial authorities had the intention to wipe out the Herero people. In her assertion, the genocide never took place. It is thus, incumbent upon the author of this study to investigate this viewpoint and either prove or disprove her claims¹³.

According to Haring,¹⁴ there is no consistent legal basis for any of the modern reparations regimes. The concept of reparations is rooted in natural law, the common law, and international law. It is an equitable principle that the beneficiary of an ill-gotten gain should make restitution, both as an act of contrition and good will, but also simply to restore the victim to some part of their previous life. As a political matter when related to the specific context of war reparations, it is generally "winners" who demand restitution from "losers." The original post World War Two German reparations law, Law Number 59 on Restitution of Property Stolen in the Course of the Aryanization of the Economy, was adopted by the U.S. military government and imposed on Germany in November, 1947.¹⁵ However, within the modern world, liberal democracies have used the language of reparations in making voluntary payments through various statutory regimes to their own indigenous or minority populations. American and Canadian payments to

¹³ Lau, B. (1989) "*Uncertain certainties*", in: Mibagus, Windhoek, 1989/2: 4-5, 8.

¹⁴ Haring, S (2002) "German Reparations to the Herero Nation: an Assertion of Herero Nationhood in the Path of Namibian Development?", 104 West Virginia Law Review 393-497- 393-398-, 401-410. Available online at <http://academic.udayton.edu/race/06hrights/georegions/africa/Nambia01.htm>

¹⁵ Haring, *ibid*, p.1

Japanese citizens as reparations for wartime injustice are the most extensive example, although many payments to indigenous peoples are broadly of this type. Although these Japanese reparation claims included complex litigation strategies, these ultimately failed and the final reparations settlements were political, voted by the U.S. Congress and the Canadian Parliament.¹⁶

The Jewish claims against Germany also avoided litigation and began with ally-ordered regimes to return stolen Jewish property but proceeded to a formal claim, filed on behalf of the State of Israel, as the lawful representative of the Jewish people, with the German government. A series of negotiations followed, with a final agreement resulting through political processes, and voted on by the German Parliament. The original reparations legislation has been revised and expanded several times, with substantial opposition within Germany.¹⁷ The Luxembourg agreements which paved a way for the Federal Republic of German to pay reparations to the Jews and the State of Israel were historically unprecedented and had no basis or counterpart in international law. For one thing, the State of Israel did not exist at the time of the actions for which restitution was paid¹⁸. Moreover, the Claims Conference had no legal authority to negotiate and act on behalf of Jews who were citizens of sovereign countries. Jews were represented in an internationally

¹⁶ Harring, *ibid.*

¹⁷Harring, *ibid.*

¹⁸ Harring, *ibid.*, p.1

recognized treaty with a foreign state not by the governments of the countries of which they were citizens, but rather by a supranational and sectarian Jewish organization.¹⁹

The legal basis of Herero reparations is rooted in both of these traditions, although it lacks support from the Namibian government. The Herero reparations claim has never been formally acted on by the German government, but it was dismissed out of hand in a speech by Roman Herzog, President of Germany. In a 1998 trip to Namibia, Herzog was quoted as saying that "no international legislation existed at the time under which ethnic minorities could get reparations."²⁰ Herero activist Mberumba Kerina countered by claiming that the Hague Convention of 1899 outlawed "reprisals against civilians on the losing side."²¹ In the same exchange, Herzog dismissed the idea of an apology because too much time had passed to make sense - and also fired his translator for misinterpreting his statements.²²

To the extent that this exchange begins to structure the Herero case and the German response to it, several important issues emerge leaving an unclear legal basis for their reparations claim. President Herzog describes the legal basis for reparations differently than do the Herero. Herzog put his response in the language of colonialism, with his clear historical reference to the colonial domination of ethnic minorities serving as a basis for reparations as supported by no

¹⁹ Webber (2008) "West Germany's Holocaust Payoff to Israel and World Jewry". Institute of Historical Review .p. 1. Available online at: http://www.ihr.org/jhr/vo8p243_Weber.html

²⁰ Christopher Munnion "Namibian tribe sues Germany for genocide". The Telegraph, 31 January 2003 available online at: <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/namibia/1420687/Namibian-tribe-sues-Germany-for-genocide.html>

²¹ For more on the History of Namibia and the Hereros see Kerina, M (1981) *Namibia, the making of a nation*. (New York: Books in Focus,).

²² Haring, supra note 14 at p.1.

"international legislation at the time." Thus, for Herzog, colonialism was "legal" in 1905 under international legislation, therefore ending the discussion of Herero reparations.²³

This analysis, however, is not the basis of the Herero claim. Rather, the Herero locate their claim in terms of the international laws of war as defined in the Second Hague Convention of 1899, a Convention at which the Germans were represented and which bound the European powers as they went about their "business" of civilized warfare, that is, warfare between signatory nations. Unless Germany seeks to argue, in the twenty-first century, that there was, after 1899, one set of rules for European nations conducting wars with each other and a completely different set of rules for those same nations conducting war with colonial peoples, or even more bluntly put, wars against "ethnic" peoples, it is both an untenable legal and moral position.²⁴

The Hague Convention on the Laws and Customs of War by Land was signed on July 29, 1899 and took effect on September 4, 1900. Intended to regulate modern warfare, the Convention contains a number of provisions that, in their plain language, were apparently violated by Germany in the Herero War. Article 4 requires that "prisoners of war in the power of the hostile government . . . must be honorably treated."²⁵ Article 7 provides that "the government into whose hands prisoners of war have fallen is bound to maintain them."²⁶ Article 23 states that "it is especially prohibited to kill or wound treacherously individuals belonging to the hostile nation or army; to declare that no quarter will be given; to destroy or seize the enemy's property, unless

²³ Harring, *ibid.*

²⁴ Harring, *ibid.*

²⁵ See Article 4 of the Hague Convention on the Laws and Customs of War by Land, 1899.

²⁶ See Article 7 of the Hague Convention on the Laws and Customs of War by Land, 1899.

such destruction or seizure be imperatively demanded by the necessity of war." Finally, Article 46 states that "family honors and rights, individual lives and private property . . . must be respected."²⁷

It would follow that a systemic violation of that Convention, for example, in an order to kill all the Herero and starve their women and children, clearly a declaration that "no quarter will be given," would be legally actionable under whatever regime of international enforcement the Hague Convention recognizes, but for the fact that the Herero were not represented at the Hague, and could not, therefore, sign the Convention.²⁸

Thus, the issue is not the literal application of the Hague Convention to the Herero War. Rather, it is the Convention as a statement of international customary law. Importantly for the Herero, their claim can be analogized to Jewish and Japanese reparation claims, which are also not based on the Hague Convention, but on more general principles of human rights.²⁹

This leaves unanswered President Herzog's defense: that colonialism and, apparently, colonial genocide, was legal in 1905. Although his position may literally be true, that, again, is not the issue. The political and legal reasons for not opening up four hundred years of colonialism to broad claims of reparations are clear, regardless of the justice of the claims. Such a claim parallels other equally broad-based claims, most prominently in the growing discussion of reparations for African slavery. There is a substantial literature including in law reviews on these

²⁷ See Article 46 of the Hague Convention on the Laws and Customs of War by Land, 1899.

²⁸ Haring, *supra* note 14, pp.1-10.

²⁹ Haring, *ibid.*

legal arguments. In 1989, Representative John Conyers introduced a resolution into the House of Representatives requiring the exploration of the issue of reparations for slavery in the United States.³⁰ A Pan-African Congress on Reparations was held in Nigeria in 1993 and claims of reparations underscore some of the discourse on the rebuilding of African economies. Although these efforts have most often been dismissed as politically impossible, existing legal doctrines of equity and natural law, as well as the thirteenth and fourteenth amendments of the U.S. Constitution, lend both moral and legal credibility to the case for black reparations for both slavery, primarily involving the tens of millions of overseas blacks, and for the devastation of colonialism, primarily involving blacks still living on the African continent.³¹

In light of the above it is also important to carefully scrutinize the assertions of both the former German President and the Herero activist, Mburumba Kerina on the liabilities of the German State in paying the reparations to the Herero claimants. Both seem to be basing their arguments on what international legal instruments, past and present, entail on the subject matter.

Romanowsky³² states that the question of reparations remains a difficult one to answer, and it would be futile to try and decide whether or not Germany owes the Herero/Nama people reparations. Nevertheless, one must look at other formal apologies across history in order to realize why the Herero/Nama people so diligently push for reparations. On August 10, 1988

³⁰ Commission to Study Reparation Proposals for African Americans Act. Available online at: <http://conyers.house.gov/index.cfm/reparations>

³¹ For more on African reparations see Howard –Hassman, R.E. (2004) ‘Reparations to Africa and the Group of Eminent Persons’ p. 81-87. Available online at: <http://etudesafricaines.revues.org/4543>

³² Romanowsky, S. (2009) ‘Analysis of an Apology: A Critical Look at Genocide in South West Africa and its Effects on the Herero/Nama People’. pp. 1-10. Available online at <http://www.history.ucsb.edu/faculty/marcuse/classes/133p/papers/096RomanowskyHereroGenocide.htm>

United States President Ronald Reagan and the US Congress passed the Civil Liberties Act of 1988³³ that issued an apology to the Japanese Americans whom the United States interned during World War II. In this Act, the US government unequivocally issued not only an apology, but also a promise for reparations to Japanese-Americans who suffered as a result of internment. More recently, on February 13, 2008, Australian Prime Minister Kevin Rudd gave an apology on behalf of the government to the aborigines of Australia. In this speech, Rudd specifically used the word “apology” several times, and made reference to explicit acts that the government apologizes for³⁴. These examples leave the Herero wondering, “why not us?”

The issue of foreign Immunity of states is one significant area that has largely been ignored by most scholars on the issue of reparations. To counter any reparations claims, it is highly likely that the German government will invoke the doctrine of foreign immunity to escape liability. The normal result of a successful immunity plea is that a state or its officials sued in a foreign court are immune from any kind of prosecution or execution proceedings. On the other hand, it has to be realized that, very often, certain violations of international law are universally condemned as offending the common conscience of humankind and elementary considerations of humanity are perpetrated by persons exercising the official authority of the state and using the state machinery.³⁵

³³ See the Civil Liberties Act of 1988. Available online at: <http://digital.lib.usu.edu/cdm/ref/collection/Topaz/id/6370>

³⁴ For more on the then Australian Prime Minister’s apology to indigenous Australians. See Staff writer “Kevin Rudd’s national apology to Stolen Generations”. News.com.au, 13 February 2008 available online at: <http://www.news.com.au/national-news/pm-moves-to-heal-the-nation/story-e6frfw9-111115539560>

³⁵ Orakhelashvili, A (2006) *Peremptory Norms in International Law*. Oxford University Press. pp. 320-321.

The immunity of a state and its officials arises as an impediment to the prosecution of the accused or the award of remedies to the victims when a state and its officials are sued in foreign courts.³⁶ An unconditional deference to the immunity of a State and its officials is hardly justified. It must not be forgotten that such deference amounts, in effect, to the denial of a legal remedy in respect to what may be a valid legal claim, and as such, immunity is open to objection'.³⁷ In light of this state of affairs, I will give a detailed analysis of the effect of the doctrine of state immunity on the Herero/Nama claims for reparations.

Another neglected aspect of the OvaHerero claims against the German government is on the potential modes available to the claimants. No significant literature exists on the purpose and nature of possible reparation modes to the Hereros. According to Erichsen,³⁸ the most mentioned forms of reparations were:

1. Land
2. Livestock
3. Decent Work
4. Hospitals
5. Employment Opportunities

³⁶ Orakhelashvili, *ibid*, pp.320-322.

³⁷ Jennings R., and Watts, A (1992) *Openheim's International law*. p. 346 for a negative approach to State immunity see Lauterpacht, H. (1951) 'The Problem of Jurisdictional Immunities of Foreign States' 28 *BYIL*, pp. 220-271 and Garnett, R. (1999) 'Should the Sovereign Immunity be Abolished?'. *Australian YBIL*. p. 190

³⁸ Erichsen, C. (2008) "What the elders used to say": Namibian Perspective on the Lost Decade of German Colonial rule. John Meinert Printing. pp. 15-44.

It is against the above that it is imperative to conduct an in-depth investigation on the internationally recognized forms/modes of reparations available to claimants.

The complex land issue in independent Namibia is among the under-researched topics directly linked to the 1904-1908 genocide. Statistics show that the majority of arable land in Namibia is in the hands of white farmers, many of whom are descendants of the early German colonialists. It is thus incumbent upon the author of this study to carry out an extensive analysis of the relationship between the 1904-08 Herero genocide and the socio-economic conditions of the Hereros today.³⁹

1.7 Research Methodology

1.7.1 Research Design

In conducting this (academic) research, two research methods were employed, namely qualitative research and quantitative research. For the purposes of this study, it is imperative to distinguish between the two research methods. Shank⁴⁰ defines qualitative research as a “form of systematic empirical inquiry into meaning”. By systematic he means “planned, ordered and public”, following rules agreed upon by members of the qualitative research community. By empirical, he means that this type of inquiry is grounded in the world of experience. Inquiry into meaning entails that researchers try to understand how others make sense of their experience. Denzin et al claims that qualitative research involves an interpretive and naturalistic approach:

³⁹ For more on the land issue in Namibia, see Legal Assistance Center (2005) ‘Our Land We Farm: an analysis of the Namibian Commercial Agricultural Land Reform Process’. Available online at: <http://www.lac.org.na/projects/lead/Pdf/landwefarm.pdf>

⁴⁰ Shank, G. (2002). ‘Qualitative Research. A Personal Skills Approach’. New Jersey: Merrill Prentice Hall.p.5 available online at http://wagner.nyu.edu/leadership/publications/files/Qualitative_Research.pdf

“This means that qualitative researchers study things in their natural settings, attempting to make sense of, or to interpret, phenomena in terms of the meanings people bring to them”.⁴¹

According to Babbie et al⁴² qualitative researchers attempt always to study human action from the perspective of the social actors themselves. The primary goal of studies using this approach is defined as describing and understanding rather than explaining human behavior. According to these authors, the Quantitative Researcher believes that the best, if not the only way of measuring the properties of phenomena, is quantitative measurement which involves assigning numbers to the perceived quality of things. Quantitative Research is restrictive, and the categories of the phenomenon to be studied are in most instances pre-determined. The questions are hardly open-ended, and as such the respondents are confined to available categories.

Qualitative research method will be utilized more than quantitative research method in this study because of the following advantages:

- Flexibility to follow unexpected ideas during research and explore processes effectively;
- Sensitivity to contextual factors;
- Ability to study symbolic dimensions and social meaning;
- Increased opportunities
- To develop empirically supported new ideas and theories

⁴¹ Denzin, Norman K. & Lincoln, Yvonna S. (Eds.). (2005). *The Sage Handbook of Qualitative Research* (3rd ed.). Thousand Oaks, CA: Sage.p.3.

⁴² Babbie, E. and Mouton, J. (2001). *The Practice of Social Research*. Cape Town: Oxford University Press. p. 270.

- For in-depth and longitudinal explorations of leadership phenomena; and for more relevance and interest for practitioners.⁴³

However, it is generally desirable in research circles to combine qualitative and quantitative research approaches to harness the advantages offered by both.

1.7.2 Population of this study

The target population for this study was mainly members of the Herero and Nama communities, as well as some several senior government officials and politicians. The most senior government official that I interviewed was the Right Honourable Prime Minister, Nahas Angula. Three opposition party leaders were also interviewed. The interviewed opposition party leaders were Mr. Kuaima Riruako of the National Union Democratic Organisation, Mr. Katuutire Kaura of the Democratic Turnhalle Alliance as well as Mr. Usatjiue Maamberua of the South West Africa National Union. Among the traditional authorities' leaders interviewed was the paramount chief of the OvaHereros and also the leader of NUDO mentioned above and one of his representatives, Mrs. Utjiua Muinjangwe.

1.7.3 Sampling method

Purposive Sampling was employed in this study. Purposive or judgmental sampling is an improvement on convenience sampling in that the researcher applies his/her experience to select

⁴³ Conger, J. (1998). "Qualitative Research as the cornerstone methodology for understanding Leadership. Leadership Quarterly," 9 (1): 107-121.

cases which are in the researcher's judgment representative or typical. This strategy must be clearly explained and justified to the reader by the researcher.⁴⁴

The sample of the population mentioned are members of the Herero and Nama communities and several senior government officials and politicians, and for practical purposes, a selected number of traditional leaders from each of the communities were interviewed.

1.7.4 Methods of data collection

(a) Interviews

Face to face interviews were conducted in this regard to selected interviewees from government officials, politicians and members of the Herero traditional group. Semi-structured interviews were used mostly in this research. According to Bernard⁴⁵ in situations where the researcher will not have more than one chance to interview someone, semi structured interviewing is best. It has much of the freewheeling interviewing quality of unstructured interviewing, and requires all the same skills, but semi structured interviewing is based on the use of an interview guide. This is a written list of questions and topics that need to be covered in a particular order. Bernard further asserts that semi structured interviewing works very well in projects where you are dealing with high-level bureaucrats and elite members of a community, that is, people who are accustomed to efficient use of their time. It demonstrates that you are fully in control of what you want from an interview but leaves both you and your respondent free to follow new leads. It shows that you are prepared and competent but that you are not trying to exercise excessive control.

⁴⁴ Briggs, A. Coleman, M. (2007). *Research Methods in Educational Leadership and Management*. Sage publications. 2nd. ed. p. 135.

⁴⁵ Bernard, H. Russell. (1988). *Research Methods in Cultural Anthropology*. Newbury Park, California: Sage.p. 212.

He further opines that many researchers like to use semi-structured interviews because questions can be prepared ahead of time. This allows the interviewer to be prepared and appear competent during the interview. Semi-structured interviews also allow informants the freedom to express their views in their own terms. Semi-structure interviews can provide reliable, comparable qualitative data.

(b) Tape Recorders and Field notes

Tape recorders and field notes were used hand in hand to get the best out of every interview. The researcher took notes during the interview, regardless of whether it was being tape-recorded. These notes served as a backup when recording failed and to capture nonverbal information.

1.7.5 Procedures

The researcher invited selected members of the Herero and Nama communities as well as senior government officials to participate in this study. They were interviewed on why they think it is important for the German Government to pay reparation for colonial injustices and what modes of reparations they will accept in the event of their claims being successful amongst other things, to participate in this study? Semi-structured interviews were also used in this regard to obtain the relevant information from participants. The researcher aimed to interview five (5) Chiefs and/or senior members of the said communities. Among these Chiefs, two (2) were supposed to be from the Nama ethnic group and three (3) from the OvaHerero ethnic community. three (3) senior government officials/politicians were also to be interviewed to obtain information regarding the government's position with regard to the reparations issue. The researcher also intended to interview at least three (3) officials representing the Federal Republic of Germany in Namibia for

their views on the subject matter. However, due to the reasons explained in the Limitations of the Study section, most of my intentions were not fulfilled.

However, at the conclusion of the study, I only managed to interview one (Herero Chief) and no Nama Chiefs. I also managed to interview three senior government officials as planned and their information was very helpful.

1.8 Legal Literature and the Internet

Legal literature such as textbooks, case law precedents, and international legal instruments as well as the internet were consulted. Notable books that were researched included literature relevant to the successful Jewish claims against the German government and United Nations resolutions on the subject matter, as well as analyzing the contents of internationally recognized genocide conventions. National libraries and archives in the Republic of Namibia were also visited in order to obtain historical sources chronicling the events that led to the genocide.

1.9. Ethical issues

Morals underpin ethics, but the two terms are not synonymous. Morality and morals are to do with beliefs about what is right and wrong, while ethics can be defined as a systematic reflection on morality, an attempt to clarify and codify what is right and is wrong. Ethics are postulates regarding what people ought to do. Ethical issues are present in any kind of research. The research process creates tensions between the aims of research to makes generalizations for the good of others, and the rights of participants to maintain privacy. Ethics pertain to doing good

and avoiding harm. Harm can be prevented or reduced through the application of appropriate ethical principles.⁴⁶

There are many ethical issues to be taken into serious consideration for research. I accepted the responsibility to secure the actual permission of all those involved in the study. I vowed not to misuse any of the information discovered, and I promised I would abide by certain moral responsibility towards the participants. There is a duty upon me to protect the rights of people in the study as well as their privacy and sensitivity. The confidentiality of those involved in the observation was respected, keeping their anonymity and privacy secure.

1.10. Structure of the thesis

Chapter 1 is a basic introduction chapter, and contains the orientation of the study, the statement of the problem, objectives of the study, research questions, significance of the study, research methodology and the literature review.

Chapter 2 deals with the history of Namibia as well as the pre-colonial history of the Herero and Nama peoples, the beginning of the German colonialism and the events that led to the genocide.

Chapter 3 deals with the nature and scope of the crime of genocide. The chapter also aims to examine whether the German conduct during the Namibian war amounted to genocide. This chapter also aims to examine the history of the laws of war and how they were alleged to have been violated by the German colonial authorities.

⁴⁶ Orb, A, Eisenhauer, L. Wynaden, D (2000) "Ethics in Qualitative Research". Journal of Nursing Scholarship. p.93. Available online at <http://www.columbia.edu/~mvp19/RMC/M5/QualEthics.pdf>

Chapter 4 discusses the notion of reparations under both international humanitarian and human rights law. It is in this chapter that the author of this research also examines other possible avenues for reparations available to the Herero/Namas.

Chapter 5 examines possible modes of reparations available to the Hereros.

Chapter 6 discusses the legacy of the 1904-08 Herero/Nama genocide on Namibia today. It is in this chapter in which the author gave a detailed investigation and analysis of the link between the Herero/Nama genocide and the complex land issue in Namibia.

Chapter 7 deals with the major conclusions of the thesis, findings as well as recommendations.

CHAPTER 2: HISTORICAL CONTEXT OR BACKGROUND

2.1 Introduction

Chapter 2 of the study provides a historical background of Namibia from precolonial times, colonial times to the present. Namibia is a multicultural nation and every ethnic group residing in the country has a unique and rich history. Three main language groups are represented in Namibia, namely Bantu, Khoisan and Germanic. For the purposes of this study, special emphasis is placed on the origins of the Hereros and Namas as well as their prominence in the country's historiography. This is crucial in order to understand some of the root causes of the genocide. It is also worth noting that there were other groups other than the two which also suffered the genocide albeit marginally. These were San and Damara peoples. However, the legacy of the genocide is felt by all Namibians to some degree irrespective of their ethnic affiliation.

2.2 A Brief History of Namibia

The territory today known as Namibia has not, of course, always been known by that name. Before, as well as during, the colonial era various parts of the country were referred to by different names by the local inhabitants as well as by missionaries and travelers. But the first name denoting the entire area, '*Sudwestafrika*', was used by the Rhenish Missionary Society in the mid-nineteenth century, which became '*Deutsch Sudwestafrika*' under German colonial rule.⁴⁷

⁴⁷ Maho, J.F (1998) *Few People, Many Tongues: The Languages of Namibia*. Gamsberg McMillan Publishers.p.1.

In fact, it is important to state from the very outset that there was no single national social formation corresponding to present day Namibia in pre-colonial times. Instead, there were several autonomous social formations in the area comprising present day Namibia. Present day Namibia was a creation of imperialism. Indeed, it was an arbitrary creation. There was no cultural, political, or economic logic internal to the area comprising present day Namibia in accordance with which the geographical demarcation could be made.⁴⁸

In spite of German and South African land expropriations, the pattern of African settlement in Namibia today generally reflects that of the pre-colonial era.⁴⁹ The Herero and *Damara* people lived in central and north-western parts of the territory, while in the north were the *Ovambo* communities, extending into what is now southern Angola. Various Nama clans were settled in southern Namibia, the *Orlams* migrating from the Cape during the early nineteenth century. The *Rehobothers* also originally from the Cape established their community south of Windhoek in 1870.⁵⁰ In Okavango there were five groups of people, namely the *Kwangali*, *Mbunza*, *Sambyu*, *Mbukushu* and *Geiriku*. The *Mbukushu* also extended into Caprivi, alongside the *Subia*, the *Lozi* and other groups. Groups from both Okavango and Caprivi were not, however, confined to territory within the current borders of Namibia but were part of wider societies that crossed these borders.⁵¹

⁴⁸ Mbuende, K. (1986) *Namibia, the Broken Shield: Anatomy of Imperialism and Revolution*. Liber Forlag. p.16.

⁴⁹ Katjavivi, P.H. (1988) *A History of Resistance in Namibia*. James Currey Ltd. p.1.

⁵⁰ Katjavivi, *ibid*, pp.1-2.

⁵¹ Katjavivi, *ibid*. pp.1-2.

The oldest inhabitants of Namibia, as of the rest of southern Africa, are the nomadic San. They live mostly along the Kalahari Desert and in the Grootfontein area. Modern technology, other cultures and economic and political pressures have affected their lifestyle, but in many ways, it remains much the same as it has been for centuries.⁵²

On 21 March 1990, Namibia gained its independence after a bitter, decades-long struggle against South African rule. The transition took place a quarter century after decolonization swept most of the continent, but four years before South Africa itself achieved majority rule.⁵³ Namibia's colonial history was, thus, a long one: originally occupied by Germany in 1884, it was conquered by South Africa in 1915, ruled by the latter from 1921 as a Mandated Territory of the League of Nations and, after the Second World War, effectively as part of South Africa itself.⁵⁴

After the League of Nations was succeeded by the United Nations Organisation (UNO), it requested South Africa to place Namibia under its trusteeship. Instead, the Union of South Africa not only refused to place South West Africa under the UN Trusteeship but also failed to promote the 'material and moral well-being of the people of the territory'.⁵⁵ And above all, it systematically introduced the policy of apartheid in the country. The pillars of this policy were the continued appropriation of African land for white settlement through forced removals, the confinement of African people to small barren reserves consolidated into tribal-based

⁵² Katjavivi, *ibid.* pp.1-2.

⁵³ Kinahan, J and Wallace, M (2011) *The History of Namibia: From the beginning to 1990*. Written by HURST AND CO. London. p.1.

⁵⁴ Kinahan, *ibid* p.1.

⁵⁵ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Second and Third Country Report, Ministry of Women Affairs and Child Welfare, p.4-5.

“homelands”, the denial of political rights to the African people and the reservation of white-collar and professional employment opportunities for people mainly of European descent.⁵⁶

Towards the end of the 1950s and early 1960s the national liberation movements emerged and took up the cause of the oppressed people. Initially, these movements concentrated their efforts on petitioning the United Nations and the political mobilization of the people inside the country.

In 1966 the UN General Assembly declared that South Africa had failed to fulfill its obligations under the Mandate. It then terminated that Mandate, and placed the territory under the direct responsibility of the United Nations. In 1967, the Assembly established the United Nations Council for South West Africa to administer the Territory until independence⁵⁷. Although the Council was unable to establish itself in Namibia it did purport to legislate for the territory internally and to accede to international treaties on its behalf.⁵⁸ The Council was dissolved in 1990 shortly after the independence of Namibia. In 1968 South West Africa was renamed Namibia.⁵⁹

In its first resolution on the Namibian question, the Security Council, in 1969, recognized the termination of the Mandate, described the continued presence of South Africa as illegal, and called on South Africa to withdraw its administration immediately. In 1970, the Security Council

⁵⁶ Convention to Eliminate All Forms of Discrimination against Women CEDAW, First Country Report, Department of Women Affairs, 1995, p.1.

⁵⁷ General Assembly Resolution 2145 (XXI) 1966.

⁵⁸ Naldi, G. (1995), *Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights*. Cape Town, Juta.p.4.

⁵⁹ General Assembly Resolution 2372 (XXII).

declared for the first time that all acts taken by South Africa concerning Namibia after the termination of the mandate were “illegal and invalid”. This was upheld in 1971 by the ICJ. The Court stated that South Africa’s presence was illegal, and that South Africa was under an obligation to withdraw its administration from South West Africa. South Africa, however, continued to refuse to comply with the United Nations resolutions, and continued its illegal administration of Namibia, including the imposition of apartheid laws, the bantustanisation of the Territory, and the exploitation of its resources.⁶⁰

In 1966 the South West Africa Peoples Organization (SWAPO) launched an armed struggle against the racist South African regime which eventually drew in other players such as the Angolan government under (MPLA) and Cuban internationalist’s forces on SWAPO’s side.⁶¹

As a result of the intensification of the armed struggle together with worldwide pressure against the racist apartheid regime, the United Nations Security Council adopted Resolution 435 aimed at reaching a peaceful settlement to the Namibian question.⁶² After the implementation of the UN Resolution 435, Namibia finally threw off the yoke of colonialism forever.

⁶⁰Namibia-United Nations Transitional Assistance Group (UNTAG) Background. (undated) at: <http://www.un.org/en/peacekeeping/missions/past/untagS.htm>

⁶¹ For more on SWAPO’s role in the Namibian Liberation Struggle see Peter, Abbott; Helmoed-Romer Heitman and Paul Hannon (1991). Modern African Wars (3): South-West Africa. Osprey Publishing

⁶² United Nations Resolution 435 adopted on September 29, 1978, put forward proposals for a cease-fire and UN-supervised elections in South African-controlled South-West Africa which ultimately led to the independence of Namibia. Importantly, it established the United Nations Transition Assistance Group (UNTAG) which oversaw the election and the South African withdrawal. The resolution was adopted by 12 votes to none; Czechoslovakia and the Soviet Union abstained while the People’s Republic of China did not participate in the vote. On December 22, 1988, South Africa agreed to implement the resolution upon its signature of the Tripartite Accord at UN headquarters in New York. For more on the resolution see Wellens, Karen; T.M.C. Asser Instituut (1990). *Resolutions and statements of the United Nations Security Council (1946-1989): a thematic guide*. BRILL. p. 200.

Topographically, the country is divided into three regions: a coastal desert covering approximately 15 percent of the total territory, a central plateau covering approximately 60 percent, and a semi-desert covering approximately 25 percent. The coastal desert, or the Namib Desert, lies to the west.⁶³ The Namib Desert is characterized by low rainfall, high sand dunes, hardly any vegetation and a relatively cool climate. It is the only true desert in sub-Saharan Africa. to the east of the Namib Desert is the central plateau, with broken mountain ranges, shrub, forest and woodland vegetation, dry and flat savannah plains, as well as hot veld areas in the north⁶⁴. The Kalahari Desert, which is actually a semi-desert, covers large parts of eastern Namibia and extends into western Botswana, of which it covers the better part. It is characterized by sand, limestone, shrub vegetation, hot veld areas and practically no surface water at all.⁶⁵

In his description of the archaeology in Namibia, Kinahan⁶⁶ postulates that the archaeological sequence as it is presently known in Namibia starts with the late Pleistocene evidence of the Early and Middle Stone Age, with later Stone Age evidence first appearing before the Last Glacial Maximum⁶⁷ and the commencement of the Holocene about 10,000 years ago, when the classic hunter-gatherer cultures of the recent pre-colonial period developed. Possibly much older are informal pebble tools which might even date to the Plio-Pleistocene boundary at about two million years. The Holocene period, mainly characterized by the Later Stone Age record, also

⁶³ Maho, *supra* note 47, at p.3.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Kinahan and Wallace, *supra* note 53, p.20.

⁶⁷ Emmett, T (1999) *Popular Resistance and the Roots of Nationalism in Namibia, 1915-1966* (Basel: P. Schlettwein) p. 262-3.

includes the first appearance of ceramics, metallurgy and farming within the last 2,000 years. In general, research covering the early part of the archaeological sequence refers to questions of human evolution, while the middle part of the sequence provides evidence of cognitive and technological advances as well as the rise of regional diversity. The final and most recent part of the sequence includes the richest evidence of human adaptation to the Namibian environment, and of development towards complex social traditions.

Namibia has four basic vegetation zones. These are: desert (Namib), Karoo shrub (the greatest part of the south), grassland (central and eastern parts) and thornveld savannah (northern and north-eastern parts). The resources of the landscape, of which water and food are of cardinal importance, influenced both the pattern of settlement and of conflict of the earliest inhabitants.⁶⁸

Archaeological remains give proof of the importance of river systems and floodplains such as the Cunene (north-west border with Angola), the *Cuvelai* and *Etosha* drainage (in Western Owambo and southern Angola), the *Cubango* (Kavango and Caprivi), the *Kuiseb* (Central highlands and Namib) and the Fish (South) for settlement and subsistence.⁶⁹

2.3 The pre-colonial History of the Herero and Nama people of Namibia

It is imperative for the purposes of this study to give a brief but detailed history of the Herero and Nama communities before the dawn of German colonialism. The reason why I chose to focus on the historiography of these two communities among the many ethnic groups in the

⁶⁸ Du Pisani, A. (1986) SWA/Namibia: the politics of continuity and change. Jonathan Ball Publishers. p. 5.

⁶⁹ Du Pisani, *ibid.*

country is because they were the main “players” in the early phases of Namibia’s resistance to colonial rule and the eventual victims of the first genocide of the 20th century.

2.3.1 The Hereros

The Hereros have not always lived in Namibia. There is, however, great uncertainty about their origins, as well as about the origin and meaning of their name. The scanty information available is based mainly on tradition and what could be gleaned from their cultural life. The tradition was recorded in the main by missionaries of the Rhenish Mission Society who worked amongst the Hereros. These traditions correspond to a certain extent about where the Hereros originally lived, but differ drastically concerning the time at and route along which they migrated.⁷⁰

Herero tradition states that, the Hereros are descended from the Ovamba (u)ndu national group. This latter group lived in a well-watered area with plenty of grass and reeds⁷¹ probably the area west of Lake Tanganyika. According to Reverend Irle, who questioned numerous Hereros about their early history, there is a definite affinity between the language of the Hereros and that of the Bailunda and Barotse and especially the tribes in the southern Congo basin.⁷² Irle’s surmise was confirmed by the German officer Curt von Francois. Von Francois brought a young Baluba boy, who had grown up along the Lualua River in the Congo (Zaire) to South West Africa with him.

⁷⁰ Pool, G. (1991) Samuel Maharero. Gamsberg Macmillan.p.3.

⁷¹ Vedder, H. “*Bedeutung der Stammes-und Ortsnamen in Sudwestafrika*”. Journal, SWA Scientific Society, IV, 1928-1929, p. 18.

⁷² Irle, J. (1906) ‘*Die Religion der Herero*’ (Sonderabdruck aus dem Archiv fur Gutersloh).

He soon realized that the young Johannes Franz, as the boy was called, could talk to the Hereros in their own language.⁷³

The Ovamba (u)ndu probably started migrating towards the south sometime during the 16th century. There are, however, great differences of opinion about what happened after this. According to information recorded by Reverend Vedder, both the Herero and Mbanderu national groups were at this stage still included in the Ovamba(u)ndu group. They moved together into Bechuanaland (Botswana).⁷⁴ At that time, the Bechuanas lived as far west as Oviumbo, north-east of Okahandja.

Reverend Irle, who studied the early history of the Hereros through their traditions even before Vedder, was of a different opinion. According to him, the Mbanderu did not originally belong to the same national group as the Herero. He believed that they only came into contact with each other in the Sandveld (Omaheke). Irle claimed that the Mbanderu moved out of the east from upper reaches of the Zambezi River past Lake Ngami into present Namibia.⁷⁵ Curt von Francois's brother, Hugo, supported Irle's view. According to him, the Mbanderu moved from Lake Ngami via Ghanzi and Rietfontein to settle in the area stretching from the drainage area of the upper reaches of the Black and White Nossob Rivers to the edge of the Kalahari Desert.⁷⁶

⁷³ Von Francois. H. (1937) *'Nama und Damara'*. Deutsch-Sud-West-Afrika. Magdenburg, 1896.

⁷⁴ Vedder. H. (1937) *Die Voorgeschiedenis van Suidwes-Afrika. Gebeurtenisse in Suidwes tot aan die dood van Maharero in 1890.* Windhoek.

⁷⁵ Irle, J: *Die Herero.* pp. 50-52.

⁷⁶ Von Francois, H: *Namaund Damara.* pp. 100-101.

Reverend Vedder's version of the origins of the Mbanderu differs completely from that of Irle. According to Vedder, one of the prosperous leaders of the Ovamba(u)ndu lived amongst the Bechuanas with his sons, Tjivisiua and Kamata. After his death, a dispute arose between Tjivisiua's herdsmen and those of the Bechuanas. In the subsequent fight, Tjivisiua and his supporters were defeated.⁷⁷ The Herero teacher, Gustav Kamatoto, was probably referring to this same battle when he wrote in his memoirs of a great battle that took place at Omatemba between the Hereros and the Bechuanas.⁷⁸ According to Vedder, Tjivisiua and his followers moved north-westwards after their defeat, occupying the uninhabited territory between the Owambo tribes and the Atlantic Ocean, that is, the Kaokoveld (Kaokoland).⁷⁹ Kamata and his followers, on the other hand, remained with the Bechuanas.

Pool⁸⁰ further narrates that when the Bechuanas asked Kamata and his people whether Tjivisiua and his people would return, the latter are said to have replied: "Va herero okukara". Literally translated, this could mean: "They were determined to remain there." As a result, those people who settled in the Kaokoveld were called the Ovahereros or "the determined ones."⁸¹ In their turn, Kamata and his people became known as the "Ovambandu of the reeds". Because reeds were called "Oruu" in their language, they became known as the "Ovambanderuu" or

⁷⁷ Vedder, H: *Bedeutung der Stammes-und Ortsnamen in Sudwesafrika*. Journal, SWA Scientific Society, IV, 1928-1929, p. 18; H. Vedder: *Die Voorgeschiedenis van Suidwes-Afrika*, p. 153

⁷⁸ RSA WXL. 15.1 *Mitteilungen* von Gustav Kamatoto, Herero, in Windhoek, *Lehrer der Rheinischen Missionsschule*.

⁷⁹ Vedder, *ibid.* p.153.

⁸⁰ Pool, *supra* note 70 at p. 4.

⁸¹ Vedder, *ibid.* p. 135.

Mbanderu.⁸² Vedder emphasized that the Hereros' name could not be derived from the word "okuherera", that is, "to wave an assegai in the air as done during war dances".⁸³ This explanation was offered by Schinz.⁸⁴ It can also not be derived from the word "Ova-ha-erero" or "people who are not here since yesterday", meaning people from very long ago.

According to Sarkin ⁸⁵the Herero people populated the central region of Namibia, and various estimates and censuses from the time place the population somewhere around 80 000. Socially, Herero society was generally organized around its livestock; they were herders and nomads rather than farmers, and ownership of cattle was the best indicator of wealth in the community.⁸⁶ Cattle, in fact, were extremely important in the society of the Herero: Herero language includes over one thousand words to describe markings and colour of cattle, and the Herero would go to war to protect their livestock if their cattle were threatened. Politically, before the colonial era, the Herero were organized into paternal and maternal groups, which overlapped in complex patterns and were distinguished by the different roles of cattle in each society. However, by 1870, this cooperative system began to collapse, and according to historian Heinrich Loth, the

⁸² Vedder, *ibid.*p. 19.

⁸³ *Ibid.*

⁸⁴ Schinz, H. (1891) *'Deutsch-Sudwest-Afrika.'* *Forschungsreisen durch die deutschen Schutzgebiete Gross-Nama- und Hereroland, nach dem Kunene, dem Ngami-See und der Kalaxari* 1884-1887.

⁸⁵ Sarkin. J. and Fowler, C. (2008) "Reparations for Historical Human Rights Violations: The International and Historical Dimensions of the Alien Torts Claims Act: Genocide Case of the Herero of Namibia". *Human Rights Review*.pp.335-336.

⁸⁶ Drechsler, H. (1980). *Let us die fighting: The struggle of the Herero and Nama against the German Imperialism (1894-1915)*. London. Zed Press.

Herero sociopolitical system at the end of the 19th century had transitioned into the early stages of pastoral feudalism.⁸⁷

During the dawn of European exploration of Africa, a significant population of European traders, missionaries and adventurers ventured into the interior of the continent. Like any other ethnic groups that encountered Europeans in Africa, the Herero were characterized by early European settlers as being barbaric and “governed by ‘unspeakable abominations and vices.’” According to one missionary’s survey in 1847 “the entire character” of the Herero as consisting of “robbery and murder, theft and whoring, hypocrisy and lying”.⁸⁸ Missionary views of the Herero during the first two decades of the colonial era did not change much. The cultural inscrutability of the Herero and their resistance to Christianity continued to be intensely frustrating to the missionaries, and they responded with continuing symbolic violence.⁸⁹

2.3.2 The Namas

Archaeological and other evidence establishes that the Nama were part of the wider semi-nomadic (transhumant) pastoral societies which appeared in southern Africa about two thousand years ago. By the time the Dutch arrived in 1652, Nama society, or *Khoekhoe* had fully developed socio-economic and political structures suitable for their pastoral lifestyle.⁹⁰

⁸⁷ Heinrich, L. *Die christliche Mission in Suwestafrika. Zur destruktiven Rolle der Rheinschen Missionsgesellschaft beim Prozess der Staatsbildung in Sudwestafrika* (1842-1893) (Berlin 1963).

⁸⁸ Steinmetz, G. (undated) *The devil’s handwriting: Pre-coloniality and the German Colonial State*. pp. 147-149, 185-186 and 209.

⁸⁹ Ibid.

⁹⁰ Masson, J. (2001) *Jacob Marengo: An Early Resistance Hero of Namibia*. Out of Africa Publishers. p.6.

The Nama people consisted of two major groups, the Namaqua and the Orlams, which were in their turn sub-divided. The *Orlam* crossed the Orange River in five waves, because of mounting pressure from white settlers in the Cape colony at the turn of the eighteenth century. The *Orlam* consisted of five subgroups, namely the *Afrikaaners*, who settled in the area around Windhoek, the *Witboois* who settled in Gibeon, the *Khauas* who settled in *Gobabis*, the *Berseba* and the *Bethany* groups. Each group constituted an autonomous social formation under the leadership of a chief.⁹¹

The other major group of Nama consisted of seven sub-groups who claimed common ancestry, namely the *Gai-//khaun* or Red Nation of *Hoachanas*, the *!Gami-/nun* or *Bondelswarts* of Warmbad, the *//Haboben* or *Veldskondraers* of the area south of the present day Keetmanshoop, the *!Khara-khoen* or *Fransmann* Nama of the Fish River, the *//Khau-/goan* or *Swartboois* of the area around present day Rehoboth, the *!Aonin* or *Topnaar* of Walfish Bay and *Rooi Bank*, and the *!Gomen* or *Groot Doode* of the area between the Fish River and the Kuiseb.⁹²

The main economic activity in these formations was hunting supplemented by herding and gathering. Hunting expeditions often went beyond the territorial confine of Namaland, at times going as far as *Ovamboland* and Lake Ngami in present day Botswana.⁹³ Hunting expeditions were organized on a large-scale embracing participants from different homesteads within one formation. There was a complex division of labour within the hunting band which was augmented by the introduction of firearms and horses, since it was often only a few people were

⁹¹ Mbuende supra note 48, at p. 33.

⁹² Ibid.

⁹³ Vedder, H (1938) South West Africa in Early Times. London: OUP.p.53.

in possession of horses and firearms. Some members of the band were responsible for the killing of the game, while others were responsible for transportation.⁹⁴

The Leader of one of the Nama clans was a warrior by the name of Hendrick Witbooi. He was one of the most powerful African leaders at the time when European imperialism began to carve up Africa into colonies.⁹⁵ Despite standing only around five feet tall, Hendrik Witbooi was a feared military commander and the dominant force among the Nama peoples. He possessed a razor-sharp mind and, in stark contrast to the popular nineteenth-century European image of the African Chief, he was extremely worldly. In 1885, he was fifty-five years old and had built up a body of knowledge and contacts that ranged far beyond the confines of his own people or the African south-west. He was well aware of events outside Africa and fully understood that the powers of Europe were seeking access to the continent and its people.⁹⁶

2.3.3 The Berlin-Africa Conference and the beginning of German colonialism

The scramble for Africa started in the late 19th century and was fully completed by the turn of the 20th century. It began in earnest in the years 1860s-1870s when the French and the British started exploring systematically Western Africa and sign bilateral agreements assigning spheres of

⁹⁴ Ibid at p. 169.

⁹⁵ Lau, B. (1995) The Hendrick Witbooi papers. 2nd ed. published by the National Archives of Namibia. p. 1.

⁹⁶ Olusoga, D and Erichsen, W. (2010) Kaiser's Holocaust Germany's Forgotten Genocide. Faber and Faber Ltd. p.48-49.

influence. The scramble was completed with the Franco-Spanish partition of Morocco and the annexation of Libya by Italy in 1912.⁹⁷

The event that stands for the partitioning of Africa is the conference that Otto von Bismarck organized in Berlin from November 1884 till February 1885. While the Berlin conference mainly discussed the boundaries of Central Africa (the Congo Free State), it came to symbolize the partitioning, because it laid down the principles that would be used among Europeans to divide the continent.⁹⁸

In Germany in particular, until the year of the conference, “the German Government had no definite footing on the continent”.⁹⁹ Thereafter they began to play a leading role in the partitioning of the continent, staking a claim in East Africa and asserting their commitment to colonizing Africa by calling the conference itself. In virtually the span of one year, Germany’s colonial empire became complete. Throughout 1884, Germany found itself on a path to rapid development of colonial territories: The Cameroons in July, German South-West Africa in August, and New Guinea in December. Samoa was added in 1899, after the borders of German East Africa were settled in 1890.¹⁰⁰

⁹⁷ Michaelopolous, S. and Papaioannou, E. (2011) ‘The Long-Run Effects of the Scramble for Africa’. NBER WORKING PAPER SERIES.p. 2-4. Available online at <http://www.nber.org/papers/w17620.pdf>

⁹⁸ Ibid., p. 3.

⁹⁹ Axelson, E. (1967) Portugal and the Scramble for Africa. Witwatersrand University. p. 75.

¹⁰⁰ Pakenham, T. (1991) The Scramble for Africa: The White Man’s Conquest of the Dark Continent from 1876 to 1912. New York: Random House, 1991. Print. pp. 201-217.

Von Bismarck then formed the Triple Alliance with Italy and Austria as a way of neutralizing possibly aggressive rival powers. In 1884, after the Anglo-French relations took a dive in France's defeat in Egypt, Germany turned to reconciliation with France.¹⁰¹ On a more international level, "it was no accident that the conference should have been held at Berlin: no accident either that German restlessness should have been the yeast fermenting the mixed African and European leaven in the years 1884-1885. Germany, at that time, was the arbiter, in a very real sense, of colonial destinies".¹⁰²

The Berlin West Conference of 1884 gave Germany colonial rights to South West Africa (modern day Namibia) and East Africa (modern day Tanzania, Rwanda, and Burundi).¹⁰³ The conference outlined provisions and guidelines for the "preservation of native tribes, suppression of slavery and protection of religious freedom".¹⁰⁴ Thus, arguably, Germany obligated itself to protect the indigenous populations in its colonies. Germany signed various treaties, which governed upstanding behavior towards the indigenous population.¹⁰⁵

Although a latecomer in the scramble for Africa, Germany hesitated at length before committing itself to the annexation of Namibia, then known by the geographical expression South West Africa and the expense and burden of securing control over the indigenous tribes in the interior.

¹⁰¹ Pakenham, *ibid*, at pp.201-217.

¹⁰² Crowe, S. (1966) *The Scramble and the Berlin West African Conference*. "The Scramble" for Africa: Causes and Dimensions of Empire. Ed. Raymond F. Betts. Boston: D.C. Heath and Company, 1966. Print.

¹⁰³ Rivera, A. M. (2012) 'Did the German Actions in the Herero Rebellion of 1904-1908 Constitute Genocide?'. Fort Leavenworth, Kansas. MA Thesis in Military Art and Science. pp. 40-41. Available online at www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA563131

¹⁰⁴ Sarkin and Fowler, *supra* note 85, at p.341.

¹⁰⁵ Rivera, *supra* note 103 at p. 40.

The discovery of diamonds in Griqualand West in the former Cape Province of the Union of South Africa, in geological surrounds not dissimilar to those of the coastal areas around *Angra Penguena* (now *Luderitz*), undoubtedly deepened the German Reich's imperialist hankerings and contributed to the upsurge of pressures exerted upon the German Government by missionaries, settlers and powerful business interests.¹⁰⁶

Then on 24th April 1884 Bismarck's telegram declared *Angra Penguena*, a small bay on Namibia's Atlantic coast, subject to the protection of the Reich and sanctioned the hoisting of the German flag. Bismarck's declaration was the sequel to the purchase by Bremen businessman, Adolf *Luderitz*, of *Angra Penguena*, and a twenty-mile broad coastal strip extending from the mouth of the Orange River to the 26 parallel.¹⁰⁷

On April 10, 1883 Luderitz emissary Heinrich Vogelsang landed at *Angra Penguena* and negotiated a fraudulent lease of land from Joseph Fredericks, "*Kaptein*" of the indigenous Bethanie community. Vogelsang used the unit of geographical miles in lieu of ordinary miles, effectively obscuring the true amount of land to be leased. Luderitz turned *Angra Penguena* into a trading station, and after Bismarck's declaration of the German Protectorate over the area, it was renamed Luderitz and work began to make it a naval base.¹⁰⁸

The penetration of German power into the interior presented more difficulties. On the 21st October 1885 Imperial Commissioner, Dr. Heinrich Goering, father to Herman Goering who was

¹⁰⁶ Soogot, D (1986) *Namibia: The Violent Heritage*. Rex Collings. London p.1.

¹⁰⁷ *Ibid.*

¹⁰⁸ Zimmer, E. M (undated). *German South West Africa*.pp. 1-3. Available online at [http://www.estherlederberg.com/Eugenics%20\(CSHL_List\)/German%20South%20West%20.....](http://www.estherlederberg.com/Eugenics%20(CSHL_List)/German%20South%20West%20.....)

destined to become a Nazi war leader landed together with a secretary and a police superintendent. Goering set out to procure unauthorized protection agreements from indigenous chiefs.¹⁰⁹

In signing these protection treaties, and in the belief that German protection meant the deployment of some of the nation's might against his enemies, the Herero paramount chief readily entered into a treaty with Germany.¹¹⁰

The terms of the 1885 treaty between Germany and Paramount Chief Maharero stipulated as follows. Chief Maharero and his subjects promised:

1. To guarantee the safety of life and their possessions of Germans and their equals in their territories.
2. To guarantee German citizens and their equals unlimited right to travel, to live, to trade, and to work in their territories.
3. To recognize on the occasion of legal difficulties between German citizens and their equals the jurisdiction of the German Emperor.
4. Not to alienate land without the consent of the German Emperor to any other nation or subject thereof; not to contract any treaties with any other nation without the German Emperor's consent nor to grant greater privileges to any other nation or subject of such in their territories but to treat Germany and its citizens as the most favoured nation.

The German Government, in reciprocity, obligated itself:

¹⁰⁹ Soggot., *ibid* at p. 3.

¹¹⁰ *Ibid*.

1. To guarantee protection to Paramount Chief Maharero and his people. It was a token of such protection that the German flag was raised.
2. To leave the jurisdiction in both civil and criminal cases over the Chief's own people solely to him
3. To see to it that white residents of hereroland respect the laws, customs and usages of the Natives, and pay the Hitherto customary taxes, and do nothing in violation of German criminal law.
4. To respect the treaties concluded between the Herero Tribes and other nations or their citizens prior to this treaty.¹¹¹

2.3.4 Genocide

The first genocide of the 20th century occurred not in Europe but in Southwest Africa, a colony that had been annexed by Germany in the early 1880s. Between August 1904 and 1907, the Germans attempted to exterminate the indigenous OvaHerero people, along with the groups of rebellious *Khoikhoi*.¹¹²

In the autumn of 1903, the German administrators and officials in South West Africa were quietly confident that the colony was advancing in an orderly way along the path that led to “civilization”.¹¹³ Since the last native uprising in 1896, law and order had, for the most part,

¹¹¹ Wallenkampf, A. V (1969) *The Herero Rebellion in South West Africa, 1904-1906: A Study in German Colonialism*, University of California, p. 79-81.

¹¹² Steinmentz, G (2005) ‘The First Genocide of the 20th Century and its postcolonial afterlife; Germany and Namibian OvaHerero’. *The Journal of International Institute*. Vol. 12, issue 2. p.1. Available online at <http://quod.lib.umich.edu/j/jii/4750978.0012.201?rgn=main;view=fulltext>

¹¹³ Bridgmann, J and Worley, L.J. (2004) *Genocide of the Hereros* in Totten, S et al (2004) *A century of genocide: a critical essays and eyewitnesses accounts*. Taylor and Francis. 2nd ed.p.15.

prevailed. Year after year the governor, Major Theodor Leutwein, had travelled throughout the colony visiting the chiefs and dispensing justice. In the summer of 1903 he had demanded that the old Herero chief Tjetjo and his tribe turn in all their weapons. Backed by the support of the principal Herero chief, Maharero, who had been a long-time enemy of Tjeto, Leutwein was able to enforce compliance without recourse to arms.¹¹⁴

By 1904, the Hereros had so many reasons for rebelling that it might be profitable to ask why they had not acted sooner, rather than why they revolted when they did. First, every Herero was alarmed at the progressive loss of land. Up to 1900, only a minor portion of the Herero hereditary lands had been alienated, but with the completion of the railroad from the coast to the capital of the colony, Windhoek, the pace of alienation accelerated rapidly, so that by the end of 1903, 3.5 million hectares out of a total of 13 million had been lost, and the day when the Hereros would not have enough land to continue their traditional way of life was fast approaching. The loss of land, frightening as it was to any Herero who looked only a few years into the future, did not yet in 1903 affect the daily life of the Hereros.¹¹⁵

The problem of debt was another matter. For many years, Hereros had fallen into the habit of borrowing money from the white traders at usurious rates of interest. Leutwein had long been concerned about this practice, which he considered not only immoral, but also politically explosive.¹¹⁶

¹¹⁴ Schwabe, K. (1904) *Mit Schwert und Pflug in Deutsch-Sudwestafrika*. Berlin: E.S. Mittler. p. 67.

¹¹⁵ Bridgmann and Worley, *supra* note 113 at p.18.

¹¹⁶ *Ibid.*

The German traders, knowing that if they did not collect all outstanding debts within a year they would lose them forever, not unnaturally began recalling their loans as quickly as possible. To facilitate the collection process, government officials, and on some occasions even soldiers, were pressed into service to aid traders. In some cases, the traders themselves expropriated as many cattle as they thought necessary to cover claims, and as one trader remarked, a few extra to cover any future claims.¹¹⁷

In 1904, the conflict and tension that now prevailed in southern and central Namibia exploded into wars of resistance against the colonizing power.¹¹⁸ By the time of the last major military engagement, in 1908, Germany had committed genocide against the peoples of the south and central Namibia. Most of those who survived battle and flight were imprisoned in concentration camps, where many of them died,¹¹⁹ and the survivors were deprived of almost all their land and cattle.

The Namibian genocidal war of 1904-1908 remains a contentious issue. It has, apart from its centenary commemoration, also been put into the limelight by the attempt of a section of the Namibian Herero community to sue certain private companies and the German State for reparations.¹²⁰

¹¹⁷ Wellington, J.H (1967) *South West Africa and its Human Issues*. Oxford University Press. p.198.

¹¹⁸ Kinahan and Wallace *supra* note 53, p. 6.

¹¹⁹ Concentration camps were invented in Cuba in the late nineteenth century during a war over Spanish control; concentration camps were also used by the British in the war against the Boers in south Africa (1899-1902)

¹²⁰ Silvester, J. Hillebrecht, W. & Erichsen, C. (n.d) 'The Herero Holocaust? The Disputed History of the 1904 Genocide'. Available online at <http://www.namibweb.com/hererohol.htm>

According to Gewald¹²¹, on 11 January 1904, the Herero-German War broke out at Okahandja, a small dusty town in central German South West Africa (GSWA), present day Namibia. By the time hostilities ended in 1908, genocide had been committed, the majority of the Herero people had been killed, and the survivors, mostly women and children, incarcerated in concentration camps as forced labourers.¹²²

Gewald¹²³ further asserts that the increasing socio-economic pressure placed upon Herero society by the arrival of ever more German settlers demanding land and assuming racial privilege produced a tense situation. The war did not result from premeditated insurrection against German rule, rather, amid the tension that had developed over time, a single shooting incident served as a trigger. Starting in Okahandja the war spread across central Namibia and developed in intensity and brutality as fresh contingents of German troops disembarked and attempted to impose their vision of order on the territory and its inhabitants. The Kaiser's personal choice and appointment of commanding officers in GSWA signaled the highest authorization and endorsement of what occurred in the name of imperial Germany. In a policy of genocide, German soldiers and settlers sought out, shot, beat, hung, starved and raped Herero men, women and children. By the end of 1904 the war had spread to southern Namibia. Here it also overwhelmed the Nama inhabitants of

¹²¹ Gewald, J. (2003) "Herero genocide in the twentieth century: Politics and memory," in Jon Abbink, Miriam De Bruin, and Klaas van Walraven, (Eds.). *Rethinking Resistance: Revolt and Violence in African History*. Boston: Leiden. pp. 279-304.

¹²² Gewald, J.B. "Forced Labour in the Onjembo, the Herero –German War of 1904-1908," *Itinerario*, XIX,1 (1995) and Gewald, J.B, *Herero Heroes: A Socio-Political History of the Herero of Namibia 1890-1923* (Oxford, 1999), pp.141-91.

¹²³ *Ibid.*

GSWA. When it finally ended, no fewer than 80% of the Herero and at least 50% of the Namas had lost their lives.¹²⁴

Most of the Herero who remained, primarily women and children, survived in concentration camps as forced labourers employed on state, military and civilian projects. In short, the war and its aftermath were characterized by acts of excessive violence and cruelty on the part of German soldiers and settlers. After the initial battles, the civilian governor was relieved of his command and replaced by the Kaiser's own candidate, Lieutenant-General Lothar von Trotha. Under the command of Von Trotha, the Germany army sought to engineer a crushing defeat of the Herero in the vicinity of the Waterberg. In keeping with Von Moltke's principles of separate deployment and encirclement, Von Trotha sent out his armies to annihilate the Herero at the Waterberg. Or, as he put it in his own words:

My initial plan for the operation, which I always adhered to, was to encircle the masses of Hereros at Waterberg, and to annihilate these masses with a simultaneous blow, then to establish various stations to hunt down and disarm the splinter groups who escaped, later to lay hands on the captives by putting prize money on their heads and finally to sentence them to death.¹²⁵

On 11 August the Battle of Hamakari took place at the Waterberg. The Herero were defeated and fled in a southeasterly direction into the dry desert sands of the Kalahari, known to the Herero as the Omaheke. Hundreds of animal carcasses lay about in the veld and marked the route along which the Hereros had fled. Some had been shot and only the liver, kidneys and the best edible

¹²⁴ Ibid.

¹²⁵ Bridgman, J.M. (1981) *The Revolt of the Herero*, Berkeley. University of California Press. p.162.

meat removed. The rest lay in the sun. Hunger had even forced them to eat the branches of the bushes and trees they could reach.¹²⁶

The people themselves were now experiencing problems in obtaining water. Those who had fled on ahead had allowed their cattle to drink the waterholes dry, with the result that the Hereros at the back of the cavalcade could not even obtain water for themselves. In their distress they started slitting their animals' throats and drinking the blood. Others tried without success to quench their thirst by drinking the fluid squeezed from the stomachs of the animals. The physical strength of the older, decrepit Hereros gave in first.¹²⁷

It was only after the battle of the Waterberg that the full genocidal scope of von Trotha's plans became clear. Accounts vary as to when the command was given, but at some point, probably before the battle itself, Von Trotha issued orders that no Herero prisoners were to be taken. Although a written version of that command has never come to light, Major von Estorff, a firm critic of von Trotha's policies, recorded in his journal that orders banning the taking of prisoners were in place soon after the Waterberg.¹²⁸ Major Stuhlman, who fought at the Waterberg, also recorded having received the order not to take prisoners. In a diary entry made before the battle, he wrote: 'we had been explicitly told beforehand that we were dealing with was the extermination of the whole tribe, nothing living was to be spared.'¹²⁹

¹²⁶ Pool, supra note 54, at p.264.

¹²⁷ Ibid.

¹²⁸ Olusoga and Erichsen, supra note 96, p. 147.

¹²⁹ For more on the contents of 'Major Stuhlman Diary', see Gewalt, J.B. (undated) The Great General of the Kaiser. Botswana Notes and Records, Volume 26. Available online at: <https://openaccess.leidenuniv.nl/bitstream/handle/1887/4819/asc-1293873-029.pdf?sequence=1>

2.3.5 The extermination order

Controversy has surrounded the meaning of the so-called extermination order issued by Von Trotha. Some have expressed skepticism regarding the true intent of the order. Around 1 October 1904, General Lothar von Trotha, who was actively taking part in the pursuit, and his retinue had reached the Osombo-Windimbe waterhole. During the afternoon of the following day, Sunday 2 October 1904, after the holding of a field service, General von Trotha addressed his officers. In his address he declared that the war against the Herero would be continued in all earnestness and read out a proclamation, which stated amongst others that:

The Herero people must...leave the land. If the populace does not do this, I will force them with the Groot Rohr (Cannon). Within the German borders every Herero, with or without a gun, with or without cattle, will be shot. I will no longer accept women and children, I will drive them back to their people or I will let them be shot at. These are my words to the Herero people. The great General of the mighty Kaiser.¹³⁰

Lau¹³¹ embarrassingly argued that the original meaning of the extermination order has been overstated by many scholars. She opined that “Von Trotha’s order has been adequately challenged by Karla Poewe¹³² who problematised the word “extermination” which at the time referred to breaking the enemy’s power to resist, not killing off one by one; who pointed to the fact that the order was issued two months after the decisive battle at Hamakari when the war was all but over; and who demonstrated that it was a successful attempt at psychological warfare, never followed indeed”.. However, Von Trotha’s own words, in his diary and elsewhere, indicate

¹³⁰ Dreschler, supra note 86 at pp. 156-157.

¹³¹ Lau, Brigitte (1989), "Uncertain Certainties: The Herero-German War of 1904", *Migabus* 2: 4–8.

¹³² Poewe, K. (1985) ‘The Namibian Herero. A history of their psychosocial disintegration and survival.’ Lewiston/Queenstown, p. 65.

that he knew full well what his proclamation would entail. On the day the proclamation was issued, Von Trotha wrote in a letter:

I believe that the nation as such should be annihilated, or, if this was not possible by tactical measures, have to be expelled from the country by operative means and further detailed treatment. This will be possible if the waterholes from Grootfontein to Gobabis are occupied. The constant movement of our troops will enable us to find the small groups of the nation who have moved back westwards and destroy them gradually. My intimate knowledge of many African tribes (Bantu and others) has everywhere convinced me that the Negro does not respect treaties but only brute force¹³³.

2.3.6 Controversy surrounding the meaning of the so-called extermination order (*Vernichtung*)

What does the term *Vernichtung* used by the Germans during the military campaign in German South-West Africa in 1904 really mean?¹³⁴ Nordbruch also,¹³⁵ argues that the use of the word *vernichtung* which unknowledgeable people translate as *extermination*, in fact, meant, in the usage of the times, breaking of military, national, or economic resistance. Indeed, German military always understood and still does understand *vernichtung* in the sense of elimination, in other words, the neutralizing, the breaking of the enemy's resistance and ability to keep up fighting. Nothing else flows from Von Trotha's strategy: "My initial and adopted plan for the operations was to surround the Herero mass at the Waterberg, and to eliminate the mass through an attack, then establish individual stations so as to find and disarm the fleeing masses, with

¹³³ Pottins, C. (2011) 'Historical passages: Armenian Holocaust'. pp.1-5. Available online at: <http://historicalpassages.blogspot.com/2011/06/armenian-holocaust.html>

¹³⁴ Nordbruch, C. (2004). Atrocities committed on the Herero people during the suppression of their uprising in German South West Africa 1905-1907? An analysis of the latest accusations against Germany and an investigation on the credibility and justification of the demands for reparation. pp.10-13.

¹³⁵ Nordbruch,ibid, pp.10-13.

bounty on the heads of the captains thereby bringing them under my control, then finally punish them with death”.¹³⁶

Nordbruch¹³⁷ argues that the Herero, therefore, were not to be exterminated, but on the contrary, after being disarmed, they were to be taken prisoner and to be pacified. For this reason, reception camps for thousands of people had been prepared.¹³⁸ Therefore, in the words of Nordbruch, one can reasonably conclude that General Von Trotha’s Proclamation to the Herero People of 2 October 1904, was not an order for genocide, but a psychologically and logistically motivated announcement formulated in pathetic words.

Hillebrecht¹³⁹ partially agrees with the above interpretation, he posits that the term *vernichten* in common usage at the time “means to break resistance”, but not to exterminate. However, he argues that “This is, at best, a half-truth; the authoritative contemporary dictionary allows both interpretations.”¹⁴⁰ Von Trotha’s proclamation of 2 October 1904 itself does not use the word *vernichten*, but is extremely clear: “Within the German boundaries, every Herero, with or without rifle, with or without cattle, will be shot.’ No argument about semantics of *vernichten* can change this message.

¹³⁶ Transcription of Trotha’s diary as quoted in Gerhard Pool, Samuel Maharero, and Windhoek 1991. p. 268.

¹³⁷ Nordbruch, supra note 134, at p. 13.

¹³⁸ See also Rohrbach, P. (1909) *Aus Sudwest-Afrikas schweren Tagen*. Berlin, p. 167. (In his book *Deutsche Kolonialwirtschaft* on page 342 Rohrbach writes, that the camp offered space for the shelter of 8.000 people.

¹³⁹ Hillebrecht, H. (2007) ‘Certain uncertainties’ or Venturing progressively into colonial apologetics?’ *Journal of Namibian Studies*, Vol.1. 73-95.

¹⁴⁰ *Muret-Sanders enzyklopadisches deutsch-englisches Wörterbuch*, 1900: “to annihilate, to reduce to nought; to declare null and void, to nullify, annul, cancel; to revoke; to abolish; to destroy, to demolish; to destroy by fire, to burn (down); to exterminate, extirpate; to crush, to defeat, foil, to overthrow”.

Hillebrecht¹⁴¹ further articulates that much has been made of von Trotha's additional message to the German troops, that 'firing of shots at women and children means firing over their heads to drive them away'. This already reinforces the message that any Herero men-whether armed or unarmed-should be killed with aimed shots, but for anyone who might not yet have understood this, Trotha adds: "I am in no doubt that as a result of this order no more male prisoners will be taken." In military language, this leaves no interpretation open. It means shoot them all, no matter whether they come hands up, or are wounded and no longer able to wield a gun. Incidentally, the Geneva Convention which outlaws such war practice had by this time already been signed by Germany.

Poewe, according to Hillebrecht had the audacity to declare this order "psychological warfare" and even provides a justification: "The intent was to keep small guerrilla bands away from German troops. The former shot upon the latter unexpectedly and cruelly mutilated German soldiers."¹⁴² But one has to look at the rest of von Trotha's order:

I am in no doubt that as a result of this order no more male prisoners will be taken, but neither will it give rise to atrocities committed on women and children. These will surely run away after two rounds of shots have been fired over their heads. I trust that our force will always bear in minds the good reputation that the German soldier has acquired.¹⁴³

¹⁴¹ Hillebrecht, supra note 139. p. 85.

¹⁴² Poewe, Herero: 65

¹⁴³ "*Ich nehme mit Bestimmtheit an, dass dieser Erlass dazu führen wird, keine männlichen Gefangenen mehr zu machen, aber nicht zu Greuelthaten gegen Weiber und Kinder ausartet. Diese werden schon fortlaufen, wenn zweimal über sie hinweggeschossen wird. Die Truppe wird sich des guten Rufes der deutschen Soldaten bewusst bleiben.*" Dreschler is citing from the *Vorwärts*. Translation from Horst Dreschler's *English version of Südwestafrika, Fighting*: 157; German original on, p.184. this statement is loosely translated in English as "I am convinced that this decree will lead to a conduct of making no male prisoners, but will not turn into atrocities against women and children. These will run away when two volleys have been fired over their heads. The troops will be conscious of the good reputation of German soldiers."

In Von Trotha's opinion, the good reputation of the German soldier is not tarnished by frightening women and children into an almost certain death through hunger and thirst in the Omaheke. From Von Trotha's explanatory memorandum which he sent to the Army Chief of Staff in Berlin it becomes very clear that this was the implicit intention.¹⁴⁴ And it is also not debatable that this remained the official policy, sanctioned from Berlin, until under public pressure the order was rescinded.

2.3.7 Slave labour and Concentration camps

According to Anderson,¹⁴⁵ even after the Emperor rescinded the Extermination Order, the German colonial administration continued to decimate the Hereros by forcing Herero prisoners of war into slave-labour and concentration camps. The German Imperial Chancellor, Prince von Bulow, ordered the creation of concentration camps in Hereroland in 1904. One notable of these concentration camps was at Shark Island just off the Namibian coast, at which Herero and Nama survivors of the genocide were interned.¹⁴⁶ By late May 1905, the Germans had taken 8,040

¹⁴⁴ "Andererseits ist die Aufnahme der Weiber und Kinder, die beide zum grossten Teil Krank sind, eine eminente Gefahr fur die Truppe, sie jedoch zu verpflegen eine Unmoglichkeit. Deshalb halte ich es fur richtiger, dass die Nation in sich untergeht, und nicht noch unsere Soldaten infiziert und an Wasser und Nahrungsmitteln beeintrachtigt. "Deutsches Bundesarchiv, RKA 2089, fol. 5/6; as cited by Dreschler, *Sudwestafrika: 189-190* and Nuhn, *Strum: 284*. This statement is loosely translated as: "' On the other hand putting up women and children, both of whom are in the majority ill, constitutes an enormous risk for the troops, feeding them, however, is a mere impossibility. Therefore I deem it better that the nation in itself should perish rather than infecting our soldiers and restricting their water and food supplies."

¹⁴⁵ Anderson, R. (2005) 'Redressing Colonial Genocide Under International Law: The Herero's Cause of Action Against Germany'. *California Law Review*, Inc. pp.1164-66. Available online at: <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1299&context=facpub>

¹⁴⁶ Shark Island Extermination Camp is regarded as the world's first extermination camp (Vernichtungslager) The site was used by the German colonial empire during the Herero and Namaqua genocide of 1904-1908. Three thousand Herero and Namaqua rebels in the German-Herero conflict of 1904-1908 died there. Poised on the vast South Atlantic, the inhospitable island known in German as *Haifischinsel* stretches 1200 meters from south to north and only about 300 meters east to west at its thickest point. Apart from marine life, such as seabirds, mussels and

Herero prisoners of war, of whom more than three-quarters were women and children. The Germans immediately shipped the prisoners to slave-labour camps, where they worked under grueling conditions and were subjected to scientific experiments. The mortality rate was extremely high: more than 12% of the Hereros serving as slave labour for railroad construction died in a period of six weeks. The Germans killed all Hereros who tried to escape the inhuman conditions in the camps immediately and without mercy.

From very early on it was evident that Shark Island was unfit for human habitation. Missionary Vedder wrote to his colleague Eich about very high mortality figures among prisoners in Luderitz. Hundreds of captured Herero and Nama prisoners of war met their end at Shark Island. Rations were low, and virtually t all prisoners were worked to death. Shark Island served as a source of slave labour earmarked for railway construction in the interior of the country.¹⁴⁷

Anderson further elaborates that the brutal living and working conditions in the camps constituted a policy decision on the part of Germany. Vice Governor Hans Teckleburg commented on the high mortality rate in the camps in a letter to the Colonial Department stating, “the more the Herero people experience personally the consequences of the rebellion, the less

seals, the island is entirely barren and wind-swept and its surface is covered in solid granite rock, carved into surreal formations by the hard ocean winds. At the time of the Herero and Nama wars, the island was connected to the mainland by a small causeway. This link between coast and island had originally been constructed to avoid it falling into British hands, as the British Empire laid claim to all islands and islets off the Namibian coast. Available online at: <http://www.ezakwantu.com/Gallery%20Herero%20and%20Namaqua%20Genocide.htm>

¹⁴⁷ Erichsen. W. (2005) “The angel of death has descended violently among them”. Concentration camps and prisoners of war in Namibia, 1904-1908’. African Studies Centre Research Report.

will be their desire and that of generations to come to stage another uprising.....the ordeal they are now undergoing is bound to have a more lasting effect.”¹⁴⁸

The brutality against the Hereros continued as Friedrich Von Lindequist succeeded von Trotha as governor of South West Africa. Under Von Lindequist, German military hostilities ceased briefly from December 1905 until mid-1906. Despite the pause in military strikes, Von Lindequist established concentration camps in December 1905 for Hereros who had surrendered to Germans.¹⁴⁹

2.3.8 Pseudoscientific experiments on the natives

Captured Herero/Nama prisoners of war were subjected to a host of pseudoscientific experiments which were aimed at proving that the white race was superior to black Africans. During the Namaqua genocide, thousands of skulls were collected and sent to German universities and other research institutions. The few Hereros who survived were put in concentration camps, where they did forced labor. In addition to suffering from disease and malnutrition, some were subjected to laboratory experiments conducted by Eugen Fischer, a geneticist from the University of Freiburg. Later to become one of the Nazis' chief eugenicists, Fischer also performed pseudoscientific experiments on the mixed children of German men and Herero women forced to be sex slaves. In his book "The Principles of Human Heredity and Race

¹⁴⁸ Olusoga and Erichsen, supra note 96, p. 170.

¹⁴⁹ By May 1906, the Germans had captured 14,769 Hereros: 4,137 men, 5,989 women, and 4,643 children. The German' annihilation campaign was brutal and successful. When the Germans did not shoot or hang Herero prisoners of war, they drove them into slave-labour and concentration camps. By the end of the war in 1907, the Herero population as such was annihilated.

Hygiene," Fischer argued for the racial inferiority of the Herero and warned against the dangers of miscegenation.¹⁵⁰

2.3.9 The Blue Book Controversy (1914-1921)

After the outbreak of the First World War, South African forces under British command invaded German South West Africa and defeated the much-vaunted German army. Between 1915 and 1921, Namibia fell under the jurisdiction of a military administration. As the war progressed, it became clear that the victorious parties had no intention of allowing Germany to retain its colonies. To this end, from at least 1915 onwards, British colonial officials were instructed to gather material which would strengthen the British Empire's claims to Germany's colonies.¹⁵¹

In Namibia this task was facilitated by the existence of a well-organized and detailed German government archive which the incoming military administration found waiting for it in Windhoek. In the most chilling detail, officials found in it accounts and reports on the manner in which German settlers of German South West Africa and its administration had dealt with the country's original inhabitants. Apart from files dealing with the way in which the Herero had been incarcerated in concentration camps and distributed amongst settlers and companies, the archives also contained a series of documents dealing with the excesses of settlers who had flogged Herero.¹⁵² Glass plate negatives detailed the torn and rotting backs of women flogged for

¹⁵⁰ Lowenstein, J.K. 'Our limitless capacity for mass murder'. *Chicago Tribune news*. p.1. 2004-10-24. Available online at: http://articles.chicagotribune.com/2004-10-24/news/0410240032_1_herero-people-german-soldiers-german-army/2

¹⁵¹ Gewalt, J.B. (2003) 'Herero genocide in the twentieth century: Politics and Memory', Brill, Leiden Publishers. p. 11.

¹⁵² Ibid.

alleged insubordination, and pages and pages of court transcripts covering the brutal lashings of labourers.¹⁵³

Apart from detailed archives, the South Africans were greeted by a population more than willing to provide information about their experiences under German rule. During the course of their military campaign, South African forces were dependent on Herero scouts for information regarding watering points, routes and so forth. These scouts had in many cases fought against German forces between 1904 and 1908 and had vivid memories of the atrocities committed by German soldiers at that time. Often these scouts were the sons of Herero chiefs who prior to and in the course of German colonialism had turned in vain to Britain for assistance. They were highly articulate men who left a deep impression on the South African officers they were assigned to.¹⁵⁴

The combination of testimony taken from the German archives found in Windhoek along with a series of painstakingly detailed statements taken under oath from large numbers of survivors resulted in the publication of one of the most shocking documents of colonial history. *The Report on the Natives of South West Africa and their Treatment by Germany (London 1918)*, generally referred to as the “Blue Book”, remains an indispensable source document on the nature of German colonial rule in Namibia. It is beyond doubt that the events and issues presented so

¹⁵³ The Glass-plate negatives and files, and in fact most of the original source material used to complete the Blue Book have been sought out by J. Silvester and J.B. Gewald in the National Archives of Namibia. Silvester and Gewald are currently engaged in republishing an edited and annotated edition of the Blue Book.

¹⁵⁴ Gewald, supra note 151 at p. 287.

clearly in it served to scuttle any attempts by Germany to retain control over its former colonies, and Namibia in particular.¹⁵⁵

During the deliberations at the Paris Peace Conference, Germany was declared unfit to govern colonies and forced to renounce her colonies ‘in favour of the Principal Allied and Associated Powers, all her rights and titles over her overseas possessions’.¹⁵⁶ In addition, in terms of the Charter of the League of Nations, Namibia, which was seen to be ‘inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world’, was deemed to be a territory which could be “best administered under the laws of the Mandatory of the Union of South Africa as integral portions of its territory’.¹⁵⁷

The cataloguing and publicizing of the atrocities committed in the German colony would be a strong point of a case for permanent confiscation. Compelling evidence of German colonial atrocities was needed, not only to condemn Germany, but to unify the Allies behind the Anglo South Africa policy.¹⁵⁸

However, within the settler society in Namibia under South African mandate, the existence of the Blue Book continued to bedevil settler politics. German settlers wanted to have the book banned and all copies of the publication destroyed. In 1925 the first all-white election for a legislative

¹⁵⁵ Mayer, A.J. (1967) *Politics and Diplomacy of Peacemaking: Containment and Counterrevolution at Versailles, 1918-1919* (New York, 1967) provides a detailed and authoritative account of the Versailles Treaty negotiations. Carnegie Endowment for International Peace, *The Treaties of Peace 1919-1923* (New York, 1924) contains a complete text of the 1919 treaty.

¹⁵⁶ Article 24 of the Treaty of Versailles.

¹⁵⁷ Article 22 of the Charter of the League of Nations.

¹⁵⁸ Olusoga and Erichsen, *supra* note 96, p. 260.

assembly took place. Representatives of the German settler parties allied to the Union of South Africa. Anxious to maintain a working relationship within the legislative assembly, the administrator, A.J.Werth, acceded to German settler demands for the abolition of the Blue Book. Thus in 1926, Mr. Stauch, a member of the all-white legislative assembly in Namibia, tabled a motion stating that the Blue Book:

.....only has the meaning of a war-instrument and that the time has come to put this instrument out of operation and to impound and destroy all copies of this Bluebook, which may be found in the official records and in public libraries of this Territory.¹⁵⁹

According to Gewalt,¹⁶⁰ Stauch and his fellow members of the *Deutsche Bund* consciously denied the recorded role of the German settlers and soldiers in the Herero genocide and put pressure on the South African administration to accede to their demands. The promise of peaceful cooperation with the German settler community was uppermost in the minds and concerns of South Africa's administrators. Stauch claimed that 'the Germans were ready and anxious to co-operate in the building up of South West but they could not do so fully until the stigma imposed by the publication of the Bluebook had been removed from their name.' this claim was considered to be more important than historical veracity and the views of Namibia's African inhabitants.¹⁶¹

¹⁵⁹ NNAW, ADM 225, Memorandum on the Blue Book, Annex A. In Addition, the administration was 'requested to make representations to the Union Government and to the British Government to have this Bluebook expunged from the official records of those Governments'. Furthermore, Stauch's motion requested that the administration 'take into consideration the advisability of making representations to the Union Government and the British Government to impound and destroy all copies of the Bluebook, which may be found in the public libraries in the respective Countries and with the official booksellers on the title-sheet of the Bluebook'.

¹⁶⁰ Gewalt, supra note 151, at p. 289.

¹⁶¹ Staff Reporter. 'The Blue Book they didn't want us to read: How Britain, Germany and South Africa destroyed a damning book on German atrocities in Namibia.' New African Magazine. 01 January 2012. Available online at:

The leader of the Union Party in the Legislative Assembly, D.W. Ballot pledged his support, arguing that the subject of the war was a sensitive and ‘delicate’ one. Thus, on 29 July 1926, the resolution to destroy the book was passed ‘unanimously’ by all 18 members of the Legislative Assembly. An editorial in *The Windhoek Advertiser* on 31 July 1926 mused on the significance of the total support given to the resolution by the Assembly. ‘In effect,’ the paper said, “the House of Assembly has resolved that the matter shall be forgotten”. The resolution not only called for the Blue Book to be impounded and all copies destroyed, but also demanded that the British and South African governments ‘expunge’ all references to the Blue Book contained in ‘official records’.¹⁶²

2.4 CONCLUSION

Chapter 2 of the thesis dealt exclusively with the history of Namibia as well as the pre-colonial history of the Herero and Nama peoples, the beginning of the German colonialism and the events that led to the genocide. The Berlin Africa Conference of 1884-85 formally made Namibia a German colony. Unequal treaties were entered between German colonial administrators and indigenous Chiefs, which ultimately led to the confiscation of land and cattle from the so-called “natives”. This unlawful confiscation for land and cattle-the life blood of the OvaHerero people was a catalyst for the native rebellion against the German colonial authorities. The Germans responded with an iron fist and subsequently decimated most of the indigenous communities, particularly the Herero and the Nama peoples. As a result of the genocide, many Hereros and Namas were interned in concentration camps and subjected to horrific scientific experiments.

<http://www.thefreelibrary.com/The+Blue+Book+they+didn't+want+us+to+read%3A+How+Britain,+Germany+and+...-a081298638>

¹⁶² Ibid.

Their skulls were sent to many German universities to be used in pseudoscientific experiments which were aimed at proving that white people are inherently superior to black people. However, several scholars like Brigett Lau, argues that the “so-called” genocide never actually took place, rather the whole history of the war has been exaggerated by leftist scholars. The conduct of German colonial authorities during the war would today be rightly classified as genocide and that will make the 1904-07 massacres as the “first genocide of the 20th century.

CHAPTER 3: THE SCOPE, NATURE AND HISTORY OF THE ORIGINS OF THE PROHIBITION OF THE CRIME OF GENOCIDE.

3.1 Introduction

Genocide remains is the most heinous of all crimes known to mankind. Acts of genocide have been a relatively common occurrence since time immemorial. It has been argued by some scholars that that prior to the 1948 Genocide Convention there existed international legal instruments that proscribed acts of genocide, war crimes and crimes against humanity. In other words, the 1948 Genocide Convention was influenced by earlier laws of war that gave effect to this treaty. However, this assertion is not unanimously accepted by many academics. They argue that the 1948 Genocide Convention is the only sole and specific law prohibiting the offense. This chapter provides a brief history and analysis of the elements of the crime of genocide and how it has been dealt under various legal instruments.

3.2 Defining Genocide

According to Nersessian¹⁶³ Genocide is an extraordinarily powerful term. The Genocide Convention of 1948 labels it an “odious scourge” on the face of humanity. Others nominate genocide as ‘the ultimate crime, the pinnacle of evil’.¹⁶⁴ The word itself conveys the most reprehensible form of criminal conduct, all too often committed on a massive scale that devastates regions and even nations for generations to come. But apart from the shared horror that the word conveys, what exactly is “genocide” and how does this crime and the legal mechanisms proscribing it fit within the overall scheme of international law?

¹⁶³ Nersessian, D.L. (2010). *Genocide and Political Groups*. Oxford University Press. p. 6.

¹⁶⁴ Ratner, SR. (1998) ‘The Genocide Convention After Fifty Years: Contemporary Strategies for Combating a Crime Against Humanity’ 92. *American Society of International Law Proceedings (ASILPROC)* 1, 7.

There has been constant debate among scholars on what constitutes the crime of genocide under international law, or indeed whether the German actions against the Hereros and Namas were really acts of genocide. According to Schabas,¹⁶⁵ international law's role in the protection of national, racial, ethnic and religious groups from persecution can be traced to the Peace of Westphalia of 1648, which provided certain guarantees for religious minorities. Other early treaties contemplated the protection of Christian minorities within the Ottoman Empire and of Francophone Roman Catholics within British North America. These concerns with the rights of national, ethnic and religious groups evolved into a doctrine of humanitarian intervention which was invoked to justify military activity on some occasions during the nineteenth century.¹⁶⁶

The term 'genocide' was coined by law professor Raphael Lemkin, who combined the Greek *genos* (race or tribe) with the Latin *cide* (killing)¹⁶⁷ although the term is modern; it denotes conduct that has transpired for millennia. Historical examples include the Roman sacking of Carthage in 146 "Before the Common Era" (BCE)¹⁶⁸ and 'special wholesale massacres...by Genghis Khan and by Tamerlane'.¹⁶⁹

¹⁶⁵ Schabas, W. A. (2009) *Genocide in International Law*. Cambridge University Press.p. 18.

¹⁶⁶ Ibid.

¹⁶⁷ Lemkin, R. (1947) 'Genocide as a Crime Under International Law'. *American Journal of International Law* (Volume 41(1), p. 79. Available online at: <http://www.preventgenocide.org/lemkin/ASIL1947.htm>

¹⁶⁸ Chalk, F. and Jonassohn, K. (1998) *The History and Sociology of Genocidal Killings* in Charny, I. W. (Ed), *Encyclopaedia of Genocide*. Vol. 1. Santa Barbara, CA: ABC-CLIQ. pp. 39- 42.

¹⁶⁹ Lemkin, supra note 167, at pp. 79-80.

According to Gaeta,¹⁷⁰ Lemkin's unique contribution to the development of international criminal law in the post-war period was in focusing public attention on the combined effect of physical attacks on members of particular groups with a range of other 'attacks' on the same groups' cohesive social structures (e.g., undermining the groups' political institutions, eliminating social leaders, prohibiting cultural, religious and educational activities, exerting economic pressures and interfering with the biological reproduction of group members).

In Lemkin's own words:

Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.¹⁷¹

Schabas further states that international human rights law can also trace its origins to the law of armed conflict, or international humanitarian law. Codification of the law of armed conflict began in the nineteenth century. In its early years, this was oriented to the protection of medical personnel and the prohibition of certain types of weapons. The Hague Conventions of 1907 reflect the focus on combatants but include a section concerning the treatment of civilian populations in occupied territories. In particular, Article 46 requires an occupying belligerent to respect 'family honour and rights, the lives of persons, and private property, as well as religious convictions and practice.'¹⁷²

¹⁷⁰ Gaeta, P. (2009) *The UN Genocide Convention: A Commentary*. Oxford University Press. p.6.

¹⁷¹ *Ibid.*

¹⁷² Convention (IV) 'Respecting the Laws and Customs of War by Land', (1910) UKTS 9, annex, art. 46. See *Prosecutor v. Tadic* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 56.

3.3 Early developments in the prosecution of genocide

Schabas¹⁷³ further postulates that the new world order that emerged in the aftermath of the First World War, and which to some extent was reflected in the 1919 peace treaties, manifested a growing role for the international protection of human rights. Two aspects of the post-war regime are of particular relevance to the study of genocide. First, the need for special protection of national minorities was recognized. This took the form of a web of treaties, bilateral and multilateral, as well as unilateral declarations. The world also saw the first attempt to establish an international criminal court, accompanied by the suggestion that massacres of ethnic minorities within a State's own borders might give rise to both State and individual responsibility.

Schabas further states that the wartime atrocities committed against the Armenian population in the Ottoman Empire¹⁷⁴ had been met with a joint declaration from the governments of France, Great Britain and Russia, dated 24 May 1915, asserting that 'in the presence of these new crimes of Turkey against humanity and civilization, the allied Governments publicly inform the Sublime

¹⁷³Schabas, supra note 165 at p.19.

¹⁷⁴ Hovannisian, R. G. *The Armenian Genocide, History, Politics, Ethics*. New York: St Martin's Press, 1991; Melson, R. *Revolution and Genocide: On the Origin of the Armenian Genocide and of the Holocaust*, Chicago: University of Chicago Press, 1992; Dadrian V.N. (1989) "Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications", 14 *Yale Journal of International Law*, p. 221; Dadrian, V.N. (1990) *Warrant for Genocide, key Elements of the Turko-Armenian Conflict*, New Brunswick, NJ: Transaction, 1999; Trenon, Y, *The Armenians; History of a Genocide*, 2nd edn, Delmar, NY: Caravan Books; Balakian, P, *Burning Tigris*, New York: HarperCollins, 2003; Akcam,T (2007) *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility*, New York: Holt,.

Porte that they will hold personally responsible for the said crimes all members of the Ottoman Government as well as those of its agents who are found to be involved in such massacres.’¹⁷⁵

It has been suggested that this constitutes the first use, at least within an international law context, of the term ‘crimes against humanity’.¹⁷⁶

3.4 Versailles and the Leipzig trials

The idea of an international war crimes trial had been proposed by Lord Curzon at a meeting of the Imperial War Cabinet on 20 November 1918.¹⁷⁷ The British emphasized trying the Kaiser and other leading Germans, but there was little or no interest in accountability for the persecution of innocent minorities such as the Armenians in Turkey. The objective was to punish ‘those who were responsible for the War or for atrocious offences against the laws of war’¹⁷⁸. At the second plenary session of the Paris Peace Conference, on 25 January 1919, a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties was created.¹⁷⁹ Composed of fifteen representatives of the victorious powers, the Commission was mandated to

¹⁷⁵ English translation quoted in United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty’s Stationery Office, 1948, p. 35.

¹⁷⁶ According to Schabas the concept, however, had been in existence for many years. During debates in the National Assembly, French revolutionary Maximillien Robespierre described the King, Louis XVI, as a ‘criminal against humanity’.

¹⁷⁷ George, D.L. (1938) *The Truth About the Peace Treaties*, Vol. I. London: Victor Gollancz, pp. 93-114.

¹⁷⁸ *Ibid* at p. 93.

¹⁷⁹ Tillman, S. P. (1961) *Anglo-American Relations at the Paris Peace Conference of 1919*. Princeton: Princeton University Press. p. 312.

inquire into and to report upon the violations of international law committed by Germany and its allies during the course of the war.¹⁸⁰

Schabas states that the Commission's report used the expression 'Violations of the laws and Customs of War and of the Laws of Humanity'.¹⁸¹ Some of these breaches came close to the criminal behavior now defined as genocide or crimes against humanity and involved the persecution of ethnic minorities or groups. Under the rubric of 'attempts to denationalize the inhabitants of occupied territory', the Commission cited many offences in Serbia committed by Bulgarian, German and Austrian authorities, including prohibition of the Serb language.¹⁸²

The legal basis for qualifying these acts as war crimes, according to Schabas, was not explained, although the Report might have referred to Chapter III of the 1907 Hague Regulations, which codified rules applicable to the occupied territory of an enemy.¹⁸³ But nothing in The Hague Regulations suggested their application to anything but the territory of an occupied belligerent. Indeed, there was no indication in the Commission's report that the Armenian genocide fell within the scope of its mandate. The Commission proposed the establishment of an international 'High Tribunal', and urged 'that all enemy persons alleged to have been guilty of offences against the laws and customs of war and the laws of humanity' be excluded from any amnesty and be brought before either national tribunals or the High Tribunal.

¹⁸⁰ Rolling, V.A. (n.d) Criminal Responsibility for Violations of the Laws of War. University of Groningen. pp. 14-15. Available online at: <http://rbdi.bruylant.be/public/modele/rbdi/content/files/RBDI%201976/RBDI%201976-1/Etudes/RBDI%201976.1%20-%20pp.%208%20%C3%A0%2026%20-%20Bert%20Roling.pdf>

¹⁸¹ Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of America and Japanese Members of the Commission of Responsibilities Conference of Paris, 1919, Oxford University Press. p.23

¹⁸² Schabas, W. (2000) Genocide Under International Law. Cambridge University Press. pp.14-51. Available online at: <http://catdir.loc.gov/catdir/samples/cam032/99087924.pdf>

¹⁸³ Convention (IV) Respecting the Laws and Customs of War by land.

3.5 The treaty of Sevres of 1920 and the Armenian genocide

The treaty of Sevres was signed by the Allies and the Ottoman Empire one year after the Commission's efforts to define the atrocities that were committed in Anatolia by the latter against the former. The treaty aimed to partition the Ottoman Empire and hold the war criminals liable for crimes against humanity.¹⁸⁴ Pursuant to article 230:

The Turkish Government undertakes to hand over to allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on the 1st August, 1914. The Allied Powers reserve to themselves the right to designate the Tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognize such Tribunal. In the event of League of Nations having created in sufficient time a Tribunal competent to deal with the massacres, the Allied Powers before the tribunal, and the Turkish Government undertakes equally to recognize such Tribunal.¹⁸⁵

3.6 Inter-war developments

Schabas posits that the post-First World War efforts at international prosecution of war crimes and crimes against humanity were a failure. Nevertheless, the idea had been launched. Over the next two decades' criminal law specialists turned their attention to a series of proposals for the repression of international crimes. The first emerged from the work of the Advisory Committee of Jurists, appointed by the Council of the League of Nations in 1920 and assigned to draw up plans for the international judicial institutions. One of the members, Baron Deschamps of Belgium, proposed the establishment of a 'high court of international justice'. Borrowing language from the Martens clause in the preamble to The Hague Convention, Deschamps wrote

¹⁸⁴ Kuyumjian, P.A (2011) The Armenian Genocide International Legal and Political Avenues for Turkey's Responsibility. p. 258. Available online at http://www.usherbrooke.ca/droit/fileadmin/sites/droit/documents/RDUS/volume_41/41-2-AramKuyumjian.PDF

¹⁸⁵ See Article 230 of the Treaty of Sevres of 20 August 1920.

that the jurisdiction of the court might include not only rules ‘recognized by the civilized nations but also by the demands of public conscience and the dictates of the legal conscience of civilized nations’.¹⁸⁶

According to Schabas the International Law Association of Penal Law also studied the question of international criminal jurisdictions.¹⁸⁷ These efforts culminated, in 1937, in the adoption of a treaty by the League of Nations contemplating establishment of an International Criminal Court.¹⁸⁸ A year later, the Eighth International Conference of American States, held in Lima, considered criminalizing ‘persecution for racial or religious motives’.¹⁸⁹

In the aftermath of the First World War, the international community constructed a system of protection for national minorities that, inter alia, guaranteed to these groups the ‘right to life’.¹⁹⁰

3.7 Genocide as a New Crime

According to Gaeta¹⁹¹ a Jewish-Polish lawyer Raphael Lemkin was the first to coin the term ‘genocide’ in his 1944 book *Axis Rule in Occupied Europe*.¹⁹² However, he notes that an earlier

¹⁸⁶¹⁸⁶ ‘Question of International Criminal Jurisdiction’, UN Doc. A/CN.4/15 (1950), paras. 14-17.

¹⁸⁷ Ibid. paras. 18-25.

¹⁸⁸ Convention for the Creation of an International Criminal Court, League of Nations OJ Spec. supp. No. 156 (1936) LN Doc. C. 547 (I).M.384 (I). 1937. V (1938). Failing a sufficient number of ratifying States, the treaty never came into force.

¹⁸⁹ ‘Final Act of the Eighth Interamerican Conference’, in Scott, J.B, ed., *The International Conferences of the American States*, Washington: Carnegie Endowment for International Peace, 1940, p. 260.

¹⁹⁰ Treaty of Peace Between the United States of America, the British Empire, France, Italy and Japan, and Poland, [1919] TS 8, art. 2: ‘Poland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion’. Similarly, Treaty between the Principal Allied and Associated Powers of Czechoslovakia, [1919] TS 20, art. 1; Treaty between the Principal Allied and Associated Powers and the Serb- Croat-Slovene State, [1919] TS 17, art. 1.

response to genocide can be found in the declaration issued on 24 May 1915 by three European powers (Great Britain, France and Russia) in relation to the widespread massacres of Armenians in the Ottoman Empire during World War I. In the declaration the three states pledged to hold members and agents of the Ottoman government ‘personally responsible’ for the ‘new crimes’ against humanity and civilization’ committed during the war.¹⁹³ In a similar vein, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, created in 1919 by the Paris Peace Conference to examine the legal responsibility of the defeated Central Powers and their high ranking officials for the war and atrocities committed therein, recommended prosecuting ‘enemy persons’ implicated in offenses against the ‘laws of humanity’.¹⁹⁴

He further states that although the few trials that were actually held after World War I in Germany and Turkey did not involve the application of these ‘new crimes’, acknowledgement of the need for a new typology of crimes led the victorious powers in World War II to introduce

¹⁹¹ Gaeta, *supra* note 170 at p. 5.

¹⁹² Lemkin, R. (1944). *Axis Rule in Europe: Laws of Occupation*. Carnegie Endowment for International Peace. Rumford Press.

¹⁹³ Joint Declaration of France, Great Britain and Russia, 24 May 1915, excerpts in R. Sarkissian, ‘The Armenian Genocide: A Contextual View of the Crime and Politics of Denial’.

¹⁹⁴ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *14 American Journal of Int’l Law* (1920) 95, at 121-4. The reference to the ‘laws of humanity’ was clearly made with reference to the famous ‘Martens Clause’ (see Preamble to the 1899 Hague Convention II-Laws and Customs of War on Land, 29 July 1899, and Preamble to the 1907 Hague Convention IV-Laws and Customs of War on Land).

into the 1945 London Charter (on the basis of which the Nuremberg International Military Tribunal was established) a new category of crimes called ‘crimes against humanity’.¹⁹⁵

Lemkin, according to Gaeta, argued that the destruction of groups not only implies the commission of atrocities on a massive scale; it also results in a cultural loss to humanity as a whole. These singular characteristics and long-term consequences of genocide justified, according to Lemkin, new international legislation which would fill the legal *lacuna* in international law as it stood at the time. Lemkin thus proposed the amendment of the 1907 Hague Regulations so as to extend their scope of protections to populations groups located in occupied territories and to thereby shield them from any genocidal policies adopted by the occupying power.¹⁹⁶

In addition, Gaeta notes that Lemkin proposed the adoption of an international treaty that would require states to introduce constitutional and criminal law provisions prohibiting genocide at all times both in wartime and peacetime. Lemkin advocated for the incorporation of genocide in the list of international crimes (alongside piracy and the slave trade) and called upon all states to take measures of criminal sanction against the perpetrators of genocide.¹⁹⁷

According to Gaeta,¹⁹⁸ Lemkin’s new terminology took hold extraordinarily fast, although no reference to the crime of genocide was made in the London Charter establishing the Nuremberg

¹⁹⁵ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945, Annex: Establishing the Charter of the International Military Tribunal, Art. 6.

¹⁹⁶ Gaeta, *supra* note 170, at p.6.

¹⁹⁷ *Ibid* at pp.6-7.

¹⁹⁸ *Ibid*.

International Military Tribunal (hereinafter ‘Nuremberg Tribunal’) or in the final judgments rendered by either the Nuremberg Tribunal or the International Military Tribunal for the Far East (hereinafter ‘Tokyo Tribunal’), the term ‘genocide’ was used in the indictment before the Nuremberg Tribunal, in some of the individual prosecutorial speeches before it and in one of the judgments issued by a U.S military tribunal that operated in Nuremberg pursuant to Control Council Law No. 10 (in the so-called justice case).¹⁹⁹ Moreover, on 11 December 1946, the UN General Assembly unanimously adopted Resolution 96 (1), which affirmed the unique nature of the crime of genocide (because it constitutes ‘a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings’). It stated that ‘genocide is a crime under international law’, invited states to adopt any necessary legislation and requested the ECOSOC to undertake studies ‘with a view to drawing up a draft convention’ that will facilitate international cooperation between states on the prevention and punishment of genocide.²⁰⁰ This amounted to an espousal by the UN General Assembly of a platform containing two of Lemkin’s main recommendations: international criminalization of genocide and introduction of necessary domestic legislation.

¹⁹⁹ *U.S. v. Alstoetter*, III Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 (1951) 954, at 983. For a comprehensive survey of the application of the crime of genocide in other post World War II proceedings, see M. Lipman, ‘The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later,’ in Arizona. *Journal of International and Comparative law* (1998) vol. 15 at 415, and 445-8.

²⁰⁰ *Ibid*, at 1134.

3.8 Axis rule in Occupied Europe

According to Schabas, Lemkin affirmed that the crimes he had recommended in 1933 ‘would amount to the actual conception of genocide.’²⁰¹ But as Sir Hartley Shawcross noted during the 1946 General Assembly debate, the 1933 conference rejected Lemkin’s proposal.²⁰² During the war, Lemkin lamented the fact that, had his initiative succeeded, prosecution of Nazi atrocities would have been possible. But the allies proceeded anyway, on the basis of a definition of ‘crimes against humanity’ that encompassed ‘extermination’ and ‘persecutions on political, racial or religious grounds’.²⁰³ The International Military Tribunal and other post-war courts consistently dismissed arguments that this constituted *ex post facto* criminal law.²⁰⁴

Lemkin, according to Schabas identified two phases in genocide, the first being the destruction of the national pattern of the oppressed group, and the second, the imposition of the national pattern of the oppressor. He referred to the War Crimes Commission established in 1919, which had used the term ‘denationalization’ to describe the phenomenon. Lemkin wrote of the existence of ‘techniques of genocide in various fields’ and then described them, including political, social, cultural, economic, biological, physical, religious and moral genocide. Political genocide-not to be confused with genocide of political groups, which Lemkin did not view as

²⁰¹ Schabas, *supra* note 170 at.p.31.

²⁰² UN Doc. A/C.6/SR.22 (Shawcross, United Kingdom). The conference proceedings do not show that the proposal was defeated; it appears to have been quietly dropped by a drafting committee preparing a text for the Second Commission of the Conference: de Asua, Pella and Arroyo, V Conference, p. 246

²⁰³ Agreements for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), annex, (1951) 82 UNTS 279, art. 6 (c).

²⁰⁴ *France et al. v. Goering et al.*, (1946) 22 IMT 203, pp. 497-8; *United States of America v. Alstotter et al.* (‘Justice trial ’), (1948) 6 LRTWC 1, 3 TWC 1, (United States Military Tribunal) pp. 36-9; *United States of America v. Krupp et al.* (1948) 10 LRTWC 69 (United States Military Tribunal), p. 147.

falling within the definition-entailed the destruction of a group's political institutions, including such matters as forced name changes and other types of 'Germanisation'. On the subject of physical destruction, Lemkin said it primarily transpired through racial discrimination in feeding, endangering of health, and outright mass killings.

Lemkin observed that the system of minorities' protection created following the First World War 'proved to be inadequate because not every European country had sufficient judicial machinery for the enforcement of its constitution'. He proposed the development of a new international multilateral treaty requiring States to provide for the introduction not only in constitutions but also in domestic criminal codes, of norms protecting national, religious or racial minority groups from oppression and genocidal practices. Lemkin also had important recommendations with respect to criminal prosecution of perpetrators of genocide. 'in order to prevent the invocation of the plea of superior orders', He argued that 'the liability of persons who order genocidal practices, as well as of persons who execute such orders, should be provided expressly by the criminal codes of the respective countries.' Finally, Lemkin urged that the principle of universal repression or universal jurisdiction be adopted for the crime of genocide. Lemkin made the analogy with other offenses that are *delicta juris gentium* such as "white slavery" trade in children and piracy, saying genocide should be added to the list of such crimes²⁰⁵.

²⁰⁵ Lemkin, R (1994) 'Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress' (Washington, DC: Carnegie Endowment for International Peace, 1944), p. 93-4.

3.9 Prosecuting the Nazis

Schabas²⁰⁶ states that during the Second World War activity intensified with regard to the creation of an international criminal court and the international prosecution of war crimes and crimes against humanity. An unofficial body, the League of Nations Union, established what was known as the 'London International Assembly' to work on the problem. In October 1943, it proposed the establishment of an international criminal court whose jurisdiction (e.g. crimes in respect of which no national court had jurisdiction (e.g. crimes committed against Jews)). According to Schabas,²⁰⁷ this category of crimes was meant to include offences subsequently described as crimes against humanity.'²⁰⁸ On 17 December 1942, the British Foreign Secretary, Anthony Eden, declared in the House of Commons that reports had been received 'regarding the barbarous and inhuman treatment to which Jews are being subjected in German-occupied Poland', and that the Nazis were 'now carrying into effect Hitler's oft repeated intention to exterminate the Jewish people in Europe'. Eden affirmed his governments' intention 'to ensure that those responsible for these crimes shall not escape retribution'.²⁰⁹

3.10 The United Nations War Crimes Commission

Schabas²¹⁰ further writes that the Moscow Declaration of 1 November 1943 is generally viewed as the seminal statement of the Allied powers on the subject of war crimes prosecutions. While referring to 'evidence of the atrocities, massacres and cold-blooded mass executions' being

²⁰⁶Schabas, supra note 170 at p.35.

²⁰⁷ Ibid., p 35.

²⁰⁸ Quoted in United Nations War Crimes Commission, History, p. 103; see also p. 101.

²⁰⁹ Parliamentary Debates, House of Commons, Vol. 385, No. 17, cols. 2082-4.

²¹⁰ Ibid, at 35.

perpetrated by the Nazis, and warning those responsible that they would be brought to book for their crimes, there was no direct reference to the racist aspect of the offences or an indication that they involved specific national, ethnic and religious groups such as the Jews of Europe.²¹¹ The United Nations Commission for the Investigation of War Crimes established immediately prior to the Moscow Declaration,²¹² was composed of representatives of most of the Allies and chaired by Sir Cecil Hurst of the United Kingdom. It initially agreed to use the list of offences that had been drafted by the Responsibilities Commission of the Paris Peace Conference in 1919 as the basis for prosecution. Schabas notes that the enumeration was already recognized for the purposes of international prosecution. In addition, Italy and Japan had agreed to it, and Germany had never formally objected.²¹³

Schabas observes that although the 1919 list included the crime of ‘denationalization’ as well as murder and ill-treatment of civilians, the Commission did not initially consider that its mandate extended to prosecutions for the extermination of European Jews. The Commission’s Draft Convention for the Establishment of a United Nations War Crimes Court’, prepared in late 1944, was confined to the ‘commission of an offence against the laws and customs of war’.²¹⁴

²¹¹ See ‘*Declaration on German Atrocities*’, Department of State Publication 2298, Washington: Government Printing Office, 1945, pp. 7-8.

²¹² Kachavi, A.J. (1998) *United Nations War Crimes Commission: Prelude to Nuremberg, Allied War Crimes Policy and the Question of Punishment*. Chapel Hill, NC, and London, University of North Carolina Press. p. 112.

²¹³ ‘*Transmission of Particulars of War Crimes to the Secretariat of the United Nations War Crimes Commission, 13 December 1943*’, NAC RG-25, Vol. 3033, 4060-40C, Part Two.

²¹⁴ ‘Draft Convention for the Establishment of a United Nations War Crimes Court’, UN 3033, 4060-40C, Part Four, art. 1 (1).

3.11 London Conference

On August 8, 1945, the aspirations of the Moscow Conference crystallized into the so-called London Agreement, to which the Nuremberg Charter was appended. The International Military Tribunal (IMT) created by the London Agreement applied primarily to Nazi criminals whose crimes had no particular location.²¹⁵ But the London Agreement also provided for the return of other war criminals to the states where they committed their crimes for trial by national courts or military tribunals.²¹⁶

3.12 The Nuremberg trial

Arising from the ashes of World War II, the IMT's mandate provided first for the punishment of crimes against peace and for war crimes.²¹⁷ But it also included a provision to address Nazi abuses of civilians under the concept of crimes against humanity.²¹⁸ Genocide per se was not included in the Tribunal's Charter. Nevertheless, together with allegations of war crimes and crimes against peace, the Nuremberg indictment charged the defendants with:

Deliberate and systematic genocide; viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy

²¹⁵ Nersessian, D.L. (2002) 'The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals.' *Texas International Law Journal*. Vol.37. p.248. Available online at: <http://www.tilj.org/content/journal/37/num2/Nersessian231.pdf>

²¹⁶ Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280 [hereinafter the London Agreement]. Nineteen other nations subsequently acceded to the London Agreement.

²¹⁷ Charter of the International Military Tribunal, Aug. 8, 1945, arts. 6(a)-(b), 59 Stat. 1546, 82 U.N.T.S. 284 [hereinafter Nuremberg Charter]

²¹⁸ Ibid, art. 6(c).

particular races and classes of people, and national, racial, or religious groups, particularly Jews, Poles, Gypsies.²¹⁹

Allegations of genocide also appeared in the closing arguments of the Nuremberg prosecutors:

Genocide was not restricted to extermination of the Jewish people or of the Gypsies. It was applied in different forms to Yugoslavia, to the non-German inhabitants of Alsace-Lorraine, to the people of the Low Countries and of Norway. The technique varied from nation to nation, from people to people. The long-term aim was the same in all cases.²²⁰

The defendants engaged in the scientific and systematic extermination of millions of human beings and more especially of certain national or religious groups whose existence hampered the hegemony of the German race. This is a crime so monstrous, so undreamt of in history.....that the term “genocide” has had to be coined to define it and an accumulation of documents and testimonies has been needed to make it credible.²²¹

3. 13 From the General Assembly Resolution 96 (1) to the Adoption of the Genocide Convention

Gaeta²²² reminds us that the history of the two years that passed between the adoption by the General Assembly of Resolution 96 (1) and the adoption of the Genocide Convention in the UN General Assembly has been described at length in a number of publications²²³, and needs no rehashing here in *extenso*. Suffice it to note that the legislative process involved a number of permanent UN organs (ECOSOC, the Secretary-General assisted, inter alia, by Lemkin himself-

²¹⁹ Trial of the Major War Criminals before the International Military Tribunal 45-46 (1947) (indictment)

²²⁰ Trial of the Major War Criminals before the International Military Tribunal 497 (1948) final statement of British Prosecutor Sir Hartley Shawcross).

²²¹ Ibid, at 531 (final statement of Chief Prosecutor for the French Republic, M. Auguste Champetier De Ribes).

²²² Gaeta, *supra* note 170, at p. 8.

²²³ Lippman, M. (1985) ‘The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime Of Genocide,’. *Boston University Int’l Law Journal*, Vol. 3.p. 1; Lippman, M (2002) ‘A Road Map to the 1948 Convention on the Prevention and Punishment of the Crime Genocide,’ *Journal of Genocide Research*, Vol. 4, p. 177

the sixth Committee and the General Assembly).²²⁴ And an ad hoc Drafting Committee (comprised of eight states), revealed significant divergence of opinions on the direction that the Convention ought to follow and on the scope of its legal protections.

Eventually, the text of the Convention, which was adopted unanimously by the General Assembly on 9 December 1948, deviated from the text of Resolution 96 (1) in two important ways. First, the Convention adopted a rather narrow definition of the groups protected from acts of genocide. Whereas Resolution 96 (1) offered protection to ‘racial, religious and other groups’, the Convention protected only ‘a national, ethnical, racial or religious group.’ Significantly, Gaeta observes, attempts to include political groups in the closed list of protected groups under the Convention had failed. Secondly, Resolution 96 (1) referred to the cultural contribution of the protected groups and thus, implicitly, endorsed the notion of ‘cultural genocide’²²⁵. Gaeta further notes that the proposal to prohibit ‘cultural genocide’ was voted down by the Sixth Committee and deleted from the final text of the Convention²²⁶ (although the reference in the second recital of the Convention’s Preamble to the ‘great losses on humanity’ appears to allude to the cultural losses associated with physical genocide).²²⁷

²²⁴ The Committee on the Progressive Development of International Law and its codification, which was also consulted, declined to express an opinion on the substance of the draft presented before it.

²²⁵ Article 1 (3) (c)-(e) of the Draft Convention prepared by the secretariat, United Nations General Assembly Official Records (UN GAOR) 2nd Sess., 6th Comm. (1947), Annex, at 213.

²²⁶ See e.g., UN GAOR 3rd Sess., 6th Comm., 83rd mtg. (1948), 206.

²²⁷ See e.g., ICTY, *Judgment, Prosecutor v. Krstic*, Appeals Chamber, 19 April 2004, § 36 (those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide’).

Gaeta²²⁸ states that the proposals made by some countries to broaden the criminal law focus of Resolution 96 (1) and to introduce into the Convention a stronger state responsibility component failed, by and large.²²⁹ Although Gerald Fitzmaurice (the UK delegate to the Sixth Committee) argued that it was governments, not individuals, that were primarily responsible for genocide, and that as a result the draft Convention approached the topic from the wrong angle, his position was rejected by most other delegates. Still, the UK and Belgian delegations did succeed in inserting an opaque reference to state responsibility into Article IX-the Convention's compromissory clause, a provision which proved to be rather pivotal in the *Bosnian Genocide* case before the International Court of Justice.²³⁰

On the norms that Resolution 96 (I) sets out, Schabas notes as follows: First, the General Assembly 'affirms' that genocide is a crime under international law for which both private individuals and officials are to be held responsible. Resolution 96 (I) eliminates any nexus between genocide and armed conflict, the unfortunate legacy of the Nuremberg jurisprudence. Its designation of genocide as a crime under international law means that perpetrators are subject to prosecution, even when there has been no breach of the domestic law in force at the time of the crime. The resolution does not, however, clarify the question of the appropriate jurisdiction for such prosecutions. The following year in 1947, according to Schabas, Raphael Lemkin and two

²²⁸ Gaeta, *supra* note 170 at p. 10.

²²⁹ See e.g., rejection of the amendment that sought to introduce into the text of the Convention the following language: '[Acts of Genocide] committed by or on behalf of States or governments constitute a breach of the present Convention'. UN Doc. A/C. 6/236 and Corr. 1 (1948); UN GAOR 3rd Sess., 6th Comm., 96th mtg. (1948), 355.

²³⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia. & Herzegovina v. Yugoslavia*). (Serb. & Mont.), 1993 I.C.J. 3.

other experts consulted by the Secretariat considered that the Resolution was consistent with recognition of universal jurisdiction.²³¹

According to Schabas, the sub-committee had replaced an explicit recognition of universal jurisdiction in the original draft of Resolution 96 (I) with a much vaguer reference to ‘international co-operation’. In light of the General Assembly’s subsequent decision to exclude universal jurisdiction from the text of the Genocide Convention, the better view is that the resolution does not recognize universal jurisdiction for genocide; rather, it authorizes prosecution by international jurisdictions similar to the Nuremberg Tribunal. The reference to international co-operation implies that States are obliged to prosecute in accordance with classic rules of international law concerning jurisdiction, or to facilitate extradition to states entitled to undertake such prosecutions.

Schabas further states that Resolution 96 (I) also proposes certain elements of the definition of genocide, notably with respect to the groups protected. Interestingly, the initial draft of the Resolution listed four groups, ‘national, racial, ethnical or religious groups’, an enumeration that is virtually identical to that of article II of the Convention, adopted two years later. Resolution 96 (I) imposes obligations and creates international law with respect to prevention and punishment of genocide. But because of the uncertainty present at a time when international criminal law was still very underdeveloped, the General Assembly recognized that additional instruments were necessary. Resolution 96 (I)’s final and most significant conclusion is its mandate to draft a convention. Only five years after its adoption, in 1951, the International Court of Justice associated Resolution 96 (I) with the Convention in order to conclude ‘that the

²³¹ UN Doc. E/447, p.18.

principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'.²³²

3. 14 Genocide prosecutions after the Nuremberg Trial of the Major War Criminals

Schabas²³³ states that the Nuremberg judgment of 30 September-1 October 1946 set the tone for a second generation of prosecutions of Nazi leaders, pursuant to Control Council Law No. 10 of 20 December 1945. The United States Military Tribunal held twelve thematic trials, dealing with crimes committed by various elements of the Nazi military and civilian hierarchy, including SS commanders, the officer corps, doctors and jurists.²³⁴ They provide a more detailed exploration of the atrocities committed by bodies like the *Einsatzgruppen* (task force) and the RuSHA (“Race and Settlement Main Office”), and many of the legal principles that they examined and developed are generally considered to form part of international war crimes jurisprudence.²³⁵ He further notes that they also showed the emerging acceptance of the term ‘genocide’. In the *Ohlendorf* trial, the prosecutor used the word ‘genocide’ in the indictment, as did the Tribunal in its judgment, to characterize the activities of the *Einsatzgruppen* in Poland and the Soviet Union. Because of the definition of crimes against humanity in their enabling legislation, which did not insist upon the nexus with the war, the tribunals were more clearly entitled to address the issue of persecution of Jews within Germany prior to the outbreak of the war than had been the International Military Tribunal. Schabas cites the *Alstotter’s* case, known as the ‘justice trial’

²³² Reservations to the Convention on the Prevention of Genocide (Advisory Opinion), 1951 ICJ Reports 16.

²³³ Schabas, supra note 170 at p. 48.

²³⁴ Buscher, F. M. (1989) *The US War Crimes Trial Program in Germany, 1946-1955*, Westport, CT: Greenwood Press.

²³⁵ *Prosecutor v Furundzija (Case No. IT-95-17/1-T)*, Judgment, 10 December 1998, para. 195.

which concerned Nazi judges and prosecutors and their application of anti-Semitic legislation, even prior to September 1939. The court cited General Assembly Resolution 96 (I) on four occasions:

The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion. Its recognition of genocide as an international crime (in Resolution 96 (I) is persuasive evidence of the fact. We approve and adopt its conclusions.....we find no injustice to persons tried for such crimes. They are chargeable with knowledge that such acts were wrong and were punishable when committed.

The tribunal concluded that Oswald Rothaug, a Berlin prosecutor, ‘participated in the national program of racial persecution...he participated in the crime of genocide.’²³⁶ Another Berlin prosecutor, Ernst Lautz, was convicted of enforcing the law against Poles and Jews which comprised ‘the established government plan for the extermination of those races. He was an accessory to, and took a consenting part in, the crime of genocide.

3.15 Does the UN Genocide Convention have retrospective effect?

International law generally prohibits the retroactive application of treaties unless a different intention appears from the treaty or is otherwise established. The Genocide Convention contains no provision mandating its retroactive application. To the contrary, the text of the Convention strongly suggests that it was intended to impose prospective obligations only on the States party to it. Therefore, no legal, financial or territorial claim arising out of the events could successfully be made against any individual or state under the Convention.²³⁷

²³⁶ *United States of America v. Alstotter et al.* (‘Justice Trial’), (1948) 6 *LRTWC* 1, 3 *TWC* 1 (United States Military Tribunal), p. 1156 (TWC).

²³⁷ ICTJ Legal Analysis on Applicability of UN Convention on Genocides prior to January 12, 1951. Available online: <http://groong.usc.edu/ICTJ-analysis.html>

3.15.1 The Vienna Convention on the Law of treaties 1969

Article 28 of the Vienna Convention on the law of Treaties provides that:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.²³⁸

The Vienna Convention on the Law of Treaties did not itself enter into force until January 27, 1980. However, while the Convention “constituted both codification and progressive development of international law....at the time it was adopted,”²³⁹ “most provisions of the Vienna Convention.....are declaratory of customary international law.”²⁴⁰ The International Court of Justice has noted the customary status of certain provisions of the Vienna Convention on the Law of Treaties, including Article 62 (termination of a treaty by a fundamental change of circumstances)²⁴¹ and Article 60 (termination of a treaty due to material breach).²⁴²

²³⁸ Vienna Convention on the law of Treaties, May, 23, 1969, U.N.doc. A/Conf. 39/27 (1969), Art. 28 [hereinafter “Vienna Convention on the Law of Treaties”].

²³⁹ International Law Commission, Reports of the Commission to the General Assembly, [1966] 2 *Y.B. International Law Commission* 169, 177, UN Doc. A/CN. 4/SER. A/1966/Add.1.

²⁴⁰ Nash, M.L. (1981) ‘Contemporary Practice of the United States relating to International Law’, 75 *American Journal of International Law*. 142, 147 (quoting text of a letter dated Sept. 12, 1980 from Roberts B. Owen, Legal Adviser of the U.S. Dept of State, to Sen. Adlai E. Stevenson, Chairman of the Subcommittee on Science and Transportation).

²⁴¹ “This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of customary law on the subject the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing of circumstances.” Int’l Ct. of Justice, Fisheries Jurisdiction (*U.K. v. Ice.*), *Jurisdiction of the Court*, 1973 I.C.J. Reports 3, 8 (Feb. 2).

²⁴² “The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.” Int’l. Ct. of Justice, Fisheries Jurisdiction (*U.K. v. Ice.*) *Jurisdiction of the Court*, 1973 *I.C.J. Reports* 3, 8 (Feb. 2).

The case law of the International Court of Justice (ICJ) prior to the adoption of the Vienna Convention on the Law of Treaties tends to support the contention that Article 28 codified existing International law. In the *Ambatielos* case, the Court observed:

To accept [the Greek Government's] theory would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier.²⁴³

The Court in the *Ambatielos* case recognized that the States Parties to a treaty could provide for its retroactive application, a position the Permanent Court of International Justice had earlier upheld.²⁴⁴ The analysis under the Vienna Convention of the Law of Treaties' formulation of the rule therefore turns to whether "a different intention appears from the treaty or is otherwise established" that would permit the Genocide Convention to be applied to acts committed prior to its entry into force.²⁴⁵

However, Sarkin refutes such an assertion and argues that in 1946 before the Genocide Convention was even drafted or acceded to by any state's genocide was recognized as an

²⁴³ *Ambatielos Case (Greece v. U.K.), Preliminary Objections*, 1952 I.C.J.Reports 27, 40 (July 1).

²⁴⁴ *Mavrommatis Palestine Concessions Case*, 1924 PCIJ (Ser. A.) No. 2 ("An essential characteristic therefore of Protocol XII [is] that its effects extend to legal situations dating from a time previous to its own existence. If provision were not made in the clauses or the Protocol for the protection of the rights recognized therein as against infringement before the coming into force of that instrument, the Protocol would be ineffective as regards the very period at which the rights in question are most in need of protection.")

²⁴⁵ Vienna Convention on the Law of Treaties, Art. 28.

international crime.²⁴⁶ This is verified by the text of a 1946 General Assembly resolution, which stated:

The General Assembly therefore:

Affirms that genocide is a crime under international law which the civilized world condemns....²⁴⁷

He further argues that the preamble of the Genocide Convention states that “at all periods of history genocide has inflicted great losses on humanity.” Thus, in 1948, it was recognized that genocide had already been a crime for a long time. Even when the move began to draft a Genocide Convention, Saudi Arabia described genocide as “an international crime against humanity.”²⁴⁸ In 1946, genocide was already accepted as a crime, which many claimed was linked to crimes against humanity. The 1948 Convention did not “create” the crime, but merely codified and clarified this type of criminal conduct. According to Freeman it was only with the adoption of the Genocide Convention that the crime became dissociated with “its original military context.”²⁴⁹

Sarkin further asserts that genocide as a crime pre-1948 is corroborated in Article 1 which states that “the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law...” The word “confirm” indicates that genocide was a pre-existing crime, and incorporating it into the treaty merely formalized its prohibition.

²⁴⁶ Sarkin, supra note 14, at pp.63-94.

²⁴⁷ General Assembly Resolution 96 (i), U.N. doc. a/64/add. 1 (1946). See further Jessup, p.c. (1947). ‘The crime of aggression and the future of international law’. *Political Science quarterly*, 62, pp.1-10.

²⁴⁸ Schabas, W. A. (2003). ‘National courts finally begin to prosecute genocide, the ‘crime of crimes.’ *Journal of International Criminal Justice*, 1, pp.39-63.

²⁴⁹ Freeman, M. (1995). ‘Genocide, civilization and modernity’. *British Journal of Sociology*, 46, pp.207-225.

This was also recognized by the ICJ in the *Reservations to the Convention on the Protection and Punishment of the Crime of Genocide* case in 1951. The ICJ held that genocide was a crime beyond the Convention and noted that “the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.”²⁵⁰ In fact, it could be argued that, as genocide was a crime in customary law, the Convention has a valid retrospective effect because it simply confirmed that genocide was a crime before the Convention, and it can, therefore, be applied to events predating its coming into force, Sarkin submits.

He further argues that retrospectivity is not unknown in either international or national law. While generally speaking, it is frowned upon and seen as a violation of the rights of an accused, in certain cases there are accepted exceptions to this position. One such exception concerns international crimes such as crimes against humanity and genocide. While there has been no international court ruling on this matter, this position is widely accepted; courts in Australia²⁵¹ and Canada²⁵² have found that the prosecutions of such cases, even before legislation on these crimes was adopted, are not retrospective as they were considered crimes in international law before a new law was adopted.²⁵³

Sarkin observes that while many feel that various international crimes were controversially adopted in the London Agreement of August 8, 1945, which established the Charter of the

²⁵⁰ ICJ Rep, 1951, 23.

²⁵¹ *Polyukhovich v Commonwealth* (1991) 172, CLR 501.

²⁵² *R. v. Finta* (1989) 61 DLR (4th) 85.

²⁵³ Clarke, R. (2002). ‘Retrospectivity and the constitutional validity of the Bali bombing and East Timor trials,’ *Australian Journal of Asian Law*, Vol. 5, 128, pp.140-141.

Nuremberg Tribunal, the counterpoint of their use then was that no new crimes were enacted; the Charter merely codified existing international law. Critically, retrospectivity is contained today in modern international treaties, including the Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity of 1968 and the Vienna Convention on the Law of Treaties of 1969. While one could argue that *nullum crimen sine lege, nulla poena sine lege praevia* (no crime without law, no penalty without previous law) is a basis for non-retrospectivity and validity for not pursuing events that occurred before the treaty came into force, this norm is not always applicable. For example, while the applicability of this norm is contained in Article 15 (1) of the International Covenant on Civil and Political Rights, it is limited in its operation by Article 15 (2) which states:

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

In other words, Sarkin submits, if a crime was criminalized under customary law before the treaty came into effect, it is not limited by the retrospective nature of the operation of the treaty. This same limitation on the operation of *nullum crimen* is contained in Article 11 (2) of the Universal Declaration of Human Rights (UDHR), which provides that retrospective application of the criminal law is not prohibited if the event that is the basis of the prosecution was a crime in national or international law.²⁵⁴ Regarding the question of retrospectivity and the Genocide Convention it has been noted:

²⁵⁴ De Zayas, A Memorandum on the Genocide against the Armenians 1915-1923 and the application of the 1948 Genocide Convention. European Armenian Federation for Justice and Democracy (EAFJD) (ed.), at http://www16.brinkster.com/eafjd/en/bulletins/dezayas_report.pdf

The language of the Genocide Convention neither excludes nor requires its retroactive application; in other words-there is nothing in the language of the Convention that would prohibit its retroactive application. By contrast, there are numerous international treaties that specifically state that they will not apply retroactively.²⁵⁵

He further argues that some statutes find it necessary to stipulate they are not retrospective implies the possibility that retrospectivity might exist in others. Citing notable international law jurists, Sarkin argues that Lyn Berat too has written that “genocide always constituted an international crime”.²⁵⁶ In 1955 Professor Hersch Lauterpacht stated in his treatise that “it is clear that as a matter of law the Genocide Convention cannot impair the effectiveness of existing international obligations.”²⁵⁷ This view has been supported by the UN Commission on Human Rights, which, in 1969, stated: “it is therefore taken for granted that as a codification of existing international law the Convention on the Prevention and Punishment of the Crime of Genocide did neither extend nor restrain the notion of genocide, but that it only defined it more precisely.”²⁵⁸ This does not imply that the Genocide Convention itself in its treaty form applies retrospectively; it probably does not as it simply codifies what was in existence before 1948. But genocide as a prohibited criminal act existed before 1948.

According to Steinmetz it “remains to be seen whether courts and public find the U.N genocide convention to be retroactively applicable to events such as the German assault on the OvaHerero

²⁵⁵ For more on the non-retroactivity of the Genocide Convention see the case Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*). At :<http://www.icj-cij.org/docket/index.php?sum=479&code=bhy&p1=3&p2=3&case=91&k=f4&p3=5>

²⁵⁶ Berat, L. (1993). ‘Genocide: The Namibian case against Germany’. *Pace International Law Review*, Vol.5, pp. 165-207.

²⁵⁷ Lauterpacht, H. in Oppenheim, H. (1955). *International law: A treatise*, Vol. 1: Peace (8 ed.) New York: David Mackay, p.751.

²⁵⁸ Report of the ad hoc working group of experts established under Resolution 2 (XXIII) and 2 (XXIV) of the Commission on Human Rights, Doc. E/CN. 4/984/Add.18.

which happened before the mid-20th century.”²⁵⁹ The Vienna Convention on the Law of Treaties states:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any place situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.²⁶⁰

Sarkin asserts that though the Vienna Convention did not enter into force until 1980, it is accepted that its provisions primarily delineate what customary international law was and is, and that, unless the notion of genocide as a punishable crime before the entry into force of the convention is read by a court, it will not apply retrospectively. Before the Vienna Convention came into force, the ICJ noted in the *Ambatielos* case:

To accept the Greek Government’s theory would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier.²⁶¹

3.15.2 Elements of genocide under the convention

Genocide is a crime with three elements:

1. One or more prohibited acts;

²⁵⁹ Steinmetz, G. (2005). From ‘Native Policy’ to extermination as in: German South West Africa, 1904,’ in Comparative Perspective, Theory and Research in Comparative Social Analysis, Paper 30, 4-5. Los Angeles: Department of Sociology, UCLA, 1. Found at: <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1036&content=uclasoc>.

²⁶⁰ Vienna Convention on the Law of Treaties, May 23, 1969, UN Doc. A/CONF. 39/27 (1969), Article 28.

²⁶¹ *Ambatielos case (Greece v U.K)*. Preliminary objections, 1952, ICJ, 27, 40 (July 1). Cited in ICTJ Legal Analysis on Applicability of UN Convention on Genocides prior to January 12, 1951.

2. Against members of a protected group

3. Committed with intent to destroy, in whole or in part, a protected group.

All the three elements must be proved in order to establish the crime. The first two comprise the actus reus, or material component of the crime.²⁶² The last element comprises genocide's *mens rea*, or requisite mental state.²⁶³

3.15.3 Prohibited Acts

According to Nersessian, article II is restrictive. Only the five listed acts are covered. Despite the general sense that genocide applies to cases of mass slaughter, a protected group need not actually be destroyed. Genocide is completed when a prohibited act is committed against a group member with intent to destroy the group. There is no numeric threshold of victims. Nersessian contends that genocide is thus an inchoate offence *vis a vis* the protected group. Inchoate offences criminalize the doing of certain acts with a particular mental state, whether or not the intended harm occurs (e.g., attempts).²⁶⁴ This contrasts with results-oriented offences, where the act actually must achieve a prohibited result to complete the offence (e.g. murder).²⁶⁵

3.15.4 Killing members of the group

Article II (a) covers the direct killing of members of the group. It deals with situations such as the holocaust, where millions of Jews were murdered in an effort to destroy the Jewish race in

²⁶² Nersessian, supra note 215, at p. 256.

²⁶³ Ibid. at pp.256-7.

²⁶⁴ Ashworth, A. J. Defining Criminal Offences Without Harm, in *Criminal Law: Essays in Honour of J.C. Smith* 7, 8 (Peter Smith ed., 1987).

²⁶⁵ Ibid.

Europe. The material aspects are satisfied if the victim dies and that death from an unlawful act or omission.²⁶⁶

3.15.5 Causing serious bodily or mental harm

Article II (b) prohibits ‘causing serious bodily or mental harm to members of the group.’²⁶⁷ It includes:

enslavement, starvation, deportation, and persecution of the members of the protected group and their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture.²⁶⁸

3.15.6 Imposing destructive conditions of life

Article II (c) prohibits ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.’²⁶⁹ It covers acts without temporal immediacy of ‘killing’ under Article II (a) and contemplates the extermination of a group over time.²⁷⁰

Article II (c) does not specifically delineate the proscribed conduct. This was intentional and stems from the practical impossibility of specifying in advance all acts that qualify as genocidal acts. The determination is made case by case under the totality of the circumstances. It clearly includes ‘placing a group on a subsistence or starvation diet, reducing required medical services below a minimum, and withholding sufficient living accommodations.’ It also covers

²⁶⁶ Ibid.

²⁶⁷ Genocide Convention art II (b).

²⁶⁸ *Eichmann* (TC) 1961 36 ilr 5 (Isr Dist Ct) 238. Although Eichmann was a domestic case, its international character is evident. The court justified applying Israeli law to Eichmann’s crimes in occupied Europe in part based on universal jurisdiction over the crime of genocide.

²⁶⁹ Genocide Convention art II (C).

²⁷⁰ *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber 1, 2 September 1998.

deportations and expulsions committed with the requisite intent²⁷¹ and other acts of ‘slow death’ such as eliminating the necessities of life or imposing excessive work or physical exertion upon the group.²⁷²

3.15.7 Preventing births within the group

Nersessian states that Article II (d), which prohibits ‘imposing measures to prevent births within the group’, had its genesis in the Nazis’ Gigantic plan to change permanently the population balance in occupied Europe in their favor.... And to wipe out entirely the national-biological power of the neighbours of Germany so that Germany might win a permanent victory...where even in the case of Germany’s defeat the neighbours would be so weakened that Germany would be able to recover her strength in later years.²⁷³

The coercive element is critical. Voluntary birth control programmes, even if state-sponsored, are not genocide.²⁷⁴ Article II (d) covers all measures imposed to prevent reproduction and ‘was broadly conceived as encompassing castration, compulsory abortion, sterilization and the segregation of the sexes’.²⁷⁵ Less directly, it includes forced birth control and prohibitions on

²⁷¹ Forced relocation without the intent to destroy the group is not genocide. Krstic (AC) 2004 *ICTY* 33.

²⁷² *Kayishema (TC)* 1999 *ICTR* 115-116; Lemkin 87-9 (1944).

²⁷³ Lemkin, (1947) R. ‘Genocide as a Crime under International Law’ 41 *AJIL* 145, 147.

²⁷⁴ [1996] Draft Code art 17 cmt 16.

²⁷⁵ Lippman, M. (1998) ‘The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later’ 15 *Arizona JICL* 414, 457.

marriage,²⁷⁶ as well as rape perpetrated in societal contexts that stigmatise the victim and render them socially unfit for subsequent marriage or procreation.²⁷⁷

3.15.8 Transferring the children of the group

Article II (e) prohibits ‘forcibly transferring children of the group to another group’²⁷⁸ but does not define children’. The prohibition includes not only direct removal, but also threats, coercion or intimidation leading to it.²⁷⁹ Removal alone is insufficient; children must be transferred to another group (racial, ethnic, national or religious). Article II (e) prevents group characteristics (religion, etc) from being replaced by alien characteristics from a different group. Removing children for political ‘re-education’ thus is not genocide because the characteristic of ‘political identity’ is not covered by the Convention. The removal of children clearly is physically and biologically destructive. The removal violates Articles II (a) (if the children are killed), II (b) (serious mental injury to parents and children from breaking up the family), and II (d) (group members are less likely to reproduce if they know their children will be taken).

3.15.9 Ethnic cleansing as a genocidal act?

According to Gaeta,²⁸⁰ the expression ‘ethnic cleansing’ is not a legal, but a factual term that describes a complex phenomenon, a policy whose implementation is accompanied by serious

²⁷⁶ *Musema (TC)* [2000] ICTR §158.

²⁷⁷ ‘Women and peace and security’ UNSC Res. 1888 (30 Sep 2009) UN Doc S/RES/1888 § 15 (encouraging ‘leaders at the national and local level, including traditional leaders where they exist and religious leaders, to play a more active role in sensitizing communities on sexual violence to avoid marginalization and stigmatization of victims, to assist with their social reintegration, and to combat a culture of impunity for these crimes’).

²⁷⁸ Genocide convention art II (C).

²⁷⁹ *Rutaganda (TC)* 1999 ICTR 53.

²⁸⁰ Gaeta, *supra* note 170, pp. 103-104.

human rights violations geared toward forcing an ethnic group out of a certain region to change the ethnic composition of the population. Whether and to what extent so-called ethnic cleansing can be classified as genocide depends on the individual circumstances of the case.²⁸¹ For instance, the German Constitutional Court held in *Jorgic* that ‘systematic expulsion can be a method of destruction and therefore an indication, though not the sole substantiation, of an intention to destroy.’²⁸² Classification as genocide can fail because the primary aim of ‘ethnic cleansing’ is to expel a population group from a certain area, but not to exterminate the group as such. In addition, not all conduct that takes place in the course of ethnic cleansing can be subsumed under the heading of genocide; this is the case, for example, for the destruction of houses or churches. Still, frequently, ‘ethnic cleansing’ exhibits genocidal features, and in such cases it can be punished accordingly as genocide.

3.16 Genocidal intent

(1) The meaning of intent

The definition of genocide requires that the individual acts are ‘committed with intent’. The meaning of intent is still a matter of controversy.²⁸³ While no prior planning on the perpetrator’s part is required, the destruction of the group in whole or in part must be the perpetrator’s (preliminary) goal. Mere knowledge on the part of the perpetrator that his acts contribute to the destruction of a protected group is not sufficient. In cases in which the perpetrator does not personally aim at the destruction of the group, he may, however, still be criminally responsible for genocide, but, according to this view, not as a principal perpetrator but as an aider and abettor

²⁸¹ Werle, G. (2005) *Principles of International Criminal Law*. The Hague: Asser Press.

²⁸² See *Bundesverfassungsgericht*, 12 December 2000, *Neue Juristische Wochenschrift* (2001) 1848, at 1850

²⁸³ Gaeta, supra note 170, p. 105.

to the crime.²⁸⁴ The opposing view argues that genocidal intent already exists if the perpetrator knew of the organized attempt to exterminate the group.²⁸⁵ The argument runs as follows: in systematic crimes, the goals, preconditions and effects cannot be distinguished. In this constellation, therefore, the perpetrator's certain knowledge of the destructive intent of the main or organizational perpetrators should be sufficient to find the requisite mental element.

Haldorson²⁸⁶ in her thesis posits that regarding genocide there can be no doubt but that the type of intent that is included in the legal definition comes from the type identified by blameworthy responsibility. Further, there can be no doubt but that the blameworthy intent is meant to be the kind that is legally enforceable (that is, relevant to law). Ipso facto, to talk of intent in the context of genocide is to talk about either *dolus directus*, *dolus indirectus*, or *dolus eventualis*. To include this intent in the definition of genocide, not unlike the similar case with murder, is to use it as a substantive *mens rea* for the crime.

She further states that intent presently acts as the substantive *mens rea* of genocide. Evidencing intent is thus necessary to support the claim that any particular activity is or was genocidal. On these grounds, even an activity on par with the Nazi *Endlosung* could be brought into question as

²⁸⁴ Werle, supra note 281.

²⁸⁵ Greenawalt, A.K.A. (1999) 'Rethinking Genocidal Intent: The Case for a knowledge-Based interpretation', 99 *Columbia Law Review*. p. 2259.

²⁸⁶ Haldorson, H. M. (1992) 'A philosophical Criticism of Genocide as it is defined in the United Nations' Convention on the Prevention and Punishment of the Crime of Genocide.' Master of Arts Thesis. Concordia University. Montreal, Quebec, Canada. pp. 52-62. Available online at: <http://spectrum.library.concordia.ca/3361/>

possibly not constituting genocide on the grounds that it was never the intent to cause the death of the victims.²⁸⁷

(2) Destruction of the group

To commit genocide, the *genocidaire* does not need to succeed and actually destroy the group.²⁸⁸ The destruction of the group is subject to the *mens rea* only. It is a matter of controversy, however, whether the perpetrator must aim at the physical or biological destruction of the (members of the) group or whether or whether it suffices if he intends to eliminate its existence as a social entity, e.g. through dissolution of the group, while there is national case law referring to the social concept of the group.²⁸⁹ International Jurisprudence points towards a stricter understanding of the term based on physical destruction.²⁹⁰

Gaeta notes that the wording of the Convention allows for both readings. In support of a broad understanding of genocidal intent, including the (intended) destruction of the group as a social entity within the concept of genocidal intent, it is argued, that Article II includes genocidal acts which do not require the actual killing of group members, such a broad understanding would also be in line with Lemkin's concept of genocide.²⁹¹

²⁸⁷ Haldorson, *ibid*, at p.52-62.

²⁸⁸ Judgment *Prosecutor v. Akayesu*, Trial Chamber, 2 September 1998, 497.

²⁸⁹ See *Bundegerichtshof*, Judgment, 30 April 1999, *Entscheidung des Bundesgerichtshofs in Strafsachen* 45, at 81.

²⁹⁰ *Prosecutor v. Krstic*, Trial Chamber, Judgment, 2 August 2001, 580; Judgment, *Semanza*, Trial Chamber, 15 May 2003, 315; Judgment, *Nahimana*, Trial Chamber, 3 December 2003, 627; but see Judgment, *Blagojevic*, Trial Chamber, 17 January 2005, 659 and the partial Dissenting opinion by Judge *Shahabuddeen* to Judgment, *Prosecutor v. Krstic*, Appeals Chamber, 19 April 2004.

²⁹¹ See Lemkin, *supra* note 205.

(3) Partial destruction of the group

Genocide does not require that the perpetrator aims to achieve elimination of the entire group.²⁹²

As article II expressly stipulates, it is sufficient if the perpetrator intends to destroy a part of the group; this part must, however, be substantial.²⁹³ In order to determine whether a part of a group is substantial, international tribunals adopted an approach which refers alternatively to the quantity or the quality of the part within the group.²⁹⁴

(4) Destruction of the Group ‘As Such’

Genocide intent needs to be directed against one of the protected groups, that is national, ethnic, racial or religious groups. By requiring that the perpetrator intends the destruction of the group as such, the definition makes it very clear that the victim of genocide is chosen not because of his individual identity, but rather on account of her or his membership of a protected group. From

²⁹² Judgment, *Jelusic*, Trial Chamber, 14 December 1999, 80; ICTR, Judgment, *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber, 21 May 1999, 95

²⁹³ See ICTR, Judgment, *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber, 21 May 1999, 96 et seq.; ICTY, Judgment, *Prosecutor v. Jelusic*, Trial Chamber, 14 December 1999, 82; ICTY, Judgment, *Prosecutor v. Krstic*, Trial Chamber, 2 august 2001, 634; ICTY, Judgment, *Prosecutor v. Semanza*, Trial Chamber, 15 may 2003, 316; Judgment, *Kamuhanda*, Trial Chamber, 22 January 2004.

²⁹⁴ ICTY, Judgment, *Prosecutor v. Jelusic*, Trial Chamber, 14 December 1999, 82 ICTY: ‘A targeted part of a group would be classed as substantial either because the intent sought to harm a large majority of the group in question or the most representative members of the targeted community. [.....] Genocidal intent may therefore be manifest in two forms. It may consist of desiring the extermination of a very large number of the members of the group, in which case it would constitute an intention to destroy a group en masse. However, it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such.’

this perspective, the target or (intended) victim of the crime of genocide is the group itself and not (only) the individual.²⁹⁵

Gaeta further notes that ‘as such’ replaced the reference to motives of the perpetrator in Resolution 96(1) and the *ad hoc* Committee’s draft.²⁹⁶ By deleting any reference to the motives of the perpetrator, the definition of genocide is in line with general international criminal law: as a rule, motives of the perpetrator do not matter.²⁹⁷ Neither is it necessary for the *genocidaire* to act for discriminatory reasons,²⁹⁸ nor does the intent to commit individual discriminatory acts against members of the group suffice to convict for genocide.²⁹⁹

The Convention does not make express mention that the perpetrator may not belong himself or herself to the group he or she seeks to destroy; in particular, this cannot be deduced from the phrase ‘group as such’. It follows that so-called ‘*autogenocide*’, a merely descriptive term used by the UN Commission on Human Rights,³⁰⁰ may be covered by the Convention’s definition provided that the requirements are met.

²⁹⁵ ICTR, Judgment, *Prosecutor v. Akayesu*, Trial Chamber, 2 September 1998, 521; ICTY, Judgment, *Prosecutor v. Jelusic*, Trial Chamber, 14 December 1999, 79; Judgment, *Stakic*, Trial Chamber, 31 July 2003, 521; see also Commentary on the ILC’S 1996 Draft Code (Art. 17, 7).

²⁹⁶ See, also the proposal by Venezuela, UN GAOR 3rd session, Sixth Committee, 76th meeting, p. 124.

²⁹⁷ See, judgment *Tadic*, Appeals Chamber, 15 July 1999, 269.

²⁹⁸ See ICTY, Judgment, *Prosecutor v. Jelusic*, Appeals Chamber, 5 July 2001, 49, according to which the reason for criminality is not significant.

²⁹⁹ ICTY, Judgment, *Prosecutor v. Jelusic*, Trial Chamber, 14 December 1999, 79; ICTY, Judgment, *Prosecutor v. Krstic*, Trial Chamber, 2 August 2001, 553; Draft Code 1996, Commentary on Article 17(7).

³⁰⁰ See Commission on Human Rights, 35th session, Summary Record of the First Part (Public) of the 1510th Meeting, UN Doc. E/CN. 4/SR.1510, 22, 24.

3.17 Did the German atrocities committed during the Herero/Nama war amount to genocide?

There has been claims that the German actions did not constitute acts of genocide, proponents of this view argue that the German imperial army was simply putting down a rebellion.

Despite the alternate explanations, ample direct and indirect evidence exists demonstrating German intent and attempts to destroy the Herero as a whole. Consistent with the Western standard of proof, beyond a reasonable doubt, the Herero endured savage cruelty in the midst of German genocide.³⁰¹ The early twentieth century was an era where Western nations recognized the responsibility for natives in their colonies, but Germany did not.³⁰² German disregard and authoritarian agenda certainly radicalized a counter-insurgency campaign into full-blown genocide. Modernized communications and media venues aided in the public awareness of happenings in GSWA, making it a crime that would not go unnoticed.³⁰³

Notwithstanding claims to the contrary, Von Trotha made his intent clear and so did the German government. The public extermination decree undoubtedly targeted the Herero, in accordance with genocide criteria. Savage methods occurred long before Von Trotha's arrival, but he abandoned the last-minute traces of respect for international law.³⁰⁴

³⁰¹ Rivera, *supra* note 103, at p. 102.

³⁰² The “White Man’s Burden”—presumed responsibility of the white man to govern and impart their culture on non-white/uncivilized people; sort of a justification for European colonialism.

³⁰³ Wallenkampf, *supra* note 111, at p. 102.

³⁰⁴ Rivera, *supra* note 103, at p.103.

In Von Trotha's own words, "my policy was and is, to apply such violence with the utmost degree of terrorism and brutality. I will exterminate the rebellious tribes with rivers of blood."³⁰⁵ This left little doubt as to the German intent. Genocide criteria include both act and intent, one of which was evident. The extermination policy proved counterproductive to colonial requirements for success; however, von Trotha continued his policies up to his 19 November 1905 recall—indicative of his forthright nature.³⁰⁶ Prevalent German military culture valued leadership and victory such that the German Government empowered von Trotha and rewarded him with Order of Merit and four other prestigious awards "for his devotion to the Fatherland."³⁰⁷ Convincing evidence indicates that the Germans acted "with intent to destroy, in whole or in part, a national, ethnic, racial or religious group [Herero] as such," meeting both act and intent criteria.³⁰⁸

Rivera³⁰⁹ argues that German actions satisfy the elements of the crime of genocide. The Germans blatantly announced and demonstrated such intent. In summary, the Germans intended to and committed the most heinous human rights violation (now called genocide), as defined by the case study criteria and evidence. Contributing factors ranged from individual and national policy execution. Von Trotha was not a colonizer or diplomat, but a soldier who premeditated violence as the mechanism with which he would conquer the Herero before he ever set foot on GSWA soil. Von Trotha's commandeered decision-making authority and ignored guidance from the Kaiser and General Staff to cease the extermination order. He fought to solidify his reputation

³⁰⁵ Sarkin, J. (2011) *Germany's Genocide of the Herero: Kaiser Wilhelm II, His General, His Settlers, His Soldiers*. James Currey. p.132.

³⁰⁶ Drechsler, supra note 120, at p. 190.

³⁰⁷ Pakenham, supra note 100, at p. 615.

³⁰⁸ Rivera, supra note 103, at pp. 105-106.

³⁰⁹ Rivera, *ibid*, at pp. 105-107.

and avoid failure on Germany's part to colonize GSWA³¹⁰. He faced an enemy he did not understand nor wish to. Herero did not gauge success of war by battles or campaigns, they garnered victory by cattle capture and retention as their lifeline, even when engaged as combatants—they valued land and cattle for life sustainment. They constantly gathered and regrouped following skirmishes of irregular warfare, but that did not warrant treatment of all Herero as combatants. The Germans overreacted to Herero resistance by means of genocide³¹¹.

In the case of *Prosecutor v Jean-Paul Akayesu*³¹², arguably the first ever genocide conviction, it was stated that:

Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”

Additionally, the UN itself has recognized the German treatment of the Herero and Nama peoples as genocide. In 1983, the Sub-Commission of the UN Commission on Human Rights appointed Benjamin Whitaker as “Special *Rapporteur* with the mandate to revise, as a whole, and update the study on the question of the prevention and punishment of the crime of genocide.”³¹³ In the study Whitaker names the German massacre of the Herero as one of several examples of genocide that took place during the 20th century, and he specifically cites Von

³¹⁰ Rivera, *ibid* at. pp.105-10.

³¹¹ Rivera, *ibid*.

³¹² Case no. *ICTR*. 96-4, 2 September 1998.

³¹³ Whitaker report notes that “it could seem pedantic to argue that some terrible mass-killings are legalistically not genocide, but on the other hand it could be counter-productive to devalue genocide through over-diluting its definition.” Available online at: <http://www.preventgenocide.org/prevent/UNdocs/whitaker/section5.htm>

Trotha's extermination order, the poisoning of water-holes, and the shooting of African peace emissaries as examples of how this genocide was carried out.

According to Whitaker quoting Arnold Toynbee's³¹⁴ definition of genocide: "it is committed in cold blood by the deliberate fiat of holders of despotic political power, and that the perpetrators of genocide employ all the resources of present-day technology and organization to make their planned massacres systematic and complete." Therefore, Sarkin, argues that under this definition, the Herero extermination was most definitely genocide, as the Germans had taken over total power in the area. German forces also used superior weaponry to soundly defeat the native forces, even when the Germans were vastly outnumbered.

It is also evident that German actions in GSWA did indeed constitute genocide according to the modern definition of the crime. However, the true question is not whether or not genocide occurred but whether or not Germany today is liable for actions that took place during the colonial era, before genocide was recognized as a crime by international law. However, some scholars argue that German actions in GSWA must not be judged by the laws of today, but by the laws of the time. Through this lens, Germany should not be held accountable because the atrocities committed by colonial forces were not illegal in the first few years of the twentieth century. According to Crawford,³¹⁵ "there was no prohibition on genocide at the beginning of the twentieth century. In fact, the term genocide hadn't been invented."

³¹⁴ Arnold Toynbee defines genocide as "it is committed in cold blood by the deliberate fiat of holders of despotic political power, and that the perpetrators of genocide employ all the resources of present-day technology and organization to make their planned massacres systematic and complete."

³¹⁵ See Professor James Crawford, qtd. In "Germany Bank Accused of Genocide," BBC News, September 25, 2001.

3.18 The History of the Development of the laws of war

3.18.1 Historical development

States have long employed law to limit their conflicts. The idea that wars should be subject to legal rules dates back at least to the ancient civilizations of India, China, Israel, Greece, and Rome.³¹⁶ Ancient India's Book of Manu, which dates from the fourth century B.C., instructed:

When (the king fights with his foes in battle, let him not strike with weapons concealed in wood), nor with (such as are) barbed, poisoned, or the points of which are blazing with fire. Let him not strike now who (in flight) has climbed on an eminence, nor a eunuch, nor one who joins the palms of his hands (in supplication), nor one who (flees) with flying hair, nor one who sits down, nor one who says "I am thine"; nor one who sleeps, nor one who has lost his coat of mail, nor one who is naked, nor one who is disarmed.³¹⁷

Throughout its history, the development of international humanitarian law has been influenced by religious concepts and philosophical ideas³¹⁸. Customary rules of warfare are part of the very first rules of international law.³¹⁹

If Cicero (106-43 B.C.) actually said, "*inter arma leges silent*"-in time of war the laws are silent³²⁰, "even when followed, ancient humanitarian rules were soft and malleable and offered

³¹⁶ Brownlie, I (1963) *International Law and the Use of Force by States*. Oxford University Press. pp-3-4.

³¹⁷ Janis, M.W (2008) *International Law*. 5th ed. Aspen Publishers. p. 176.

³¹⁸ For more on the History of the laws of war see Howard, M et al (1994) *The Laws of War: Constraints on Warfare in the Western World*. Yale University Press. New Haven and London.

³¹⁹ Greenwood, C. 'Historical Development and the Legal Basis of Humanitarian Law' in Fleck, D. (2008) *The Handbook of International Humanitarian Law*, Oxford University Press.

³²⁰ Solis, G.D (2010) *The Law of Armed Conflict: International Humanitarian Law in War*. Cambridge University Press. p. 3-10. Available online at:
http://assets.cambridge.org/97805218/70887/excerpt/9780521870887_excerpt.pdf

little if any expectation of compliance.”³²¹ Whereas Keegan opines that “ War may have got worse with the passage of time, but the ethic of restraint has rarely been wholly absent from its practice....Even in the age of total warfare when, as in Cicero’s day, war was considered a normal condition, and the inherent right of sovereign states presided, there remained taboos, enshrined in law and thankfully widely observed.”³²²

Sun Tsu, writing *The Art of War* in the fourth century BC, and *Manu Sriti*, an anonymous Sanskrit treatise (probably dating from sometime between 2000 BC and 200 AD), both forbade the slaying of prisoners of war, giving as alternatives absorption into one’s own army, enslavement, or ransom.³²³

The Western concept of *Bellum justum* (just war) originated in the early Roman era,³²⁴ at which time it had principally a procedural meaning: a war “preceded by a solemn action taken by the *collegiums fetialium*, a corporation of special priests, the *fetiales*,” who would certify to the senate under oath that a “foreign nation had violated its duty toward the Romans” and thereby created a just cause for war.³²⁵

³²¹ Meron, T. (1998) *Bloody Constraint: War and Chivalry in Shakespeare* (New York: Oxford University Press), p.49.

³²² Keegan, J. (2001) *War and Our World* (New York: Vintage Books), p.21.

³²³ Levie, H. (2000) ‘History of the Law of war on land.’ *International Review of the Red Cross*, No. 838. Available online at: <http://www.icrc.org/eng/resources/documents/misc/57jqhg.htm>

³²⁴ Dinstein, Y. (2005) *War, Aggression and Self-Defence*. 63. 4th ed. Jus ad bellum antecedents exist in the writings of classical Greece, the Hebrew Bible, and elsewhere, but until ancient Rome, none of these can be described accurately as an ethical concept, still less a legal one. Available online at http://www.yale.edu/yjil/files_PDFs/vol34/Sloane.pdf

³²⁵ Nussbaum, A. (1947) *A Concise History of the law of nations*. Macmillan. New York. pp. 9-15.

In his work ‘*De iure belli ac pacis*’, published in 1625, Hugo Grotius, the father of modern international law, signaled the existing bounds to the conduct of war. He wrote about the laws of war: ‘I saw prevailing thought the Christian world a licence in making war of which even barbarous nations should be ashamed; men resorting to arms from trivial or for no reasons at all, and when arms were once taken up no reverence left for divine or human law, exactly as if a single edict had released a madness driving men to all kinds of crime.’³²⁶

3.18. 2 Codification of the law of war on land

(1) Martens Clause- connecting war crimes and crimes against humanity

According to Meron,³²⁷ together with the principle prohibiting weapons “of a nature to cause superfluous injury” or “calculated to cause unnecessary suffering”³²⁸, the Martens Clause, in the Preamble to the Hague Conventions on the Laws and Customs of War on Land,³²⁹ is an enduring legacy of those instruments.

In the years since its formulation, the Martens Clause has been relied upon in the Nuremberg jurisprudence, addressed by the International Court of Justice and human rights bodies, and reiterated in many humanitarian law treaties that regulate the means and methods of warfare. It

³²⁶ Hugo, G. (1625). *The Law of War and Peace in Three Books [De Jure Belli ac Pacis Libris Tres]*. Available online at: http://www.archive.org/stream/hugonisgrottiide21grot/hugonisgrottiide21grot_djvu.txt

³²⁷ Meron, T. (2000) ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience.’ *The American Journal of International Law*, Vol. 94, No. 1, pp.78-79. Available online at <http://users.polisci.wisc.edu/kinsella/martens%20clause.pdf>

³²⁸ These phrases appear, respectively, in Article 23 (e) of Hague Convention No.II of 1899 and Hague Convention No. IV of 1907. Convention [No.II] with Respect to the Laws and Customs of War on Land, with annex of regulations, July 29, 1899, 32 Sta. 1803, Bevans 247; Convention [No. IV] Respecting the Laws and Customs of War on Land, with annex of regulations, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631

³²⁹ See generally Strebels, H. (1982) “Martens Clause,” [Installment] 3 *Encyclopedia of Public International Law* 252 (Rudolf Bernhardt ed., 1982).

was restated in the 1949 Geneva Conventions for the Protection of Victims of War,³³⁰ the 1977 Additional Protocols to those Conventions³³¹ and the Preamble to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons,³³² albeit in slightly different versions.

The Martens Clause has formed a part of the laws of armed conflict since its first appearance in the Preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land:

“Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.”³³³

The clause was based upon and took its name from a declaration read by Professor von Martens, the Russian delegate at the Hague Peace Conferences 1899.³³⁴ Martens introduced the

³³⁰ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 63, 6 UST 3114, 75 UNTS 31; Convention for the Amelioration of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, Art. 62, 6 UST 3217, 75 UNTS Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 158, 6 UST 3516, 75 UNTS 287.

³³¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, Art. 1 (2), 1125 UNTS 3 [HEREINAFTER Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, pmbl., para. 4, 1125 UNTS 609 [hereinafter Protocol II]

³³² Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, pmbl., para. 5, 1342 UNTS 137.

³³³ Ticehurst, R (1997) Article, *International Review of the Red Cross*, No. 317. Available online at: <http://www.icrc.org/eng/resources/documents/misc/57jnhy.htm>

³³⁴ The life and works of Martens are detailed by V. Pustogarov, “Fyodor Fyodorovich Martens (1845-1909)-A Humanist of Modern Times”, *International Review of the Red Cross (IRRC)*, No. 312, May-June 1996, pp. 300-314.

declaration after delegates at the Peace Conference failed to agree on the issue of the status of civilians who took up arms against an occupying force. Large military powers argued that they should be treated as *francs-tireurs* and subject to execution, while smaller states contended that they should be treated as lawful combatants.³³⁵ Although the clause was originally formulated to resolve this particular dispute, it has subsequently reappeared in various but similar versions in later treaties regulating armed conflicts.³³⁶

The problem faced by humanitarian lawyers is that there is no accepted interpretation of the Martens Clause. It is therefore subject to a variety of interpretations, both narrow and expansive. At its most restricted, the Clause serves as a reminder that customary international law continues to apply after the adoption of a treaty norm.³³⁷ A wider interpretation is that, as few international treaties relating to the laws of armed conflict are ever complete, the Clause provides that something which is not explicitly prohibited by a treaty is not *ipso facto* permitted.³³⁸

The Advisory Opinion of the International Court of Justice (ICJ) on the Legality of the Threat or Use of Nuclear Weapons issued on 8 July 1996 involved an extensive analysis of the laws of

³³⁵ See Kalshoven, F (1987) *Constraints on the Waging of War*. Martinus Nijhoff, Dordrecht, p.14.

³³⁶ Preamble, 1907 Hague Convention (IV) *respecting the laws and customs of war on land*, reprinted in Roberts, A and Guelf, R, *Documents for the protection of war victims* (GC I: Art. 63; GC II: Art. 62; GC III: Art. 142; GC IV: Art. 158), op. cit., pp. 169-337; 1977 Additional Protocol I, Art. 1 (2), op. cit., p. 390, and 1977 Additional Protocol II, Preamble, op. cit., p. 449; 1980 Weapons Convention, Preamble, op. cit., p. 473.

³³⁷ Greenwood, C, 'Historical Development and Legal Basis', in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford/New York, 1995, p. 28 (para. 129).

³³⁸ Sandoz, Y, Swinarski, C, Zimmermann, B. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhof, Geneva, 1987, p. 39 (para. 55); Singh, N and McWhinney, E. *Nuclear Weapons and Contemporary International Law*, 2nd ed., Martinus Nijhof, Dordrecht, 1989, pp. 46-47.

armed conflict.³³⁹ Although this analysis was specific to nuclear weapons, the Opinion required general consideration of the laws of armed conflict. Inevitably, the oral and written submissions to the ICJ and the resulting Opinion made considerable reference to the Martens Clause, revealing a number of possible interpretations. The Opinion itself did not provide a clear understanding of the Clause. However, State submissions and some of the dissenting opinions provided very interesting insight into its meaning.³⁴⁰

Moreover, Ticehurst observes that the dominant philosophy of international law is positivist. Obligations to the international community are therefore regulated through a combination of a treaty and customary international law. With regard to the laws of armed conflict, this has important implications. By refusing to ratify treaties or to consent to the development of corresponding customary norms, the powerful military States can control the content of the laws of armed conflict. Other states are helpless to prohibit certain technology possessed by the powerful military states. They can pass United Nations General Assembly (UNGA) resolutions indicating disapproval but, in the presence of negative votes and abstentions, these resolutions are not, from a strictly positivist perspective, normative³⁴¹.

He further posits that the Martens Clause provides a link between positive norms of international law relating to armed conflicts and natural law. One of the reasons for the decline of natural law was that it was wholly subjective. Opposing States claimed the support of contradictory norms of

³³⁹ International Court of Justice, *Legality of the threat or use of nuclear weapons*, of 8 July 1996 (hereinafter referred to as “opinion”) see Ticehurst, R. “The Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons”, *War Studies Journal*, Autumn 2 (1), 1996, pp. 107-118.

³⁴⁰ *Ibid*, at pp. 107-119.

³⁴¹ Ticehurst, *supra* note 333, at p. 1-12.

natural law. However, the Martens Clause establishes an objective means of determining natural law, the dictates of the public conscience. This makes the laws of armed conflict much richer, and permits the participation of all states in its development. The powerful military States have constantly opposed the influence of natural law on the laws of armed conflict even though these same states relied on natural law for the prosecutions at Nuremberg. The ICJ in its Advisory Opinion did not clarify the extent to which the Martens Clause permits notions of natural law to influence the development of the laws of armed conflict. Consequently, its correct interpretation remains unclear. The Opinion has, however, facilitated an important debate on this significant and frequently overlooked clause of the laws of armed conflict.³⁴²

(2) The Lieber Code

The Lieber Code referred to as ‘the first modern codification of the laws of war’,³⁴³ was commissioned by the Union government and promulgated by President Lincoln in the midst of the American Civil War. Though authored by a private person, its impact on subsequent codification of the laws of war and its development was considerable.³⁴⁴

Lieber’s essays reveal a dual sense of humanity: on the one hand, an observation on conditions of human nature from which emanates a theory of the individual, society, the state, and

³⁴² Ibid.

³⁴³ Baxter, R.R. “The first modern codification of the laws of war: Francis Lieber and General Orders No. 100”, in *International Review of the Red Cross*, Vol. 3, No. 25, April-May 1963, p.171; Schindler, D. and Toman, J, above note 3, p. 3 (The “Lieber Instructions” represent the first attempt to codify the laws of war”).

³⁴⁴ Giladi, R. (2012) ‘A Different sense of humanity: occupation in Francis Lieber’s Code’. Vol. 94 Number 885 spring 2012. *International Review of the Red Cross*. p.82. Available online at www.icrc.org/eng/assets/files/review/2012/irrc-885-giladi.pdf

international society; on the other, a civilizational vocation to which individuals and their organizations are subordinate.³⁴⁵

Section II of the Lieber Code, containing Articles 31 to 47, provided for the “Protection of persons and especially of women, of religion, the arts and sciences. Punishment of crimes against the inhabitants of hostile countries”.³⁴⁶ There were also provisions requiring the humane treatment of prisoners of war.³⁴⁷

Article 60 of the Lieber Code states that “it is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give....quarter...”³⁴⁸ This provision, according to Sarkin not only states the U.S. position, but the use of the term “modern war” indicates a more universal application. The Code goes even further in Article 61, stating: “Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.” It also stipulates that:

The unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit and private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.³⁴⁹

³⁴⁵ Ibid at p.91.

³⁴⁶ See Section II of the Lieber Code.

³⁴⁷ See Lieber Code, Section III, Articles 49 to 80.

³⁴⁸ See Lieber Code Article 60.

³⁴⁹ See Article 61 of the Lieber Code.

3.19 The Historical and Conceptual Development of International Human Rights and Humanitarian law

The beginnings of human rights and humanitarian law are somewhat disjointed.³⁵⁰ Human rights clearly had a beginning in humanitarian law that is strongly associated with international law governing the justification of wars (*jus ad bellum*) and the conduct of war (*jus in bello*). The principle that law should protect the rights of individuals against the abuses of government is rooted in natural law.³⁵¹ Human rights can be dated at least back to John Locke's two treatises of Government, published in 1690.³⁵² Locke believed that human rights, not governments, came first in the natural order of things:

“If Man in the State of Nature be so free, as has been said; if he be absolute Lord of his own Person and Possession, equal to the greatest, and subject to no Body, why will he part with his freedom? Why will he give up this Empire, and subject himself to the Dominion and Control of any other Power?”³⁵³

The conceptual beginning of international human rights law may also owe its existence to the *jus gentium* governing commercial transactions insofar as this law freed up the conceptual limits on international law confined to a law between nation-states only to allow for the protection of the economic interests of individuals and commercial organizations.³⁵⁴

It is in the nineteenth century that an integration of international human rights law and international humanitarian law that reflects and integrates the ideas, events, and conditions

³⁵⁰ Martin, F.F. et al (2006) *International Human Rights and Humanitarian Law*. Cambridge University Press. p.1

³⁵¹ Janis, supra note 317, at pp- 261-272.

³⁵² Ibid.

³⁵³ Locke, J. (1698) *Two Treatises of Government* 395, (3rd ed. laslett rev. ed. 1963).

³⁵⁴ Martin, supra note 350, at pp.2-3.

outlined emerges. For example, in the nineteenth century, states began to adopt the practice of outlawing the trafficking of slaves, a human rights concern. In 1868, the St. Petersburg Declaration condemned the use of “*dum dum*”³⁵⁵ bullets in war; thereby introducing the modern international humanitarian law on which modern Laws and Customs of Land War (the First Hague Convention”) was established as the first international codification of laws of land war.³⁵⁶

Accordingly, one later begins to see humanitarian law cases and additional treaties, for example, in *The Paquete Habana*,³⁵⁷ the U.S. Supreme Court held that the seizure of two civilian fishing boats as prizes of war was unlawful under customary international law. In 1920, the Treaty of Sevres provided for Turkey’s surrender of persons responsible for the murder of an estimated six hundred thousand Armenians in 1915.

An important change occurred with the establishment of the League of Nations in 1919.³⁵⁸ Article 22 of the Covenant of the League set up the mandates system for peoples in ex-enemy colonies ‘not yet able to stand by themselves in the strenuous conditions of the modern world’³⁵⁹. The mandatory power was obliged to guarantee freedom of conscience and religion and a Permanent Mandates Commission was created to examine the reports the mandatory authorities

³⁵⁵ The Hague Declaration (IV,3) of 1899 gives expression, with regard to a particular bullet, to the customary rule prohibiting the use of weapons which inflict unnecessarily cruel wounds. The Declaration is aimed at the Dum-Dum bullet which is so called after the arsenal near Calcutta, India, where the bullet was first made.

³⁵⁶ Ibid.

³⁵⁷ *The Paquete Habana* 175 U.S. 677 (1900).

³⁵⁸ Shaw, M. A. (2008) *International Law*. 6th ed. Cambridge University Press. Cambridge. pp. 200-201

³⁵⁹ Ibid, at pp. 200-202.

had undertaken to make.³⁶⁰ The arrangement was termed ‘a sacred trust of civilization’. Article 23 of the Covenant provided for just treatment of the native populations of the territories in question. The 1919 peace agreements with Eastern European and Balkan states included provisions relating to the protection of minorities,³⁶¹ providing essentially for equality of treatment and opportunities for collective activity.³⁶² These provisions were supervised by the League of Nations, to whom there was a right of petition.³⁶³

3.20 Wars of annihilation as violations of contemporaneous International law

International law during the German colonial enterprise in South West Africa obligated European powers to protect the moral and humanitarian interests of colonized peoples. These interests included (1) protection of the indigenous people of Africa from destruction and annihilation, (2) prohibition of the trade in human beings, and (3) preservation of freedom of religion among Christian denominations³⁶⁴.

3.20.1 The Statute of the International Court of Justice

According to Dugard³⁶⁵ the sources of international law are described in Article 38 (1) of the Statute of the International Court of Justice as

³⁶⁰ Ibid, at pp. 200-203.

³⁶¹ Thornberry, P. (1980) ‘Is there a Phoenix in the Ashes? -International Law and Minority Rights’, Vol.15, *Texas International Law Journal*, p. 421.

³⁶² See e.g. *The Minority Schools in Albania* case, PCIJ, Series A/B, 1935, No.64, p.17.

³⁶³ Thornberry, supra note 361 at pp.433-54.

³⁶⁴ Anderson, supra note 145, at p.1167.

³⁶⁵ Dugard, J. (2005) *International Law: A South African Perspective*. 3rd ed. Juta. p. 27.

- (a) International conventions (treaties), whether general or particular;
- (b) International custom, as evidence of a general practice accepted as law;
- (c) The general principles of law recognized by civilized nations; and
- (d) Judicial decisions and the teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of law³⁶⁶.

3.20.2 International treaties

The obligatory nature of treaties is founded upon the customary international law principle that agreements are binding (*pacta sunt servanda*). Treaties may be divided into ‘law making’ treaties, which are intended to have universal or general relevance, and ‘treaty-contracts’, which apply only as between two or a small number of states. Such a distinction is intended to reflect the general or local applicability of a particular treaty and the range of obligations imposed. It cannot be regarded as hard and fast and there are many grey areas of overlap and uncertainty.³⁶⁷

On international treaties, Oppenheim³⁶⁸ posits that treaties are the second source of International Law, and a source which has of late become of the greatest importance. As treaties may be concluded for innumerable purposes, it is necessary to emphasize that such treaties only are a source of International as either stipulate new rules for future international conduct or confirm,

³⁶⁶ See further, on this subject Parry, C (1965) *The Sources and Evidence of International Law*. Manchester University Press, Manchester, and D’amato, A. (1971) *The Concept of Custom in International Law*. New York, Cornell University Press.

³⁶⁷ Shaw, *supra* note 358, p. 94.

³⁶⁸ Oppenheim, L.F. L. *International Law. A treatise*. Vol 1. New York, Bombay and Calcutta. Longmans, Green and Co. p.23.

define, or abolish existing customary or conventional rules. Such treaties must be called law-making treaties. Since the family of nations is not a state-like community, there is no central authority which could make law for it in a similar way as parliaments make law by statutes within the States. The only way in which International Law can be made by a deliberate act, in contradistinction to custom, is that members of the Family of Nations are parties solely. Their law is universal International Law then only when all the members of the Family of Nations are parties to them. He further argues that many law-making treaties are concluded by a few states only, so that the law which they create is particular International Law. On the other hand, there have been many law-making treaties concluded which contain general International Law, because the majority of states, including leading powers, are parties to them.

Crucially, Oppenheim asserts that general International Law has a tendency to become universal because such states as hitherto did not consent to it in future either expressly give their consent or recognize the respective rules tacitly through custom. But it must be emphasized that whereas custom is the original source of International Law, treaties are a source the power of which derives from custom. For the fact that treaties can stipulate rules of international conduct at all is based on the customary rule of the Law of Nations, that treaties are binding upon the contracting parties³⁶⁹.

Treaties of peace, alliance, and commerce have shaped the positive law of nations since the beginning of the nineteenth century³⁷⁰. Treaties have also played an important role in delineating

³⁶⁹ Oppenheim, *ibid* 368, at p. 25.

³⁷⁰ Wheaton, H. (1889) 'Elements of International Law' (3d Eng. Ed. Stevens and Sons Ltd. 1889) (1836); see generally *The Paquete Habana*, 175 U.S.677 (1900); *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825). See De Martens, G. F. (1802) 'A Compendium of the laws of nations. 5

international humanitarian law and elements of fundamental rights, including protections of religious freedom and prohibitions against trafficking in human beings. Anderson cites the example of the Berlin West Africa Conference of 1884-1885 which established guidelines for the European colonization of Africa, included humanitarian obligations such as the “preservation of the native tribes,” the suppression of slavery and the slave trade, and the protection of religious freedom.³⁷¹ Treaties prohibiting trade in human beings provide further evidence that international law recognized and protected indigenous Africans during the late nineteenth century. These treaties included the 1889 German-Dutch Agreement³⁷², the 1890 German-Belgian Agreement to Criminalize Trade in Girls³⁷³, and the 1904 Agreement on Administrative Regulation to Ensure Effective Protection Against Trade in Girls³⁷⁴, which was ratified by fourteen countries. Additionally, trade in human beings, specifically indigenous Black Africans, was criminalized by the 1815 Second Paris Peace Agreement³⁷⁵ and the 1841 Quintuple Treaty between England, France, Russia, Austria and Prussia.³⁷⁶

³⁷¹ General Act of the Berlin Conference, Feb. 26, 1885, art. VI, 165 Consol. T.S. 485, reprinted in 3 SUPPLEMENT AM.J.INT’L. 7 (1909), reprinted in Gavin, R.J. and Betley, J.A. (1973) *The scramble for Africa: Documents on the Berlin West African Conference and related subjects, 1884/1885*, Ibadan University Press. p. 291.

³⁷² See the 1889 German-Dutch Agreement.

³⁷³ See the 1890 German-Belgian Agreement to Criminalize Trade in Girls.

³⁷⁴ See the 1904 Agreement on Administrative Regulation to Ensure Effective Protection Against Trade in Girls.

³⁷⁵ See the 1815 Second Paris Peace Agreement.

³⁷⁶ See the 1841 Quintuple Treaty between England, France, Russia, Austria and Prussia.

3.20.2 Customary International law

According to earlier international law jurists like Oppenheim³⁷⁷ custom is the oldest and the original source of International Law in particular as well as of law in general. He asserts that custom must not be confounded with usage. In everyday life and language both terms are used synonymously, but in the language of the jurist they have two different meanings. Jurists speak of a custom, when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are legally necessary or legally right. He further states that jurists speak of a usage, when a habit of doing certain actions has grown up without there being the conviction of their legal character. Thus, the term “custom” is in juristic language a narrower conception than the term “usage”, as a given course of conduct may be usual without being international relations may therefore be usual without being the outcome of customary International Law.

International customary legal obligations binding upon States are thus created when there is evidence of both

- acts amounting to a “settled practice” of states; and

- a “belief that this practice is rendered obligatory by the existence of a rule of law requiring it” (*opinio juris*).³⁷⁸

A judge will thus have to assess the existence of one objective element consisting of the general practice, and one subjective element, namely that there is a belief among States as to the legally

³⁷⁷ Oppenheim, supra note 368.

³⁷⁸ *North Sea Continental Shelf* cases, Judgment, ICJ Reports 1969, p. 44, para. 77

binding nature of this practice.³⁷⁹ With regard to the question of practice, it follows from the ruling of the International Court of Justice in the *North Sea Continental Shelf* cases that, at least with regard to “the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule”, the passage of time can be relatively short, although

an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been extensive and virtually uniform in the sense of the provision invoked and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.³⁸⁰

In *Nicaragua v. the United States of America*, the International Court of Justice appears however to have somewhat softened this rather strict interpretation of the objective element of state practice, whilst at the same time placing a correspondingly greater emphasis on the *opinio juris* in the creation of custom. In its reasoning, which related to the use of force, the Court held, in particular:

It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from intervention in each other’s internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is

³⁷⁹ Ibid.

³⁸⁰ *North Continental Shelf* cases supra note 378 at p. 43, para. 74.

in fact justifiable on that basis. The significance of that attitude is to confirm rather than to weaken the rule.³⁸¹

3.20.3 General Principles of Law

According to Fitzmaurice³⁸² Article 38 of the Statute of the ICJ refers, in this respect, to the ‘general principles of law recognized by civilized nations’. Fitzmaurice further states that there are certain general principles common to all systems of law which can be identified. These include the:

- (a) Principle of good faith. This principle has fundamental importance in the law of treaties, as codified in Article 26 of the Vienna Convention on the Law of Treaties (VCLT) 1969. This principle has been mentioned in many judgments of the ICJ. Examples include the: Nuclear Test Case, when the Court said ‘one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith, and the 1997 *Gabcikovo-Nagymaros* case.³⁸³
- (b) Principle of equity. According to Brownlie³⁸⁴ “Equity is used in the sense of consideration or fairness, reasonableness, and policy often necessary for the sensible application of more settled rules of law. Strictly, it cannot be a source of law and yet it may be an important factor in the process of decision. Equity may play a role in supplementing the law or appear unobtrusively as a part of judicial reasoning.”

³⁸¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, Judgment, ICJ Reports 1986, p. 98, para. 186.

³⁸² Fitzmaurice, M and Quast, A. (2007) *Law of Treaties*. University of London Press. p. 14. Available online at: www.londoninternational.ac.uk/sites/default/.../law_treaties.pdf

³⁸³ *Gabcikovo Nagymaros Project (Hungary v. Slovakia)* [1997][ICJ] Rep. 7.

³⁸⁴ Brownlie, I. (2003) *Principles of Public International Law*. 6th edition. Oxford University Press. p. 25.

There are various opinions as to what the general principles of law concept are intended to refer.³⁸⁵ Some writers regard it as an affirmation of Natural Law concepts, which are deemed to underline the system of international law and constitute the method for testing the validity of the positive/man-made rules.³⁸⁶ Other writers, particularly positivists, treat it as a sub-heading under treaty and customary law and incapable of adding anything new to international law unless it reflects the consent of the states. Soviet writers like Tunkin subscribed to this approach and regarded the ‘general principles of law’ as reiterating the fundamental precepts of international law, for example, the law of peaceful co-existence, which have already been set out in treaty and custom law.³⁸⁷

3.21 Alleged war crimes perpetrated on the Herero as violations of international law at the time.

3.21.1 The St. Petersburg Declaration

The Declaration of Saint Petersburg 1868 materialized as the first formal agreement to prohibit the use of certain weapons during warfare. It also highlighted the military role to defend humanitarian interests. The Declaration coincides with the Russian invention of a modern bullet designed to explode on contact. The bullet, considered inhuman when used against human targets, led the Russian government to advocate international prohibition.³⁸⁸ “The Declaration to that effect adopted in 1868, which has the force of law, confirms the customary rule according to

³⁸⁵ Shaw, *supra* note 358, at p.99.

³⁸⁶ See e.g. Lauterpacht, *Private Law Sources*. See also Waldock, ‘General Course’, p. 54; Jenks C. W. (1958), *The Common law of Mankind*, London, p. 169, and Judge Tanaka (dissenting), *South-West Africa case*, (Second Phase), *ICJ Reports*, 1966, pp. 6, 294-9; 37 *ILR*, pp. 243, 455-9

³⁸⁷ Tunkin, G.I. and Butler. E.(1974) *Theory of International Law*. Harvard University Press. Chapter 7.

³⁸⁸ Rivera, *supra* note 103, at. pp-27-28.

which the use of arms, projectiles and material of a nature to cause unnecessary suffering is prohibited.”³⁸⁹ The Declaration of Saint Petersburg emerged from the efforts of twenty nations including Prussia and the North German Confederation. They recognized that the “necessities of war ought to yield to the requirements of humanity,”³⁹⁰ and prohibited the bullet from being used on the battlefield before ever witnessing first-hand the grotesque and brutal effects on a human body. The Declaration in turn, limited human suffering in conflict and identified a threshold for the resources and techniques of warfare. In essence, the Saint Petersburg Declaration of 1868 served as somewhat of a springboard for the continued evolution of human rights law. Modern day international law still operates on the premise that the Saint Petersburg Declaration will thrive as a “beacon of humanity” in the future as it was in 1868.³⁹¹

From what has been discussed thus far, it is fair to conclude that the German actions during the genocidal war of 1904-07 violated the provisions of the St Petersburg Declaration.

3.21.2 1885 Berlin West Africa Convention

According to Anderson³⁹² the 1885 Berlin West Africa Convention directly establishes a claim for the Hereros under international law. The Convention was an international agreement that divided Africa into spheres of European colonial influence. It also established European nations’

³⁸⁹ International Humanitarian Law: Treaties and Documents from International Committee of the Red Cross (ICRC); dated 11 December 1868, authentic text was in French; source D. Schindler and J. Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher, 1988), 102, <http://www.icrc.org/ihl.nsf/INTRO/130?OpenDocument> (accessed 3 February 2012).

³⁹⁰ International Committee of the Red Cross, 140th Anniversary of the 1868 Saint Petersburg Declaration, speech by Jakob Kellenberger, president of the ICRC, 24 November 2008.

³⁹¹ Rivera, *supra* note 103, at p.28.

³⁹² Anderson, *supra* note 145, at p.1173.

obligations and duties to indigenous Africans, as well as third-party beneficiary rights for the colonized peoples of Africa. Anderson points out that Germany signed and ratified the Berlin West Africa Convention in 1885.³⁹³ Article VI of the Convention explicitly bans annihilation of native peoples by requiring its signatories to protect African peoples.³⁹⁴ Under Article VI, all powers exercising sovereign rights in Africa bound themselves to “watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery, and especially the Slave Trade.” The Convention also contains a dispute-settlement clause.³⁹⁵

The protocols from the Berlin West Africa Conference reveal that the European powers intended to use the Convention’s affirmative obligations to protect indigenous Africans. In November 1884, Prince von Bismarck, German Chancellor and President of the Conference, outlined the intention of the Conference as “guided by the conviction that all the Governments invited share the wish to bring the natives of Africa within the pale of civilization.”³⁹⁶

Documents discussing the content of Article VI further support the intent of the signatories to protect indigenous African peoples. The Report on the Congo Basin Commerce Declaration, which examined the intent of the delegates regarding each article of the Convention, described

³⁹³ Other signatories included Austria, Belgium, Denmark, Spain, The United States, France, the United Kingdom, the Netherlands, Portugal, Russia, and the Ottoman Empire.

³⁹⁴ The Convention also confirms the expansion of international humanitarian law in the area of religious tolerance. Article VI states that “freedom of conscience and religious toleration are expressly guaranteed to the natives, no less than to subjects and to foreigners”.

³⁹⁵ Art. 12 (reserving a right to mediation or arbitration of disputes before “serious dissention” is resolved through the use of force).

³⁹⁶ Protocol No. 1 to the Berlin West Africa Conference, Nov. 15, 1884.

Article VI as protecting humanitarian interests. According to the Report, “the VIth Article regulates various matters, all of which, however, apply to moral interests.”³⁹⁷ Specifically, Article VI addresses three areas of humanitarian international law: (1) protection of indigenous African populations, (2) elimination of the Slave Trade, and (3) protection of religious freedom. Anderson observes that the first element is the most important with regard to the German war of annihilation against the Hereros. The Report discussed the first element in detail, stating:

With regard to native populations, which for the most part, ought, undoubtedly, not to be considered as placed without the pale of international law, but which in the present state of affairs are scarcely of themselves able to defend their own interests, the Conference has been obliged to assume the role of an unofficial guardian. The necessity of ensuring the preservation of the natives, the duty of assisting them to attain a more elevated political and social state, the obligation of instructing them and of initiating them in the advantages of civilization, are unanimously recognized³⁹⁸.

3.21. 3 1890 Anti-Slavery Convention

The 1890 Anti-Slavery Convention strengthened international legal protections of African nations from annihilation. Also known as the Brussels Act of 1890, the Anti-Slavery Convention includes language similar to that of the Berlin West Africa Convention. Article II of the Convention states that the Convention’s purpose is to “improve the moral and material conditions of existence of the native races.”³⁹⁹ Further, as part of the European powers’ goal to

³⁹⁷ Report Made in the Name of the Commission Charged with Examining the Project of Declaration Relating to Freedom of Commerce in the Basin of the Congo and its Affluents, Annex 1 to Protocol No. 4 of the Berlin West Africa Conference, Dec. 1, 1884.

³⁹⁸ Anderson, *supra* note 145, at p.1176.

³⁹⁹ Declaration of the General Act of the Brussels Conference, July 2, 1890, 27 Stat. 886, T.S. No. 383, 173 Parry’s T.S. 293 (1968), REPRINTED IN Henry Wellington Wack, *THE STORY OF THE CONGO FREE STATE* 552 (1905), <http://www.zum.de/whkmla/documents/wack/wackapp10.html> [hereinafter General Act of the Brussels Conference]

ensure the survival of indigenous Africans, Article VIII of the Convention limits the use of certain weapons.

Anderson further argues that in addition to violating the positive laws that were in place prior to the German-Herero conflict, the German war of annihilation against the Hereros contravened contemporaneous customary international law.⁴⁰⁰ Even though Germany's acts of genocide took place during wartime, actions such as poisoning wells, committing rape, killing women and children, and wounding and killing prisoners of war violated the permissible exceptions to contemporaneous customary international law allowed in wartime.⁴⁰¹

3.21.4 The Hague Convention of 1899

The Hague Regulations of 1899 and 1907 incorporated the Declaration of Saint Petersburg featuring updated prohibitions on “projectiles and explosives from balloons, the use of asphyxiating gases and the use of expanding bullets” in land warfare.⁴⁰² The Hague Convention of 1899 served “the interest of humanity and the ever-increasing requirements of civilization,”⁴⁰³ by governing the laws and customs of war on land. It further defined and clarified the general customs of war, outlining limits and ameliorating the tragic effects as much as possible. The Hague Convention specifies humane treatment of prisoners of war, including

⁴⁰⁰ Bluntschli, J.C. (1878) ‘*Das Mordene Volkerrecht Der Civilisirten Staten*’ 299. pp.283-300.

⁴⁰¹ Anderson, supra note 145, at 1177.

⁴⁰² Rivera, supra note 103, at pp.27-30.

⁴⁰³ The introduction of the Hague Convention 1899. Available online at: http://www.opbw.org/int_inst/sec_docs/1899HC-TEXT.pdf

rebels/belligerents.⁴⁰⁴ Article 23, Section II governs rules during hostilities and explicitly prohibits poison, excessive violence, unwarranted killing, and destruction or confiscation of property. Article 45 of Section III prohibits “any pressure on the population of occupied territory to take the oath to the hostile power.”⁴⁰⁵

Germany participated in both the Declaration of Saint Petersburg, the Hague Convention, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (July 1906 updating the 1864 Convention), as well as various other international treaties and customary law during the Herero Rebellion timeframe.⁴⁰⁶

3.22. CONCLUSION

Chapter 3 of the thesis extensively discussed the scope, nature and history of the origins of the prohibition of the crime of genocide. The term “genocide” was coined by the eminent Jewish scholar, Raphael Lemkin in 1944. He defines genocide as "Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups."

⁴⁰⁴ Hague Convention 1899, Section 1, Articles 1 through 21.

⁴⁰⁵ See Article 45 of Section III of the Hague Convention of 1899.

⁴⁰⁶ Rivera, *supra* note 103, at. p.30.

The chapter also dealt with the history of International Human Rights and Humanitarian law as it applied to both parties during the genocidal war. It is worth noting that Germany was a state party to notable international humanitarian law treaties of the time such as the Declaration of Saint Petersburg, The Hague Convention, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (July 1906 updating the 1864 Convention), as well as various other international treaties and customary law.

The (non) retroactivity of the 1948 United Nations Genocide Convention was critically examined as well as relevant case law on the subject matter. Other notable instruments governing the laws of war such as the Lieber Code and the Martens Code were also discussed.

CHAPTER 4: LEGAL BASIS FOR HERERO REPARATIONS AGAINST THE GERMAN GOVERNMENT UNDER INTERNATIONAL LAW

4.1 Introduction

The Herero have sought reparations from the German government and German corporations who played a role in the crimes committed in GSWA. Germany, expectedly, has repeatedly denied the Herero's claim to reparations, and for several years, German leaders even refused to issue an official apology to the Herero for the colonial crimes. The Germans on their part have often argued that the current Germany government cannot be held liable for the colonial atrocities because international law at the beginning of the twentieth century did not have any provisions allowing ethnic minorities to seek reparations. This chapter thus aims to interrogate whether the Germany government's contention that international law at the time of the genocide didn't provide for reparations for atrocities is valid or not.

4.2 Sources of the law of reparations

The demand for reparations for historical injustices is not in vacuum, instead they have their own origins. Sources on the law of reparations are rooted in various international human rights and humanitarian law instruments as well as in domestic laws of nations.

(1) International law as a source of reparations

The U.N. General Assembly adopted the Universal Declaration of Human Rights in 1948, providing that no-one shall be held in slavery or servitude.⁴⁰⁷ The United Nations acted again in 1963 when it adopted the Declaration on the Elimination of All Forms of Racial

⁴⁰⁷ G.A. Res. 217 A, U.N. GAOR, 3d Session. Supp. No. 3, U.N.Doc. A/810 (1948).

Discrimination.⁴⁰⁸ The 1963 Declaration states that “no state, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on the ground of race, colour or ethnic origin.”⁴⁰⁹ The United Nations also held the International Convention on the Elimination of all forms of Racial Discrimination (1965), the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), the First (1973) and Second (1983) World Conference to Combat Racism and Racial Discrimination.⁴¹⁰

In 1997, the U.N. Commission on Human Rights in Geneva set the stage for the 2001 WCAR by adopting African texts recommending to the General Assembly that the Conference be held.⁴¹¹ The proposed conference was the subject of substantial debate, as many countries including EU states and the United States argued that a special session of the General Assembly would be just as effective in combating racism, and would be less expensive.⁴¹²

The Asian Preparatory Conference, held in Tehran, forthrightly recognized that “States which pursued policies or practices based on racial or national superiority, such as colonial or other forms of alien domination or foreign occupation, slavery, the slave trade and ethnic cleansing,

⁴⁰⁸ See United Nations Declaration on the Elimination of All forms of Racial Discrimination, G.A. Res. 1904, U.N. GAOR, 18th Sess., U.N. Doc. AIRES/1904 (1963).

⁴⁰⁹ Art. 2 (1).

⁴¹⁰ WCAR Basic Information 1973 and 1983.

⁴¹¹ Dennis, M.J. (1998) ‘The Fifty-Third Session of the UN Commission on Human Rights’.92 *AM. J. INT’L L.* pp.112, 112.

⁴¹² WCAR, *ibid.*

should assume responsibility therefore and compensate the victims of such policies and practices.”⁴¹³

Another landmark in the process of progressive recognition of the obligation to provide reparation to indigenous peoples and other victims of historical injustices is the UN Declaration on the Rights of Indigenous Peoples approved in 2007 after a long negotiation process in which indigenous peoples played an outstanding role.⁴¹⁴ The fact that the Declaration was passed is interpreted by some as a sign of commitment to the past and to reparation for a process of exploitation and domination that has not concluded.⁴¹⁵

International human rights are “significant because of their articulation of global norms of governmental behavior,” and are “problematic because of the difficulty, if not impossibility, of enforcement of those norms in state and federal courts in the United States.”⁴¹⁶ For example, while U.N. Member States vote and adopt Declarations, those provisions are not legally binding on the states and subsequent enforcement must be pursued to apply the agreement to a situation within a member state.

(2) Common law as a source of reparations

⁴¹³ Reports of Preparatory Meetings and Activities at the International, Regional and National Levels, Report of the Asian Preparatory Meeting (Tehran, Feb. 19-21, 2001), U.N. GAOR, Preparatory Comm., 2nd Sess., U.N. Doc. A/CONF.189/PC.2/9 (2001), at 11, para. 50.

⁴¹⁴ Gomez, F.I. (undated) The Right of Indigenous Peoples to reparation for historical injustices. Available online at http://paperroom.ipisa.org/papers/paper_2835.pdf

⁴¹⁵ Ibid.

⁴¹⁶ Yamamoto, Y.K. (1998) ‘Racial Reparations: Japanese American Redress and African American Claims’, 40 *B.C. L. REV.* 477, p.490.

Scholars who support a common law analysis for use in determining whether reparations are payable look to four basic theories: contract law, trust law, restitution law, and tort law.⁴¹⁷ In the American instance, the contract law claim rests on an economic theory that reparations paid to African Americans encompass restitution of unpaid labour plus a sum for underpayment of black people since 1863.⁴¹⁸ A claim rooted in trust law reasons that slaves were not paid for their work, and therefore, a trust consisting of withheld wages should be created for the descendants.⁴¹⁹ A restitution claim resembles the contract claim, but adds the element of beneficiary unjust enrichment; namely that “the beneficiary of goods and services may not keep the benefits without paying restitution.”⁴²⁰ Finally, a possible remedy in tort law equates slavery with a “racial assault”, and calls for private entities, such as corporations and churches, to pay African Americans “racial assaults” committed in the past.⁴²¹ However, the above exposition reflects the American legal system.

4.3 Does Humanitarian law apply to reparation?

A lot of literature exists on the right to claim reparations under certain aspects of international law. What is not clear is whether individuals or groups can claim reparations via humanitarian law.

⁴¹⁷ Ozer, I.M. (1998) ‘Reparations for African Americans’. 41 *HOW. L.J.* pp. 479, 482.

⁴¹⁸ Browne, R. (1972) ‘The Economic Basis for Reparations to Black America’. 2 *REV. BLACK POL. ECON.* 67, 72-73.

⁴¹⁹ For more on African-Americans reparations Verdun, Vincene (1993). "If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans". *Tulane Law Review*, February 1993, Volume 67, Number 3, p. 607-610.

⁴²⁰ Matsuda, M. J (1987) ‘Looking to the Bottom: Critical Legal Studies and Reparations’, 22 *HARV. C.R.-C.L.L. REV.* pp.323-380.

⁴²¹ *Ibid*, at pp.323-380.

4.3.1 The notion of reparations in international law

The latter half of the twentieth century witnessed unprecedented development and codification of international legal standards for the protection of individuals. These include numerous universal and regional human rights instruments such as the 1949 Geneva Conventions and their Additional Protocols of 1977 and the various instruments of refugee law. Despite this indispensable step forward in the protection of the individual, the reality today is that individuals continue to suffer at the hands of abusive governments especially in situations of armed conflict.⁴²²

The term “reparations” usually refer to the measures that a state must take after it violates a rule of international law. Reparations can also apply more generally to remedying all wrongs, whether committed by a state and its agents or by private parties. Reparations for genocide and crimes against humanity will usually require remedial action by both individual perpetrators and the state involved because such acts are illegal under international and national law. Human rights law and humanitarian law also impose a duty on states to take reasonable measures, or in legal terminology to “exercise due diligence,” to prevent violations of human rights by private persons. If the state fails to do so, it will be responsible for providing reparations.⁴²³

In an early international court case, the Permanent Court of International Justice called the obligation to make reparations for an unlawful act “a general principle of international law” and

⁴²² Gillard, E. C. (2003) ‘Reparation for violations of international humanitarian law’. Vol. 85. p. 529. Available online at www.icrc.org/eng/assets/files/other/irrc_851_gillard.pdf

⁴²³ Reparations (Genocide and Crimes Against Humanity)-enotes. Com. Available from: <http://www.enotes.com/reparations-reference/reparations>.

part of “a general conception of law”.⁴²⁴ This reflects the fact that all legal systems require those who cause harm through illegal or wrongful acts to take action to repair the harm they have caused.⁴²⁵

In addition, human rights treaties and declarations adopted by the United Nations guarantee individual victims the right to a remedy, that is, access to justice and reparations in national proceedings. The Universal Declaration of Human Rights, Article 8, proclaims that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or laws.”⁴²⁶

In 1985 members of the UN adopted the Declaration of Basic Principles for Victims of Crime and Abuse of Power. The Declaration details the types of reparations due to crime victims in national law. Principle 8 states that:

When appropriate, restitution should be made to victims, their families, or dependents by offenders or the third parties responsible for their behavior. This includes the return of property and may include compensation for harm or loss suffered. Restitution may be considered as a sentencing option in criminal cases in addition to other sanctions. Because cases often involve state agents or officials acting in an official or quasi-official capacity.⁴²⁷

In practice, reparations may be difficult to obtain. The UN has thus created a voluntary fund for victims of torture and a voluntary fund for victims of slavery and slave-like practices. These funds finance programs that provide medical, psychological, social, or legal assistance to victims and their relatives. Examples of this include the establishment of treatment centers, meetings of

⁴²⁴ *Chorzow Factory case (Germany v. Poland)*, 1928 P.C.I.J. (ser. A), no. 17 at 29 (September 13).

⁴²⁵ *Ibid.*

⁴²⁶ See Article 8 of the Universal Declaration of Human Rights.

⁴²⁷ Principle 8 of the Declaration of Basic Principles for Victims of Crime and Abuse of Power.

experts, aid to child victims, publications, legal assistance, and economical and social rehabilitation. Although these funds do not serve the purpose of making the perpetrators redress the harm they have caused, the money collected is used with the aim of ensuring some relief for those who are victims of the acts specified.⁴²⁸

4.3.2 Reparation for violation of international humanitarian law

According to Gillard,⁴²⁹ the general principles of international law also apply to violations of international humanitarian law. This was expressly laid down as long as 1907 in The Hague Convention (IV) respecting the Laws and Customs of War on Land, Article 3 of which stipulates that:

a belligerent Party which violates the provisions of the (.....) Regulations respecting the Laws and Customs of War on Land shall, if the case demands, be liable to pay compensation...⁴³⁰

A similar requirement to pay compensation for violations of international humanitarian law is expressly reiterated in Article 91 of Additional Protocol I.⁴³¹ Despite this explicit language, it should be noted that the obligation to make reparation arises automatically as a consequence of the unlawful act, without the need for the obligation to be spelt out in the conventions. Gillard

⁴²⁸ Victims of Gross Violations of Human Rights and International Humanitarian Law. UN Document E/CN.4/1997/104. appendix. Available online at: http://untreaty.un.org/cod/avl/ha/ga_60-147/ga_60-147.html

⁴²⁹ Gillard, supra note 422 at p. 532.

⁴³⁰ See Article 3 of The Hague Convention (IV) respecting the Laws and Customs of War on Land.

⁴³¹ Other instruments also expressly refer to an obligation to make reparation. For example, Article 19 of the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearances provides that the victims of acts of enforced disappearance and their family have the right to adequate compensation; including the means for as complete a rehabilitation as possible. It further stipulates that “in the event of the death of the victim as a result of an act of enforced disappearance, their dependants shall also be entitled to compensation”, UN Doc. A/47/49, 18 December 1992.

further notes that although The Hague Convention and Additional Protocol I speak only of compensation, reparation for violations of international humanitarian law can take various forms. The most relevant are restitution, such as the return of unlawfully taken property, as envisaged by the Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.⁴³²

4.3.3 The notion of “victim”

The right to a remedy presupposes a victim whose primary rights have been violated. Victims are the primary concern of IHL. Such victims may then be defined as those who suffer because they are affected by an armed conflict; they are termed “war victims”. This definition potentially refers to an entire population that has been caught up in armed conflict. However, the occurrence of the armed conflict as such falls outside the scope of IHL, as this law does not deal with the conflict’s legality or illegality. Hence war victims have no individual right to peace under IHL. This does not mean that war victims are left without rights, their supreme right being the right to protection.⁴³³

⁴³² Article 3 of the Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict provides: “each contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the prohibition on exporting cultural property from occupied territory during armed conflict.”

⁴³³ Although the different conventions are limited in scope, the law of Geneva serves to provide protection for all those who, as a consequence of an armed conflict, have fallen into the hands of the adversary. The protection envisaged is against the arbitrary power which one party acquires, in the course of an armed conflict, over persons belonging to the other party.

Zegveld⁴³⁴ opines that to contend that violation of the right to protection entails a claim to reparation would, however, be absurd, since every member of the population affected by the armed conflict is a victim. The wider category of war victims is to be distinguished from what is hopefully a smaller category: victims of violations of IHL, i.e. those who are injured by such violations. This category of victims is defined by the legal restraints placed by IHL on the conduct of war. While the key object of IHL is to protect war victims, it is silent on this second category of victims of IHL violations. The IHL regime focuses solely on persons to be protected against the dangers of war, leaving open the question of action required when protection fails.

According to Zegveld,⁴³⁵ the UN Principles on the Right to a Remedy are intended to fill this gap, concentrating on victims of violations of IHL. They define a victim in the following terms:

A person is ‘a victim’ where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person’s fundamental legal rights.⁴³⁶

4.3.4 Victim’s rights

According to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law:

⁴³⁴ Zegveld, L. (2003) Remedies for victims of violations of international humanitarian law. vol. 85. p. 497. Available online at http://www.ikrk.org/eng/assets/files/other/irrc_851_zegveld.pdf

⁴³⁵ Ibid., at p.502.

⁴³⁶ Principle 8, UN Principles on the Right to a Remedy: A “Victim” may also be a dependant or a member of the immediate family or household of the direct victims as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm”.

Victims are “persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization” (para. 8).⁴³⁷

4.4 The Alien Tort Claims Act (ATCA) of 1789, United States of America

The language of the ATCA is deceptively simple.⁴³⁸ It states, “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁴³⁹ This single sentence has generated a great deal of discussion among scholars.⁴⁴⁰ From the perspective of an international jurist, this sentence seems incoherent. From the positivistic perspective, there could be no tort liability of an individual for violations of international law as the individual was not regarded as a subject of positive international law at the time the ATCA was enacted. Even today, the only clearly established form of individual responsibility in international law is criminal responsibility.⁴⁴¹

⁴³⁷ See para 8 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. available online at: http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf

⁴³⁸ Cerone, J. (undated) “The ATCA at the Intersection of International Law and U.S. Law.” *New England Law Review*. Vol.42. p.106. Available online at: http://www.nesl.edu/userfiles/file/Lawreview/vol42/4/Cerone_%20Final.pdf

⁴³⁹ Alien Tort Claims Act, 28 U.S.C. 1350 (2000).

⁴⁴⁰ See, e.g., Stephens, B. (2002) ‘Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations,’ *27 Yale J. INT’L L.* 1; Stephens, B. (2002) Individuals Enforcing International Law: The Comparative and Historical Context, *52 DEPAUL L.REV.* 433; Genc Trnavci, the Meaning and the Scope of the Law of nations in the context of the Alien Tort Claims Act and international Criminal Tribunal for Rwanda art. 1, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8. 1994), available at <http://69.94.11.53/ENGLISH/basicdocs/statute/2007.pdf>.

⁴⁴¹ See, e.g., Statute of the International Criminal Tribunal for Rwanda art. 1, S.C.Res. 955 (Nov. 8, 1994) available at <http://69.94.11.53/ENGLISH/basicdocs/statute/2007.pdf>; Statute of the International Criminal Tribunal for the

From the natural lawyer's perspective, this sentence was less problematic, at least with respect to violations of the law of nations. As noted by Cerone⁴⁴² at the time the ATCA was enacted, the law of nations was derived from natural law, a body of law that bound individuals in the first place. Similarly, the common law was derived from natural law. As they both had the same source, it is unsurprising that the law of nations was regarded as part of the common law. Nor is it surprising that this conception of the law of nations was equally amenable to direct application to individuals as was the common law.

The ATCA was part of the Judiciary Act of 1789. There is little surviving legislative history regarding the Act, and its original meaning and purpose are uncertain⁴⁴³. However, scholars have surmised that the Act was intended to assure foreign governments that the U.S would act to prevent and provide remedies for breaches of customary international law, especially breaches concerning diplomats and merchants.⁴⁴⁴

former Yugoslavia art. 5-7, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) available at <http://www.un.org/cty/legal/doc-e/basic/statut/statute-feb08-e.pdf>; Charter of the Int'l Military Tribunal art. 6, reprinted in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL NUREMBERG 10, 11 (William Hein and Co. 1947), available at <http://www.yale.edu/lawweb/Avalon/imt/proc/imtconst.htm#art6>.

⁴⁴² Cerone, *supra* note 438, at p.107.

⁴⁴³ According to Keneth C. Randall, the ATS was used only twenty-one times during this period and used as a basis of jurisdiction only twice. Randall, K.C. (1985) Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute, 18 *N.Y.U.J. INT'L.* and POL. 1, 4 n. 15. The two cases using the ATS to establish jurisdiction are: *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857 (D.Md. 1961); *Bolchos v. Darrel*, 3 F. Cas. 810, 1 Bee 74 (D. S.C. 1795)).

⁴⁴⁴ For more on the nature, origin and purpose of the ATCA see Ghatan, R.A. (n.d) The Alien Tort statute and prudential exhaustion'. Cornell University. Available online at: <http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Ghatan-final.pdf>

The ATS may have been enacted in response to a number of international incidents caused by the non-availability of remedies for foreign citizens in the United States. For example, the peace treaty ending the American Revolution provided for the satisfaction of debts to British creditors. The refusal of some states to enforce the payment of such debts prompted Great Britain to threaten to retaliate. In 1784, a French diplomat Francois Barbe-Marbois was assaulted, but no remedy was available to him. The incident was notorious internationally and prompted Congress to draft a resolution asking the states to allow suits in tort for the violation of the law of nations. However, few states enacted such a provision, and congress subsequently included the ATCA in the Judiciary Act of 1789. From 1789 until 1980, only two courts-based jurisdiction on the ATCA.⁴⁴⁵

The defining case in the use of ATCA for human rights violations is *Filartiga v. Pena-Irala*.⁴⁴⁶ In *Filartiga*, a Paraguayan citizen, brought civil action against Americo Norberto Pena-Irala, also a Paraguayan citizen. She sought compensation for Pena-Irala's kidnapping and torturing her brother Joelito, and a New York federal court awarded her \$10 million in damages. *Filartiga* was the first case to make use of ATCA for human rights violations, and *Filartiga*'s victory was a defining moment in human rights litigation because it gave US Courts jurisdiction over cases of human rights abuse and granted significant reparations to the plaintiff. Other cases involving the ATCA have followed ever since. In *Doe v. Unocal*,⁴⁴⁷ a group of Burmese villagers charged

⁴⁴⁵ See *Respublica v. De Longschamps*, 1 U.S. (1 Dall., 116 (Pa. 1784) ("The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and well being of nations; he is guilty of a crime against the whole world").

⁴⁴⁶ *Filartiga v. Pena-Irala* 630 F.2d 876, 885 (2d Cir. 1980).

⁴⁴⁷ *Doe v. Unocal* 248 F.3d 915 (9th Cir. 2001).

Unocal, an American oil company, with “assisting and encouraging the torture, murder and rape of Burmese villagers by government soldiers so that Unocal could build a gas pipeline.” In 2002, Unocal was found to be responsible and had to compensate the villagers who brought the suit.

Other successful cases of ATCA include *Sosa v. Alvarez-Machain*,⁴⁴⁸ the plaintiff in *Sosa*, Alvarez, brought a claim under the Alien Tort Statute for arbitrary arrest and detention. Alvarez had been indicted in the U.S for torturing and murdering a Drug Enforcement Agency officer. When the U.S. was unable to secure Alvarez’s extradition, it paid Sosa, a Mexican national; to kidnap Alvarez and bring him into the U.S. Alvarez claimed that his “arrest” by Sosa was arbitrary because the warrant for his arrest only authorized his arrest within the U.S. The U.S Court of Appeals for the Ninth Circuit held that Alvarez’s abduction constituted arbitrary arrest in violation of international law.

The Supreme Court reversed its decision. It clarified that the ATS did not create a cause of action, but instead merely “furnished jurisdiction for a relatively modest set of actions alleging violations of the law of nations.” Such actions must rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized in the 18th century, with respect to recognizing contemporary international norms, the court’s opinion stated that “the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant door keeping. In Alvarez’s case, “a single illegal detention of less than a day, followed by the transfer of custody

⁴⁴⁸ *Sosa v. Alvarez-Machain* 542 U.S. 692 (2004).

to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”⁴⁴⁹

Moreover, it has been argued that a review of other cases in the period of the enactment of the ATCA also supports the proposition that the ATCA was never intended to be wholly extraterritorial.⁴⁵⁰ *Moxon v. The Fanny*, involved at ATCA case in which the owners of a British ship sought damages for its seizure by a French privateer. Though the action was denied since it was found not to be a suit in “tort only,” the British ship at issue had been seized in U.S. waters.⁴⁵¹ The Judge in the above case remarked as follows:

“Neither does this suit for a specific return of the property, appear to be included in the words of the judiciary act of the United States, giving cognizance to this court of ‘all causes where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.’ It cannot be called a suit for a tort only, when the properties, as well as damages for the supposed trespass, are sought for.”

In *Bolchos v. Darrel*, the court assumed ATCA jurisdiction in a suit brought by a French privateer against the mortgagee of a British slave ship found in U.S. waters.⁴⁵²

In light of the above, it is safe to conclude that the value of public opinion and awareness on this topic is immeasurable; as such a motion would never have come about without the Herero’s pursuit of justice.

⁴⁴⁹ Ibid.

⁴⁵⁰ Razzano, F.C et al (2011) ‘The Alien Tort Statute: Are French Companies at Risk of Suits in the United States for Torts Committed Overseas? A Publication of Pepper Hamilton LLP.p.1. Available online at: http://www.pepperlaw.com/publications_update.aspx?ArticleKey=2155

⁴⁵¹ *Moxon v. The Fanny*, 17 Cas. 942 (No. 9, 895) (Pa. 1793).

⁴⁵² *Bolchos v. Darrell*, 3 F. Cas. 810 (No. 1,607) (S.C.1795).

4.5 The Hereros' cause of action under the Third-Party Beneficiary Doctrine

Anderson⁴⁵³ states that since the Hereros were not signatories to the 1885 Berlin West Africa Convention and the 1890 Anti-Slavery Convention, these Conventions conferred rights on the Hereros through the third-party beneficiary doctrine. The parties to these international agreements intended to confer a distinct set of protections upon indigenous Africans. She further states that the protocols of the Berlin West Africa Conference lend substantial support to this interpretation. As third-party beneficiaries of these instruments, the Hereros had the right to protection from harm by colonial powers. Because Germany failed to provide these protections and instead waged a war of annihilation against indigenous Africans, the Hereros are entitled to a cause of action under international law.

4.6 Third-party Beneficiary Doctrine under International Law

The relationship between third parties and treaties is defined by a general formula *pacta tertiis nec nocent nec prosunt*.⁴⁵⁴ This principle has been recognized in states' practice as fundamental, and its existence has never been questioned.⁴⁵⁵ For states non-parties to the treaty, the treaty is *res inter alios acta*. It has been reflected in numerous cases before the World Court. For example, in the German Interests in *Polish Upper Silesia Case*, the PCIJ observed that: "a treaty

⁴⁵³ Anderson, *supra* note 145, at pp.1177-1178.

⁴⁵⁴ Fitzmaurice, M. (n.d) 'Third Parties and the Law of Treaties' in *Max Planck Yearbook of United Nations Law*, Volume 6, 2002, 37-137. © 2002 Kluwer Law International. Printed in the Netherlands.

⁴⁵⁵ See e.g., Lord McNair, *The Law of Treaties*, 1961, 309; Harvard Research article 18: "(a) a treaty may not impose obligations upon a State which is not party thereto; (b) if a treaty contains a stipulation which is expressly for the benefit of a State which is not a party or a signatory to the treaty, such a State is entitled to claim the benefit of the stipulation so long as the stipulation remains in force between the parties to the treaty"; see also Roxborough, R (1973) 'International Convention and Third States'. 453.

only creates law as between States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States.”⁴⁵⁶

4.7 Third State in the 1969 and the 1986 Vienna Conventions

According to Fitzmaurice,⁴⁵⁷ there are certain preliminary considerations, such as what constitutes a third party. According to the 1969 Vienna Convention, a third state is a state not a party to the treaty (article 2 para. 1 lit. (h)); and the 1986 Convention defines “third state” and “third organization” as a state or an international organization not a party to a treaty (article 2 para. 1 lit. (h)). A party to a treaty, according to the 1969 Vienna Convention is “a State which expressed its consent to be bound...and for which the treaty is in force” (article 2 para. 1 lit.(g)). In the text of the 1986 Vienna Convention this is expressed as follows: “a party means a State or an international organization which has consented to be bound by a treaty and for which the treaty is in force” (article 2 para. 1 lit. (g)).⁴⁵⁸

Anderson further states that there are, however, exceptions to this general rule. Under *the 1965 Restatement (Second) of the Foreign Relations Law of the United States*, “an international agreement may create a right in favour of a state not to a party to it if the agreement manifests the intention of the parties that it shall have this effect.”⁴⁵⁹ This statement of the third-party

⁴⁵⁶ PCIJ Ser. A, No. 7, 28; see *Chorzow Factory Case*, PCIJ Ser. A, No. 17, 45; *Austro-German Customs Union Case*, PCIJ Ser. A/B, No.41, 48.

⁴⁵⁷ Fitzmaurice, *supra* note 454 at p. 39.

⁴⁵⁸ See article 2 para. 1 lit. (g) in the text of the Vienna Convention 1986

⁴⁵⁹ According to Anderson the Restatement (Second)’s formulation is relevant because it is more likely to reflect the understanding of the doctrine as it stood at the beginning of the twentieth century than the Restatement (Third), which has narrowed the third-party doctrine under modern international law. Although the Vienna Convention of 1969 officially codified the legal standard for revoking or modifying third-party beneficiary rights, it also reined in its scope.

beneficiary doctrine explicitly states that the intentions of the contracting parties could create positive rights for non-parties.⁴⁶⁰ The third-party beneficiary doctrine is also addressed in international case law. For example, in *Free Zones of Upper Savoy and the District of Gex*⁴⁶¹, the Permanent Court of International Justice found that a declaration signed by France and other powers conferred rights upon Switzerland to French territory even though Switzerland was not a party to the declaration.

Under international and domestic law as stated by the Free Zones case, Anderson posits, the *Restatement (Second)*, and the Vienna Convention on the Law of Treaties, the intent of the parties to the contract or treaty is controlling. The existence of third-party beneficiary rights and intent must be established on a case by case basis. Intent of the parties may be established using “*travaux préparatoires*, diplomatic correspondence, and voting on pertinent proposals and resolutions.”⁴⁶²

According to the Vienna Convention as argued by Anderson “a right for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right.....to the third State....and the third State assents thereto.” The assent of the third party “shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.”⁴⁶³ Once third-party

⁴⁶⁰ Ibid.

⁴⁶¹ *Free Zones of Upper Savoy and District of Gex (France. v. Switzerland.)*, 1929 P.C.I.J. (ser. A) No. 22 (Order of Aug. 19).

⁴⁶² Lee, L.T. (1983) ‘The Law of the Sea Convention and Third States’. 38 *AM. J. Int’l law*. pp.541-545.

⁴⁶³ See Art 6 the Vienna Convention on the laws of treaty 1969.

beneficiary rights have been created, contracting states may not revoke or modify them without the consent of the third party.⁴⁶⁴

4.8 The Herero Nation as a third-Party Beneficiary

Anderson⁴⁶⁵ further articulates that given the socio-political history and structure of the Herero Nation, its exercise of the powers of a state, and its de facto recognition by other states, the distinction between the Herero's status as a "nation" rather than a "state" is nominal rather than substantive. The Herero Nation falls within the scope of the third-party beneficiary doctrine because it: (1) had the characteristics of a sovereign state and (2) was the intended beneficiary of the 1885 Berlin West Africa Convention.

Anderson argues that first; the Hereros' socio-political structure was that of a state. The Hereros had a population, a territory, and a government, which are the core elements of a state under contemporaneous international law. The Hereros, a Bantu speaking people, formed a distinct population group comprising the *Mbanderu* and the *Tjimba*. At the turn of the twentieth century, the Hereros constituted both a people and a nation. The Herero Nation is analogous to other recognized nations of indigenous peoples such as the Native American Nations of North America. She postulates that nations are distinct from "peoples" because the term "nation" denotes a people who occupy a specific territory. Nations can be "understood as cultural groups with a common language, a common cultural identity, and common traditions. In the late 1800s, Herero society became "strongly centralized and centered upon a number of specific urban centers", and "specific geographical areas". By the nineteenth century "an influential aristocracy"

⁴⁶⁴ See Article 37 of the Vienna Convention 1969.

⁴⁶⁵ Anderson, supra note 145 at p.1181.

was assuming control of the Herero Nation, and “the contours of a class society had become clearly visible.”⁴⁶⁶

It has also been argued that the Herero Nation also exercised the powers of a state by entering into treaties with African and European nations. The bilateral protection treaties with the German government evidence the Herero Nation’s exclusive jurisdiction over German nationals in Hereroland. The treaty also created an obligation for the Germans to provide military support to the Hereros. Although the treaties limited the Herero Nation’s jurisdiction over German nationals, the Hereros remained an independent sovereign entity because the treaties did not make the Herero government subject to direct orders by the German government. Germany did not exercise sovereign control over South West Africa as a colony until after the end of the German-Herero War in 1907.⁴⁶⁷

Secondly, Anderson⁴⁶⁸ asserts that the creation of third-party beneficiary rights for indigenous African peoples and nations was an intended result of the Berlin West Africa Convention and the Anti-Slavery Convention⁴⁶⁹. She further postulates that the protocols contain evidence of intent to preserve the continued existence of indigenous Africans, among them the Herero nation. Because the intent of the parties to a contract or treaty is controlling, the protocols support the

⁴⁶⁶ Anderson, *ibid*, at p.1182.

⁴⁶⁷ Anderson, *supra* note 145 at pp.1182-83.

⁴⁶⁸ *Ibid*, at 1183.

⁴⁶⁹ General Act of the Brussels Conference was a collection of anti-slavery measures signed in Brussels on 2 July 1890 (and which entered into force on 31 August 1891) to, as the act itself puts it, “*put an end to Negro Slave Trade by land as well as by sea, and to improve the moral and material conditions of existence of the native races*”. The act was specifically applicable to those countries “*who have possessions or Protectorates in the conventional basin of the Congo*”, to the Ottoman Empire and other powers or parts who were involved in slave trade in East African coast, Indian Ocean and other areas.

provision of a third-party beneficiary right to the Hereros for protection from annihilation. Under the Berlin Africa Convention, the signatories intended to “bind themselves to watch over the preservation of the native tribes.”⁴⁷⁰

Anderson⁴⁷¹ concludes that the Herero Nation was a third party to the 1885 Berlin West Africa Convention and the 1890 Anti-slavery Convention. The Hereros were subjects of international law even though they were not signatories. Since the Hereros were not in attendance at the conferences and did not affirmatively oppose the conferral of third-party beneficiary rights conferred on them through the Berlin West Africa Convention and the 1890 Anti-Slavery Convention, they can be regarded as beneficiaries of the Third-Party Doctrine. As stated by Anonymous of the OvaHerero Genocide Committee “the Berlin West Africa Conference was hypocritical, it was about us, without us”.⁴⁷²

4.9 The potential liability of German multinational companies in the commission of the Herero/Nama genocide?

There is no question that the genocide of Hereros during 1904 constitutes a grave injustice and an important event in the history of crimes against humanity.⁴⁷³ The Herero have several options before them in seeking reparations for this crime, yet each is fraught with obstacles. Among these options is, Namibia could bring a case against companies investing and trading in Namibia during the time it was occupied by South Africa. In 1971, the ICJ issued an Advisory Opinion

⁴⁷⁰ Ibid.

⁴⁷¹ Anderson, supra note 145, ibid at 1184.

⁴⁷² Anonymous. Personal interview. (22 March 2012).

⁴⁷³ Cooper, A. D. (2006) “Reparations for Herero Genocide: Defining the limits of International Litigation”. Oxford Journal for African Affairs, 106/422, Oxford University press p.113-126.

declaring South Africa's continued presence in Namibia to be a violation of international law. This ruling stipulated that commercial enterprises involved with Namibia could face legal actions from a future legitimate government in Namibia. US President Richard Nixon M. Nixon accepted this decision, and his administration made a public notice to the American corporate community that the US government did not sanction their economic activities in Namibia and would not defend them in any action by the future Namibian government.⁴⁷⁴ Such an action has the advantage that the ICJ has already accepted the potential liability of the hundreds of companies that supported South Africa's occupation of Namibia. Furthermore, the United Nations Council for Namibia issued Decree No. 1 in 1974 asserting that the natural resources of Namibia were under the protection of the UN and the international community, and therefore, exploitation and depletion of these resources during South Africa's illegal occupation was a violation of international law.⁴⁷⁵

Cooper⁴⁷⁶ further states that a potential downside to this potential claim is that some of these companies continue to invest in Namibia and are consequently working with the government to advance the economic growth of the territory. But it remains a possibility that the Namibian government, given its special circumstances arising from previous ICJ rulings, could seek an advisory opinion from the ICJ regarding the culpability of specific transnational corporations whose investments in apartheid Namibia impeded the enforcement of international law. He further enumerates that it remains problematic whether the ICJ in The Hague would accept a

⁴⁷⁴ For more information on the American Economic interest in Namibia see Cooper, A. (1982) *Economic Power and Political Influence in Namibia, 1700-1982*. (Westview Press, Boulder CO, 1982)

⁴⁷⁵ Cooper, *ibid* at 124.

⁴⁷⁶ *Ibid*.

claim by Namibia against transnational corporations, since the latter are not states that would otherwise be parties to World Court litigation. In *Holy See v. Starbright Sales Enterprises* (1994), the Philippines Supreme Court ruled that the Holy See was a sovereign entity with immunity from lawsuits arising from a dispute with a commercial interest. However, in a potential case litigated by the Namibian government, this principle would not apply, since the sovereign plaintiff is the party seeking the judicial proceeding.⁴⁷⁷

4.9.1 Multinational Companies and Historical injustices

In addition to their claim against Germany, the Hereros are currently involved in a case against two large corporations, *Deutsche Bank* and *Woermann Line (now known as Deutsche-Afrika Linien GmbH & Co)*.⁴⁷⁸ The Hereros allege that the two corporations committed violations of international law, crimes against humanity, forced labour, genocide, and slavery.

According to Ratner,⁴⁷⁹ the doctrine of state responsibility has recognized that governments may act through a variety of actors in breaching its international obligations. International decision

⁴⁷⁷ *The Holy See v. Starbright Sales Enterprises Inc. (Philippines Supreme Court, 1994)*, 102 ILR 163, at 169–70.

⁴⁷⁸ *Herero Peoples' Reparations Corp. v. Deutsche Bank AG (S.D.N.Y. Filed Feb. 13, 2003)* (alleging violations of international law, crimes against humanity, genocide, slavery, and forced labour seeking relief under the Alien Tort Claims Act, 28 U.S.C. 1350). This case is a companion case to one filed by the Hereros in Washington, D.C., at the same time as the case against the Federal Republic of Germany. The Washington D.C. District Court case, which was affirmed on appeal, was dismissed against Woermann Line for lack of personal jurisdiction and against Deutsche Bank for failure to present a valid cause of action since “the District Court of Columbia Circuit does not appear to recognize a private right of action for violations of international law.” *Herero People's Reparation Corp. v. Deutsche Bank AG, Civ. No. 01-1868, slip op. (D.C.C. June 31, 2003)*; *Herero People's Reparations Corp. v. Deutsche Bank AG*, 370 F. 3d 1192 (2004), cert denied 125 S. Ct. 508 (2004) (holding that (1) federal claims were present, (2) plaintiffs' claims were not too insubstantial and frivolous to support federal jurisdiction, and (3) the doctrine of universal jurisdiction could not supply basis for exercise of personal jurisdiction). However, the Hereros have filed a case in New Jersey District Court, where Woermann Line has agreed to submit jurisdiction.

⁴⁷⁹ Ratner, S.R. (2001) ‘Corporations and Human Rights: A Theory of Legal Responsibility’. 111 *Yale. L.J.* 443 in *International Human Rights and Humanitarian law*. Treaties, cases and analysis. (2006). Cambridge University Press.

makers evaluate the connections between these actors and the government to determine whether the state has violated international law. The reverse applies as well, that is, the ties between the government and the TNE⁴⁸⁰ play a major role in determining the obligations of the corporation. Where an enterprise has close ties to the government, it has prima facie a greater set of obligations in the area of human rights.

Ratner⁴⁸¹ further enumerates that governments, international courts, and others have devoted significant time to appraising the legal implications of a state serving as a principal to private agents. A key issue here is the degree of control that a government must have over private actors in order to be responsible for their actions. In the *Nicaragua case*, the International Court of Justice held that the United States could be held responsible for the acts of the Contras in their war against the Nicaraguan government in the 1980s only if it had “effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”⁴⁸² Deriving duties of corporations from the law’s recognition that states are responsible for their complicity in illegal acts by other states, and that individuals are responsible for complicity in illegal acts by other individuals, must be done with care. Ratner posits that at a minimum, both the state (civil) and individual (criminal) standards clearly recognize such responsibility as long as the underlying activity is illegal and the state or individual involved in the illegal activity has, in some sense, knowledge of it. With respect to corporate activity, this view would suggest that if a business materially contributes to a violation of human rights by the

⁴⁸⁰ Transnational Enterprises.

⁴⁸¹ Ratner, supra note 479, p.133.

⁴⁸² Ibid, at pp.133-34.

government with knowledge of that activity, it should be held responsible as a matter of international law, putting it conversely, that a business has a duty not to form such complicit relationships with governments.

The decision in *Farmer-Paellman v. Fleetboston Corp*⁴⁸³ and similar suits have renewed the common law claim for reparations by identifying corporations that have kept record of their involvement in slavery and naming corporations as concrete defendants. By naming corporate defendants, as compared to governmental or individual defendants, the suits have eliminated an enormous weakness in past efforts, namely the lack of an identifiable and culpable defendant.

According to Ryngaert,⁴⁸⁴ the reluctance to criminally prosecute corporations for historical injustices under international law may, at least partly, be explained by the fact that not all legal

⁴⁸³ *Farmer-Paellman v. Fleetboston Corp.* No. 1:02-cv-1862 (NGG) (E.D. N.Y. filed Apr. 3, 2002). In this case Plaintiff and the proposed plaintiff class are African American slave descendants whose ancestors were forced into slavery from which defendants unjustly profited. Defendants, including, but not limited to Fleetboston Financial Corporation, Aetna Inc., CSX, through their predecessors-in-interest, conspired with slave traders, with one another and other entities and institutions to commit and knowingly facilitate crimes against humanity and to profit illicitly from slave labor. Named plaintiff asserts human rights violations under international law, conversion, and unjust enrichment claims. Plaintiff alleges that Fleetboston is the successor-in-interest to Providence Bank, which a Rhode Island businessman founded. She alleges that Providence Bank lent substantial sums to the businessman, thus financing and profiting from slave trading; that the businessman owned ships that embarked on several slaving voyages and was prosecuted in federal court for participating in the international slave trade after it had become illegal under federal law. Plaintiff alleges that CSX is a successor-in-interest to numerous predecessor railroad lines that were constructed or run, at least in part, by slave labor. Plaintiff claims that Aetna's predecessor-in-interest insured slave owners against the loss of their human chattel and that Aetna knew the horrors of slave life; Aetna's knowledge was evident in a rider whereby it declined to pay the premiums for slaves who were lynched, worked to death, or committed suicide. Plaintiff seeks class certification, an accounting, constructive trust, restitution, disgorgement, and compensatory and punitive damages arising out of defendants' past and continued wrongful conduct.

⁴⁸⁴ Ryngaert, C. (2010) "Finding Remedies for Historical Injustices: Dealing with Organizations and Corporations". *Working Paper No. 38-January 2010*. Leuven Centre for Global Governance Studies.

systems provide for corporate criminal liability.⁴⁸⁵ Most if not all, legal systems provide for corporate civil or tort liability, however, and it is uncontroversial that, technically speaking, historical injustices may be considered as wrongful acts of which the victim may initiate a claim for compensation. As an International Civil Court does not yet exist, such claims against corporations can only be filed in domestic courts.

Ryngaert⁴⁸⁶ further argues that since the 1990s, the U.S. legal system has become the forum of predilection of victims of historical injustices seeking reparations for a variety of reasons. Most such claims are based on the so-called ‘Alien Tort Claims Act’ (ATCA) or ‘Alien Tort Statute’,⁴⁸⁷ by virtue of which foreign victims of ‘violations of the law of nations’ can file a civil claim in U.S. federal courts. Many well-known multinational corporations have been targeted under the ATCA by victims and their representatives. The claims relate to the great wrongs of humanity’s recent history, such as the apartheid in South Africa between 1948 and 1994,⁴⁸⁸ the use of slave labour from the Herero nation in German-controlled South West Africa (Namibia) between 1890 and 1915, the U.S. Army’s use of the defoliant Agent Orange during the Vietnam War between 1961 and 1971,⁴⁸⁹ or Israel’s demolition of homes in the Occupied Palestinian

⁴⁸⁵ See e.g. Clapham, A. (2008) Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups. 6 *Journal of International Criminal Justice* 899, 902 (stating the “the exclusion of non-natural persons can be seen as the consequence of a ‘rule of procedure’ rather than the inevitable result of application of international criminal law”).

⁴⁸⁶ *Ibid.*, pp. 899-903.

⁴⁸⁷ 28 U.S.C. Section 1350.

⁴⁸⁸ *Khukumani v. Barclay National Bank, Ltd; Ntsebeza v. Daimler Chrysler Corp.*, 504 F. 3d 254 (2nd Cir. 2007) (plaintiffs arguing in A00166 that ‘apartheid would not have occurred in the same way without the participation of corporate defendants’ and claiming reparations amounting to USD 400 billion).

⁴⁸⁹ *In Re Agent Orange’ Prod. Liab. Litg.*, 373 F. Supp. 2d 7 (E.D.NY. 2005).

Territories.⁴⁹⁰ But they also relate to lesser known abuses perpetrated by repressive governments teaming up with corporations to develop the oil, gas and mining industry, e.g., in the Nigerian Delta (Shell),⁴⁹¹ Sudan (Talisman Energy),⁴⁹² or Myanmar/Burma (Unocal).⁴⁹³

4.9.2 Corporations and International Legal Personality

According to Duruigbo⁴⁹⁴ those challenging the international legal orthodoxy excluding corporations and other non-state actors as subjects of international law have adopted a multi-prolonged strategy. The first approach is to reject it as an offspring of nineteenth century positivism, which should not displace relevant natural law principles of earlier origins.⁴⁹⁵ Secondly, the challengers dismiss the orthodox view as obsolete,⁴⁹⁶ a relic of a past era which is

⁴⁹⁰ *Corrie v. C aterpillar*, 503 F. 2d 974 (9th Cir. 2007).

⁴⁹¹ *Wiwa v. Royal Dutch Petroleum Co.*, 2009 WL 1574869 (S.D.N.Y. April 23, 2009); *Wiwa v. Shell: The Settlement*, ASIL Insight, September 9, 2009, Vol. 13, Issue 14.

⁴⁹² *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, U.S. Court of Appeals for the Second Circuit, August Term, 2008, Docket No. 07-0016-cv, 2 October 2009.

⁴⁹³ *Doe I v. Unocal Corp.*, 395 F. 3d 932 (9th Cir. 2002).

⁴⁹⁴ Duruigbo, E. (2008) 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges.' Northwestern University School of Law Volume 6, issue 2 (Spring 2008) *Northwestern Journal of International Human Rights*. Available online at: <http://www.law.northwestern.edu/journals/jihr/v6/n2/2/Duruigbo.pdf>.

⁴⁹⁵ For a discussion along these lines with a focus on individuals, see Stephens, B. (2002) *Individuals Enforcing International law: The Comparative and Historical Context*, 52 *DEPAUL L. REV.* 433, 445-50. Professor Stephens decries the positivist hijack of international law in the nineteenth century and the dismissal by positivists of "the moral, natural law basis of international obligations, only recognizing the validity of agreements accepted by states, the only actors recognized as subjects of international law."

⁴⁹⁶ *Int'l Fed'n for Hum. Rts., Position Paper, Comments to the Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Feb. 22, 2006, at 7, (Mar. 15, 2006), available at <http://www.fidh.org/IMG/pdf/business442a.pdf>; INT'L Peace Academy and FAFO & AIS, *BUSINESS AND INTERNATIONAL CRIMES: ASSESSING THE LIABILITY OF BUSINESS ENTITIES FOR GRAVE VIOLATIONS OF INTERNATIONAL LAW: EXECUTIVE SUMMARY* 14-15 (Dec. 1, 2004), available at http://www.fafo.no/liabilities/exe_summary.pdf.

irrelevant today because it is incompatible with modern realities.⁴⁹⁷ They, therefore, can be seen as seeking to liberate humanity from the thrall of such a historical artifact of a concept. Opponents of the current paradigm that places MNCs outside the realm of international law have also attacked it by arguing for the abandonment of the subject-object dichotomy.⁴⁹⁸ They call for its replacement with the notion of *participants*, a term that is broad enough to encompass states, international organizations, individuals, private non-governmental groups and MNCs.⁴⁹⁹

Another weapon in the arsenal of attacks is the contention that international legal personality follows attribution of rights and duties.⁵⁰⁰ A final argument to hold corporations accountable is that corporations are international legal persons because they already, in certain international settings, possess rights and duties and the capacity to enforce those rights and duties.⁵⁰¹ Okeke⁵⁰² states that a credible case could be made that MNCs, at least to a certain extent, are subjects of international law: they have rights, possess duties and are empowered to vindicate their rights. Ascription of international legal personality to the MNC has been anchored partly on the volume, transboundary nature and international effect of multinational corporate activity, coupled with

⁴⁹⁷ Higgins, R. (1994) *Problems and Process: International law and how we use it*. Oxford: Oxford University Press. pp.48-49.

⁴⁹⁸ Allot, P. (1990) *Eunomia, New Order for a New World*. Oxford: Oxford University Press. pp. 372-73.

⁴⁹⁹ De Schutter, O. (n.d) *The Challenge of Imposing Human Rights Norms on Corporate Actors*, in *Transnational Corporations and Human Rights*. pp. 33-34.

⁵⁰⁰ De Schutter, *ibid* at pp.33-34.

⁵⁰¹ Jagers, N. (2002) *Corporate Human Rights Obligations: In Search of Accountability*. Intersentia Printing Press.p.36.

⁵⁰² Okeke, C.N. (2003) *Controversial Subjects of Contemporary International Law: An Examination of the New Entities of International Law and their Treaty-Making Capacity*. Rotterdam: Rotterdam University Press. p. 19.

access to international legal processes.⁵⁰³ Charney⁵⁰⁴ posits that MNCs possess international legal personality and have had an enduring participation in the international legal system. As examples of such participation, he offers the fact that public international law has been applied to contracts concluded between MNCs and state entities, as well as it has been applied to contracts concluded between MNCs and state entities, as well as corporate access to forums established under international conventions or by intergovernmental organizations for the settlement of disputes.

He further observes that certain principles of public international law, by virtue of their broad acceptance, have become binding on the international operations of MNCs. MNCs are bound by principles of international law when advising international organizations and lobbying national governments on pertinent international issues.⁵⁰⁵ Ijalaye⁵⁰⁶ similarly states that MNCs can now be regarded as selective subjects of international contract for contracts entered into with states. International arbitral practice provides some support to this position. For instance, in the *Libya-Oil Companies Arbitration*,⁵⁰⁷ Umpire Dupuy applied international law in a dispute between a

⁵⁰³ Wallace, D. C. (1983) *Legal Control of the Multinational Enterprise*. The Hague: Martinus Nijhoff Publishers. pp. 1-38.

⁵⁰⁴ Charney, J. (1983) "Transnational Corporations and Developing Public International Law," *Duke L.J.* 748, 764 (Stating that the responsibility of corporations to international legal rules appear to be linked to the extent of their ability to be direct participants in the international legal process).

⁵⁰⁵Charney, *ibid*, at pp. 748-764.

⁵⁰⁶ Ijalaye, D. A. (1978) *The Extension of Corporate Personality in International Law*. Oceana Publications (Dobbs Ferry, N.Y.) pp.221-23.

⁵⁰⁷ Dolzer, R. (1997) "Libya Oil Companies Arbitration", in *3 Encyclopedia of Public International law*". pp.215-216.

state and a private oil company, viewing international law as part of the governing law of the contract in addition to Libyan law.

Lauterpacht⁵⁰⁸ looking at the dispute settlement mechanisms in investor-state arbitration, reasons that these developments have “put an end to the myth, so prevalent until the end of the Second World War that only States are subjects of international law and that individuals cannot possess rights or bear duties directly under international law”. He thus contends that corporations, by virtue of these agreements and other modern developments in the international system, have been shown to possess international legal personality.⁵⁰⁹

4.9.3 Complicity: Aiding and Abetting

Most often corporations are not the direct actors but rather accomplices in human rights violations. The concept of complicity is anchored in the legal concept of aiding and abetting under international criminal law.⁵¹⁰ It implies that actors bear responsibility if they assist, encourage or morally support a crime before, during or after the execution and if they know about the crime intention of the party conducting the abuse.⁵¹¹ In particular there are three different understandings of complicity which range from a narrow to a wider interpretation:

⁵⁰⁸ Lauterpacht, E. (1997) ‘International Law and Private Foreign Investment,’ 4 *IND. J. Global Legal Studies*. 259, 274.

⁵⁰⁹ Lauterpacht *ibid*, at pp. 259-274.

⁵¹⁰ Ruggie, J. (2008). ‘Promotion and Protection of all Human rights, civil, political, economic, social and cultural rights, including the right to development’. Clarifying the concepts of “sphere of influence” and “complicity”. Human Rights Council. Eighth Session, Item 3. Available online at: www2.ohchr.org/english/bodies/hrcouncil/.../A-HRC-8-5.doc.

⁵¹¹ Druigbo, *supra* note 494, at p.3.

direct, beneficial and silent complicity.⁵¹² *Direct complicity* is the narrowest form of complicity and assigns responsibility to actors for harm doing if they knowingly contribute to or assist in violations. It implies a direct activity (assistance) in human rights violations. The state and the corporation act in concert.⁵¹³ Since the mid-1990s, corporations are increasingly taken to court under the Alien Tort Claims Act for human rights violations to which they were connected.⁵¹⁴

A wider interpretation of complicity is *beneficial complicity* according to which corporations are responsible for human rights violations if they benefit from them without having initiated or influenced the action leading to the abuse⁵¹⁵. Finally, the widest interpretation of complicity is silent complicity which builds on the assumption that corporations are responsible for human rights violations even if they do not benefit from them, have not initiated or influenced them.⁵¹⁶ Silent complicity captures those cases “when a business follows laws or regulations of a government to act in ways that support its activities that intentionally and significantly violate people’s human rights”.⁵¹⁷ Within the context of this broad understanding of complicity, business as usual is not an excuse for corporate silence regarding human rights abuses.⁵¹⁸ Coca Cola’s operations in South Africa during the Apartheid regime can be regarded as silent complicity. The

⁵¹² Ibid, at p.4.

⁵¹³ Ibid, at pp.3-4.

⁵¹⁴ Ibid, at pp.3-5.

⁵¹⁵ Clapham, A., and Jerbi, S. (2001). ‘Categories of corporate complicity in human rights abuses.’ *Hastings International and Comparative Law Review*, 24, 339-349.

⁵¹⁶ Clapham, ibid, at pp.339-349.

⁵¹⁷ Brenckert, G.C. (2009) ‘Google, human rights, and moral compromise’. *Journal of business Ethics*, 85, 453-478.

⁵¹⁸ Chandler, G. (1999). “The new corporate challenge: Globalization requires companies to do more than seek higher profits”. *Time Magazine*, 1999, p. 68.

company dominated the soft drink market in South Africa with a market share of 90 percent. The company did not produce any product integral to the oppressive regime's policies but its mere presence in the country was criticized for being a silent approval of the regime.⁵¹⁹

In the aforementioned Herero lawsuit against three German companies, *Deutsche Bank AG*, *Terex Corporation (Orenstein und Koppel)*, and *Woermann Line (Deutsch Afrika Linien)*, were charged, along with the Federal Republics of Germany (in the person of its Foreign Minister, Joschka Fischer). The introductory paragraph of the charge reads as follows:

The Federal Republic of Germany ('Defendant' or Germany'), in a brutal alliance with German multi-national corporations, relentlessly pursued the enslavement and the genocidal destruction of the Herero Tribe in Southwest Africa, now Namibia. Foreshadowing with chilling precision the irredeemable horror of the European Holocaust only decades later, the Defendant formed a German commercial enterprise which cold-bloodedly employed explicitly sanctioned extermination, the destruction of tribal culture and social organization, concentration camps, forced labour, medical experimentation and the exploitation of women and children in order to advance their common financial interests.⁵²⁰

4.10 Comparative study of other cases of reparation claims for historical injustices.

It is imperative to note that the Herero/Nama reparation claim against Germany for historical injustices is not a unique one. Currently, dozens of lawsuits have been lodged in different courts of the world demanding reparations in one way or the other. There is speculation that should any of these lawsuits yield a positive result, there is a high possibility that it will open up the "Pandora's" box for similar claims. In the same vein I will investigate in detail other claims for reparations for historical wrongs may be successful than the others.

⁵¹⁹ Payne, O. (1986). "The Coca Cola South Africa Connection." *The Washington Afro-American*. p.5.

⁵²⁰ Gewalt, J. B. (n.d) *Imperial Germany and the Herero of Southern Africa: Genocide and the Quest for Recompense*. Available online at <https://openaccess.leidenuniv.nl/bitstream/handle/1887/4853/asc-1293873-001.pdf?sequence=1>

4.10.1 Successful claims for reparations in comparatives

(1) Jews

In 1952 in line with what was agreed during the Conference on Jewish Material Claims Against Germany, the West German government began paying reparations to Jewish survivors of the Holocaust.⁵²¹ The reparations were based on the acts of the Nazis forcing Jews to surrender their jewelry and other valuables, freezing their bank accounts, disinheriting their survivors, and subjecting them to collective levies and fines.⁵²² Additionally, tens of thousands of Jews abandoned their homes, businesses, and properties by fleeing Nazi persecution, and the Jews that stayed were concentrated in ghettos and other segregated areas. Plans for German compensation to individuals, as well as the Jewish people as a whole, were formulated prior to the end of World War II. The Luxembourg Agreements of 1952 became the basis of an unprecedented⁵²³ piece of legislation known as *Wiedergutmachung*, whereby money was claimed by the State of Israel and claims organizations on behalf of victims who had immigrated to other countries.

(2) Why were Jewish claims for genocide committed by the German government under Nazi rule successful?

In September 1945, shortly after the end of the Second World War, Jewish leader Chaim Weizmann, submitted a memorandum on behalf of the Zionist Jewish Agency to the

⁵²¹ The Conference on Jewish Material Claims Against Germany, Inc., was set up in New York by various Jewish organizations in order to coordinate their efforts to secure reparation from Germany.

⁵²² Westley, R. (1998) 'Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?' 40 *B.C.L. REV.* 429, 453-54.

⁵²³ For the first time in the history of a people that has been persecuted, oppressed, plundered and despoiled for hundreds of years in the countries of Europe a persecutor and despoiler has been obliged to return part of his spoils and has even undertaken to make collective reparation as partial compensation for the material losses.

governments of the United States, the Soviet Union, Britain and France “demanding reparations, restitution and indemnification due to the Jewish people from Germany”.⁵²⁴

A major provision of the treaty of May 1952 by which the United States, Britain and France granted “sovereignty” to the Federal Republic of West Germany obligated the new state to make restitution.⁵²⁵ West Germany Chancellor Konrad Adenauer laid the emotional and psychological groundwork for the reparations program when he solemnly declared to the Bundestag on September 27, 1951:

The Federal government and the great majority of the German people are deeply aware of the immeasurable suffering endured by the Jews of Germany and by the Jews of the occupied territories during the period of National Socialism...in our name, unspeakable crimes have been committed and they demand restitution, both moral and material, for the persons and properties of the Jews who have been so seriously harmed...⁵²⁶

The representative of the Jewish organizations was the “Conference on Jewish Material Claims Against Germany, Inc.” or “Claims Conference”, a body formed for the sole purpose of demanding maximum reparations from the German people. The 20 member organizations represented Jews in the United States, Britain, Canada, France, Argentina, Australia and South Africa. Jews in the Soviet Union, Eastern Europe and the Arab countries were not represented.⁵²⁷

⁵²⁴ Weber, M. (2008) ‘West Germany’s Holocaust Payoff to Israel and World Jewry’. *Institute of Historical Review*. p.1. Available online at http://www.ihr.org/jhr/v08p243_Weber.html

⁵²⁵ Ibid, at pp. 1-5.

⁵²⁶ For more on Konrad Adenauer’s speech on Jewish on reparations see Engert, S. (2010) “A Case Study in “Atonement”: Adenauer’s Holocaust Apology”. *Israel Journal of Foreign Affairs* IV : 3 (2010). Available online at: <http://israelcfr.com/documents/4-3/4-3-7-StefanEngert.pdf>

⁵²⁷ Lewan, K. (1975) ‘Journal of Palestine Studies’, pp.48-49.

(3) The Luxembourg agreements of 1952

According to Heilig⁵²⁸ the 1952 adoption of the Luxembourg Agreements was wholly novel. The adoption:

Was a revolutionary idea. In no previous case in history had a State paid indemnification directly to individuals, most of them not even its own citizens. Countries paid indemnification when they were defeated in war; the fact is as old as human history itself. But that a government should pay for crimes committed, not only to its own citizens, which was unusual enough, but to hundreds of thousands of non-citizens, or to another state, the State of Israel, which was not even in existence at the time the crimes were committed.....was truly a revolutionary idea.⁵²⁹

The agreement between Germany and the Jewish people was seen as one of the most important cornerstones of the newly formed German Federal Republic as well as an important element in the future relationship between Germany and the Jewish people. Because Germany viewed reparations to victims as a moral obligation as well as pragmatic policy, Germany provided reparations to victims who were in no political position to enforce such payments.⁵³⁰ From the Jewish perspective, the Luxembourg Agreements represented recognition by the Jewish community of the German attempt to atone for its crimes, but in no way symbolized forgiveness of them.⁵³¹

⁵²⁸ Heilig, K. (2012) 'From the Luxembourg Agreement to today'. p. 5. Vol. 20, Issue 1. *Berkeley Journal of International Law*. Available online at: <http://scholarship.law.berkeley.edu/bjil/vol/iss1/6>

⁵²⁹ Robinson, H. (1964) *Ten Years of German Indemnification*.p.8.

⁵³⁰ Sagi, N. (1980). *German Reparations: A History of the Negotiations*. Hebrew University. Magness press p. 3.

⁵³¹ Barkan, E. (2000) *The Guilt of Nations: Restitution and Negotiating Historical Injustices*. Publisher: W. W. Norton & Company; 1st edition p. 24.

Peresztegi⁵³² states that what made the case of Holocaust survivors so successful is not that the Holocaust survivors and their representatives did not argue about every possible detail, but exactly the opposite. They argued about all the details while bearing in mind that such arguments could go on as long as they did not jeopardize the final settlement. During these arguments, many of which continued for over 50 years, new details, necessary for any decision emerged. Persistence and perseverance are what made the representatives of Jewish organizations successful, they brought their claims over a period of 50 years, and they never gave up. The often-criticized use of high power attorneys, who charged exorbitant fees, also contributed to their success. They provided invaluable legal help, not to mention the equally important media coverage. Holocaust survivors were relatively well organized; they were also brave and had knowledge of how to apply the US legal system.⁵³³

Peresztegi⁵³⁴ concedes that she cannot provide a detailed legal argument as to why certain compensation cases are successful and others are not. All of the recent agreements were settled out of court. Therefore, legal principles were only applied at their minimum. She further opines that there exists a fragile connection between international law and justice and politics. In international negotiations, many interests collide. The victims want full and just reparation, the wrongdoer would argue for the minimum, and the facilitators of the negotiations often have some other interest that they would like to prevail, which may be no more than demonstrating their ability to broker an agreement between opposing parties. There is also consideration for the

⁵³² Peresztegi, A. (n.d) Reparation for Holocaust-Era Human Rights Violations. pp.1-5. Available at <http://web.ceu.hu/jewishstudies/yb03/13peresztegi.pdf>

⁵³³ Ibid, at pp.142-143.

⁵³⁴ Ibid, at pp.143-144.

real needs of the victims and the economic power of the wrongdoer. Peresztegi⁵³⁵ concludes that law has to balance all interests so that the fund and/or the assets offered by the wrongdoer is allocated in the most efficient way to facilitate not only just and meaningful reparation but also reconciliation.

(3) Equating the successful Jewish claims for reparations with that of the Hereros

In campaigning for reparations, Chief Kuaima Riruako is using two very powerful symbols: the land question in Namibia and the Holocaust.⁵³⁶ The land question in Namibia locates the claim for restitution and reparation in the African postcolonial context, whereas the reference to the Holocaust places the claim in the centre of a global debate on justice and history, on human rights and memory.⁵³⁷ Kruger⁵³⁸ states that colonial history is a history of colonial violence and exterminatory warfare. What makes the Namibian case so special today is not the wars' length, intensity, or aim. Forced labour, a scorched-earth policy, the expropriation of land and cattle, and the dehumanization of the enemy were part and parcel of most colonial wars in Africa. But the Herero restitution claim does not compare the war of 1904 with other colonial wars and massacres, but explicitly connects the war with the Holocaust.

⁵³⁵ Ibid, at pp. 144.

⁵³⁶ Kruger, G. (2005) 'Coming to terms with the past'. GHI BULLETIN NO.37. University of Zurich (positing that the land question is symbolic because the redistribution of land-even if possible-would never solve the social and economic problems in the country.

⁵³⁷ For more information on the complex land issue in Namibia see Hunter, J. (2004) "Who should own the land? Analyses and Views on Land Reform and the Land Question in Namibia and Southern Africa." Konrad-Adenauer-Stiftung and the Namibia Institute for Democracy. Available online at http://www.nid.org.na/pub_docs/land_reform_namibia.pdf

⁵³⁸ Kruger, supra note 536 at p. 46.

The indictment reads for instance: “foreshadowing with chilling precision the irredeemable horror of the European Holocaust only decades later the defendants and imperial Germany formed a German commercial enterprise which cold-bloodedly employed explicitly-sanctioned extermination....”⁵³⁹ This argument is not only questionable because it reduces the colonial massacre to a prelude of the Holocaust, but it is also inconsistent. According to Kruger “One might well ask why the colonial commercial enterprise should destroy the base of its success: the African workforce. The background to Von Trotha’s policy of extermination was not an economic consideration, as many German colonial settlers had already realized to their alarm during the war; instead, his approach was based on the ideology of a “race war” that could only end with a “final solution.”⁵⁴⁰

Melber et al⁵⁴¹ constructs a direct connection between settler colonialism and Nazi dictatorship.⁵⁴² Even personal continuities between German colonialism and National Socialism are stressed. A striking example of this construction/argumentative pattern reads as follows: “As a warrior and colonial administrator, Heinrich Goering left a potent legacy upon which his son Hermann would build”. And Franz von Epp, who took part in the German-Herero War, “acted as a direct human conduit through which German South West African ideas and methods flowed

⁵³⁹ *The Herero people’s Reparations Corporation, : a District of Columbia Corporation v Deutsche Bank AG, Terex Corporation a.k.a. : Orenstein-KoppelWoermann Line*. Superior Court of the District of Columbia, Civil Division, Case No. 01-0004447, 21. Available online at: http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/Herero_Genocide_Case_Complaint_06-09-2001.pdf

⁵⁴⁰ Kruger, supra note 536, at pp.46-47.

⁵⁴¹ Reinhart Kobler/Henning Melber, “Völkermord und Gedenken. Der Genozid an den Herero und Nama in DSWA”, in *Journal of Namibian Studies*, History, Politics and Culture. 2007. Otjivanda Presse. Essen.

⁵⁴² Ibid, at p. 110.

into the highest echelons of the Third Reich.”⁵⁴³ Finally, even the brown uniform shirts of the SA are said to have been inspired by the uniforms of the Imperial *Schutztruppe*, the protection troops.⁵⁴⁴

German colonialism, paradigmatically seen as a predecessor of National Socialism, is thus credited with the mental, even practical, preparation of the Holocaust. Headings, such as “From Africa to Auschwitz”, underscore this paradigm uncritically:

The German terms *lebensraum* and *Konzentrationslager*, both widely known because of their use by the Nazis, were not coined by the Hitler regime. They were minted years earlier in reference to German South West Africa.⁵⁴⁵

(4) Japanese Americans

Reparations paid for World War II internment of Japanese Americans is one of the most cited examples of monetary compensation paid to individual citizens for past injustices and unreasonable hardship.⁵⁴⁶ In 1988, U.S. President Ronald Reagan signed the Civil Liberties Act⁵⁴⁷ into law, formally acknowledging the injustices associated with the U.S. internment of Japanese Americans during World War II.⁵⁴⁸

⁵⁴³ Madley, B. (2005) ‘From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe’, *European History Quarterly*, 35, 429-464 (451).

⁵⁴⁴ Ibid at 452.

⁵⁴⁵ Ibid at 429.

⁵⁴⁶ See Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988) (codified at 50 U.S.C. app. 1989 (2010)).

⁵⁴⁷ Ibid.

⁵⁴⁸ The Civil Liberties Act of 1988 includes the following provisions: an apology for the evacuation, relocation, and internment of such citizens and permanent resident aliens; a provision for a public education fund to educate citizens about the internment; a call for restitution to interned Japanese Americans; a call for restitution to Aleut residents of

Federal courts have both rejected and accepted claims for Japanese American reparations from World War II internment. In 1944, the Supreme Court approved of the internment in *Korematsu v. United States*, citing that the military possessed constitutional authority.⁵⁴⁹ However, the issue reopened in the 1980s when a class action case, *Honri v. United States*, sought monetary compensation for internment losses.⁵⁵⁰

(5) Rosewood Massacre Victims

In 1923 violence erupted at Rosewood, near Cedar Key, when whites came looking for a black man who had allegedly assaulted a married white woman. At least six blacks and two whites were killed, and the town's homes, churches and stores were torched. The claim against the state was based on a lack of action by the Levy County sheriff, Governor Cary Hardee and other government officials to protect Rosewood residents' lives and property.⁵⁵¹

In 1995, the State of Florida paid each of the 9 survivors of the 1923 Rosewood Massacre \$150,000, and paid each of the 145 descendants of residents between \$ 375 and \$ 22,535. The

the Pribilof Islands and the Aleutian Islands west of Unimak Island for injustices suffered while those Aleut residents were under U.S. control during World War II; discouragement of the occurrence of similar injustices and violations of civil liberties in the future; and a call to make any declarations of concern by the United States regarding violations of human rights in other nations more credible.

⁵⁴⁹ *Korematsu v. United States*, 323 U.S. 214, 218 (1944).

⁵⁵⁰ *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), AFFIRMED IN PART, 782 f. 2d 227 (D.C. Cir. 1986), vacated, 482 U.S. 64 (1987), on remand, 847 F.2D 779 (D.C. Cir. 1988).

⁵⁵¹ Jerry Fallstrom 'Senate Ok's \$2.1 Million For Rosewood Reparations'. Sun Sentinel April 9, 1994. Available online at: http://articles.sun-sentinel.com/1994-04-09/news/9404080701_1_rosewood-descendants-rosewood-bill-reparations

reparations, believed to be the only reparations paid to African-Americans, were paid as redress to a black community that was burned to the ground by whites in 1923.⁵⁵²

(6) Italian reparations to Libya

In August of 2008, Silvio Berlusconi, the then Italian Premier bowed symbolically before the son of ‘Umar al-Mukhtar, hero of the Libyan resistance to Italian colonial rule. After this symbolic gesture Italy and Libya signed a treaty in which it was agreed that Italy will pay \$ 5 billion as reparations for the harm done to Libya by colonial rule.⁵⁵³

(7) Other successful reparation payments

Australia gave its indigenous Aborigines more than ninety-six thousand square miles of land in 1976 after having appropriated it during European settlements in the 18th and 19th centuries.⁵⁵⁴

Four years later, Canada compensated Japanese Canadians for World War II internment, and granted land to indigenous Canadian peoples after thirteen years of negotiations.⁵⁵⁵ In early 2008 the then Australian Prime Minister apologized to the country’s indigenous aborigines for a range of injustices committed to them for many decades by successive governments.⁵⁵⁶

⁵⁵² Yamamoto, K. (1998) ‘Racial Reparations: Japanese American Redress and African American Claims’, 40 *B.C. L. REV.* 477, 490.

⁵⁵³ Gazzini, C. (2009) “Assessing Italy’s Grande Gesto to Libya”. *Middle East Report*. p.1 available online at: <http://www.merip.org/mero/mero031609>

⁵⁵⁴ Robinson, L. “Righting a Wrong; Among Black Americans, The Debate is Escalating over Whether an Apology for Slavery is Enough,” *SEATTLE POST-INTELLIGENCER*, June 29, 1997, at E1.

⁵⁵⁵ *Ibid*, at pp.1-2.

⁵⁵⁶ Tim Johnston. ‘Australia apologizing to aborigines’. *New York Times*, 03 November 2003. Available online at: http://www.nytimes.com/2008/02/13/world/asia/13iht-13aborigine-copy.9995732.html?_r=0

A number of agreements have been made under the British Foreign Compensation Act of 1950; lump sum settlements were made to Bulgaria, Poland, Hungary, Egypt and Romania, and a tribunal was set up to make awards from the sums made available, so as to do justice to thousands of claimants whose property had been expropriated. A US-Iran Claims Tribunal was set up in 1981 for a similar purpose.⁵⁵⁷ Japan has made reparation payments to South Korea for acts committed during the period of invasion and occupation by Japan. The UN Security Council passed a resolution, binding in international law, requiring Iraq to pay reparations for its invasion of Kuwait.⁵⁵⁸

4.10 Pending reparation claims

(1) The Case for United States Reparations to African-Americans

The African American reparations movement is commonly perceived as a recently developed political and litigation strategy resting on the shoulders of the lawsuits and legislation designed to achieve justice for Japanese American World War II internees and victims of the Holocaust. African -American reparations arguments, however, began long before both these movements, growing out of a larger debate over the place of African- Americans in American society as well as the proper response of both whites and African Americans to slavery, Jim Crow, and the persistence of racism from the founding of that country until the present.⁵⁵⁹

⁵⁵⁷ Staff Writer “For Whom the Bell Tolls: The legal Basis for the African Reparations Claim”. *New African Magazine*, December 1999. Available online at <http://www.africaasia.com/icpubs/na/dec99/nacs1204.htm>

⁵⁵⁸ *New African Magazine*, *ibid*, p.5.

⁵⁵⁹ Ogletree, C.J. (undated) ‘Repairing the Past: New Efforts in the Reparations Debate in America’ p.285. Available online at: http://www.law.harvard.edu/students/orgs/crcl/vol38_2/ogletree.pdf

Reparations activism has a history of over 130 years in the United States since the defeat of slavery in 1865.⁵⁶⁰ Five waves of reparations activism since the emancipation of the black slaves have been identified: (1) the Civil War Reconstruction era, (2) the turn of the century, (3) the Garvey Movement, (4) the Civil Rights movement of the late 1960s and early 1970s, and (5) the post-Civil Liberties Act era beginning in 1989.⁵⁶¹ The redress sought has included claims for back pay of slave wages; land acquisition and educational benefits; monetary compensation for abuse, indignities suffered, forced indoctrination into a foreign culture, and destruction of the family unit; relocation to Africa or designated lands; relief from income tax obligations; and the once-promised forty acres and a mule, or equivalent value.⁵⁶²

The most famous statement of the arguments against African-American reparations comes from David Horowitz, who took out a series of advertisements in college newspapers in the spring of 2001. His advertisement, entitled, “Ten Reasons Why Reparations for Slavery are a Bad Idea and Racist too,” established the basis for the arguments against reparations.⁵⁶³

Horowitz’ ten points are:

1. There is no single group clearly responsible for the crime of slavery
2. There is no one group that benefited exclusively from its fruits

⁵⁶⁰ Ozer, supra note 417, at pp.488-92.

⁵⁶¹ Verdun, V. (1993). ‘If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans,’ 67 *TUL. L. REV.* 597, 600.

⁵⁶² Chisolm, T.E. (1999) “Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations”, 147 *U. PA. L. REV.* 677, 684.

⁵⁶³ Brophy, A. L. (2004) ‘The Cultural War over Reparations for Slavery’, 53 *DePaul Law Review* 1201-12. Available online at: <http://www.Academic.udayton.edu/race/02rights/repara29c.htm>

3. Only a tiny minority of white Americans ever owned slaves, and others gave their lives to free them
4. America today is a multi-ethnic nation and many Americans have no connection (direct or indirect) to slavery
5. The historical precedents used to justify the reparations claim do not apply, and the claim itself is based on race not injury
6. The reparations arguments are based on the unfounded claim that all African-American descendants of slaves suffer from the economic consequences of slavery and discrimination.
7. The reparations claim is one more attempt to turn African-Americans into victims. It sends damaging message to the African-American community.
8. Reparations to African-Americans have already been paid.
9. What about the Debt Blacks Owe to America?
10. The reparations claim is a separatist idea that sets African-Americans Against the Nation that gave them freedom.⁵⁶⁴

Reparations lawsuits have almost as long a history as reparations activism.⁵⁶⁵ The first known reparations lawsuit, *Johnson v. MacAdoo*⁵⁶⁶ was filed in 1915. The plaintiff, Cornelius J. Jones,

⁵⁶⁴ For more on Horowitz's assertions see Horowitz, D (2001) 'Ten Reasons Why Reparations for Blacks is a Bad Idea for Blacks-and Racist Too.' available online at: <http://dfamily.com/philosophy/teach/hswtl/extras/ten-reasons-why-reparations-is-bad-idea-for-blacks.pdf>

sued the United States Department of the Treasury claiming that the government's taxation of raw cotton produced by slave labour of African Americans.⁵⁶⁷ The D.C.Circuit Court of Appeals found against Jones, holding that the government was immune from suit on sovereign immunity grounds.⁵⁶⁸

Moreover, in 1995, the Ninth Circuit affirmed the dismissal of two suits, brought by African American plaintiffs against the U.S. government seeking \$100 million in reparations.⁵⁶⁹ The court of appeals held in *Cato v. United States*, to date only case examining the issue, that: (1) the United States possesses sovereign immunity to such claims; (2) that the claims are time-barred, (3) claimants lack standing to pursue such claims since they themselves were never slaves.⁵⁷⁰

Other potential and pending reparation claims are the Armenians against Turkey⁵⁷¹ and the so-called Korean comfort women case against Japan⁵⁷².

⁵⁶⁵ Ogletree, supra note 559 at p.294.

⁵⁶⁶ *Johnson v. MacAdoo* 45 App. D.C. 440 (1916), aff'd, 244 U.S. 643 (1917).

⁵⁶⁷ Ibid. at p. 441.

⁵⁶⁸ Ibid.

⁵⁶⁹ *Cato v. United States*, 70 F. 3rd 1103 (9th Cir. 1995).

⁵⁷⁰ *Cato Case*, ibid., at pp.1107-1111.

⁵⁷¹ For more on the Armenian case for reparations against Turkey see Cohan, S. (2005) 'A brief history of the Armenian Genocide'. Social Education 69(6), ©2005 National Council for the Social Studies p. 333–337. Available online at:

<http://www.genocideeducation.org/files/A%20Brief%20History%20of%20the%20Armenian%20Genocide.pdf>

⁵⁷² For more on the case of comfort women see Lee, S.R. (2003) Comforting comfort women: who can make Japan pay?. University of Pennsylvania. Available online at:

[https://www.law.upenn.edu/journals/jil/articles/volume24/issue2/Lee24U.Pa.J.Int'lEcon.L.509\(2003\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume24/issue2/Lee24U.Pa.J.Int'lEcon.L.509(2003).pdf)

4.11 Pandora's Box?

There have been concerns from several scholars that the success of the Herero claims for reparations may open a Pandora's Box for similar cases in some parts of Africa by communities that suffered under colonial rule. According to Kustaa,⁵⁷³ in terms of international law, the case that stands out as a precedent is that of the Nazi holocaust in which the Nazis annihilated six million Jews.

Thompson further states that the Jews have done a great service to the world by exposing genocide simply as a crime against humanity, so that never again should it be repeated. They organized themselves and challenged their oppressors and brought them before the tribunals of the world and received not only acknowledgement of their guilt, but also approximately \$60 billion so far and running, in reparation for resettlement of the descendants of those who suffered.⁵⁷⁴

Reparations for colonial atrocities in Africa are now, for perhaps the first time, a serious topic of discussion in European politics⁵⁷⁵. The claims of the *Mau Mau* veterans from Kenya, and the descendants of the victims of the Herero Genocide in Namibia make headline news. The British government was recently forced, effectively, to declare itself guilty, but not liable, for its

⁵⁷³ Kustaa, O. (2004) Reparations for Herero People of Namibia in Global Perspective: Focus on North American Reparations Cases and International Law.p.15. Available online at: http://www.mfdemocracy.org/yahoo_site_admin/assets/docs/Reparations_for_Herero.83205451.pdf

⁵⁷⁴ Thompson, D.(n.d) 'The Debt Has Not Been Paid; The Accounts Have not Been Settled.' Available online at: <http://web.africa.ufl.edu/asq/v2/v2i4a4.htm>.

⁵⁷⁵ Brett, P. (2012) 'European Governments and African demands for reparations'. p.1. Available at <http://blogs.lse.ac.uk/ideas/2012/01/european-governments-and-african-demands-for-reparations>

repression of the uprising.⁵⁷⁶ In other words, it, like its German counterpart, is concerned about opening the infamous ‘Pandora Box’, and creating a legal precedent which would precipitate an avalanche of claims from every corner of its former colonial world. Four elderly Kenyans have been told they can sue the Foreign Office for their alleged torture by British colonial authorities 50 years ago. The English High Court said the group could seek damages over their treatment during the 1950s and 60s.⁵⁷⁷ The court rejected claims from the government’s lawyers that too much time had elapsed since the seven-year insurgency in the 1950s, and it was no longer possible to hold a fair trial. The same court had in the previous year rejected the government’s claim that the three claimants should be suing the Kenyan government as it had inherited Britain’s legal responsibilities on independence in 1963.

The foreign office acknowledged that the ruling had “potentially far-reaching legal implications”, and said it was planning to appeal. Among those who are known to have been watching the case closely are a number of veterans of the *Eoka* insurgency in Cyprus in the 1950s. There may also be claims from Malaysia, where large numbers of people were detained during the 12-year war with communist insurgents and their supporters that began in 1948. Relatives of 24 unarmed rubber plantation workers massacred by British troops are currently fighting through the British courts for a public inquiry.⁵⁷⁸

⁵⁷⁶ Mau Mau uprising: Kenyans win UK torture ruling-. Available at <http://www.bbc.co.uk/news/uk-19843719>

⁵⁷⁷ Dominic Casciani, (2011) Mau Mau Kenyans allowed to sue the UK. BBCNEWS. Available online at <http://www.bbc.co.uk/news/uk-14232049>

⁵⁷⁸ “Mau Mau veterans win right to sue British government”. *The Guardian*. Available at: <http://www.guardian.co.uk/world/2012/oct/05/maumau-court-colonial-compensation-torture>

Immediately after the *Mau Mau* ruling, a lawsuit against Britain, France and the Netherlands was instituted by 14 Caribbean countries demanding what could be hundreds of billions of pounds in reparations for slavery. Around 175 years after Britain freed its last slaves in the West Indies, an alliance of Caribbean nations is demanding to be repaid for the 'awful', lingering legacy of the Atlantic slave trade.⁵⁷⁹

Caricom, a group of 12 former British colonies together with the former French colony Haiti and the Dutch-held Suriname, believes the European governments should pay – and the UK in particular.⁵⁸⁰ It has hired the British law firm Leigh Day, which recently won compensation for hundreds of Kenyans tortured by the British colonial government during the Mau Mau rebellion of the 1950s. Caricom has not specified how much money they are seeking but senior officials have pointed out that Britain paid slave owners £20 million when it abolished slavery in 1834. That sum would be the equivalent of £200 billion today.⁵⁸¹

Moreover, Anderson⁵⁸² argues that a settlement agreement with the German government or eventual success in U.S. or international courts could have precedential value for claims brought by other groups to redress similar wrongs committed under colonial rule. The *Damara*⁵⁸³ could

⁵⁷⁹ Leonard T, and Tomlinson, S. '14 Caribbean nations sue Britain, France and Holland for slavery reparations that could cost hundreds of billions of pounds'. *Mail online*. 10 October 2013. Available online at: <http://www.dailymail.co.uk/news/article-2451891/14-Caribbean-nations-sue-Britain-Holland-France-slavery-reparations.html>

⁵⁸⁰ *Mail online*, *ibid* at. p. 1.

⁵⁸¹ *Mail Online*, *ibid* at pp. 1-2.

⁵⁸² Anderson, *supra* note 145 at p.1187.

⁵⁸³ One third of the Berg *Damara* were killed during the German colonial administration's attempted annihilation of the Herero as a result of the "German troops" inability to tell them from the Herero".

sue the German government for their slaughter during the German-Herero War. The descendants of the *Maji-Maji* revolt could sue Germany for their brutal suppression in former German East Africa (now Tanzania) from 1905 to 1908.⁵⁸⁴ The Congolese could sue Belgium for perpetrating genocide in Congo under King Leopold's reign.⁵⁸⁵ The Bunyoro could sue the United Kingdom for war crimes in Uganda during the 1890s. The Algerians may sue the French for atrocities committed by the latter during the former's war of liberation. Recently an opposition MP in the Namibian National Assembly expressed his desire to see his own tribe demand reparations for the loss of lives they suffered during the Battle of Namutoni in 1904⁵⁸⁶. The Battle of Namutoni was one of the few skirmishes that involved the German colonial troops and the Owambos who were largely unaffected by the 1904-1908 war.

4.12 Other possible avenues that the Herero/Namas can approach to seek redress

With the Herero lawsuit against the German government and companies being dismissed in the US by the District Court of Columbia, and the Namibian government still not fully pronouncing itself on the matter, the Hereros are still more determined to seek redress somewhere. As stated by Festus Muundjua "we will explore all possible avenues in our endeavour to hold the German government accountable for their past deeds". In light of the above, several avenues have been mooted by the Hereros to take their case, below is a detailed analysis of such avenues. As stated

⁵⁸⁴ The German suppression of the rebellion led to the "murder of approximately 200, 000 in the region." Paulette Reed-Anderson, *Rewriting the footnotes: Berlin and the African Diaspora* 18 (2000). A Bibliography of sources from direct observers of the *Maji Maji* Rebellion is available at the *Maji Maji* Bibliography Project, at <http://www.mhundi.de/maji/Bibliography.html>

⁵⁸⁵ See Hochschild, A. (1998) *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonialism*. University of Michigan. Houghton Mifflin Harcourt Trade & Reference Publishers.

⁵⁸⁶ Staff Reporter "Now Moongo wants Aandonga reparations". *The Namibian Sun*, 14 March 2013.

by Sarkin,⁵⁸⁷ one of the major questions facing litigants to pursue ex-colonial powers responsible for colonial gross human rights violations (including the Herero in the future) is which court or tribunal to approach to hear their claims. In the past, this has proven to be the biggest obstacle to getting resolution of these claims, as relatively few courts will hear such historical matters. While plaintiffs could approach the courts in their own countries, pursuing states in the domestic courts has not been possible for both political and legal reasons. Legally, pursuing a state in the courts of another country is extremely difficult, as many states have rules that make it virtually impossible to bring these types of cases. Sarkin further notes that politically, the relationship between the previous colonial power and the formerly colonized, now independent state is typically one of dependency and aid. Hence, the government of the latter is usually extremely reluctant to engage in anything that might sabotage the economic relationship between the two states and will do all it can to avoid such cases.⁵⁸⁸

4.12. 1 Procedures for claiming reparations

According to Shelton,⁵⁸⁹ taking together the traditional law of state responsibility, human rights law, and international criminal law, claims for reparations can be presented in one of five ways (1) The state of nationality of the victims could bring a claim on their behalf against the state responsible for the wrong; (2) the victims may be able to bring a claim against the responsible state in an international human rights tribunal; (3) victims may bring claims against the

⁵⁸⁷For more on avenues to be pursued for seeking reparations for historical wrongs see Sarkin, *supra* note 14 at pp.163-177

⁵⁸⁸ Sarkin, *ibid*, at pp.163-177.

⁵⁸⁹ For more on procedures for claiming reparations see Shelton, D. (2005). *Remedies in International Human Rights Law*. New York: Oxford University Press. pp.239-251

responsible state in national judicial or administrative bodies; (4) victims may present their claims against the individual perpetrators in an international criminal court; and (5) the victims may make a claim against the individual perpetrators in a national civil or criminal proceeding.

In nearly all instances, reparations are first claimed through administrative or judicial procedures within a state. International law requires that such procedures be followed before a case can come to an international body. This is known as the *doctrine of exhaustion of local remedies*. Those who have been wronged may sue the wrongdoer for civil remedies or seek to have the perpetrator prosecuted according to criminal law. If the wrongdoer is an agent of the state, a special law and/or process may govern or restrict the right to sue.⁵⁹⁰

(1) Who may claim redress?

When human rights violations occur, the victim of the violation has the right to seek redress. The designation of a 'victim' is an international question and at a minimum includes the individual whose right or freedom has been violated. It generally is not necessary that the victim be a national or resident of the defendant state. When the victim is deceased or the injury has consequences for other persons, third persons, third parties also may be characterized as victims of the violation.⁵⁹¹

⁵⁹⁰ Minnow, M. (1998). *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston: Beacon Press

⁵⁹¹ *Case 186/87, Cowan v. Tesor Public* [1989] *E.C.R* (Community law prevents a member state from making the award of state compensation for harm suffered in that state subject to the condition that the victim hold a residence permit or be a national of a country with which that state has a reciprocal agreement).

(2) Individual Victims

The Human Rights Committee of the United Nations has indicated that family members may be considered victims of violations perpetrated on one of their relatives. In the case of a disappearance, the Committee found that the mother of the disappeared was a victim, stating:

The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The mother has a right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter, in particular Article 7.⁵⁹²

(3) Survivability of Claims

The European Court of Human Rights has held that an award of pecuniary damages to the direct victim can be recovered by heirs and successors if the applicant dies during the proceedings, while non-pecuniary or moral damages do not survive unless the court deems it necessary to advance the cause of justice.⁵⁹³

(4) Allocation of the Award

Survivability of claims has led human rights tribunals into questions of choice of law regarding inheritance and succession. The Inter-American Court has tended to develop its own law rather than deferring to the national law of the state concerned or any expressed wishes of a decedent through a will or testament. According to the Court, in the case of international human rights

⁵⁹² *Comm. No. 107/1981, Quintana v. Uruguay, U.N. GAOR, Hum. Rts. Comm., 38th Sess., Supp. No. 40, at 216, U.N. Doc. A/38/40 (1983), para. 14*

⁵⁹³ *X v. United Kingdom* (1982) 55 Eur. Ct. H.R. (ser. A) at paras. 18-19 (Art. 50); *Deumeland v. Germany* (1986) 100 Eur. Ct. H.R. (ser. A) at para. 97.

violations, beneficiaries need not be heirs under the law of the state where the violation occurred to be considered as such by the Court.⁵⁹⁴

(5) Group claims

The issue of whether or not groups can claim remedies for damages to the collective body is a controversial issue in international human rights law. The rights of various groups are given specific protection in human rights texts.⁵⁹⁵ Most common is protection for the family. In the Inter-American system, *Castillo Paez* was the first instance where the Court awarded patrimonial damage to the family group itself.⁵⁹⁶ But larger entities find guaranteed rights in some treaties. International Labour Organisation Convention No. 169 protects the rights of indigenous peoples, in particular in their lands, resources, environment, and culture. In the *Aloeboetoe* case, the Inter-American Commission for Human Rights argued before the Inter-American Court that the *Saramaca* tribe suffered direct moral damage and was entitled to compensation. According to the Commission:

In the traditional Maroon society, a person is not only a member of his own family group, but also a member of the village community and of the tribal group. In this case, the damages suffered by the villages due to the loss of certain members of its group must be redressed. Since the villagers, in practice, constitute a family in the broad sense of the term...they have suffered direct emotional damages as a result of the violations of the Convention.⁵⁹⁷

⁵⁹⁴ *Velasquez-Rodriguez v. Honduras (Compensatory Damages)* (1990) 7 Inter-Am. Ct. H.R. (ser. C), para 54.

⁵⁹⁵ Shelton, *supra* note 589, at 246.

⁵⁹⁶ *Castillo Paez Case (Reparations)*, 43 Inter-Am. Ct.H.R. (ser. C), para. 76.

⁵⁹⁷ *Aloeboetoe v. Suriname* (1994) 15 Inter-Am. Ct. H.R. (ser. C), para. 49.

4.12.2 Domestic Namibian Courts

The domestic Namibian Courts have been cited as a possible avenue for the OvaHerero to take their case. This is due in line with the international doctrine of exhaustion of local remedies which the author will discuss in detail in due course.

With regard to reparation sought in national courts, the Hague Convention (IV) of 1899 and Additional Protocol I require that compensation be paid but do not indicate whether only States are recipients or also individuals, nor do they specify the mechanism for reviewing claims for compensation.⁵⁹⁸

Neither humanitarian law as a whole nor any specific article imposes an obligation states to give direct effect in their national legal systems to the provisions of IHL norms could be invoked by individuals before national courts in the same was as national norms. Where a state does choose to do so, the precise article may be invoked directly before national courts. For other States there is the possibility of integrating the substance, if not the actual articles, of IHL into domestic law. But where neither course is adopted, victims are left empty-handed. This seems to be the more common situation worldwide.⁵⁹⁹

Despite indications to the contrary in the drafting history of Article 3 of the 1907 Hague Convention IV, national courts have thus far regularly rejected individual claims for compensation based on that provision. Courts have found most of the IHL rules to be public law

⁵⁹⁸ Rule 150. A State responsible for violations of International humanitarian law is required to make full reparation for the loss or injury caused. Available online. http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter42_rule150 accessed: 7 April 2012

⁵⁹⁹ Zegveld, L. (2003) 'Remedies for victims of violations of International Humanitarian Law'. Vol. 85 No. 851, September 2003, p. 503. Available online at: http://www.ikrk.org/eng/assets/files/other/irrc_851_zegveld.pdf

norms applying to states only and not applicable in litigation between injured individuals and the state. For instance, Japanese courts have continuously dismissed such individual claims in cases relating to violations of IHL during World War II. These cases include the so-called “comfort women” cases.⁶⁰⁰ The plaintiffs, women survivors of military sexual slavery all claiming legal state compensations and apology from the government, argued that individual victims have a right to claim compensation under international customary law and under Article 3 of the Hague Convention applicable at the time of World War II. The Japanese courts denied the existence of such a right both under the said Article 3, and under customary international law. In the case of *Leo Handel et al. v. Andrija Artukovic*,⁶⁰¹ a US District Court rejected a claim for compensatory and punitive damages based on the 1907 Hague Convention IV and the 1929 Geneva (Prisoners of War) POW Convention. The defendant, the Commissioner of Public Security and Internal Administration and subsequent Minister of the Interior for the Independent State of Croatia, a puppet State of the German Reich, was allegedly responsible for the deprivations of life and property suffered by the Jews in Yugoslavia during World War II. In his official capacity, he oversaw and implemented Croatia’s solution to “the Jewish question”. According to the Court:

A treaty which provides that signatory States will take measures through their own laws to enforce its provisions evinces an intent that the treaty not to be self-executing. As a result, the Geneva Convention does not offer plaintiffs a private right of action....⁶⁰²

⁶⁰⁰ Two out of the ten “comfort women” claims made against the government of Japan in Japanese courts, seeking an apology and State compensation, were dismissed by the Supreme Court of Japan. The eight other cases have been dismissed by the Lower Court. Other such cases are those of English and Dutch prisoners of war. See the correspondent’s reports in *Yearbook of International Humanitarian Law: Hideyuki Kasutani and Seigo Iwamoto. “Japan”* in *Yearbook of International Humanitarian Law*, Vol.2. 1999, pp. 389-390

⁶⁰¹ US District Court for the Central District of California Us 601 f. Supp. 1421.

⁶⁰² Ibid.

The Court then turned to The Hague Convention and held that, although there is no provision in The Hague Convention for implementation into national law, other obstacles would necessitate a rejection of the provision's self-executing power:

The consequences of implying self-execution compel the conclusion that the treaty is not a source of rights enforceable by an individual litigant in domestic court. Recognition of a private remedy under the Convention would create insurmountable problems for the legal system that attempted it; would potentially interfere with foreign relations; and would pose serious problems of fairness in enforcement...⁶⁰³

Individual claimants before national courts have indeed encountered a number of obstacles in trying to obtain compensation on the basis of Article 3 of the Hague Convention (IV), although no court has explicitly ruled out such a possibility under contemporary international law.⁶⁰⁴ In the *Shimoda* case in 1963, for example, the Tokyo District Court held that individuals did not have a direct right to compensation under international law, and considerations of sovereign immunity precluded proceedings against another state before Japanese courts.⁶⁰⁵

Until the 1990s, German courts generally considered that the 1953 London Agreement on German External Debts had postponed the question of indemnification of individuals, though it did not exclude the possibility of granting compensation once the issue of reparations to States had been settled.⁶⁰⁶ As a result, after the coming into force of the 1990 Treaty on the Final

⁶⁰³ Ibid.

⁶⁰⁴ See, e.g., Germany, Administrative Court of Appeal of Munster, Personal Injuries case (ibid. 190); Germany, Federal Supreme Court, Reparation Payments case (ibid. 191).

⁶⁰⁵ Japan, Tokyo District Court, *Shimoda case*.

⁶⁰⁶ See Germany, Federal Supreme Court, *Reparation Payments case*.

Settlement with Respect to Germany (“Two-Plus-Four-Treaty”),⁶⁰⁷ the German courts held that, in general, they were no longer prevented from dealing with the question of compensation to individuals⁶⁰⁸. As a consequence, Germany’s Constitutional Court in the Forced Labour case in 1996 stated that there did not exist a rule of general international law preventing the payment of compensation to individuals for violations of international law.⁶⁰⁹ However, in the *Distomo* case in 2003, Germany’s Federal Supreme Court stated that, owing to a concept of war as a “relationship from State to State” as it existed during the Second World War, a State which was responsible for crimes committed at that time was only liable to pay compensation vis-à-vis another State but not vis-à-vis the individual victims. According to the Court, international law conferred upon States the right to exercise diplomatic protection of their nationals, and the right to claim compensation was the right of the state “at least for the period in question”, that is during the Second World War.⁶¹⁰

According to Spitzer,⁶¹¹ the notion of paying reparations to atone for gross crimes and atrocities against individuals began after Second World War. While there was controversy around the calls for monetary compensation for the crimes for the Holocaust, in the end, Germany “voluntarily

⁶⁰⁷ Treaty on the Final Settlement with Respect to Germany (“Two-Plus-Four-Treaty”) between the Federal Republic of Germany, the German Democratic Republic, France, the USSR, the United Kingdom and the United States of America, 12 September 1990.

⁶⁰⁸ See, e.g., Germany, Constitutional Court, *Forced Labour Case* (cited in Vol. II. Ch.42, 192); Germany, Federal Supreme Court.

⁶⁰⁹ *Germany, Constitutional Court, Forced Labour case 1 BvR 1804/03 (Official Case No) ILDC 439 (DE 2004) (OUP reference).*

⁶¹⁰ Germany, Constitutional Court, *Distomo Case*.

⁶¹¹ Spitzer, R.M. ‘The African Holocaust: Should Europe Pay reparations to Africa for Colonialism and Slavery?’. In *Vanderbilt Journal of Transnational Law*, October 2002, pp. 3-29.

agreed to compensate the survivors of the Holocaust under the leadership of Chancellor Konrad Adenauer, who believed the German people owed a moral duty to compensate the Jewish people for their material losses and suffering.” When asked by this author, what makes the Jewish claims against the German government for the Nazi atrocities different to that of the Hereros and Namas? Festus Mundjuua replied “this is racism at its worst. Jews were successful simply because they are white, and Hereros and Namas are black and African”⁶¹². Such sentiments have been expressed by many members of the affected groups that the author of this research encountered.

Spitzer⁶¹³ further argues that similarly there were laws on the books in the USA that granted American citizens interned during times of war the right to claim reparations from the government afterwards. He cites the Civil Liberties Act of 1988 which grant \$ 1.2billion to the families and descendents of those Japanese Americans imprisoned in internment camps during the Second World War. He further mentions the case of the Aleut Indians of Alaska who were relocated from their traditional villages during the Second World War. It has been said that this case is very relevant to the Herero claims because the reparations were granted to both those villagers who had been caused by the relocation not only affected the communities at the time but also that these events were still having effects four or five decades later. Such a precedent is very useful to the Herero case, which is being pursued by the descendants of the victims of the crimes, rather than the victims themselves. Much like the *Aleut case*⁶¹⁴, the subsequent

⁶¹² Muundjua, F. Personal interview. (March 16, 2012,).

⁶¹³Spitzer, supra note 611, at p. 11-27.

⁶¹⁴ *United States Court of Appeals, Federal Circuit*. - 702 F.2d 1015, March 17, 1983.

generations have suffered greatly from the legacy of the genocide, which decimated not only the Herero population, but also their stores of wealth, cattle, and land.

According to the precedent set by the *Aleut case*, the Herero may be entitled to compensation. As stated by Sarkin, the Herero case for reparations is made stronger by the fact that the concept of reparations paid to individuals did, in fact, exist before 1945. In *Ware v. Hylton*⁶¹⁵ the US Supreme Court acknowledged the rights of individuals to compensation for acts that happened in wartime.

4.12.3 The doctrine of exhaustion of local remedies

According to Waugh⁶¹⁶ exhaustion of remedies in international law requires that a claimant seek relief first in the forum where the harm occurred. There are numerous rationales for this requirement. They include the notion that “the citizen going abroad is presumed to take into account the means furnished by local law for the redress of wrongs.” The exhaustion requirement is also supported by the principle that national courts and administrative organs should be granted deference by foreign states.⁶¹⁷ Finally, exhaustion allows the host State a sufficient opportunity to remedy the injury.⁶¹⁸

⁶¹⁵ *Ware v. Hylton*, 3 U.S (3 Dall.) 199 (1796).

⁶¹⁶ Waugh, R. (2010) ‘Exhaustion of Remedies and the Alien Tort Statute.’ p. 2. Available online at http://www.boalt.org/bjil/documents/Waugh_FINAL.pdf

⁶¹⁷ See, e.g., Amerasinghe, C.F, (2000) *Local Remedies in International Law* (2d ed., 2004) (“Respect for the sovereignty of the respondent or host State constitutes the foundation of the rule that local remedies must be exhausted”).

⁶¹⁸ See Mummery, D.R. (1964) “The Content of the Duty to Exhaust Local Judicial Remedies”, 58 *American Journal for International Law*. 389, 391; *Interhandel (Switzerland v. United States)* 1959 I.C.J. 6, 27 (Mar. 1959) (“It

Exhaustion of local remedies under international law has generally, however, been found to include an exception for those cases where seeking relief under local remedies would be futile or impossible.⁶¹⁹ Various human rights instruments also incorporate an exhaustion requirement following the international law standard. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides that “the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law”.⁶²⁰ Similarly, Article 41 of the American Convention on Human Rights requires that “the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law”.⁶²¹ Finally, the International Covenant on Civil and Political Rights refers to exhaustion of local remedies “in conformity with the generally recognized principles of international law.”⁶²²

Amerasinghe⁶²³ notes that given the difference in situations generating a breach of an international norm, it becomes easier to see how the rule that local remedies must be exhausted will operate in each case. Where the alleged initial wrong is attributable to the State, the

has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system”)

⁶¹⁹ *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* 713 (1987) (“under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged”)

⁶²⁰ The European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 35 (1), Nov. 4, 1950, 213 U.N.T.S.221.

⁶²¹ American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

⁶²² International Covenant on Civil and Political Rights, art. 41 (1) (c), opened for signature Dec. 16, 1966, 999 U.N.T.S

⁶²³ Amerasinghe, C.F. (1990) *Local Remedies in International Law*. Cambridge. Grotius Publications Limited.pp.45-51.

exhaustion of local remedies will take place in respect of the wrong and will be concerned with rectifying that wrong. The rule would then require that remedies be exhausted up to the highest level. The whole of the dispute settlement procedure becomes the substance of the rule in the case. It would be important to recognize that consequent upon the exhaustion of remedies, it is sufficient merely that the initial wrong remain unrequited or inadequately redressed for the violation of international law to persist and generate an international responsibility that can be subjected to an international claim or to diplomatic protection. There is clearly no requirement that in the process of settling the dispute anything such as a “denial of justice” in any appropriate sense by the organ or organs responsible for settling the dispute be committed, it being understood that the initial violation of international law, which continues to remain unredressed and therefore subsists, should not and cannot be described as a denial of justice.⁶²⁴

The violation of international law which subsequently takes place may usually be described as a denial of justice. In whatever terms it is described, and whether it is, for example, an act of the executive interfering with the judicial process or an improper act of the judiciary which renders the process tainted or a manifestly unjust judgment pertaining to the substance of the case, this malfunctioning of the judicial process is the international wrong which generates international liability.⁶²⁵ If any such malfunctioning of the judicial process, which is to be determined according to the norms of international law, may conveniently be described as a denial of justice, then the international wrong generating liability is properly called a denial of justice.⁶²⁶ This is,

⁶²⁴ Amerasinghe, *ibid* p. 46.

⁶²⁵ Amerasinghe, *ibid*, p. 47.

⁶²⁶ Where denial of justice is so defined as not to cover all the substantive obligations of the host State connected with the administration of justice, it is possible that the international wrong generating international liability will be

however, not the end of the matter. The rule of local remedies is further applicable to this international wrong and the claimant must in accordance with the requirements of that rule, exhaust the means of local redress in redress in respect of that so-called denial of justice up to the highest level.⁶²⁷

In *Jawara v. The Gambia*⁶²⁸, the complainant who was the former Head of State of the Gambia alleged that after the military coup of July 1994 that overthrew his government, there was blatant abuse of power by the military junta which was alleged to have incited a reign of terror, intimidation and arbitrary detention. Furthermore, the complainant alleged that the abolition of the Bill of Rights as contained in the 1970 Gambia Constitution by Military Decree No, 30/31 ousting the competence of the courts to examine or question the validity of any such decree violated the provisions of the Charter of the African Court on Human and Peoples Rights. As regards exhaustion of local remedies, the African Commission Human and Peoples Rights remarked, among other things, that:

Considering the fact that the regime at the material time controlled all the arms of government and had little regard for the judiciary, as was demonstrated by its disregard of a Court Order...it would be reversing the clock of justice to request the complainant to attempt local remedies...

an act or omission relating to the administration of justice which is not described as a denial of justice but which is, nevertheless, connected with the administration of justice.

⁶²⁷ See *Ziat, Ben Kirran Case (GB v. Spain 1924)*, 2 UNRIAA at p. 731 per arbitrator Huber. However, this is only the general principle.

⁶²⁸ *Jawara v The Gambia Comm. Nos. 147/95 and 149/96 (2000)*.

4.12.4 Regional and International remedies

(1) International Committee of the Red Cross

The ICRC claims to be the primary international body for the protection of war victims. It is broadly mandated to protect and assist war victims and to act as promoter and guardian of IHL. It is specifically empowered “to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law”.⁶²⁹

Moreover, Zegveld notes that while the ICRC’s entire focus is on seeing that IHL is applied, it has no official implementation procedures at its disposal and its mandate and activities certainly do not provide victims with a right to remedy. It does not have the means to make enforceable determinations with regard to claims of individuals who allege that they are victims of such violations, nor is that its purpose. Instead, it operates through confidential discussions with governments. In the case of the Herero claims, the passage of time also will determine whether it is a possible avenue to seek redress.

(2) Claims commissions

In recent years, there has been a proliferation of tribunals and commissions that have been set up as a result of international or internal armed conflicts to provide remedies for claims from victims of violations of IHL.⁶³⁰ Two known examples are the United Nations Compensation

⁶²⁹ Statutes of the International Red Cross and Red Crescent Movement, adopted by the International Conference of the Red Cross (1986, amended 1995), Art. 5 (2) (c). Text unchanged in Statutes of the ICRC (1998) Art. 4 (1) (c).

⁶³⁰ Wuhler, N. “The role of ad hoc claims commissions”, in Collection of Documents, pp. 50-58.

Commission (UNCC) and the Eriteria-Ethiopia Claims Commission (EECC), whose jurisdictional bases include specific references to violations of IHL.⁶³¹ For the purpose of this research, the author will concentrate on the former. The UNCC was established in 1991 by the UN Security Council to implement Iraq's liability, "under international law, for any direct loss, damage, including environmental damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations. The vast majority of the 2.6 million claims received are from individuals."⁶³²

Zegveld⁶³³ states that, typically claims commissions provide for restitution of or return into property, or monetary compensation. In a number of programmes the individual claimants have the right to initiate proceedings. The claimants either submit their claimants directly to the respective commission (the United Nations Compensation Commission (UNCC) and/or the Eriteria-Ethiopia Claims Commission (EECC),). The reason that in the latter cases the governments file the claims is administrative rather than a legal conclusion that individuals have no rights of their own to compensation.⁶³⁴

It is important to note that mass claims mechanisms are the most appropriate for victims of mass crimes committed in setting where it is difficult to resolve claims on a case by case basis and where usually limited resources are available. In view of the specific nature of IHL,

⁶³¹ Other examples are the mixed arbitral tribunals set up under the rules of peace treaties after the First World War and similar tribunals set up after the Second World War. These tribunals had the purpose of giving compensation to individuals for losses suffered during the wars.

⁶³² Approximately 7,000 claims have been filed by corporations and around 300 by governments. See the UCC'S website: www.uncc.ch

⁶³³ Zegveld, *supra* note 599, at 522.

⁶³⁴ See for example, Report of the Secretary-General on the establishment of the UNCC, UN Doc. S/22559. para. 21.

compensatory measures in particular are likely to be problematic. By individualizing claims of reparation for violations of IHL that occur in the midst of armed conflict and are sometimes committed on a large scale, possibly as part of a plan or policy, the capacities of an international body may be overwhelmed.⁶³⁵

(3) African Commission on Human and Peoples Rights

According to Shelton⁶³⁶the African Charter on Human and Peoples Rights, which entered into force on 21 October 1986,⁶³⁷ obliges states parties to recognize the rights, duties, and freedoms contained in the Charter and to adopt legislative or other measures to give effect to them. The Charter provides for an African Commission on Human and Peoples Rights whose functions are to ‘promote human and people’s rights and ensure their protection in Africa’⁶³⁸as well as to monitor state compliance with the provisions of the Charter. To sum up, the Commission has three responsibilities. First, it promotes human rights by conducting studies, organizing symposia, preparing studies region wide violations, and assisting states parties in the drafting of national legislation. Second, the Commission can issue advisory opinions. Third, it investigates cases submitted by both individuals and states parties.⁶³⁹

⁶³⁵ For corresponding considerations with regard to grave human rights violations, See also *Leo Handel v. Andrija Artukovic*, US Distr. Cal. 91985).

⁶³⁶ Shelton, *supra* note 589, at p. 219.

⁶³⁷ African Charter on Human and Peoples’ Rights, adopted 27 June 1981, entered into force 21 Oct. 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, reprinted in (1982) 21 *International Legal Matters*. 58.

⁶³⁸ Art. 30.

⁶³⁹ Martin, et al, *supra* note 350, at p.19.

However, critics of the African Commission on Human and Peoples Rights have pointed out that the Commission has been reluctant to award damages or reparations, even in cases where it determined that the Charter has been violated. In *Henry Kalenga v. Zambia*,⁶⁴⁰ the detained person was held without trial by order of the President. Despite this violation, the Commission closed the file on this matter after the person was released, claiming his release and the fact that they received no further correspondence on the case were sufficient. In the case of *Louis Mega Mekongo v. Cameroon*,⁶⁴¹ the Commission found that the complainant was entitled to reparations for the prejudice he had suffered, but that the valuation of the amount of such reparations should be determined in accordance with the laws of Cameroon.

According to Martin et al⁶⁴² beginning in 1994, the Commission began discussions about establishing an African Court of Human and Peoples Rights, eventually resulting in the OAU's adoption of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court of Human and Peoples' Rights. The Protocol entered into force in 2004.

The African Commission, states parties to the Protocol, and African intergovernmental organizations can bring a claim based on violations of any international human rights instrument that has been ratified by the state party concerned. Furthermore, the Court can exercise its discretion in granting leave to individuals and NGOs to submit petitions directly to the Court if

⁶⁴⁰ *Henry Kalenga v. Zambia*, African Commission on Human and Peoples Rights, Comm. No. 11/88, 1994

⁶⁴¹ *Embga Mekongo Louis v. Cameroon*, African Commission on Human and Peoples' Rights, Comm. No. 59/91, 1995.

⁶⁴² Martin, et al, supra note 350, at pp. 19-21.

the state party agrees. The Court can award damages and other provisional protective measures and injunctive relief. It remains to be seen whether historic human rights violations can be brought before the court. However, the real question is who the defendant will be: a multinational, a former colonial power, or a present African government.

(4) South African Courts

Cooper⁶⁴³ opines that the one case that would eliminate any question of standing is for the Namibian government to sue South Africa in the ICJ, or another tribunal sanctioned by the court, for damages resulting from the latter's illegal occupation of Namibia. This case could assert that all damages resulting from at least 1971, when the ICJ issued its advisory opinion are subject to a reparations claim. However, according to Cooper the irony of such litigation is that democratic South Africa, which itself was a victim of apartheid abuses could be held responsible for damages resulting from the pre-1994 apartheid government of South Africa. Ironically, there is a precedent in international law for such an understanding. The ICJ ruled in *Bosnia v. Yugoslavia* (2003) that even democratic regimes are responsible for the crimes committed by non-democratic regimes that preceded them.⁶⁴⁴ Namibia could proceed with a similar case, but only if Herero political leaders removed themselves as plaintiffs and let the Windhoek government assume full responsibility for the case since the ICJ only hears cases brought by states. Given Namibia's close relations with South Africa, such a suit is highly unlikely at this time.⁶⁴⁵

⁶⁴³ Cooper, A. (2003) 'Reparations for the Herero genocide: defining the limits of international litigation'. *Oxford University Press*. pp. 113-126.

⁶⁴⁴ See international Court of Justice, 'Application for revision of the judgment of 11 July 1996 in the case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide. (*Bosnia and Herzegovina v. Serbia and Montenegro*)', available online at <http://www.icj-cij.org>

⁶⁴⁵ Cooper, supra note 643 at 125.

Sarkin⁶⁴⁶ also posits that it is also possible for complainants to file similar claims against the South African state, possibly in South Africa. As had been noted, “The African inhabitants of South West Africa have experienced both the harshness of German rule and the severity of the South African administration’s segregation policies.”⁶⁴⁷ According to Troup South Africa’s role was not only its own implementation of a discriminatory system. She notes that when South Africa took over control of South West Africa the farmers of German origin were not

Dispossessed and repatriated as were enemy subjects in Tanganyika and the Cameroons, they remained in possession of their farms. This might have been most praiseworthy treatment of the Union’s late enemies, had it not been at the expense of her late native allies, whose lands the Germans had appropriate. Not only were the Germans allowed to remain on their lands, but there was no barrier to the entry into the country of others; nor were they subject to any political or other disabilities. In 1924 the Naturalization of Aliens Act automatically gave union nationality to all German adult males unless they objected. The following year the Legislative Assembly was set up. In the election the Germans gained seven out of twelve elective seats and had a majority of one after the nominated seats had been filled.⁶⁴⁸

Whether the Herero would attempt to hold South Africa accountable for what happened to them during German colonial rule remains to be seen. Certainly, the Foreign States Immunities Act, 1981 (Act 87 of 1981) and the Diplomatic Immunities and Privileges Act, 2001 (Act 37 of 2001) may obstruct attempts to sue Germany or Namibia or obtain execution of judgment before the South African courts.

⁶⁴⁶ Sarkin, supra note 14, at p.175.

⁶⁴⁷ Scott, M. (1958). “The International Status of South West Africa”. *International Affairs*, 34, 318-329, 321.

⁶⁴⁸ Troup, F. (1950). *In face of fear: Michael Scott’s challenge to South Africa*. London: Faber & Faber.p. 63.

(5) German Courts

The Herero claims have not been brought forward in Germany because the chance of success in a civil liability lawsuit is remote, as the claims are beyond the statute of limitations of 30 years.⁶⁴⁹

In addition to their procedural functions, statutes of limitations also have a substantive justification, which the German Constitutional Court aptly summed up as follows:

The punishment can, when some considerable time has passed, no longer reach its purpose. To the extent that punishment aims at just retribution and restoration of the legal order, it loses after passage of a longer period its legitimacy because the indignation about the disturbance of the legal order has faded away. A particular preventive goal can no longer be reached with punishment, because the penalty is applied to an inwardly changed person that distinguishes himself fundamentally from the one that has been guilty of the crime.⁶⁵⁰

Yet, this neglects the perspective of the victims of human rights crimes and their families for whom time does not heal all wounds. Prolonged impunity and the related denial of the truth will allow old wounds to fester and may increase post-traumatic stress suffered by the victims of human rights crimes.⁶⁵¹ In this respect, Cohen has observed that “after generations of denials, lies, cover-ups and evasions, there is a powerful, almost obsessive, desire to know exactly what happened.”⁶⁵²

⁶⁴⁹ Meron, T. (1995). ‘International Criminalization of Internal Atrocities’. *American Journal of International Criminal Justice*, 1, pp.39-63.

⁶⁵⁰ *Bundesverfassungsgerichts {BVerfGE}* [Federal Constitutional Court] Fed. 26, 1969, 25 BVERFGE 269. 1969 (Ger.), available at <http://www.servat.unibe.ch/dfr/bv025269.html>.

⁶⁵¹ Special *Rapporteur* on the Right to Restitution, Comp. & Rehab. For victims of Gross Violations of Human Rights & Fundamental Freedoms, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, 135, Comm’n on Human Rights, Econ. & Soc. Council, U.N. Doc. E/CN. 4/Sub.2/1993/8 (July 2, 1993) {hereinafter van Boven} (by Theo van Boven).

⁶⁵² Cohen, S. (2001) *States of Denial: Knowing About Atrocities and Suffering*. (Malden, MA: Blackwell Publishers, 2001) p. 225.

When it comes to the worst crimes with thousands of victims, it is hard to see how the *genocidaire* or the organizer of crimes against humanity could ever be considered redeemed without punishment based on the mere passage of time, as the crime is of such gravity that it comes to define the perpetrator, not only in the eyes of his own national community but in the conscience of humanity as a whole.⁶⁵³ As noted by Bassiouni, to “withhold the grant of mercy in these cases is not to uphold hatred or vengeance but to express the most basic sense of justice and fairness.”⁶⁵⁴

Sarkin opines that various claims could be made if a civil action is brought in Germany concerning the Herero genocide. These include claims that GSWA events were in violation of German law, in violation of Germany’s international obligations at the time, or in violation of the protection treaties between the German government and the indigenous groups in GSWA.

(5.1) Is there any law in Germany that the Herero>Nama can use to claim reparations against Germany?

The only laws in existence relating to compensation for historical injustices in Germany are the Federal Compensation Law of 1953⁶⁵⁵ and the law establishing the “Remembrance,

⁶⁵³ See Corte Suprema de Justicia devla Nacion [CSJN] [National Supreme Court of Justice], 24/8/2004, “Arancibia Clavel, Enrique Lautaro/homicide calificado y asociacion ilicita y otros,” La Ley [L.L] (2004-F-292), 20-21 (Arg.), available at http://www.csjn.gov.ar/cfal/fallos/cfal3/toc_fallos.jsp. International criminal tribunals have stressed that retribution and also deterrence constitute the main purpose of sentencing for core international crimes. See *Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgment, 806 (Int’l Crim. Trib. For the Former Yugoslavia Feb. 20, 2001).

⁶⁵⁴ Bassiouni, M.C. (1999) Crimes against Humanity in International Criminal Law. 2nd ed. p.226.

⁶⁵⁵ In 1953, the Federal Republic of Germany adopted the Federal Compensation Law Concerning Victims of National Socialist Persecution (*Bundesentschadigungsgesetz* (BEG) in order to compensate certain categories of victims of Nazi persecution.

Responsibility and Future” Foundation⁶⁵⁶. None of which can be invoked by the Hereros in their quest to obtain reparations.

(6) European Court of Human Rights

The remedial practice of the European Court of Human Rights (ECtHR) is hardly known for being innovative or progressive. The reparations the Court uses to remedy violations of the 1950 European Convention of Human Rights (ECHR) generally consist of declaratory judgments that establish breaches of Convention rights coupled with, depending on the circumstances, damages. Nevertheless, in some instances involving violations of the right to property and the right to liberty and security between 1995 and 2004, the Court has adopted a more proactive, innovative approach to redressing violations by requesting respondent states to provide specific non-monetary relief to victims⁶⁵⁷. In light of the above, the European Court of Human Rights is a potential avenue for the Hereros to bring their claim for historical injustices against the German government.

The ECtHR’s authority to afford reparation is set out in Article 41 of the European Convention (previously Article 50): “If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured

⁶⁵⁶ On 2 August 2000, a Federal Law was adopted in Germany, establishing a “Remembrance, Responsibility and Future” Foundation (hereinafter the “2000 Federal Law”) to make funds available to individuals who had been subjected to forced labour and “other injustices from the National Socialist period” (Sec. 2, para. 1).

⁶⁵⁷ Nifosi-Sutton, I. (undated) “The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: a Critical Appraisal from a Right to Health Perspective”. *Harvard Human Rights Journal* / Vol. 23.p.52 Available online at: <http://harvardhrj.com/wp-content/uploads/2010/10/51-74.pdf>

party.”⁶⁵⁸ Interpreting this provision, the Court has outlined its own authority to decide whether or not to order just satisfaction after having evaluated the circumstances of each case and the alleged violations. In the famous *Vagrancy cases*, the Court spelled out three pre-conditions to exercise its power to order reparations under Article 41. First, the Court must find the conduct of a contracting state to be in violation of the rights and obligations set forth in the ECHR. Second, there must be an injury, that is to say moral or material damage, to the plaintiff. Third, the Court must deem it necessary to afford just satisfaction⁶⁵⁹. The third pre-condition hints at the discretionary nature that the Court has further acknowledged in subsequent cases⁶⁶⁰. Generally, just satisfaction afforded by the Court in application of Article 41 of the Convention is provided in two forms: either a declaratory judgment establishing one or more violations of the ECHR, or a financial award consisting of pecuniary and/or non-pecuniary damages, coupled with a declaratory judgment⁶⁶¹.

However, according to Sarkin⁶⁶² before the creation of this court, a reservation Germany made to the Convention in 1952 could have influenced any case against Germany for historic human rights violations:

In conformity with Article 57 of the Convention the German Federal Republic makes the reservation that it will only apply the provisions of Article 7, paragraph 2, of the

⁶⁵⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 41. Nov.4. 1950. 213. U.N.T.S. 221, as amended by Protocol No. 11, Nov.1. 1998. E.T.S.No.155.

⁶⁵⁹ Cases of De Wilde, Ooms and Versyp (“Vagrancy”) v. Belgium (Article 50), App. Nos. 2833/66, 2835/66 and 2899/66, 1 Eur. H.R. Rep. 438 (1972).

⁶⁶⁰ See, e.g., *Guzzardi v. Italy*, App. No. 7367/76, 3 Eur. H.R. Rep. 333, ¶ 114 (1980).

⁶⁶¹ See Amerasinghe, F. C (2003) “Jurisdiction of International Tribunals” 393-94 (analyzing the ECtHR’s practice under Article 41); Leach, P. (2005) Dawn for Redress Before the European Court of Human Rights? 10 Eur. Hum. RTS. L. REV. 148.

⁶⁶² Sarkin, *supra* note 11. p. 169.

Convention within limits of Article 103, clause 2, of the Basic Law of the German Federal Republic. This provides that “any act is only punishable if it was so by law before the offence was committed.”⁶⁶³

(7) Approaching the International Court

Sarkin points out that one option for claimants of colonial violations is to pursue such claims before an international court. He further posits that although the ICJ could potentially hear the case, the major problem is that a state usually has to bring such a claim. States accepted the right of the ICJ to adjudicate on matters when they make a declaration, in terms of section 36 (2) of the statute, that the court can give a ruling on a dispute it has with another state. Article 9 of the Genocide Convention permits the Court to hear disputes between states that have ratified the Convention. The Court may then deal with the questions concerning the interpretation, application, or fulfillment of the treaty. Sarkin asserts the Court may also be approached regarding matters such as state responsibility for genocide or any other acts as laid out in the Convention. The Court has jurisdiction to establish the nature or extent of the reparations to be made for the breach of an international obligation.⁶⁶⁴

He argues that Namibia could therefore go to the ICJ concerning Germany’s responsibility for what occurred a century ago. The problem, however, according to Sarkin, is that the Namibian government would have to bring the case. In addition, the Herero constitute less than ten percent of the Namibian population and have little political clout in a state where another group

⁶⁶³ The European Court of Human Rights: Notes for the guidance of persons wishing to apply to the European Court of Human Rights, 17. Available at <http://www.echr.coe.int/NR/rdon1yres/23F65B04-5BB6-48DB-AFED-C47A906F092E/0/NoticeENG.pdf>

⁶⁶⁴ ICJ Statute, Art. 36 (2) (d).

maintains power.⁶⁶⁵ The right to reparation is firmly embedded under both international human rights⁶⁶⁶ and international humanitarian law⁶⁶⁷, although its enforcement remains difficult.

Yet according to Sarkin, this does not mean that no case could be brought before the Court, as the ICJ has found:

The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to Advisory proceedings even where the request for an opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an "organ of the United Nations," represents its participation in the activities of the Organization, and, in principle, should not be refused.⁶⁶⁸

He asserts that should the improbable situation arise that a UN organ referred the Herero predicament to the ICJ for an advisory decision on whether what occurred was genocide, the ICJ

⁶⁶⁵ Shelton, D. (2003). 'The World of atonement: Reparations for historical injustices'. *Netherlands International Law Review*, 60, 289-325, 319.

⁶⁶⁶ See inter alia, the 1948 Universal Declaration of Human Rights (Art. 8), the 1966 International Covenant on Civil and Political Rights (Art. 2 (3), 9 (5) and 14 (6)), the International Convention on the Elimination of All Forms of Racial Discrimination (Art. 6), the Convention of the Rights of the Child (Art. 39), and the Convention against Torture and other forms of Cruel, inhuman and Degrading treatment (Art. 14). The right to reparations is also found in several regional instruments, e.g. the European Convention on Human Rights and Fundamental Freedoms (Arts. 5 (5), 13 and 41), the Inter-American Convention on Human Rights (Arts. 25/68 and 63 (1)), the African Charter of Human and Peoples Rights (Art.21 (2)). See also the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly Resolution 40/34 of 29 November 1985; Declaration on the Protection of all Persons from Enforced Disappearance (Art. 19) General Assembly Resolutions 47/133 of 18 December 1992.

⁶⁶⁷ Art. 3 of the Hague Convention regarding the Laws and Customs of Land Warfare, 1907 Hague Convention IV; Article common to the four Geneva Conventions 1949 (GCI: Art. 51; GCII: Art. 52; GCIII: 131; GCIV: Art. 148); and Art. 91 of the 1977 Additional Protocol I. See also Gillard, E-C, "Reparations for violations of International Humanitarian law", 2003 IRRC 85, pp. 529-553.

⁶⁶⁸ Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, ICJ Reports 1950, 71 and cited with approval in the ICJ Palestinian Wall case, paragraph 47.

would in all likelihood decline to hear the matter on the basis of the non-consent of both Namibia and Germany to allow a dispute concerning them to be brought before the World Court.

(8) Approaching the United Nations

Sarkin⁶⁶⁹ argues that various options might be available to the Herero to approach structures within the United Nations system for redress. Two instruments, and their supervisory processes, that are accessible are the International Covenant on Civil and Political Rights (ICCPR) and its Human Rights Council (HRC) and the Convention for the Elimination of Racial Discrimination (CERD) and its committee.

According to Sarkin both Germany and Namibia have ratified the ICCPR and CERD, as well as the First Optional Protocol to the ICCPR. The ICCPR entered into force on March 23, 1976. While Article 41 of the ICCPR permits inter-state complaints, this is an unlikely possibility as this procedure has not been used before. In fact, although by 2003 forty-seven states had given authorization to the HRC to consider inter-state complaints against them, no such complaint had been made.⁶⁷⁰ Furthermore, these bodies only examine issues occurring after the date of ratification and the entry into force of the complaints procedure, but will investigate events that occurred before then if they constitute continuing violation or have continuing effects.⁶⁷¹ According to Sarkin the Human Rights Committee was established under Article 28 of the

⁶⁶⁹ Sarkin, *supra* note 11 at p.165.

⁶⁷⁰ Hanski, R. & Scheinin, M. (2003) *Leading cases of the Human Rights Committee*. Turku/Abo (Finland): Institute for Human Rights Abo Akademi University, p.11.

⁶⁷¹ O' Sullivan, M. (2005). "Past violations under international human rights law: The Indigenous 'Stolen Generation' in Australia." *Netherlands Quarterly of Human Rights*, 23, 243-272, 255.

International Covenant on Civil and Political Rights (ICCPR).⁶⁷² As Germany has ratified the Protocol, this mechanism is available to individual victims who believe their rights have been violated. Complaints can be raised before the Committee, as it covers “events within the territory of a State Party....or that otherwise within the jurisdiction (under the effective control) of the State in question.”⁶⁷³ The Human Rights Committee has also held:

The principle of equality sometimes requires States Parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a state where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the state should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the covenant.⁶⁷⁴

4.13 Doctrine of state immunity as a barrier to reparation claims

When the Courts of one state assume jurisdiction over another state or its representatives the authority of the forum state to adjudicate the dispute conflicts with the principle of state equality, often expressed by the maxim “*par in parem non habet imperium*”.⁶⁷⁵ Overtime, a number of customary rules barring domestic courts from adjudicating disputes involving another state have emerged under international law. These rules are commonly justified by the need to avoid interference with the exercise of its sovereign prerogatives by the foreign state and to allow its representatives to perform their official duties without undue impairment.

⁶⁷² Established in terms of UN GA Resolution 2200 A (XXI) of December 16, 1966 and entered into force March 23, 1976. By July 2004, 152 states were parties to the Convention.

⁶⁷³ Hanski, *supra* note 670.

⁶⁷⁴ HRC General Comment 18, paragraph 10.

⁶⁷⁵ Knuchel, S. (2011) State Immunity and the Promise of *Jus Cogens* Vole 9, Number 2. Available online. <http://www.law.northwestern.edu/journals/jjhr/v9/n2/2/> accessed on 30 May 2012

4.13.1 State sovereignty and Non-Intervention in the Internal Affairs of a State

State sovereignty and the related doctrine or principle or notion of non-intervention in the internal affairs of a state constitute grounding principles of international law.⁶⁷⁶ State sovereignty formed the basis of international law and relations. As originally conceived, in their external relations state were, at least formally, understood to be independent and equal and internally, each state was understood to have exclusive control and competence over its own territory. In order to protect the sovereignty of each state, the principle of non-intervention in the internal affairs of a state applied. In short, therefore, each state could do whatever it pleased within its own territory and it could not be subject to scrutiny by other states or other bodies.⁶⁷⁷

As a whole, state sovereignty and the principle of non-intervention are not obsolete but remain influential components of international law and are embodied in Article 2 (1) and 2 (7) respectively of the United Nations Charter. Although states are only formally equal, the principles can provide important protection to weaker states against powerful states.⁶⁷⁸

As a result of the developments in international law, states could not argue that they had the legal right to commit serious international crimes on the basis of state sovereignty. In support of the maintenance of state immunity, state sovereignty and non-interference are some of the primary justifications advanced. Yet, courts have failed to take into account the developments on state sovereignty when addressing the availability of state immunity in cases concerning serious

⁶⁷⁶ Redress: (2005) Immunity v. Accountability: Considering the Relationship between State Immunity and Accountability for Torture and other Serious International Crimes. Available online at: <http://www.redress.org>

⁶⁷⁷ Redress, *ibid*, at pp.1-2.

⁶⁷⁸ However, some commentators, such as Henkin, L. (1995) International Law: Politics and Values. Springer Publishers.p.10, argue that state sovereignty should be eliminated in modern international law.

international crimes. Instead, courts usually begin with a description of the development of state immunity on the principles of state sovereignty and the non-interference in the internal affairs of a state.⁶⁷⁹

4.13.2 The protection of Human Rights as a new challenge to the Immunity of States and their Officials

Knuchel⁶⁸⁰ posits that the individual's position under international law has evolved considerably in the past several decades. The law has recognized individuals as persons entitled to a number of fundamental rights and remedies for violations of those rights. At the same time, the prospect of international enforcement of these rights remains uncertain, as the development of adjudication mechanisms is still at an embryonic stage. As a result, victims of international human rights violations have begun to explore other avenues for obtaining reparation, notably by turning to civil actions in national courts. He notes that it is specifically at the national level that their efforts to encounter the obstacle of the doctrine of sovereign immunity.

4.13.3 A case study of the Judgment of the International Court of Justice that declared that Germany's immunity prevails over the right of victims of grave violations of international law to access to justice.

The facts underlying the dispute between Germany and Italy were as follows⁶⁸¹: during World War II, the German Reich committed many serious breaches of international humanitarian law

⁶⁷⁹ Redress, supra note 676. p. 50.

⁶⁸⁰ Knuchel, supra note 675.

⁶⁸¹ Press Release, Int'l Court of Justice, Germany Institutes Proceedings Against Italy for Failing to Respect Its Jurisdictional Immunity as a Sovereign State (Dec. 23, 2008), available at <http://www.icj-cij.org/docket/files/143/14925.pdf>

(IHL) under its Nazi leadership, to the detriment of persons of Italian nationality.⁶⁸² Italy was a close ally of Germany since 1936/37.⁶⁸³ On June 10, 1940, it entered World War II on the side of Nazi Germany.⁶⁸⁴ A few months later, on September 27, 1940, Germany, Italy, and Japan signed the Tripartite Pact to form the so-called Axis Powers. After suffering several military defeats during the following years, and realizing that Nazi Germany was about to lose an armed conflict with the great majority of the nations of the world, Italy left the axis in September 1943 and joined the Anti-Hitler Coalition of the Allied Powers.⁶⁸⁵

The rupture of the alliance between Germany and Italy had many serious consequences. Predictably, Italy and the Italian people were henceforth considered to be enemies by German authorities, and even worse, as traitors who deserved harsh treatment. Accordingly, the Nazi government felt that IHL need not be fully respected as required by the new circumstances. As a consequence, many grave breaches of applicable IHL were perpetrated. These breaches may be divided into three major groups of cases.

First, many Italian civilians were sent to Germany to perform forced labour. Since almost the entire male population of Germany was drafted to serve in the German *Wehrmacht*, there was an urgent need for an alternative work force that could keep the economy afloat. Hence, Nazi

⁶⁸² Tomuschat, C. (undated) “The International Law of State Immunity and Its Development by National Institutions”. *Vanderbilt Journal of Transnational Law*. Vol. 44: 1105 at:<http://www.vanderbilt.edu/jotl/manage/wp-content/.../Tomuschat.c.r.pdf>

⁶⁸³ See, e.g. Woller, H. *Geschichte Italiens IM 20. JAHRHUNDERT* 163 (2010); Schieder, T. *Italien vom ersten zum zweiten Weltkrieg*, in *Geschichte Italiens* 447, 484 (Michael Seidmayer ed., 2d ed. 1989)

⁶⁸⁴ See Deakin, F.W. (1962) ‘The Brutal Friendship: Mussolini, Hitler and the Fall of Italian Fascism’. Harper and Row. Indiana University. pp.9-17.

⁶⁸⁵ See Weinberg, G.L. (1994). *A world at arms: a global history of World War II*. Cambridge University Press. pp. 597-99.

authorities decided to fill the vacuum by deporting persons from all of the territories occupied by the *Wehrmacht* to Germany.⁶⁸⁶ Many of these forced labourers were assigned to the armaments industry. The majority of them were badly treated; others simply had to endure the same hardships as the civilian German population during war time.

The second group of cases involves Italian prisoners of war. After Italy's abandonment of the Axis, Italian soldiers under the control of German armed forces became prisoners of war, designated Italian Military Internees (IMIs), provided they did not join the forces of the northern part of Italy that temporarily remained under Mussolini's fascist rule (Republic of *Salò*). Unfortunately, Nazi Germany did not abide by the Geneva Convention of 1929,⁶⁸⁷ to which both Germany and Italy were parties. The prisoners were treated ignominiously, and the poor conditions of their detention caused many deaths among them. Additionally, by an arbitrary unilateral act, Nazi Germany purported to deprive the prisoners of their status under international law, classifying them as ordinary civilian workers and compelling most of them to perform hard labour in Germany, contrary to the stipulations of the 1929 Convention.⁶⁸⁸

Lastly, German military units committed a considerable number of massacres against the Italian civilian population.⁶⁸⁹ When it became clear that Germany would eventually be defeated, resistance groups sprang up in those parts of Italy which were still under German occupation. In

⁶⁸⁶ See Cass., sez. Un., 11 *Marzo* 2004, n. 5044 (It), reprinted in 87 *rivista di diritto internazionale* 53 (2004), translated in *Ferrini v. Federal Republic of Germany*, 128 I.L.R 658, 659.

⁶⁸⁷ Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021.

⁶⁸⁸ For a comprehensive monographic treatment of their fate, see Gerhard Schreiber, *die Italienischen militärinternierten im deutschen machtbereich* 1943 bis 1945. (1990).

⁶⁸⁹ See e.g. Luciano, C. and Gagliani, *d, la politica del terrore: stragi e violenze naziste e fasciste in emilia romagna* (2008); *gianluca fulvetti, uccidere i civili: le stragi naziste in toscana (1943-1945)* (2009).

many instances, German military forces were attacked while withdrawing from the territory of its former ally. When such attacks by partisans caused serious casualties, German commanders often ordered retaliatory actions. In some villagers, hostages were taken and killed mercilessly: generally women, children, and elderly men.

Germany requested the Court, in substance, to find that Italy has failed to respect the jurisdictional immunity which Germany enjoys under international law by allowing civil claims to be brought against it in the Italian courts, seeking reparation for injuries caused by violations of international humanitarian law committed by the German Reich during the Second World War; that Italy has also violated Germany's immunity by taking measures of constraint against *Villa Vigoni*, German State property situated in Italian territory; and that it has further breached Germany's jurisdictional immunity by declaring enforceable in Italy decisions of Greek civil courts rendered against Germany on the basis of acts similar to those which gave rise to the claims brought before Italian courts. Consequently, the applicant requested the Court to declare that Italy's international responsibility was engaged and to order the Respondent to take various steps by way of reparation.

In its Counter-Memorial, Italy submitted a counter-claim "with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich". This claim was dismissed by the Court's Order of 6 July 2010, on the grounds that it did not fall within the jurisdiction of the Court and was consequently inadmissible under Article 80, paragraph 1, of the Rules of Court.

In the end the ICJ held that:

The Italian Republic had violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich 1943 and 1945.

The Court also found that the Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law by declaring enforceable in Italy decisions of Greek courts based on violations of international humanitarian law committed in Greece by the German Reich

And lastly, found that the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect.

4.14 The doctrine of statutory limitations and the Herero/Nama reparation claims

It has been argued that though there exists a possibility that a state can be held liable for crimes committed by its predecessor, however, such a possibility is restricted by the doctrine of statutory limitation. In the same vein, citing contemporary international legal instruments, some scholars opine that limits exist as to the applicability of the said doctrine. It is thus important to discuss the merits and demerits of the effect of the doctrine of statutory limitations on the Herero/Nama reparation claims.

4.14.1 The moral case for making human rights crimes imprescriptible

If one regards the law as it should be (*lex ferenda*), in the balance of relevant moral considerations, human rights crimes ought to be imprescriptible, both in terms of prosecutions and reparation claims.⁶⁹⁰ In assessing the morality of statutory limitations for human rights

⁶⁹⁰ Hessbruegge, J. A. (2012) 'Justice Delayed, Not Denied: Statutory Limitations and Human Right Crimes.' Academic journal article from *Georgetown Journal of International Law*, Vol. 43, No. 2. Available online at: <http://www.questia.com/library/1G1-299535990/justice-delayed-not-denied-statutory-limitations>

crimes, the starting point has to be that those who have committed such heinous crimes deserve to be punished, and those who suffered merit reparation. Statutory limitations constrain legitimate claims to rectify an injustice and can therefore be “morally justified only if we have good reasons for accepting this constraint.”⁶⁹¹ Morally speaking, the burden of proof rests therefore on those making the case for the prescribability of human rights crimes.

Reasons of procedural justice have mainly been put forward to explain why the passage of time should bar courts from dealing with criminal or civil claims that are otherwise completely legitimate. The U.S. Supreme Court, for example, noted that statutes of limitations are “designed to promote justice by preventing revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared.”⁶⁹² The Court also pointed out that with time “events lose their perspective” and that time limits “may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.”⁶⁹³

Similarly, the European Court of Human Rights has taken the view that statutes of limitations “ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter, and prevent the injustice which might arise if courts were required to

⁶⁹¹ Roberts, R.C. (2003) ‘The Morality of a Moral Statute of Limitations on Injustices’. *J. ETHICS* 115, 117.

⁶⁹² *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348 (1944); *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965).

⁶⁹³ *Smith v. Hooey*, 393 U.S. 374, 380 (1969); *Toussie v. United States*, 397 U.S. 112, 115 (1970).

decide upon events which took place in the distant past on the basis of evidence, which might have become unreliable and incomplete because of the passage of time.”⁶⁹⁴

Yet, reparation claims add another layer of complexity. When the perpetrator dies, the quest for punishment comes to an inevitable end. However, claims to demand or provide reparation can pass on to others. The state or corporate entity on whose behalf the individual acted (and for some time also the perpetrators’ estate) will generally remain behind and can be held liable by the victims or their descendants long after the fact.

4.14.2 Statutory limitations and reparations for historical wrongs

Hessbruegge⁶⁹⁵ enumerates that reparations for historical wrongs involve other problems that have to be carefully distinguished from the question of whether such wrongs should be subject to statutes of limitations or not. International law orthodoxy, dominated by legal positivism, takes the position that the creation of a right (such as a claim to reparation) is determined by the positive law in place at that time.⁶⁹⁶ This disqualifies many historical injustices from being considered violations of international law. The second recurrent issue when dealing with historical injustices is of a more factual nature. Even where the state, company, or other entity in whose name the historical injustice was committed still exists, it is often not possible to trace living descendants of the original victims or prove their descendancy. However, even where a historical injustice amounts to a violation of international law (as it stood at the time) and the

⁶⁹⁴ *Stubbings v. United Kingdom* (No. 18), 1996-IV Eur. Ct. H.R. 1487, 1502-03.

⁶⁹⁵ Hessbruegge, *supra* note 690, at pp. 5-11.

⁶⁹⁶ *Island of Palmas (United States. v. The Netherlands.)*, 2. R.I.A.A. 829, 845 (Perm. Ct. Arb. 1928); see also Pierre d’ Argent, “Wrongs of the Past, History of the Future”. 17 *Eur. J. INT’L. L.* 279, 285 (2006).

perpetrating entities and the victims or their descendants can be identified, some still try to make the case that historical injustices should be subject to a moral and, by implication, also a legal statute of limitations.

Buchanan⁶⁹⁷ states that “historical grievances fade with time, noting that it is the multiplicity of competing historical claims and the need to limit major disruption for large numbers of people that can legitimize expectations to the point of expunging or overriding a preexisting territorial right.

Dissecting and refuting the various strands of this argument, Roberts observes that the difficulty of establishing adequate criteria to resolve multiple competing claims does not support the establishment of a morally arbitrary criterion in the shape of a rigid time limit.⁶⁹⁸ Furthermore, the difficulty in discerning responsibility long after the fact has its own intrinsic value as “the very process of determining the validity of claims will force collective examination of the historical process. The discovery and acknowledgement of past wrongs will educate us and help us to avoid repeating the same errors.”⁶⁹⁹

In the leading *Slavery Descendants Case*, brought against companies that profited from slavery, the Seventh Circuit of the U.S. Court of Appeals upheld the dismissal of the claim on various

⁶⁹⁷ Buchanan, A. (1991) *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*. (Boulder: Westview Press, 1991), pp-88-89

⁶⁹⁸ Roberts, supra note 691, at pp. 115-134.

⁶⁹⁹ Matsuda, M.J. (1987) ‘Looking to the Bottom: Critical Legal Studies and Reparations’, 22 Harv. C.R.-C.L.L. Rev. 323, 384.

grounds, including the fact that slavery was not illegal at the time in question.⁷⁰⁰ It is worth noting that the Court specifically invoked statutes of limitations as an additional ground of dismissal:

Suits complaining about injuries that occurred more than a century and half ago have been barred for a long time by the applicable state statutes of limitations. It is true that tolling doctrines can extend the time to sue well beyond the period of limitations-but not to a century and more beyond. Slaves could not sue, and even after the Thirteenth Amendment became effective in 1865 suits such as these, if brought in the South, would not have received a fair hearing. However, some northern courts would have been receptive to such suits, and since the defendants are (and were) northern companies, venue would have been proper in those states. Even in the South, descendants of slaves have had decades of effective access to the courts to seek redress for the wrongs of which they complain. And its not as if it had been a deep mystery that corporations were involved in the operation of the slave system.⁷⁰¹

4.15 Doctrine of State Succession

State succession is an amorphous term. Generally, a state succession takes place when a former state becomes extinct, in whole or in part, and a new state replaces it. State succession is to be distinguished from the simple continuation of a state that experiences a relatively insignificant change in legal order, government, territory, or population, in which the “the state in its new form is not considered a new state but merely a continuation of the old.”⁷⁰²

⁷⁰⁰ *In re African Am. Slave Descendants Litig.* 471 F.3D 754, 759 (7TH Cir. 2006).

⁷⁰¹ *Ibid.* at 762-63.

⁷⁰² Ebenroth, C.T and Kemner, M.J (1996) ‘The Enduring Political Nature of Questions of State Succession and Secession and the Quest for objective Standards’. Vol. 17. University of Pennsylvania Journal of International Economic law.p.756 Available online at: [https://www.law.upenn.edu/journals/jil/articles/volume17/issue3/EbenrothKemner17U.Pa.J.Int'lEcon.L.753\(1996\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume17/issue3/EbenrothKemner17U.Pa.J.Int'lEcon.L.753(1996).pdf)

According to De zayas⁷⁰³ in the report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights, Professor M. Cherif Bassiouni reiterated a basic principle of succession:

“In international law, doctrine of legal continuity and principles of State responsibility make a successor Government liable in respect of claims arising from a former government’s violations.”⁷⁰⁴

4.15.1 The Doctrine of State Succession in the Namibian perspective

It should be observed that Namibia has not yet totally relinquished the South African legal legacy. Thus, the ordinary law of the land, or common law, continues to be Roman-Dutch law.⁷⁰⁵ Articles 140 and 143 of the Constitution of the Republic of Namibia deal with the question of State Succession. Article 140 provides for legal continuity by declaring that all existing laws and acts done thereunder prior to independence are to remain in force until repealed by Parliament.⁷⁰⁶

This provision is read in conjunction with Article 25 (1) (b) on the enforcement of fundamental rights and freedoms which states that if a Court adjudges that any law in force immediately prior to independence is unconstitutional, it may either set it aside or allow Parliament to correct any defect in such law.⁷⁰⁷ Article 143 states that all treaties binding upon Namibia shall remain in force unless the National Assembly decides otherwise. Moreover, the general rule of

⁷⁰³ De Zayas, A. (undated) ‘The Genocide against the Armenians 1915-1923 and the application of the 1948 Genocide Convention’. Available online at: http://alfreddezayas.com/Law_history/armlegopi.shtml

⁷⁰⁴ Commission on Human Rights, Document E/CN.4/1999/65.

⁷⁰⁵ Naldi, supra note 58, at p.24.

⁷⁰⁶ Ibid.

⁷⁰⁷ Ibid.

international law proclaims that a new State is not bound by treaties entered into by the previous State, the so-called 'clean-slate' doctrine.⁷⁰⁸ However, Article 145, a saving clause, provides that nothing contained in the Constitution 'shall be construed as recognizing in any way the validity' of the Administration of Namibia by South Africa.

The interpretation of these provisions was at issue in *Minister of Defence, Namibia v. Mwandighi*, which was concerned with the question whether a successor State is liable for the delicts committed by its predecessor,⁷⁰⁹ and in *Government of the Republic of Namibia v. Cultura 2000*, which concerned the repudiation of the acts of the predecessor Administration.⁷¹⁰ In the former case the applicant had sustained serious injuries in 1987 as a result of being shot by the armed forces and he instituted a claim for damages against the South African Minister of Defence. However, the action was overtaken by the independence of Namibia and the applicant therefore sought to substitute as defendant the Minister of Defence for Namibia on the grounds that under Article 140 of the Constitution of Namibia had accepted liability for the delicts committed by its predecessor.

The respondent argued that the references to 'laws' and 'anything done under such laws' in Article 140 referred to lawful or valid conduct and excluded delicts committed by the previous

⁷⁰⁸ Brownlie, I. (1990) *Principles of Public International Law*. 4th ed. Clarendon Press.p.668.

⁷⁰⁹ *Minister of Defence, Namibia v. Mwandighi* 1992 (2) SA 355 (NmS), see generally Strydom, H.A. (1989/90) 'Namibian Independence and the Question of the Contractual and Delictual Liability of the Predecessor and Successor Governments'. Vol. 15. SAYIL. P.111

⁷¹⁰ *Government of the Republic of Namibia v. Cultura 2000* 1994 (1) SA 407

administration; and, furthermore, that Article 145 contained a disclaimer by the present government, on the basis of international law, for wrongs committed by its predecessor.⁷¹¹

In *Government of the Republic of Namibia v. Cultura 2000* an organization purportedly established to promote European culture received a large donation from the previous Administration just prior to independence. The Government of independent Namibia, pursuant to Article 140(3), adopted the State Repudiation (*Cultura 2000*) Act 1991 repudiating the donation. The applicants challenged the Act, inter alia, as an unconstitutional expropriation, a claim upheld by the High Court which declared it null and void.⁷¹² On appeal, the judgment of the High Court was overruled in part. According to the Supreme Court Article 140 (3) creates on the one hand a legal fiction, whereby the acts of the previous Administration are deemed factiously to be the acts of an independent Namibia, while on the other hand it enables the true position to be restored through the repudiation of this fiction by legislative enactment so that the acts of the previous Administration are no longer deemed to be the acts of the new State.

4.15.2 Continuity and succession

Questions relating to continuity and succession may be particularly difficult. Where a new entity emerges, one has to decide whether it is totally separate creature from its predecessor, or whether it is a continuation of it in a slightly different form.⁷¹³ For example, it seems to be accepted that India is the same legal entity as British India and Pakistan a totally new state.⁷¹⁴ Yugoslavia was

⁷¹¹ Naldi, *supra* note 58, at p. 25.

⁷¹² *Cultura 2000 v Government of the Republic of Namibia* 1993 (2) SA 12 (Nm).

⁷¹³ Shaw, M.N. (1997) *International Law*. 4th ed. Cambridge University press. p.677.

⁷¹⁴ See e.g. yearbook of the ILC, 1962, vol. II, pp.101-3.

generally regarded as the successor state to Serbia,⁷¹⁵ and Israel as a completely different being from British mandated Palestine.⁷¹⁶

Moreover, De zayas argues that in the case of genocide and its consequences for the survivors and their descendants, State responsibility necessarily attaches to the State itself and does not allow *tabula rasa*. Thus, it was consistent with international law for the Federal Republic of Germany to assume full responsibility for the crimes committed by the Third Reich. This has been the case with regard to the responsibility of France to repair the wrongs committed by the Vichy Government during the German occupation, and of Norway to grant restitution for confiscations and other injuries perpetrated on Jewish persons during the Quisling regime.⁷¹⁷

He further argues that the principle of responsibility of successor States has been held to apply even when the State and government that committed the wrong were not that of the Successor State. This principle was formulated, *inter alia*, by the Permanent Court of Arbitration in the *Lighthouse Arbitration case*.⁷¹⁸ There France claimed that Greece was responsible for a breach of State concessions to its citizens by the autonomous State of Crete, committed before Greece's assumption of sovereignty over Crete. The PCA held that Greece was obligated to compensate for Crete's breaches, because Greece was the Successor State.

⁷¹⁵ Shaw, *supra* note 713. p.677.

⁷¹⁶ Mullerson, R. (1994) "International Law, Rights and Politics", London. pp.140-145 and Blum, Y. (1992) 'Russia Takes over the Soviet Union's Seat at the United Nations', 3 EJIL, p. 354.

⁷¹⁷ Westlie, B. (1996) "Coming to Terms with the Past: The Process of Restitution of Jewish Property in Norway". (Inst. of the World Jewish Congress, Policy Forum No. 12, 1996).

⁷¹⁸ *Lighthouses Arbitration between France and Greece*, 23 International Law Reports pp. 659-676. C. Rousseau, « L'affaire franco-hellénique des phares et la sentence arbitrale du 24 juillet 1956 », *Révue Générale de Droit International Public*, Vol. 63 (1959) pp. 248-292. J.P. Monnier, « La succession d'Etats en matière de responsabilité Internationale », AFDI, vol. 8 (1962) pp. 65-90 at pp. 80-85.

However, Dumberry⁷¹⁹ declines to build a strict and self-contained general theory either in favour of or against the automatic transfer of the right to reparation and the obligation to repair. He nevertheless posits that the principle of unjust enrichment exists as an alternative ground upon which successor state liability ought to rest in cases where the law of state succession would otherwise not prescribe transfer⁷²⁰ and that the principle of unjust enrichment should be taken into account when evaluating the ‘factual situation’ associated with a particular succession event.⁷²¹

He further states that the line between equity and law is less rigid and the equitable value of unjust enrichment informs international law as a general principle underlying the formation and execution of legal rules. The ICJ, upon consideration of the principle noted that:

“Thus, the justice, of which equity is an emanation, is not an abstract justice, but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar principles of more general application.”⁷²²

⁷¹⁹ Dumberry, P. (2007) *State Succession to International Responsibility*. Citing Article 2 (1) (e) of the 1978 Vienna Convention on the Succession of States in Respect of Treaties, U.N.Doc. ST/LEG/SER.E/10, in: 17 I.L.M., 1978, p. 1488. Rights and obligations are regarded as Dumberry as the two consequential components of international responsibility, hence the title of the book

⁷²⁰ Dumberry, *ibid*, at 276 citing Hoeflich, M.H. (1982) *Through a Glass Darkly: Reflections upon the History of the International Law of Public Debt in Connection with State Succession*. U. Ill. L. Rev. 39, 46 (asserting that “the usefulness of this concept in the context of State succession ‘is that it entirely sidesteps the question of whether international law includes a specific ‘legal’ rule as a ‘general principle’ imposing a fiscal obligation upon successor states in cases of state succession.”).

⁷²¹ (asserting that a “successor state should be held accountable to pay compensation to an injured third State based on the evaluation of a factual situation; whether or not it has unjustly enriched itself as a result of an unlawful act.”).

⁷²² *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment of 3 June 1985, para 45.

Moreover, the principle of unjust enrichment is the cornerstone of what codified law on state succession exists⁷²³ and it is widely regarded as “the juridical justification for the obligation to pay compensation” after state successions.

According to Brockman-Hawe⁷²⁴ the most unambiguous articulation of the principle of unjust enrichment has probably come from the *Iran-U.S. Claims Tribunal in Sea-Land Service, Inc. v. The Islamic Republic of Iran, et al*⁷²⁵ where it was held that:

“There must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched.”

Although the principle found itself its earliest expression in Roman times,⁷²⁶ in the 19th century it became inexorably linked to the concept of restitution⁷²⁷ and found expression in the domestic legal systems of common law and civil law countries all over the world. As a generally recognized principle of international law, the concept of unjust enrichment serves as a source of

⁷²³ See Vienna Convention on Succession of States in Respect of Treaties, 1978, UN Doc. A/CONF. 80/31, reprinted in 17 ILM 1488 (1978), Art. 2 (b). “When it comes to such cases as the unification of states, boundary treaties, and membership in international organizations, scholars agree that the Vienna Convention is a sufficiently close reflection of customary law.”

⁷²⁴ Brockman-Hawe, B. E. (2008) ‘A Comment on State Succession to International Responsibility’. Available online at: <http://works.bepress.com/benbh/2>

⁷²⁵ *Iran-U.S. Claims Tribunal, Award No. 115-33-1*, 22 June 1984, in: 6 Iran-U.S. C.T.R., P. 149, *ibid*, at pp. 168-69.

⁷²⁶ Herman, S. (1995) ‘The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana,’ 56 La. L. Rev. 258, 276 n. 69.

⁷²⁷ Sherwin, E. (2001) ‘Restitution and Equity: An Analysis of the Principle of Unjust Enrichment,’ 79 TEX. L. REV. pp.2080- 2095.

positive obligations for states and a limitation on state discretion.⁷²⁸ In the context of the law of responsibility for commission of an international wrong, the principle requires that whichever party gained a benefit from the commission of a wrongful act must compensate the damaged state. By extension, the principle also requires that the obligation to repair presumptively transfers from a predecessor to a successor state (s) when the benefit of the wrong has also transferred. Any other result would be a priori incompatible with contemporary notions of unjust enrichment, since “to accept the benefits of an illegal action, be they the generation of power or the gain of resources otherwise committed in an international agreement, without accepting responsibility for the concomitant delictual obligations, is to be unjustly enriched.”⁷²⁹

4.16 Arguments for and against reparation payments for Historical Injustices

In her exposition Shelton enumerates that nearly all instances of reparations for historical injustices, whether in the form of an apology, in land or money, has come about through negotiations or the political process. In the United States, federal courts rejected claims for reparations for interned Japanese Americans because in 1944 the United States Supreme Court held lawful the internment.⁷³⁰ After government documents were declassified and showed the government had lied about the need for internment, a new case was filed.⁷³¹ The court found that

⁷²⁸ Schachter, O. (1991) *International Law in Theory and Practice*. p.58.

⁷²⁹ Volkovitch, M.J. (1992) ‘Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts’, 92 *Colum. L. Review*. Pp.2162, 2173-74.

⁷³⁰ *Korematsu v. United States*, 323 U.S. 214 (1944).

⁷³¹ 584 F. Supp. 1406 (N.D.Cal. 1984).

relief could be granted to individuals, but final resolution of the matter came through legislation.⁷³²

4.16.1 Arguments in favour of reparations

According to Shelton⁷³³ proponents of reparations point to the symbolic importance of apology and redress. Japanese Americans who were interned suffered lingering harm and bestowal of symbolic reparations fostered long overdue healing for many and a measure of dignity was restored.⁷³⁴ Another internee said ‘reparations have allowed many of us to put aside our bitterness and constructively reflect upon our responses to the internment’.⁷³⁵ According to him, it succeeded in bringing closure in two infinitely bringing closure in two infinitely critical ways. First, it stipulated to the truth that the community was innocent and the internment was not justified. Second, it recognized that the community immeasurably and that by paying reparations the United States symbolically accepts the detriment the community suffered.⁷³⁶

In rebutting the critique about the inability to identify individual victims of distant injustices, proponents argue that reparations are about groups, not individuals. Many base their claims on theories of unjust enrichment contending that many of today’s wealthy individuals and

⁷³² Civil Liberties Act of 1988. An earlier Act, the Japanese American Evacuation Claims Act of 1938, compensated for losses of real and personal property but not for the deprivation of liberty, moral injury to reputation, and pain and suffering attendant on internment. See Daniels, R. Taylor, S. and Kitano, H. (1986) *Japanese Americans: From Relocation to Redress*.

⁷³³ Shelton, D. (2002) “Reparations for human rights violations: How far back?”. *Aminis Curiae* issue. Available online at: <http://sas-space.sas.ac.uk/3525/1/1269-1326-1-SM.pdf>

⁷³⁴ Yamamoto, supra note 552, at p.40.

⁷³⁵ Honda, M. (2000) “Has Just Been Served?” 21 *Whittier L. Rev.* pp. 621- 622.

⁷³⁶ *Ibid.*

institutions obtained their riches through privilege and suppression, exclusion and discrimination of others.⁷³⁷

On the positive side, proponents posit that reparations for historic injustices have a broader purpose and benefit: restructuring the institutions and relationships that underlie the grievance. They are seeking reconciliation and looking at social transformation. They argue that post-civil war reconstruction in the US failed precisely because no reparations were implemented. Without land redistribution and economic benefits, freedom for slaves left them without possibility of upward movement⁷³⁸.

The most common objection to redress for historical injustices is that it involves retroactive application of the law. Nonretroactivity of law derives from the notion of fundamental fairness, the idea that individuals may legitimately rely on legal norms in force at the time.⁷³⁹ In *Landgraf v. USI Film Products*,⁷⁴⁰ it was held that:

“Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal”.

Second, Shelton postulates that states, communities, businesses and individuals have unjustly profited by many of the abuses, garnering wealth at the expense of the victims. The economic

⁷³⁷ Shelton, supra note 589, at p.6.

⁷³⁸ Ibid.

⁷³⁹ Historical injustices-eNotes. Available online at <http://www.enotes.com/historical-injustices-reference/historical-injustices>

⁷⁴⁰ *Landgraf v. USI Film Products*, 511 US 244, 265 [1995]

disparities created have continued over generations, often becoming more pronounced over time. It is thus contended that those who were unjustly enriched from slavery and apartheid, for example, should disgorge the wealth they accumulated in favour of those deprived of fair wages and their inheritance.⁷⁴¹

Third, most examples of historical injustices have a compelling moral dimension because the events took place during or after the emergence of the concept of basic guarantees of human rights to which all persons are equally entitled.⁷⁴² Payment of damages is a symbol of moral condemnation of the abuses that occurred. Although not generally recognized in international law until after the Second World War, human rights were positive law in states in Europe and North America by the end of the eighteenth century, and at least partially recognized in other countries from the same period. Proponents of reparations also reject the notion that present generations have no responsibility for the past. They note that every individual is born into a society or culture that has emerged over time and that shapes each person, making the past part of the present and giving the society and individuals an historic identity. International law, recognizing that institutions or collective entities such as states have continuity over time, provides that a change of government does not absolve a state of responsibility for wrongful conduct.⁷⁴³

⁷⁴¹ Bayzler, M. (2002) 'The Holocaust Restitution Movement in Comparative Perspective'. 20 *Berkeley J. Int'l. L.* 11, 41.

⁷⁴² Olick, J.K and Coughlin, B. (2003) *The Politics of Regret: Analytical Frames*, in J. Torpey (ed), *Politics and the Past*, p.37.

⁷⁴³ In the *Distomo Massacre* case *supra*, the German Supreme Court found that in general Germany can be liable for compensation claims as the legal successor of the German Reich.

Finally, apology is sought and supported because it acknowledges the suffering of victims and the legacies of that suffering in contemporary society. The acknowledgement in itself can be restorative and help promote better relations today. ‘The discourse of universal human rights is tied directly to a politics of regret because its advocates believe that only gestures of reparation, apology, and acknowledgement can restore the dignity of history’s victims and can deter new outbreaks of inhumanity.’ On a practical level, ‘unrighted wrongs can leave victims uncompensated, undeterred harmful conduct, and foster social resentment’.⁷⁴⁴

4.16.2 Against Reparations

Some regard reparations as unwise on practical grounds. For example, it may be too hard to figure out what really happened and hence to construct an appropriate response. Or perhaps the disadvantages that may attend pursuit of reparations programs tell decisively against them, for example why risk opening closed wounds? Another such disadvantage might be that this concern diverts from more pressing matters.⁷⁴⁵

As stated earlier by Shelton the most common objection to reparations for historical injustices is the general principle of non-retroactivity of the law. The ground of opposition assumes, of course, that the acts were lawful at the time they were committed. The passage of time also raises

⁷⁴⁴ ‘Symposium: Debates over Group Litigation in Comparative Perspective: What Can We Learn from Each Other’ (2001) 11 Duke J. Comp. and Int’l. L. 157, 158.

⁷⁴⁵ Winterbottom, J.P. (2012) ‘Corrective Justice, Harm, and Reparations for Historical injustice’. PhD Thesis. New Brunswick, New Jersey.p.2.Available online at:
<http://www.google.com/na/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CDAQFjAA&url=http%3A%2F%2Fmss3.libraries.rutgers.edu%2Fdlr%2Foutputs.php%3Fpid%3Drutgers-lib%3A39066%26mime%3Dapplication%2Fpdf%26ds%3DPDF-1&ei=1ghtUYitGOn40gWO7IGACg&usg=AFQjCNGaHIUoUfKR0zr6EwPaNDIz1gbbhw&bvm=bv.45175338,d.d2k>

the problem of long-passed statutes of limitations or laches and the fact that intervening events and contingencies can obscure the causes of harm.⁷⁴⁶

The identities of the parties also create difficulties according to opponents of reparations. Whether the defendant is a state or private party, the notion of personal responsibility, including a ban on bills of attainder in the common law, means it is unjust to require individuals or companies today to pay for the acts of their predecessors.⁷⁴⁷ Opponents also note that in many instances not only are living perpetrators absent, but there are no present day victims of temporally distant violations. In terms of standing to present claims, some governments contend that international claims, such as for war reparations can only be presented by other states. Moreover, in foreign domestic courts, states generally are afforded sovereign immunity from suit.⁷⁴⁸ According to Shelton⁷⁴⁹ governments sometimes object to reparations claims on political or economic grounds. The Namibian government, predominantly composed of the Owambo tribe, opposes the claim of the Herero on the basis that all people in Namibia were exploited by the Germans and none should be singled out for reparations.

Furthermore, opponents of reparations for slavery and colonialism introduce other objections. Some human rights advocates contend that combating slavery and slave-like practices of human

⁷⁴⁶ Soifer, A. (1998) 'Redress, Progress and the Benchmark Problem' 40 B.C.L. Rev. 525.

⁷⁴⁷ See. E.g. the comments of Representative Henry Hyde, Republican member of the United States Congress: 'The notion of collective guilt for what people did (200 plus) years ago, that this generation should pay a debt for that generation, is an idea whose time has gone. I never owned a slave. I never oppressed anybody. I don't know that I should have to pay for someone who did generations before I was born.' Kevin Merida, 'Did Freedom Alone Pay a Nations' Debt? Rep. John Conyers Jr. Has a question. He's willing to Wait a Long Time for the Right Answer', Washington Post, 23 Nov. 1999, C1.

⁷⁴⁸ See e.g. *Distomo Massacre Case. Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99.

⁷⁴⁹ Shelton, supra note 589. p. 458.

trafficking today is more important than reparations for historical slavery.⁷⁵⁰ Respecting claims of African states, Historians note that Africans were actively engaged and compliant in slavery, as were other areas of the world for millennia.⁷⁵¹ Arabs, Chinese and Malays engaged in the slave trade on the eastern shore of Africa. No causal relationship therefore can be shown between conditions in Africa today and European actions.⁷⁵²

4.17 CONCLUSION

Chapter 4 discussed the notion of reparations under both international humanitarian and human rights law. Merits and demerits for reparation claims in the international and political legal order were critically examined. Proponents of reparation claims base their claim on either tort and/or common law. On the other hand, opponents of reparations base their arguments on passage of time and statutes of limitations among other things. It is in this chapter that the author of this research also examined other possible avenues for reparations available to the Herero/Namas. The Doctrine of State Succession and its impact on the Herero/Nama reparations claims against the German Government was exhaustively discussed. The issue with regard to this Doctrine is whether the present German Government is liable for atrocities committed by the Kaiser's regime-its predecessor? Chapter 4 also discussed successful and pending reparation cases of reparation claims. A comparison was made between the successful Jewish claims for reparations

⁷⁵⁰ Slavery continues today in many parts of Africa (Cameroon, Cote d'ivoire, Mauritania, Nigeria, Somalia, South Africa, Sudan, Ethiopia, Ghana, Niger, Mali, Morocco, Sierra Leone, Togo and Uganda). See US Department of State, Country Reports on Human Rights Practices. Bonded labour is common in areas of Asia and Latin America, while sex slave trafficking is widespread in Europe.

⁷⁵¹ Milton, M. (1993) 'A World History,' vol. II, 27-32.

⁷⁵² Howard-Hassmann, R.E.. 'Moral Integrity and Reparations for Africa,' Human Rights Working Papers No. 16, posted 27 Sep. 200. Available online at: <http://www.du/humanrights/workingpapers/index.html>.

against Germany and the pending African-American claims for slavery against the American government.

CHAPTER 5: POTENTIAL MODES OF REPARATIONS AVAILABLE TO THE HERERO AND NAMAS

5.1 Introduction

Various modes of reparations are recognized under international law. Chapter 5 examines the most common modes of reparations that have been used by claimants in recent times. According to Shelton,⁷⁵³ the International Law Commission's articles on reparations restate the existing law on remedies, but they also innovate in significant ways to reinforce broader community interests in international legality. Given the dearth of precedents on reparations, both aspects can be helpful to tribunals and parties engaged in traditional inter-state litigation, but the progressive elements, if they are accepted by states, could have wider application in supporting mechanisms to enhance implementation and observance of international obligations. The combination of codification and progressive development, however, is sometimes an uneasy fit and leaves unanswered several important questions about the theoretical foundation and practical application of the law of reparations.

5.2 Claims by the Hereros and Namas as non-state actors under the rules of state responsibility

According to Francioni,⁷⁵⁴ to understand fully the complexity of indigenous peoples' claims to reparation, one must realize that the decades-old work of the International Law Commission

⁷⁵³ Shelton, D. (2002) 'Righting Wrongs: Reparations in the Articles on State Responsibility.' Vol. 96:833. p. 833. Available online at <http://www.asil.org/ajil/ilcsymp5.pdf>

⁷⁵⁴ Francioni, F. (2008) "Reparations for Indigenous Peoples: Is International Law Ready to ensure Redress for Historical Injustices?" p. 27-45 in Lenzerini, F. (2008) *Reparations for Indigenous Peoples: International and Comparative Perspectives*. Oxford University Press Inc., New York.

(ILC) on the law of state responsibility began and failed with the attempt to codify the rules of state responsibility for injuries to a special category of private persons, that is aliens.⁷⁵⁵

In the Articles on State Responsibility recently approved by the International Law Commission and submitted to the General Assembly,⁷⁵⁶ reparations are owed for every breach of an international obligation⁷⁵⁷ due to an act or omission attributable to the state.⁷⁵⁸ Absent a breach of law, the duty to afford reparations does not arise, but upon such breach, the duty to afford reparations automatically becomes an independent legal duty.⁷⁵⁹

The resolution of an international claim for historical injustice may require a determination of the law applicable to events that commenced or were concluded long ago.⁷⁶⁰ International dispute resolution bodies have expressed the notion of inter-temporality, that the rights and duties of parties are determined by the law in force at the time a claim arises.⁷⁶¹

⁷⁵⁵ See F Garcia-Amador, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (New York, Oceana, 1974); RB Lilich (ed.), *International Law of State Responsibility for injuries to Aliens* (Charlottesville: University Press of Virginia, 1983).

⁷⁵⁶ Draft Articles on the Responsibility of States for International Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-third Session, UNGAOR, 56th Sess., Supp. No. 10, at 3, UN Doc. A/56/10 (2001) [hereinafter SR Articles]. The United Nations General Assembly adopted Resolution 56/83 on December 12, 2001, commending the articles to the attention of governments ‘without prejudice to the question of their future adoption or other appropriate action.’ GA Res. 56/83, para. 3 (Dec. 12, 2001), available online at <http://www.un.org/docs>.

⁷⁵⁷ Arts. 1, 30-31, SR Articles (‘every internationally wrongfully act of a State entails the international responsibility of that State’ and state responsibility creates duties of cessation, non-repetition and full reparation).

⁷⁵⁸ Attribution of an act or omission to a state is discussed in SR Articles 4-11.

⁷⁵⁹ Shelton, D. (2004) ‘The World of Atonement: Reparations for Historical Injustices’. Vol. 1. no. 2. pp.259-289. *Miskolc Journal of International Law*. available online at <http://epa.oszk.hu/00200/00294/00002/20042shelton1.htm>

⁷⁶⁰ Shelton, *ibid*, p. 276.

⁷⁶¹ See *Island of Palmas Case 2 UNRIAA 829* (1928).

The second limit concerns the overwhelming difficulties encountered in defining the rules on state responsibility in conjunction with the primary rules on the treatment of aliens eventually moved the ILC to codify only the secondary rules on state responsibility without any explicit reference to the rights of individuals or peoples' rights the violation of which gives rise to international responsibility. Finally, the Articles do not cover liability for damage resulting from acts which at the time of their commission were not prohibited by international law.⁷⁶² Hence, from a technical point of view, their utility for the purpose of redressing past wrongs to indigenous peoples is limited to the hypotheses in which either such wrongs constituted a breach of international norms or instruments in force at the time of their commission or the effects of the wrongs extend to the present time so as to come within the scope of operation of applicable human rights and humanitarian law standards.

Moreover, Francioni⁷⁶³ notes that the rather limited and state-oriented approach by the ILC in the Articles under consideration has not prevented the explicit consideration of the hypothesis in which the responsibility of the state under international law arises directly in favour of non-state entities, such as individuals, groups and indigenous peoples. Art 33 para 2, included in the section of the Articles dealing with the 'content' of the international responsibility, provides that that section 'is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a state'.

⁷⁶² This problem was addressed by the ILC in another project focusing on 'liability' rather 'responsibility' of states under international law. See the ILC project on 'International liability for injurious consequences arising out of acts not prohibited by international law', available at <http://www.un.org/law/ilc/>.

⁷⁶³ Francioni, *supra* note 754, at pp.27-45.

5.3 Different forms of reparations

There exist different forms of reparations from which the Herero>Nama claimants can pursue in their quest for redress. However, during the course of my research I found out that the majority of interviewees prefer monetary compensation over any other form of reparations. These different forms of reparations are discussed below.

5.3.1 Restitution

The most common definition presents the restitution in restoring the previous status which might have existed if the wrongful act had not occurred. On the other hand, another definition contemplates the restitution in kind as being the establishment or restoration of the status which might have existed if the wrongful act had not occurred.⁷⁶⁴ It is said that the first definition is a limited one, as it does not extend to the compensations that might have been owed to the victim state, for instance, in case it is invoked the problem of losing the use of the goods confiscated in a wrongful manner and subsequently returned.⁷⁶⁵

(1) Material and legal restitution

There are two main forms of restitution, namely, material and legal. Material restitution is the more common in State practice and may involve the liberation of individuals illegally seized or detained, the restoration of property or of territory illegally taken or occupied, and the return of a

⁷⁶⁴ *Yearbook of the International Law Commission*, vol. II (1), 1998, p.21. Available online at: <http://untreaty.un.org/ilc/guide/>.

⁷⁶⁵ Maxim, F. (2011) "Forms of reparation of prejudices in international law: reflections on common aspects in the draft regarding the responsibility of the states for internationally wrongful acts".vo1, issue 2, December 2011.p.21. Available online at: <http://www.tribunajuridica.eu/arhiva/An1v1/nr2/art1eng.pdf>

ship or documents.⁷⁶⁶ For example, in *British Claims in the Spanish Morocco*⁷⁶⁷ the tribunal ordered Spain to replace consular premises unlawfully destroyed.

Moreover, the phrase “legal restoration” is sometimes used when the restitution consists in changing the legal status related to the internal legal system of the guilty state with regard to the relations with the victim state. Such cases include the cancellation, revocation or amendment of the facts that constitute violations of the international norms,⁷⁶⁸ cancellation or reconsideration of an illegal judicial or administrative measure taken against a foreign person or property, or the request that that steps should be taken in order to perform an international treaty. In the *Martini Case*, between Italy and Venezuela, the arbitral court decided that the Venezuelan Government had the obligation to cancel a court decision ruled by the court in Venezuela.⁷⁶⁹

Other cases on legal restitution, according to Shelton, are *El Salvador v. Nicaragua*,⁷⁷⁰ where it was held that the situation existing before a treaty concluded in violation of international law obligations had to be restored, and *La Societe Radio Orient*,⁷⁷¹ where the PCA directed the revocation of an order made in violation of Egypt’s treaty obligations.

⁷⁶⁶ Gray, C ‘The Different Forms of Reparation: Restitution,’ in Crawford, J et al (2010) *The Law of International Responsibility*. Oxford University Press. pp. 590-591.

⁷⁶⁷ *British Claims in the Spanish Zone of Morocco*, 1 May 1925, 2 RIAA 615, 722.

⁷⁶⁸ Brownlie, I. (1998). *Principles of Public International Law*. Oxford, Clarendon Press, p.464.

⁷⁶⁹ United Nations, Reports of International Arbitral Awards, vol. II, 1949, p. 97. Available online at: <http://www.un.org/law/riaa/>

⁷⁷⁰ *El Salvador v. Nicaragua, Court of Justice of Central America* (1917) 11 AJIL 674.

⁷⁷¹ *L’affaire de la Societe Radio Orient*, 2 April 1940, 3 RIAA 1871.

in *LaGrand*,⁷⁷² Germany sought legal restitution in the form of the revocation of a national court judgment; it claimed that the United States had detained, tried and sentenced to death two German nationals without providing consular access, in violation of the Vienna Convention on Consular Relations. Germany subsequently abandoned its claim for restitution when the United States executed the two Germans notwithstanding the Court proceedings. Nevertheless, Germany in its written submissions explained why it had originally asked for restitution when the United States had thus made the return to the *status quo ante* impossible. Germany argued that the remedy of revocation of a national judgment in breach of international law was not at all alien to state responsibility; domestic or legislative branches of government; and judicial acts of states are subject to the same regime of responsibility as all other acts of States. Germany cited the *Martini Case* and the Peace Treaty of Versailles of 1919 to show that a claim for annulment of a judgment of a domestic court was supported by international practice. Germany acknowledged that international practice accepting *restitutio in integrum* in case decisions of domestic courts might be seen as somewhat inconclusive, but affirmed that the existence of a rule to the opposite effect, unequivocally excluding this remedy, could not be maintained either.

(2) Limits of restitution

Gray⁷⁷³ posits that there are four exceptions to restitution as formulated in Article 43 of the Draft articles on Responsibility of States for Internationally Wrongful Acts:

- (a) Material impossibility. There can be no doubt that restitution is not required where it has become “materially” impossible, a qualification recognized both in the *Chorzow Factory*

⁷⁷² *LaGrand (Germany v. United States of America)*, Judgment, I. C. J. Reports 2001, p. 466.

⁷⁷³ Gray, *supra* note 766, at pp. 596-597.

dictum,⁷⁷⁴ by the tribunal in the *Forests of Central Rhodopia* case⁷⁷⁵ and in the literature. Nor is it doubted in the comments of governments.

(b) Breach of a peremptory norm. There is likewise no doubt that restitution cannot be required if it would involve a breach of a peremptory norm, that is, a norm of *jus cogens*. The difficulty is rather, as France observed, to think of realistic examples. One possibility might be the situation raised by the *Northern Cameroons* case⁷⁷⁶. It was argued that the administration of the Northern Cameroons in administrative union with the colony of Nigeria, and the subsequent separate holding of a plebiscite for the Northern Cameroons, was a breach of the Trusteeship Agreement. But that agreement had been terminated with the approval of the General Assembly, giving effect to the expression of the wishes of the people.

(c) Restitution disproportionately onerous. In accordance with Article 43 (c), restitution need not be provided if the benefit to the injured state of obtaining restitution is substantially outweighed by the burden for the responsible State of providing it. This might have applied, for example, in the *Great Belt* case⁷⁷⁷ if the bridge had actually been built before the issue of the right of passage had been raised by Finland. Where the cost to the responsible state of dismantling a structure is entirely disproportionate to the benefits for the injured state or states of doing so, restitution should not be required.

⁷⁷⁴*Chorzow Factory*. P.C.I.J., Series A, No. 17 (1928), p. 47.

⁷⁷⁵*Forests of Central Rhodopia*. U.N.R.I.A.A., vol. III, p. 1405 (29 March 1933).

⁷⁷⁶ *Northern Cameroons*. [1963] I.C.J. Rep. 15, at 17.

⁷⁷⁷ *Passage through the Great Belt (Finland v. Denmark) provisional Measures*, Order of 29 July 1991, I.C.J. Reports 1991, p.12.

(d) Disproportionate jeopardy to the political independence or economic stability of the responsible state. A number of states are strongly critical of this fourth exception, of which again no good examples are given. The point made is that restitution in its ordinary sense involves the return to a situation before the breach: it is difficult to see how such a return could have the effect of jeopardizing the political independence or economic stability of the state responsible for the breach. In any event, if restitution plausibly and disproportionately threatens the political independence or economic stability of the responsible state, the requirements of the third exception (paragraph (c) above) will surely have been satisfied.

5.3.3 Compensation

Customary international law suggests that victims of human rights violations must receive a remedy for the injuries they have suffered. One way that governments can respond to human injustice claims is to issue sincere apologies. Apologies may not do enough to satisfy victims' demands for justice and allay their fears that the same atrocities might be repeated.⁷⁷⁸

In addition, the issues of redress for past abuses may seem too large to address. Varying capabilities and resources often shape whether a state is prepared to grant financial compensation. Domestic governments may simply be preoccupied with other political, economic, and social problems. Many of the countries where human rights abuses occur are developing countries burdened with high levels of poverty and a variety of social structural

⁷⁷⁸ Hamber, B (n.d) Repairing the Irreparable: Dealing With Double-Binds of Making Reparations For Crimes of the Past. Available at <http://www.income.Ulst.ac.uk/research/projects/thepast/repair.html,3> .

problems.⁷⁷⁹ They may regard an expensive compensation program as far less important than the revitalization of the economy. And because these states have limited resources to compensate victims, these resources are often spent unequally. Not all victims receive just compensation.⁷⁸⁰

Compensation should be provided for any economically assessable damage, as appropriate and proportionate to the gravity of the violation and the circumstances of each case (Principle 20). The damage giving rise to compensation may result from physical or mental harm; lost opportunities; including employment; education and social benefits; moral damage; costs required for legal or expert assistance, medicine and medical services and psychological and social services.⁷⁸¹

It is a longstanding rule of customary international law, set forth in the 1907 Hague Convention (IV) and repeated in Additional Protocol I, that a state which violates International Humanitarian Law must pay compensation, if the case demands⁷⁸². This obligation has been put into practice through numerous post-conflict settlements.⁷⁸³ It is also spelled out in the Draft Articles on State

⁷⁷⁹ Lutz, E. L. (1995) 'After the Elections: Compensating victims of Human Rights Abuses', in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 1, General Considerations, ed. Kritz, J.N. (Herndon, Va: United States Institute of Peace Press, 1995), p. 557.

⁷⁸⁰ Theissen, G. (n.d) "Supporting Justice, Co-Existence and Reconciliation After Armed Conflict: Strategies for Dealing with the Past" Berghof Research Centre for Constructive Conflict Management. p.1-3. Available online at: <http://www.berghof-handbook.net/articles/thiessen-handbook.pdf>

⁷⁸¹ Declaration of Basic Principles of Justice of Crime and Abuse of Power (Adopted by General Assembly resolution 40/34 of 29 November 1985). Available online at: <http://www.reparationlaw.com/reparations/what-is-reparation.php>

⁷⁸² 1907 Hague Convention (IV), Article 3 (cited in Vol. II, Ch. 42, 110); Additional Protocol I, Article 91 (adopted by consensus) *ibid.*, 125).

⁷⁸³ See, e.g. Peace Treaty for Japan; Yoshida-Stikker Protocol between Japan and the Netherlands; Convention on the Settlement of Matters Arising out of the War and the Occupation Agreement between Germany and the CJMC;

Responsibility, which oblige a State “to compensate for the damage caused.....insofar as such damage is not made good by restitution.”⁷⁸⁴ The commentary on the Draft Articles explains that “restitution, despite its primacy as a legal principle, is frequently unavailable or inadequate.....The role of compensation is to fill gaps so as to ensure full reparation for damage suffered.”⁷⁸⁵ The obligation to compensate for damage caused by violations of international humanitarian law is confirmed by a number of official statements.⁷⁸⁶ It has also been recalled in a number of resolutions adopted by the UN Security Council and UN General Assembly.⁷⁸⁷

Barker⁷⁸⁸ further states that compensation is a prevalent remedy, typically in cash or its equivalent, calculated to make good elements of loss of, or injury to legally protected interests. It is commonly employed where the loss or injury can be quantified in money terms, but can include recognized non-pecuniary injuries, such as emotional trauma associated with violations of human rights. Barker opines that the distinction between compensation, on one hand, and

Austrian State Treaty; agreement concerning Payments on behalf of Norwegian Nationals Victimized by the National Socialist Measures of Persecution; Luxembourg Agreement between Germany and Israel.

⁷⁸⁴ Draft Articles on State Responsibility, Article 36.

⁷⁸⁵ International Law Commission, Commentary on Article 36 of the Draft Articles on State Responsibility, as to whether the damage is financially assessable in order to be compensated, the commentary states that “compensable personal injury encompasses not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual. Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life”.

⁷⁸⁶ See, e.g. the practice of Canada, China, Iraq, Kuwait, Lebanon, speaking on behalf of the Group of Arab States.

⁷⁸⁷ See, e.g. UN Security Council, Res. 387, Res. 455, Res. 471, Res. 527, Res. 571, Res. 687, Res. 692, and Res. 827. UN General Assembly, Res. 50/22 C, Res. 51/233 and Res. 56/83.

⁷⁸⁸ Barker, J. (2010). ‘The Different forms of Reparation: Compensation’. In Oxford Commentaries on International Law. The Law of International Responsibility. p.599.

‘moral damage’ to sovereign interests such as satisfaction, and punitive sanctions involving a monetary element to sovereign interests, such as satisfaction on the other, is still maintained.

Barker⁷⁸⁹ further argues that in the context of state responsibility; the payment of compensation is understood as a secondary obligation consequent upon the breach of a primary international obligation and is employed where restitution is not available or applicable.⁷⁹⁰ He states that the customary international law position is reflected in the ILC’s Articles on State Responsibility. After setting out the duty to make reparation⁷⁹¹ and the forms it may take,⁷⁹² Article 36 expresses the entitlement to compensation in the following terms:

1. The state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

According to Barker,⁷⁹³ responsibility for compensation and the amount payable may be agreed by the parties⁷⁹⁴ at any stage of the proceedings,⁷⁹⁵ or they may be determined authoritatively by

⁷⁸⁹ Ibid, at pp.599-600.

⁷⁹⁰ Very similar considerations apply to lawful taking of property and there is no clear consensus on the difference in treatment of lawful and unlawful takings of property.

⁷⁹¹ Art 31 (1) provides: ‘The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act’.

⁷⁹² Art 34 provides: ‘Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination....’

⁷⁹³ Ibid.

⁷⁹⁴ While cases are important sources of doctrinal guidance, claims between States that are settled without recourse to courts and tribunals are the rule rather than the exception. Lump sum settlement agreements may lead to the

an international judicial, arbitral or administrative body (such as the International Court, an ICSID tribunal, or the United Nations Compensation Commission, respectively). Jurisdiction to award compensation is considered an integral part of the mandate to determine responsibility. Barker further asserts that while concepts and principles relating to compensation have drawn extensively upon domestic law doctrines, either directly or by reference to ‘general principles of law’,⁷⁹⁶ a distinct legal regime determining the rights and obligations in international law relating to compensation has been evolving through case law and international instruments. He states that notwithstanding the diversity of avenues of redress and sources of international jurisprudence, a reasonably coherent and increasingly refined body of compensation law has developed to balance the competing needs and interests of the parties to a dispute and of the international community as a whole.

5.3.4 Satisfaction

Satisfaction is another form of repairing the prejudice available to the guilty state to fully meet its obligation of making full reparations of the prejudice caused by the internationally wrongful act. Satisfaction is a remedy in the event where it is identified the existence of a moral prejudice,

creation of domestic tribunals for the determination of claims by reference to international law. The oil arbitrations represent only a fraction of cases, most of which were settled privately

⁷⁹⁵ *In BP Exploration Co. v Libyan Arab Republic* (1973) 53 ILR 297, (1974) 53 ILR 375, the parties settled after a finding of liability but before damages were calculated.

⁷⁹⁶ Many precedents relevant to public international law are drawn from sources which look to other legal systems, including hybrid systems and reference to general principles of law.

having in most cases a symbolic character, irrespective of the material consequences effected in case of committing the internationally wrongful act.⁷⁹⁷

The recognition of satisfaction as a form of repairing non-material prejudices has been established by international case law in the *Rainbow Warrior* case,⁷⁹⁸ saying that the application of satisfaction as remedy or as a form of reparation of the prejudice caused by an internationally wrongful act has been instated in the practice of the states also by the international case law.

According to Zyberi,⁷⁹⁹ satisfaction under the Basic Principles is defined through a list of non-exhaustive measures that have a broad scope. That list includes six sub-categories: the cassation of continuing violations, truth and justice measures, proper searches and reburials for disappeared and the deceased, apology and acknowledgement, commemorations and tributes, and educational and training materials.⁸⁰⁰ The measures are generally geared towards state responsibility to amend violations in ways unaddressed by classic forms of restitution and compensation. On the other hand, measures of satisfaction can narrow available relief, and, on the other, can offer broad and transformative measures. In the ILC Articles, the concept of satisfaction is also broad and captures remedies that attempt to repair the injured party ‘insofar as

⁷⁹⁷ Maxim, supra note 765 at p. 28.

⁷⁹⁸ UNRIAA, vol. XX, 1990, p.217; available online at: <http://www.un.org/law/riaa/>.

⁷⁹⁹ Zyberi, G (2011) ‘The International Court of Justice and applied forms of Reparation for International Human Rights and Humanitarian law violations.’ Vol.7, Issue 1 (January). p. 20. Available online at: <http://www.utrechtlawreview.org/index.php/ulr/article/viewFile/155/154>

⁸⁰⁰ GA Res. 147, 21 March 2006, A/Res/60/147, Annex, Para. 22.

it cannot be made good by an expression of regret, a formal apology or another appropriate modality.⁸⁰¹

(1) Acknowledgement of wrongdoing

Satisfaction is one of the important forms of reparation used by the ICJ.⁸⁰² While rejecting compensation as a suitable form of reparation in the *Application of the Genocide Convention* case, the Court acknowledged that Bosnia was ‘entitled to reparation in the form of satisfaction.’⁸⁰³ Thus, the Court included an operative paragraph in the judgment stating that Serbia had failed to comply with its obligations under the Convention. An acknowledgement of wrongdoing was deemed appropriate when Serbia’s violation consisted of failing to take reasonable measures to prevent genocide rather than direct participation in the crime of genocide. While the Court has explicitly listed in its operative paragraphs the violations of international human rights and humanitarian law,⁸⁰⁴ satisfaction as a form of reparation is used sparingly.

(2) Limitations upon satisfaction: article 45 (3)

Crawford⁸⁰⁵ concludes that some governments have proposed the deletion of paragraph (3), on the grounds, *inter alia*, that the notion of “dignity” is too vague to be the basis of a legal restriction. There is some point to the objection as a matter of expression; on the other hand,

⁸⁰¹ ILC Articles, Art. 37 (2).

⁸⁰² *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, (Merits) ICJ Reports 1949, p.36.

⁸⁰³ *Application of the Genocide Convention*, ICJ Reports 2007, pp. 165-166, Paras. 462-33

⁸⁰⁴ *Nicaragua Case, (Merits)*, ICJ Reports 1986, pp. 146-150, Para. 292, Wall, ICJ Reports 2004, pp. 201-202, Para. 163; *Armed Activities case*, ICJ Reports 2005, pp. 279-283, Para. 345; *Application of Genocide case*, ICJ Reports 2007, Para. 471.

⁸⁰⁵ Crawford, *supra* note 730.

there has been a history of excessive demands made under the guise of “satisfaction”, and some limitation seems to be required. It is proposed that demands by way of satisfaction should be limited to measures “proportionate to the injury in question”; in addition, they should not take a form which is humiliating to the state concerned.

5.3.5 Interest

Lauterpacht et al⁸⁰⁶ opines that a tribunal that possesses jurisdiction to determine liability and the compensable damage flowing therefrom is both entitled and obliged to give consideration to interest. A tribunal may refuse to award interest if it is precluded from doing so by the instrument establishing its jurisdiction.⁸⁰⁷ Tribunals have also decided against the award of interest where settlement funds are restricted,⁸⁰⁸ or because of the claimant’s conduct.

Article 38 provides that interest shall be awarded when necessary to ensure full reparation, leaving the rate and mode of calculation to be decided on a case by case basis.⁸⁰⁹ Shelton posits that the “necessity” to ensure full reparations because of the lost value of money over time⁸¹⁰.

⁸⁰⁶ Lauterpacht, E and Nevill, P. ‘The different forms of reparation: Interest’, pp. 613-622 in Crawford et al (2010) ‘The International Law of State Responsibility’. Oxford University Press.

⁸⁰⁷ Motion for allowance of interest on awards from the date until their payment, *Britain-Venezuela Commission*, 9 RIAA 470, 470-1, *Christern and Co, Becker and Co, Max Fischbach, Richard Friedericy, Otto Kummerow and A Dauman claims, German-Venezuelan Commission, 1903, 10 RIAA 363, Postal Treaty claim, Italian-Venezuelan Commission, 1923, 9 RIAA 134*

⁸⁰⁸ A recent example is the United Nations Compensation Commission which decided that: Taking into account all relevant circumstances, in particular the unavailability of adequate funds and the imminent completion of the Compensation Commission’s claims processing programme, decides to take no further action with respect to the issue of awards of interest’. S/AC.26/Dec. 243 (2005).

⁸⁰⁹ See article 38 of the ILC.

⁸¹⁰ Shelton, D. (n.d) Righting Wrongs: Reparations in the articles on State Responsibility.p.853. Available online at: <http://www.asil.org/ajil/ilcsymp5.pdf>

The commentary notes the extensive practice supporting the award of interest. It cites in particular the jurisprudence of the Iran-United States Claims Tribunal in considering claims for interest, noting that it and other tribunals have found that their general jurisdiction over claims includes the inherent power to award interest.⁸¹¹ Decision 16 of the Governing Council of the United Nations Compensation Commission⁸¹² allows for awards of interest and such awards are common in human rights tribunals.

Article 38 further indicates that interest is to run from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled,⁸¹³ but without setting forth any elements by which this issue could be determined. The commentary rightly notes that the actual calculation of interest raises a complex of issues concerning the starting date of breach, date on which payment should have been made, date of claim or demand, the terminal date (date of settlement agreement or award, date of actual payment) as well as the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates).⁸¹⁴

5.4 CONCLUSION

In Chapter 5 of the Thesis, I examined the scope of possible modes of reparations available to the Herero and Nama reparation claimants. The most common modes of reparations are restitution, compensation and satisfaction. The chapter further discussed the strength and limitations of the

⁸¹¹ See, e.g., S.S. “*Wimbledon*” (*Germany v. United Kingdom, France., Italy, Japan*), 1923 PCIJ (ser. A) No. 1, at 32 (Aug. 17).

⁸¹² UNCC, Awards of Interest, Decision No. 16, UN Doc. S/AC.26/1991/16, reprinted in 34 *ILM* 247 (1995).

⁸¹³ In the *Wimbledon* case, the Court determined that 6% interest should run not from the day the wrong occurred, but only from the date of the Judgment, when reparations were ordered and an amount fixed.

⁸¹⁴ Commentaries, Art. 38, para. 10.

abovementioned modes of reparation claims. In addition, the chapter discussed the longstanding rule of customary international law, set forth in the 1907 Hague Convention (IV) and repeated in Additional Protocol I, that a state which violates International Humanitarian Law must pay compensation, if the case demands. This obligation has been put into practice through numerous post-conflict settlements. It is also spelled out in the Draft Articles on State Responsibility, which oblige a State “to compensate for the damage caused.....insofar as such damage is not made good by restitution.” The majority of OvaHerero informants I interviewed for the thesis preferred the mode of compensation as the most effective and satisfying among the three.

CHAPTER 6: THE LEGACY OF THE GENOCIDE IN CONTEMPORARY NAMIBIA

6.1 Introduction

The legacy of the 1904-07 genocide is still being felt today in contemporary Namibia. More so, among members of the Hereros and Namas. Socio-economic challenges such as poverty, unemployment, alcoholism and importantly landlessness are some of the issues affecting the descendants of the genocide victims. Ironically, much of Ovaherero and Nama peoples ancestral land is today in the hands of minority whites. Many of whom are descendants of German settlers who perpetrated the genocide.

During the course of my research I interviewed several members of the OvaHerero regarding the legacy of the genocide on the community. This question provoked an emotional reaction to the majority of the interviewees, with some breaking down in tears. One of the interviewees, Utjiua Muinjangwe⁸¹⁵ when asked about the legacy of the genocide on the OvaHereros today, summed up the following:

6.1 .1 Political

She argued that due to the genocide the OvaHereros have lost any political clout with regard to influencing the decision of the government of today. She said if in 1904 they were an estimated one hundred thousand Hereros, and had the genocide not taken place they could number almost number about half a million today, thus constituting a strong political force. She emphasized the fact that as it is the case in most of Africa, politics is all about group identity and strength in numbers. However, due to a massive population loss that remains a distant dream for them.

⁸¹⁵ Muinjangwe, U. *Personal Interview*. (2012, April 19).

6. 1.2 Socio-economic

She posits that as a result of the genocide, and the massive displacement of the Hereros at that time, most Herero land was stolen and given to German settlers, whose descendants still occupy the majority of the so-called “stolen lands”. A lot of cattle were confiscated and also given to the settlers, leaving many OvaHereros in poverty. She reiterated the fact that throughout history cattle was and is still part and parcel of the Herero community. She further stated that OvaHereros are one of the most marginalized communities in Namibia, with many of them facing social problems such as alcohol abuse, gender-based violence, amongst other things.

6.1.2.1 Social connection and Historical injustice

With regard to the social connection and historical injustices, the issue here is a persistence of racialised structural injustice that has continuities with the institutions and practices of the German colonial authorities. Quoting Paramount Chief Riruako, “The widespread poverty among the thousands of my people is a direct result of the forceful expropriation of land and cattle from the Hereros by the German colonial authorities. It is thus incumbent upon the German Government to help address this historical wrong”.⁸¹⁶ He further went as far as saying the silence and indecisiveness of the Namibian government on the matter is also tantamount to aiding and abetting Germany escape liability for the genocide.⁸¹⁷

According to a research done by the Namibian Statistics Agency, households where the main language spoken is German, English or Afrikaans reported the highest income per capita of N\$ 150 730, N\$ 74 952 and N\$ 48 879, respectively. Households where German is the main

⁸¹⁶ Paramount Chief Kuaima Riruako. *Personal interview* (March 6, 2013).

⁸¹⁷ Riruako, *ibid.*

language spoken has an income per capita of about 26 times higher than that of other black groups including the Hereros.⁸¹⁸

The majority of white Namibians, and a small but growing black middle class, enjoy one of the world's highest standards of living, while the majority of black Namibians live in abject poverty, making Namibia one of the most unequal societies in the world⁸¹⁹. It has been argued this inequality is rooted in the fact that the majority of Namibia's black population lacks secure tenure to land.⁸²⁰

6.1.3 Psychological

Muinjangué claims that due to the horrendous atrocities committed by the German colonial troops such as rape, mass murder, floggings and forced starvation, many Hereros still suffer from psychological problems; as such memories have been passed from generation to generation. It is against this background that the Hereros are regarded by some other communities as selfish and always fomenting tensions with neighbouring tribes. She also attributes the lack of social cohesion of the tribe to the genocide, as there is this constant intra-tribal conflict tearing the community apart.

⁸¹⁸ For more information on Annual Consumption and Income see the *Namibia Household Income and Expenditure Survey* (NHIES) 2009/2010: Government Publication. The National Planning Commission.

⁸¹⁹ Publication by the National Planning of the Republic of Namibia. *ibid.*

⁸²⁰ Statement by the then Right Honourable Theo-Ben Gurirab, MP, Prime Minister of the Republic of Namibia on the acceleration of land reform in the Republic of Namibia, Windhoek, 25 February 2005.

6.1.4 Cultural genocide

Muinjangué further argues that as a result of tens of thousands of Hereros displaced from their lands, many found themselves living among other communities or tribes, some were hostile to them, others were sympathetic and welcomed them. This led to forced assimilation of this fleeing Hereros into the cultures of their hosts. She noted that in the Southern part of the country, at a place called *Vaalgrass*, one may find Nama speaking Herero tribe, with little or no degree of consanguinity to their mother tribe-the Hereros. She also gave an example, of those Tswana speaking Hereros who fled to Botswana and allowed to reside there by the then British colonial authorities. Like their kith and kin in the south, they have also lost their ability to speak their Herero language and lost most of their Herero culture.

6.2 Linking Namibia's complex land issue to the 1904-1907 genocide

One of the most contentious issues in post-independence Namibia is the land issue. Scholars have postulated that there is a direct link between the 1904-1907 Namaqua genocide and the current land predicament affecting the majority of the OvaHerero and Nama communities. There have been fears that the affected communities might take the law into their own hands and forcefully seize white owned farms like in neighbouring Zimbabwe. As stated by Angula “in accepting responsibility for the atrocities committed by the Kaiser's government, Germany being a successor state has a moral obligation to help our government (Namibian) buy back the lands forcibly taken away from the indigenous people during colonial rule”⁸²¹.

⁸²¹ Angula, N. Personal Interview (. 20 July 2012).

A few statistics will put the criticality of the land issue into perspective: White Namibians make up about 6% of Namibia's population of 2.4 million people, other non-black groups (mostly mixed race) make up less than 8%, and the rest (about 76%) are black Africans. But whites control nearly 90% of the land in what is the world's 34th largest country by area. And around 50% of the arable land is in the hands of just about 4,000 white commercial farmers.⁸²²

Referring to the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Shelton⁸²³ argues that there might be some possibility of seemingly retroactive application of laws against slavery and other historical wrongs, if it were possible to show its continuous effects. "any rule which relates to the licit or illicit nature of a legal act shall apply while the rule is in force, but any rule which relates to the continuous effects of a legal act shall apply to effects produced while the rule is in force, even if the act has been performed prior to the entry into force of the rule."

Furthermore, Thompson posits that injustice can cast a long shadow. It harms not only its immediate victims. Descendants of these victims are likely to lack resources or opportunities that they would have had if the injustice had not been committed, or to have been adversely affected in other ways by the suffering of their parents or grandparents or by other more indirect social ramifications of the wrong.⁸²⁴

⁸²² Mabasa Sasa 'Landless in the Land of the Brave'-*New African Magazine*, p. 38, February, 2013.

⁸²³ Shelton, supra note 810, pp. 259-289.

⁸²⁴ Thompson, J (2002) *Taking Responsibility for the past: Reparation and Historical Justice*. Polity Press. Cambridge, United Kingdom. pp.104-107.

Thus, advocates for reparations might argue that the OvaHerero and Namas present poverty and lack of land are an on-going effect of the genocide and dispossession, so that current laws about effects of past actions—even if the actions were not considered crimes at the time—should be applied. When asked about the consequences of the genocide on the OvaHerero community today. Anonymous replied:

“Loss of our ancestral land, loss of cattle. We are a broken people, we need to be repaired. The so-called land reform programme is yet to deliver for those who lost land”⁸²⁵

After independence, the blacks adopted the policy of national reconciliation, accepted the colonial masters as their brothers and sisters and abandoned the desire to re-occupy the fertile parts of Namibia. They said to whites: “Ok, you can continue to live on our land, but please sell to us the farms you don’t like”.⁸²⁶ Instead of appreciating the gesture, the Whites continued to deny the Blacks all the opportunities to develop. They have devised all possible plans to circumvent the laws of the country in order to block the Blacks from getting land. There is no willingness on the part of the Whites to sell the farms to the Blacks; either they sell at exorbitant prices or don’t sell to Blacks at all.⁸²⁷

⁸²⁵ Anonymous. *Personal interview*. (28 March 2013).

⁸²⁶ Anonymous. *Personal interview*. (29 March 2013).

⁸²⁷ Anonymous, *ibid*.

6.2.1 The History of Land Dispossession in Namibia

According to Werner,⁸²⁸ the centrality of land in Namibia seems self-evident: about 90% of the population derives its subsistence from the land, either as commercial or subsistence farmers, or as workers employed in agriculture.⁸²⁹ But the structure of land ownership and tenure does not only affect those who derive their livelihood directly from the land. The racially-weighted distribution of land was an essential feature in the colonial exploitation of Namibia's resources, directly affecting the profitability not only of settler agriculture, but also of mining and the industrial sector.⁸³⁰

As in pre-independence Zimbabwe, Werner notes that the 'whole wage structure and labour supply system depended critically on the land divisions in the country.'⁸³¹ Access to land determined the supply and cost of African labour to the colonial economy. So, the large scale dispossession of black Namibians was as much intended to provide white settlers with land, as it was to deny black Namibians access to the same land, thereby denying them access to commercial agricultural production and forcing them into wage labour.⁸³²

⁸²⁸ Werner, W. (1993) 'A Brief History of Land Dispossession in Namibia.' *Journal of Southern African Studies*, Vol. 19, No.1. at: <http://www.the-eis.com/data/literature/Werner%20land%20disposition%20in%20Namibia%201.pdf>

⁸²⁹ Mathiessen, L. 'Landbouontwikkeling in SWA/Namibie', Paper presented at Agricultural Conference held under the auspices of the SWA Agricultural Union, Windhoek, 1987, p.K4; United Nations Institute for Namibia, Namibia. Perspectives for National Reconstruction and Development, Lusaka, 1986), p. 106

⁸³⁰ Werner, supra note 828, at pp.3-5.

⁸³¹ Riddle, R. (1978) *The Land Question*, London, p.3; Cliffe and Munslow, 'Editorial: The Prospects for Zimbabwe', *Review of African Political Economy*, 18, 1981, p.2.

⁸³² Cliffe and Munslow, 'Editorial', p.2.

It follows that colonial land policies cannot be fully understood unless set within the process of capital accumulation in Namibia.⁸³³ Conversely, changes in the distribution and utilization of land will affect the economic structure of independent Namibia. Capital accumulation in Namibia was facilitated by the establishment of ‘native reserves’. As in South Africa, these not only provided cheap labour to the settler economy, but enabled the colonial state to exert political control over the population through co-opting indigenous leaders and appointing local headmen into the colonial system as lower-level bureaucrats who administered the ‘native areas’ on behalf of the administration in return for an annual salary together with bonuses of all kinds, retaining those elements of ‘native law and customs’ that were not subversive of the capitalist system.⁸³⁴

As mentioned earlier in this study land alienation by Europeans began in 1883 when a German trader, Adolf Luderitz, obtained the first tracts of land from Chief Joseph Fredericks in the south of the territory. Increasingly, German colonialists acquired land by signing protection treaties with indigenous rulers. Exploiting local conflicts, the former offered protection to individual rulers against their adversaries. Signatories of protection treaties in return were not permitted to alienate any land to ‘a different nation or members thereof’ without the consent of the German Emperor. Similarly, indigenous rulers abrogated their rights to enter into any other treaties with

⁸³³ For a comparative example see ‘Riddel, R. *The Land Problem in Rhodesia*’. *Alternatives for the Future*, (Gwelo, 1978), pp. 1-25.

⁸³⁴ No Sizwe, *One Azania One Nation. The National Question in South Africa*, (London, 1979), p. 34.

foreign governments.⁸³⁵ By 1893 practically the whole territory occupied by pastoralist communities had been acquired by eight concession companies.⁸³⁶

The process of dispossession not only meant that indigenous communities had lost their ancestral lands. European appropriation of land brought in its wake new forms of land tenure. More specifically, the notion of private land ownership rapidly replaced communal land utilization and for the first time introduced rigid land boundaries. Stock losses as a result of rinderpest in the northern regions increased pressures by kings on commoners, forcing many into wage labour.

Werner⁸³⁷ further states that avaricious settlers took advantage of the plight of stockless pastoralists in the central and southern regions of the country. By means of unequal trade they acquired large tracts of land and substantial numbers of the livestock which had survived the rinderpest. By 1902 only 31, 4 million hectares (38 per cent) of the total land area of 83, 5 million hectares remained in black hands. White settlers had acquired 3, 7 million hectares, concession companies 29, 2 million hectares and the colonial administration 19, 2 million hectares.

Tensions arising from unscrupulous trading practices and the resulting loss of land spurred the Herero and Nama War of resistance of 1904. This war had devastating consequences for both communities. Between 75 and 80 per cent of the Herero and about 50 per cent of the Nama were

⁸³⁵ Werner, W. 'An Economic and Social History', pp. 48-49; Ngavirue, 'The Land Theft', in Segal, R and First, R. (eds). SWA Traversty of Trust, (Harmondsworth, 1967)

⁸³⁶ Melber, H. 'Das doppelte Vermaechtnis der Geschichte: Nationwedung, Kolonisierungsprozess und deutsche Fremdherrschaft in Namibia (ca. 1890 bis 1914)', *Diskurs. Bremer Beitrage zu Wissenschaft und Politik*, (Bremen, 1982), pp. 73-74

⁸³⁷ Melber, *ibid.*

exterminated by the German colonial forces. Indigenous resistance thus crushed, the German colonial administration issued regulations at the end of 1905 announcing the expropriation of all ‘tribal land-including that given to the missionaries by the chiefs.’ More specific regulations followed in 1906 and 1907, empowering the colonial administration to expropriate all the land of the Herero and Nama. Henceforth, black Namibians could obtain land only with special permission of the Governor. Up until 1912 this was never granted. Squatting on uncultivated or unsettled land was also strictly controlled. By contrast, the *Baster* communities at Rehoboth and several Nama and *Damara* communities were secured access to small reserves as a reward for their loyalty to the Germans.⁸³⁸

6.2.2 The property clause in the Namibian Constitution

According to Angula “prior to independence the then government of West Germany as part of the Western Contact Group negotiated through the constitutional principles the inclusion of this clause to safeguard the properties of Namibians of German-descent, not taking into consideration how such property was obtained in the first place.”⁸³⁹

Kandunda⁸⁴⁰ posits that Article 16 of the Namibian Constitution contains the property clause which guarantees the right of the individuals to acquire, own and dispose of property as a fundamental right. The property guarantee under the Namibian Constitution is phrased in a

⁸³⁸ Goldblatt, I. (1971) *History of South West Africa from the Beginning of the nineteenth Century*. (Cape Town, 1971), pp. 150-154.

⁸³⁹ Angula, *supra* note 821.

⁸⁴⁰ Kandunda, S.S. (2010) ‘An analysis of the constitutional property clause in the Namibian constitution’. LLB Dissertation, University of Namibia. Available online at: <http://www.wisis.unam.na/theses/kandunda2010.pdf>

positive manner. However, the same Constitution allows for state to restrict this right, but it can only do so when certain requirements are met.

Article 16 (2) of Chapter 3 of the Constitution, says:

“The state or a competent body or organ authorized by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by an Act of parliament”⁸⁴¹.

The much talked about principle of willing seller/willing buyer, is contained in article 16 (1), which states that all persons have a right to “acquire, own and dispose” of all forms of property. The right to acquire relates to the right to buy, inherit, and receive by way of a donation among other things. The right to own relates to keeping the property for oneself, for whichever purpose, including the right of use and enjoyment of the property. And the right to dispose of property would essentially be the right to sell, donate, or in any other form alienate the property.⁸⁴²

The willing buyer, willing/seller principle that the Namibian government has adopted is therefore merely a recognition of the classical right of ownership, the right of use, enjoyment and disposal of property, in that a person is permitted to freely keep and use his property in the best manner that he/she thinks fit but always subject to the conditions imposed by the law. This is the right that is now entrenched by Article 16 (1) of the Namibian Constitution.

⁸⁴¹ See Article 16 (2) of the Constitution of the Republic of Namibia.

⁸⁴² Narib, G. (n.d) “Is there an absolute right to private ownership of commercial land in Namibia?” pp.1-10. Available online at: <http://www.lac.org.na/projects/lead/Pdf/privateownership.pdf>

Kandunda⁸⁴³ further notes that the format of constitutional property right (article 16) consists of a combination of a positive and a negative guarantee. The first part of the clause creates a positive guarantee of the right to acquire, own and dispose of property. As a result, it establishes the constitutional duty upon the state to uphold and protect the institutional framework within which it is possible for people to acquire, own and alienate both movable and immovable property within the boundaries of Namibia as recognized by the UN and international community.⁸⁴⁴ Whereas, a negative guarantee is that a state can expropriate and regulate the use of property, provided the general framework within the rights can be exercised is not abrogated. In the *Kessl case*,⁸⁴⁵ the court stated that “the second part of the clause is more or less designed to ensure that expropriation only takes place in the public interest and against compensation, and in accordance with empowering statutory law”. Therefore, the exercise of expropriation of individual property is only to be done for the public interest and fair compensation is to be paid thereof.

The inclusion of this clause in chapter three of the Constitution is a result of the negotiation process to independence. Harring⁸⁴⁶ states that ‘Article 16 of the constitution, broadly protecting existing individual rights to private property, is the product of a political compromise. Its recognition of “existing” (implicitly meaning “white”) property rights was a political necessity; expedient to quickly end the war for independence and bring about a democratic (meaning “black”) government.’ As a result, for example, privately held Namibian farms were not only left

⁸⁴³ Kandunda, supra note 840, at p. 12.

⁸⁴⁴ Article 1(4) of the Constitution of the Republic of Namibia.

⁸⁴⁵ *Gunter Kessl and Ministry of Lands and Resettlement, case number (P) A 27/2006 and 266/2006.*

⁸⁴⁶ Harring, S. (1996) ‘The Namibian Constitution and the “Rights and Freedoms” Guaranteed Communal Land Holders: Resolving the Inconsistency between Article 16, Article 100 and Schedule 5,’ 12 *South African Journal on Human Rights*, pp. 467-484.

in white hands, but the “existing” property rights of the white owners were constitutionally protected. In the end, this constitutional property provision maintains the status of private property.

The function of a property clause is usually to provide guarantee for the existence and protection of individual property rights on one hand, and to provide the possibility and the limits for the state interference with those same property rights on the other. Although, on the face of it, it appears as if the provision is in conflict in terms of its functions, it must be remembered that no right is or can be guaranteed absolutely. Therefore, some form of state interference is essential to enforce controlling mechanisms for the benefit of the public welfare. What is challenging though is how to draw the line between these two functions.⁸⁴⁷

Despite the presence of the property clause in the Constitution, what is unclear to many Namibians is what is to be included or excluded from the protection of the constitutional property clause. In other words, does it include all kinds of rights (both real and personal rights) with regard to all kinds of property (movable and immovable corporeal property, immaterial or intellectual property, and incorporeal property)? Moreover, does it include customary land rights? Whether a wide or narrow interpretation of this constitutional provision will be taken by our courts, due regard to foreign and international law will be essential as guiding framework for such an interpretation.⁸⁴⁸

⁸⁴⁷ Kandunda, supra note 840, at pp.10-12.

⁸⁴⁸ Kandunda., supra note 840, at pp. 12-27.

6.2.3 Land reform in Namibia

The very first premises to be deliberated on when dealing with the land question is to ascertain that “the land and all the wealth belongs to all the Namibian people.”⁸⁴⁹ According to Maamberua,⁸⁵⁰ the current government land policy of “willing buyer and willing seller” leaves much to be desired as there are too many willing buyers and very few, if at all, willing sellers. Instead most farms are being converted into rest camps, lodges, trophy hunting units and many other profit making entities.

In May 1990 the National Assembly decided to prepare a conference on land reform and the land question. The main reason for the decision was to consult widely on the land question in order to achieve some kind of consensus. The Conference was held in June 1991 and 500 participants from all over the country debated the issue for several days and passed 22 Consensus Resolutions.⁸⁵¹ In accordance with a Land Conference resolution, the Prime Minister appointed the Technical Committee on Commercial Farmland in December 1991.⁸⁵² The recommendations of the committee were guided by concerns to bring abandoned, under-utilized and unused land back into production by expropriating it where necessary. A further recommendation was that

⁸⁴⁹ Excerpt from the SWANU Party manifesto: The South West Africa National Union (SWANU) is the oldest political party in Namibia, formed in 1959. Most of its members came from the Herero people, while fellow independence movement SWAPO was mostly an Ovambo party. The party's President is Usutjiuae Maamberua.

⁸⁵⁰ Usutuaije Maamberu. *Personal Interview*. (12 March 2012).

⁸⁵¹ For more on the 1991 Land Conference see Adams, M.E and Devitt, P. (n.d) ‘Grappling with Land Reform in Pastoral Namibia’. Available online at: <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5383.pdf>

⁸⁵² Office of the Prime Minister, *Report of the Technical Committee on Commercial Farmland*, Windhoek, 1992.

foreigners should not be allowed to own land on a freehold basis in Namibia, and that land held by absentee foreigners should be expropriated and reallocated to the land reform programme.⁸⁵³

Foreigners wishing to invest on a large scale should be able to lease land on a long-term basis. The committee also recommended ceilings on the total amount of land that a single owner should be permitted to own.⁸⁵⁴ Another concern expressed by most of the OvaHereros that I interviewed was the fact that most of the beneficiaries of the current law reform programme are not the descendents of the genocide victims. As stated by Jahanika.⁸⁵⁵

“They came up with the so-called resettlement policy that was biased, because they wanted to include ex-Plan fighters, while those who were exterminated and are landless are not a priority. I am not against our fellow Namibians being resettled but the first priority must be given to those whose forefathers were exterminated for land 108 years ago. Our land reform does not include land restitution, as in the case of South Africa, and our government is not supporting our reparation case against the German government. This is because they are afraid that, when they tell their counterpart to pay reparations, the German government will withdraw their financial aid to our government which it is using to balance its budget.”

Indications are that the passing of the Agricultural (Commercial) Land Reform Act⁸⁵⁶ accelerated the acquisition of commercial farmland. While the Ministry of Lands, Resettlement and Rehabilitation had acquired only 17 farms in the commercial sector for a total amount of N\$12.9 million by early 1996,⁸⁵⁷ this number had more than doubled by mid-1997, when government had obtained a total of 39 commercial farms for just over N\$30 million.

⁸⁵³ Werner, W. (1997) “Land Reform in Namibia-the first seven years.” NEPRU Working Paper No. 61

⁸⁵⁴ Werner, *ibid*, at pp. 1-2.

⁸⁵⁵ Meundju Jahanika “Land Grab Is Inevitable in Namibia”, *The Namibian* newspaper, 31 August 2012

⁸⁵⁶ Act no. 6 of 1995.

⁸⁵⁷ *New Era*, 18-24 April 1996.

The government of Namibia is in the process of drastically hiking tax on commercial farms as it looks for N\$400 million in the next five years to buy farms to speed up land reform. That means N\$80 million every year—a stark contrast to the roughly N\$25 million per year raised through land tax on commercial farms since 2004.⁸⁵⁸

6.2.4 Political parties and land reform

Most political parties represented in the National Assembly of the Republic of Namibia have expressed support for land reform, albeit with different viewpoints on how best to address this problem.

The ruling SWAPO party posits that the so-called “willing buyer, willing seller principle” has failed. They have warned white commercial farmers to sell land or else the government will find other ways of getting the land back to resettle previously disadvantaged communities.⁸⁵⁹ The

Head of State and the ruling party, His Excellency, President Hifikepunye Pohamba remarked:

“The main objective of our struggle for national liberation was to reclaim the land of our ancestors. Our people need land, but our willing buyer, willing seller system has failed. The struggle was not for us to be able to hoist the flag, but for land. Government is ready to buy land. Those who have the land must sell it to the state or we will find other ways to ensure that our landless people get access to land. We tried to get the land from those that have it, but there is reluctance. Something else has to be tried. We must admit that government did not provide enough access to land by the previously disadvantaged communities”.⁸⁶⁰

The Rally for Democracy and Progress (RDP), which is the country’s only official opposition party, like the ruling party, also voiced its concern about the willing buyer, willing seller principle and called for urgent measures which can, among others, help create a successful and

⁸⁵⁸ Jo-mare Dudley “Land Tax Milks Farmers” *The Namibian* Newspaper. 05 October 2012.

⁸⁵⁹ Asser Ntinda. “Sell or Else”. Swapo Party online. Available online at: http://www.swapoparty.org/sell_land_or_else.html

⁸⁶⁰ Ntinda, *ibid.*

fully commercial black farming sector. The RDP strongly recommends that a mechanism be devised to ensure that the current high demand for land does not distort land prices in Namibia. A price control mechanism of some kind should be devised. Stakeholders in the transaction must agree on a price and the difference must be included in the price if there is any. A Land Price Control Act must be introduced in the absence of agro-ecological zoning in Namibia. A land price ceiling, based on the ecological zoning in formation, or other scientific measure could be considered.⁸⁶¹

The Democratic Turnhalle Alliance of Namibia (DTA), acknowledging the danger inherent in a lack of action in steering the issue of land reform to its logical conclusion, believes that the amicable resolution of this issue will be the deciding factor in whether Namibians will live peacefully in the future or succumb to the violence that may result from allowing the matter to continue to drag on indefinitely.⁸⁶² The D.T.A. further believes that a workable land reform policy must be introduced as a matter of urgency and that its outcome should be to settle black commercial farmers on unutilized and under-utilized state and communal land, as well as previously white owned commercial farms in an equitable, permanent, productive and sustainable manner in order to bring about an even distribution of arable land in Namibia. Consistent with article 16 of the Namibian Constitution this land reform policy will be based on the principle of willing buyer, willing seller, which has been accepted by all political parties in Namibia.⁸⁶³

⁸⁶¹ Sun Reporter. "Kamburona calls for faster land reform programme". *The Namibian Sun*. 15-06-2012. Available online at: <http://sun.com.na/content/agri/kamburona-calls-for-faster-land-reform-programme>

⁸⁶² Land Policy: D.T.A of Namibia. Available online at: <http://www.dtaofnamibia.org.na/files/754081901/policy.pdf>

⁸⁶³ Ibid.

The Congress of Democrats (COD) on their part contends that should any land expropriation take place, it should be done in a clearly demonstrable case of public, and not political, interest".⁸⁶⁴ The South West African National Union (SWANU), a self-declared democratic socialist political party has also been at the forefront of the land debate in Namibia. The party has at times even covertly supported the controversial land reform undertaken by the government of Zimbabwe, which “forcefully” reclaimed back the land “stolen” by British settlers. SWANU therefore proposes that part of the Namibian Constitution that allows land to be classified as private property be revoked, or to be amended, in order for the state to take over the land and administer it on behalf of the people.⁸⁶⁵

Moreover, the then Minister of Information and Broadcasting, Ben Amathila, stated during the debate of the Commercial Land Reform Act that:

We feel that as long as land remains with the white people we are not independent. This is a sentiment throughout this country for as long as you are black. You can see it in this house, from the time that this debate started the unanimity on this issue, not only in principle, but in anticipated reality. Among us blacks, there is no difference, no difference whatsoever.⁸⁶⁶

6.3 The potential impacts of the Herero/Nama claims on the so-called “cordial relationship” between the Namibian and German government.

Namibian government has not explicitly pronounced its stand with regard to the reparations claims pursued by the Hereros and the Namas against the German government. This is despite

⁸⁶⁴Staff reporter. “Let's have a steady path on land reform: COD”. *The Namibian*, 24-05-2004. Available online at: http://www.namibian.com.na/index.php?archive_id=7493&page_type=archive_story_detail&page=5576

⁸⁶⁵ Staff Reporter. “Swanu warns against 'fake solution' on land question”. *The Namibian*. 24-02-2004. Available online at: http://www.namibian.com.na/index.php?archive_id=4687&page_type=archive_story_detail&page=5677

⁸⁶⁶ Republic of Namibia, Debates of the National Assembly, Vol. 42, 19-28 October 1994, pp. 33-34.

the fact a motion sponsored by the leader of the opposition party and paramount chief of the OvaHerero was passed and unanimously adopted in parliament. The German government has remained adamant that it will not pay any reparations to the descendants of the Namaqua genocide, citing the so-called “cordial relations” between the two countries and the fact that Namibia receives more German development aid per capita than any other nation in the developing world.

To make matters worse, the German Ambassador to Namibia angered the descendants of the genocide victims when he remarked that the constant reminders of those events and persistent demands for reparations might tarnish the current bilateral relations between Namibia and Germany. The OvaHerero and *Ovambanderu* Council for the Dialogue on the 1904 Genocide (OCD 1904), reacted strongly to the Ambassador’s remarks, and urged him to treat the genocide issue with the sensitivity it deserves.⁸⁶⁷ In the words of the OCD Secretary, Ueriuka Tjikuua:

“We note the view of His Excellence Huckmann on the issue of reparation as a reflection of the position of the authority that appointed him. It is no surprise for the OCD-1904 to hear such a view from an official serving the German conservative government. It must be pointed out here perhaps, that the German ambassador is right to state that the Namibia-German bilateral relations will be tarnished by the issue of reparations. The German government is to be blamed for such eventuality, because as long as Germany is failing to commit itself to the principle of restorative justice, reparation issues will feature prominently in the Namibia-German agenda.”⁸⁶⁸

⁸⁶⁷ Elvis Muraranganda “Ambassador angers Genocide Victims”, *The Sun*. February 2013.

⁸⁶⁸ Muraranganda, *ibid*.

However, the assertion by the German Ambassador is rejected by anonymous⁸⁶⁹ who argues that “the issue of reparations should be separated from that of development aid. These are two distinct issues”.

Germany has consistently refused to pay reparations to its former colony, arguing that it has given much development aid to Namibia,” Sarkin⁸⁷⁰ states that:

“For many years, Germany has countered claims that it is liable for reparations for its past conduct using the argument that it has a special relationship with Namibia and anything it owes Namibia is given by way of development aid”.

When asked whether the continuing Herero reparation claims has the potential to damage the so-called excellent cordial relationship between Germany and Namibia, Kaura⁸⁷¹ opines “to the contrary it will strengthen the existing bilateral relations, just as the current relationship between Germany and Israel. In acknowledging and paying reparations the affected group will extend a hand of friendship to the German people and their government and finally putting this issue to rest”.

Sarkin⁸⁷² further points out that “the amount given has been about 20 million dollars per year, while Egypt, as the highest recipient, received more than 220 million per year. If only the post-independence years are considered, Namibia’s position as a receiver of aid from Germany improves to twentieth position. This was further highlighted by the Interim President of the Association of the OvaHerero Genocide in the United States of America, Ngondi Kamatuka

⁸⁶⁹ Anonymous. *Second personal interview*. (23 October 2013).

⁸⁷⁰ Sarkin, *supra* note 11.

⁸⁷¹ Kaura, K. *Personal Interview*. (26 July 2012).

⁸⁷² Sarkin, *supra* note 11.

when he spoke about the return of 20 Nama and Herero skulls from Germany. He stated “The aggrieved communities are not against the development aid Germany gives to Namibia. What they demand is reparation for the wrongs Germany committed against the OvaHerero and the Nama people. These communities call upon the Government of Namibia to forcefully demand reparations from Germany”.⁸⁷³

6.3.1 German development aid to Namibia

German-Namibian development cooperation is a central component of the special German-Namibian relations. Since Namibia’s independence in 1990, Germany supported the Namibian government in its policy of national reconciliation and in coping with the legacies of apartheid. Dismantling the social and economic differences originating from the past is the main aim of German-Namibian cooperation. In this, German development cooperation supports the medium- and long-term objectives set by Namibia in her vision 2030 and national development plan.⁸⁷⁴

Germany and Namibia have agreed to concentrate cooperation on three priority areas: management of Natural Resources, Transport and Economic Development. Moreover, the Germany government also believes that since HIV and AIDS jeopardizes the social and economic development of the country at all levels, German development cooperation supports the partners in prevention work in the said priority areas.⁸⁷⁵

⁸⁷³ Staff reporter, ‘Development aid no substitute for reparations’, in the *New Era* of 12 October 2011.

⁸⁷⁴ Historical Responsibility: German Development Cooperation with Namibia. Available online at http://www.windhuk.diplo.de/contentblob/3594784/Daten/2500152/Download_Cooperation_flyer_small.pdf

⁸⁷⁵ Historical Responsibility, *ibid.*

In addition to that the federal government promotes renewable energies from its special facility for climate and environmental protection. For instance, the *KfW-Entwicklungsbank* (German Development Bank) finances the extension of the *Ruacana* hydro-electric power plant to the amount of 35 million Euros via a subsidized interest rate loan. The German government also contends that German organizations cooperate with their Namibian partners in various programmes and projects, these are:

- *Deutsche Gesellschaft für Internationale Zusammenarbeit* (GIZ), the new agency after the merger of GTZ, DED and *InWent*;
- *Kreditanstalt für Wiederaufbau* (KfW);
- German Federal Institute for Geosciences and Natural Resources (BGR);
- Centre for International Migration and Development (CIM);
- German Investment and Development Company (DEG).

The stakeholders of German development co-operation in Namibia coordinate their activities closely with other donors. Due to the large contribution by Germany (approximately 20%) towards the European Development Fund (EDF), collaboration with the EU Delegation plays a particular role.⁸⁷⁶

Following the announcement by the Federal Government in 2004 to double the funds for German-Namibian development cooperation in the medium term, this target was reached during

⁸⁷⁶ Historical Responsibility, *ibid.*

the last German-Namibian government negotiations in July 2009. For the years 2009 and 2010 Germany committed funds in the amount of 116.5 million Euros.⁸⁷⁷

6.3.2 Is German development aid to Namibia a substitute for reparations?

In 2006, Germany and Namibia joined together in a “Financial Cooperation between the Governments of Namibia and Germany: Special Initiative” which sought to bring development aid to areas with “historic ties” to Germany.⁸⁷⁸ Sadly for the Hereros and Namas, the Special Initiative explicitly states that the Germans did not enter into the negotiation to serve as reparation, and furthermore, “all land requisition and resettlement projects must be excluded from funding”.⁸⁷⁹ According to Romanowsky,⁸⁸⁰ these guidelines are nothing short of a slap in the face to the Herero/Nama people. After the outwardly historic apology speech by the Minister, this special Initiative retracted from the promises the Minister laid out.

To confuse German development assistance with the specific demands of the Herero for compensation for land and cattle expropriated during the colonial era must surprise all reasonable persons. These are obviously two different issues that cannot and should not be mixed. Besides, if the compensation were included in development assistance, then that portion should be clearly stated and indicated.⁸⁸¹

⁸⁷⁷ Historical Responsibility, *ibid.*

⁸⁷⁸ Consulting Services for a design and Feasibility-Study ‘The Special Initiative.’ The Republic of Namibia, www.npc.gov.na/tenders.

⁸⁷⁹ The Special Initiative, *ibid.*

⁸⁸⁰ Romanowsky, *supra* note 32, pp. 1-3.

⁸⁸¹ Kwame Opoku (2012) ‘Return of stolen skulls by Germany to Namibia: Closure of a horrible chapter?’ p. 14. Available online at <http://www.pambazuka.org/en/issue/577>

Romanowsky⁸⁸² further posits that despite the large amount of money Germany has given to Namibia, the Herero/Nama people largely remain unsatisfied. In 2005, when Germany pledged to give \$160 million for a “reconciliation program,” several members of the Ovaherero Genocide Association protested what they saw as a “complete lack of respect” and a “disappointment”.⁸⁸³ According to Romanowsky not only did the government fail to consult the Herero/Nama people, these people felt that the amount proposed by Germany was a “criminal insult and grossly insensitive.”⁸⁸⁴ Minister Wieczorek-Zeul claimed in 2004 that she was in Namibia to listen to the people, but just one year later, Herero and Nama people still did not have a say in what was going on between Germany and Namibia. From the beginning, the victims have demanded to have a part in the discussions with Germany, and they have been ignored in this request.

According to Sarkin,⁸⁸⁵ for many years, Germany has countered claims that it is liable for reparations for its past conduct using the argument that it has a special relationship with Namibia and anything it owes to Namibia is given by way of development aid. Sarkin notes there is certainly a close relationship between Germany and Namibia. In this regard Heike Becker has noted: Namibia is not just any country. Seventy-four years after the end of colonial rule in German SWA, a wide ranging network between Germans and their favourite colony exists from

⁸⁸² Romanowsky, supra note 32, at pp. 1-15.

⁸⁸³ Statement by the Herero Genocide Committee in the USA in Response to Germany’s Proposed 160 million Payment over a period of 10 years for the reconciliation program.” Namibian. Com. May 23, 2005. www.namibian.com.na/news/full-story/archives/2005

⁸⁸⁴ Ibid.

⁸⁸⁵ Sarkin, supra note 11 at pp.60-62.

family ties to German politicians and organizations.⁸⁸⁶ While Germany espouses this notion of its special relationship with Namibia, a comparison of its relationships and development aid packages⁸⁸⁷ to other countries does not support this claim. Although Germany has been Namibia's biggest donor, this does not mean that its support has been commensurate with their historical relationship. Germany disburses about 7.5 billion dollars a year in official development aid (ODA), which is about 0.28 percent of its gross national income (GNI). In proportion to gross national product disbursed, it is twelfth on the list of countries giving such aid. This figure has decreased from 0.42 percent in 1990.⁸⁸⁸ Sarkin further notes that in terms of the amount given, Germany was the fifth highest in the world, behind the United States, Japan, France, and the United Kingdom. It was also third on the list of countries granting debt forgiveness over the period 1990 to 2003.⁸⁸⁹ Yet it allocated only 1.4 percent of government spending to ODA, compared to 7.3 percent on the military.⁸⁹⁰

Sarkin⁸⁹¹ further observes that Germany hardly imports or exports to Namibia. In fact, less than one percent of imports and only about two percent of exports flow between Germany and

⁸⁸⁶ Becker, H. in Schuring, E. (2004). History obliges: The real motivations behind German aid flows in the case of Namibia. MA thesis (Law and Diplomacy), Fletcher School of Law and Diplomacy, Tufts University, 45.

⁸⁸⁷ Collier, P. (1999). "Aid dependency: A critique." *Journal of African Economies*, 8, pp.528-545; and De Renzio, P. (2005). Can more aid be spent in Africa? Opinions. London: Overseas Development Institute, p.30.

⁸⁸⁸ This was the official figure for 2003. *United Nations Development Programme (2005) Human Development Report*, 278

⁸⁸⁹ United Nations Development Programme (2005). Human Development Report, 94.

⁸⁹⁰ United Nations Development Programme (2005). Human Development Report, 94.

⁸⁹¹ Sarkin, supra note 11 at p.61.

Namibia.⁸⁹² In addition, Germany's claim that Namibia receives the highest levels of aid seems to be false. Between 1985 and 2001 Namibia was in absolute terms only twenty-third on the list of African receivers of development aid from Germany. The amount given has been about \$20 million per year, while Egypt as the highest recipient received more than \$220 million per year. If only the post-independence years are considered, Namibia's position as a receiver of aid from Germany improves to twentieth position.⁸⁹³ During these years the amount given to Namibia has been about \$29 million dollars per year, compared to the more than \$250 million dollars per year received by Egypt. In both periods, Egypt, the highest African recipient of German ODA, received approximately ten times more than Namibia. Another of Germany's former colonies, Tanzania, ranks third in the first period (receiving an average of \$ 61 million per year) and fifth in the shorter period (on average \$65 million per year).⁸⁹⁴

However, contrary to Romanowsky and Sarkin's assertions, the German Ambassador to Namibia announced that Namibia-German trade volume reached N\$ 990 million in first half of 2012. He stated that "Germany imported products worth €45, 3 million (approximately N\$ 520 million) while Namibian imports from Germany reached €41, 5 million), (approximately N\$477 million) in the first half of the year."⁸⁹⁵

⁸⁹² Schuring, E. (2004). History obliges: The real motivations behind German aid flows in the case of Namibia. MA thesis (Law and Diplomacy), Fletcher School of Law and Diplomacy, Tufts University, p.158.

⁸⁹³ Ibid.

⁸⁹⁴ Sarkin, supra note 11, at p.61.

⁸⁹⁵ Staff reporter. 'Nam-German trade volume reached N\$990 million in first half of 2012', *Die Republikein*, 28 November 2012.

On the controversial Namibia-German Special Initiative, He stated that the programme is faring well and Namibia' National Planning Commission has requested for additional funding. He further stated that an additional €11 million (N\$ 123.9 million) was approved, whereby €10 million (N\$112.7 million) will be used for investment in drilling boreholes and construction of schools € 1 million (N\$11.4 million) for accompanying measures such as planning, civil engineering, and architecture has been made available by the German Government.⁸⁹⁶

6.4 The Official Namibian government position

At first, the Namibian government feels strongly that all Namibians suffered not just the Herero. Germany provides development aid to Namibia for the entire country, and the Namibian government is satisfied with the economic development funding for roads and schools for all ethnic groups that suffered from colonialism as of 2001 German provided approximately N\$ 3 billion to Namibia. Hence Namibia does not wish to jeopardize cooperation with Germany and continuation of economic assistance for the country.⁸⁹⁷

However, the Namibian government's position with regard to the reparation debacle is changing, in February 2007, the then Namibian Prime Minister, Nahas Angula, stated that any Namibian who feels wronged by colonial actions has the right to seek justice, and he commended Herero efforts to call into account Germany's responsibility to the descendents of their victims.⁸⁹⁸

⁸⁹⁶ Ibid.

⁸⁹⁷ Absalom Shigwedha "Hereros v Germany", *New African Magazine*, January 2001.

⁸⁹⁸ Brigitte Weidlich, "Government Supports Herero Reparation Demands," in *The Namibian*, February 21, 2007. Available online at: <http://allafrica.com/stories/200702210832.html>

Moreover, the current Prime Minister, Dr. Hage Geingob, expressed his support to the cause, when reacting to the Germany Ambassador's call that Namibians must accept that for reconciliation to occur, the nation should move past the sad episode of genocide against the Namas and the Hereros.⁸⁹⁹ He recently stated "We cannot stop people from talking about reparations. It is their right to do so."⁹⁰⁰ Moreover, to a certain degree, by according the return of the skulls a state ceremony addressed by the Head of State Hifikepunye Pohamba, the Namibian government, through this gesture, sent an important signal that it was potentially opening a new front in its engagement with Germany on the demands by the affected communities.

6.4.1 The Namibian Parliament's resolution on genocide

In the year 2006 the Namibian National Assembly debated and adopted a motion on the "genocide on the Namibian people" put forward by Paramount Chief Riruako.⁹⁰¹ The intention of the motion was to provide the background for the demand for reparations for the genocide committed by Germany.⁹⁰² In his presentation to the National Assembly, Riruako recounted what had happened in 1904 and the years thereafter. He argues that what had happened then would not only qualify as genocide if one applied the rules of the Convention on the Prevention and

⁸⁹⁹ Elvis Muraranganda "Hage tears into German ambassador over genocide", *The Sun Newspaper*, February 6, 2013. Available online at: <http://www.namibiansun.com/content/national-news/geingob-tears-into-german-ambassador-over-genocide>

⁹⁰⁰ Ibid.

⁹⁰¹ debates of the National Assembly of the Republic of Namibia of 19 September, 18 October and 26 October 2006. The motion and its justification can be found in the *Debates* of 19 September 2006, pp 32-42

⁹⁰² Hinz. M.O. (Undated) "More than one hundred years after Ohamakari, or: How to deal with the genocide committed by Imperial Germany". *Namibia law journal*. Volume 04-Issue 02, December 2012.

Punishment of the Crime of Genocide, but also in terms of international law in place at the time the event occurred. Riruako states the following belief:⁹⁰³

.....that significant parts of the Geneva and other similar treaties of the late 1940's were merely codifications of pre-existing legal principles governing "unjust wars" and the consequences thereof. ... Crimes against peace and crimes against humanity are all included in the Genocide Convention of 1948.

6.4.2 The repatriation of skulls and its significance to the current reparations debate

In late 2011, a delegation led by the then Minister of Youth, Sports, National Service and Culture Kazenambo Kazenambo visited Berlin with the purpose of repatriating dozens of skulls belonging to the victims of the genocide, which was sent to major German Universities for pseudoscientific research. At the occasion marking the return of the skulls the Bishop of the Lutheran Church in Namibia Dr. Zephania Kameeta remarked "I do not know whether we comprehend the enormity of this solemn divine occasion and the privilege and honour accord to our generation. In his mercy and wisdom, God has chosen this generation to come here from Germany and to take back the remains of our ancestors who were brutally killed by the German colonial forces and in an undignified manner removed from Namibia to Germany."⁹⁰⁴

Many pundits have argued that the return of skulls cannot be a symbolic closure of a tragic chapter in the history of Germany and Namibia. At best, the handing over could be regarded as a symbolic beginning of a process that may close this incredible chapter of cruelty and criminality

⁹⁰³ *Debates of the National Assembly of the Republic of Namibia* of 19 September 2006, p.38.

⁹⁰⁴ Peter H. Katjavivi (2012) 'The Significance of the Repatriation of Namibian Human Skulls' p. 11-12. Available online at <http://www.pambazuka.org/en/issue/577>

organized by a European state against African peoples.⁹⁰⁵ German rule in South West Africa (1884-1914) was marked by singular brutality, disregard of the human rights of Namibians, confiscation of land and cattle, coupled with exploitation of the human and material resources of the vast colony. The massacres of the Herero and the Namas were the first genocides of the 20th century, a period that was to be distinguished by many other atrocities including Nazi genocides.⁹⁰⁶

If the return of the skulls was supposed to be an occasion to foster a more united people in the form of a unifying history, the opposite has been truer. Contrary reports in the international media, including in Germany (*Der Spiegel*) and the United Kingdom (Reuters and The Guardian), reporting in the Namibian media had been scant and pedestrian, without searing analyses, focusing largely on the controversies around the return of the skulls, and less on the historical, political and moral significance of the event. Bar a few exceptions, media concerns in Namibia focused largely on mundane issues, such as cost and the size of the delegation that went to Germany. In doing so, the local media avoided any serious grounding of the issue in terms of its moral, historical and political significance to Namibia and the affected communities.⁹⁰⁷

⁹⁰⁵ Kwame Opoku , supra note 881, at p. 16.

⁹⁰⁶ The UN's 1985 'Whitaker Report on Genocide' described the German war against the Herero as genocide, paragraphs 14 to 24, pp. 5-10, available online at <http://www.Preventgenocide.org/prevent/UNdocs/Whitaker/section5.htm#n1>. Kwame Opoku, 'Namibian Bones in European Museums: How Long are the Dead Remain Unburied? Genocide with Impunity', <http://www.afrikanet.info>; 'Why do European Museums have so much trouble with African Bones?' <http://www.museum-security.org>

⁹⁰⁷ Alfredo Tjiurimo Hengari (2012) 'The return of the Herero and Nama Skulls: Coming to terms with a difficult History' p. 40. March, 20, 2012. Available online at <http://www.pambazuka.org/en/issue/577>

Some members of the public have lambasted President Pohamba for being selective on matters related to the country's colonial past and for not using the occasion marking the return of Herero and Nama skulls to unequivocally demand reparations from the German government.⁹⁰⁸

Recently, the Namibian government moved to eliminate all vestiges of German colonialism by renaming towns and other settlements bearing German names. The Caprivi Region, named after Count Leo von Caprivi, who was the German Chancellor between 1890 and 1894, is now known as the Zambezi Region. The coastal town and harbor of Luderitz, named after the German merchant and arguably the first "colonizer" of the territory is to be renamed "ǃ NamiǂNüs".⁹⁰⁹

This Namibian government onslaught against the vestiges of German colonial rule hasn't escaped scrutiny from the descendants of the 1904-1907 genocide. As remarked by anonymous:⁹¹⁰

The Namibian government is busy renaming towns and settlements that bear German names, while doing nothing to confront the German government to start exploring ways of paying reparation payments to the Hereros and Namas communities for the genocide suffered at the hands of Von Trotha and his colonial troops. The renaming of towns should be accompanied by the expulsions of white farmers of German descent and their land be returned to us without compensation. Renaming towns and settlements can never alleviate all the social evils currently experienced by the Herero and Nama communities. No land no justice.

⁹⁰⁸ Sun Reporter. "Pohamba Mandume's remarks sparks outcry". 07-03-2013. Available online: <http://sun.com.na/content/national-news/pohamba%E2%80%99s-mandume-remarks-sparks-outcry>

⁹⁰⁹ Shinovene Immanuel. "Caprivi is no more". *The Namibian*. 09-08-2013. Available online at: http://www.namibian.com.na/index.php?archive_id=112767&page_type=archive_story_detail&page=89

⁹¹⁰ Anonymous. Personal interview. (23 October 2013).

6.4.3 Namibian political parties views on the Herero/Nama reparations

Most of the opposition parties represented in parliament overwhelmingly supports the Herero/Nama reparation claims against the German government. This is evidenced by the bipartisanship acceptance of the motion sponsored by Herero Chief Riruako in 2004 demanding Germany accept and acknowledge its historical wrong.

However, the so-called historically Herero political parties have been on the forefront of the reparation debate. The South West African National Union (SWANU) under Usatjiua Maamberua, the Democratic Turnhalle (DTA) Alliance under Katutire Kaura and the National Union Democratic Organization (NUDO) has time and time again raised the issue of reparations in the National Assembly.

On a party level, the ruling SWAPO party, under pressure from the aforementioned political parties has in recent years been supportive of the cause, albeit on individual basis. Only time will tell if this will translate into government policy without irking both the Germans who are reluctant to yield to the reparation demands and the local populace who are largely in favour . One can thus conclude that the ruling party is treading on dangerous ground. Other smaller parties have also voiced their support to the reparations cause, with the All Peoples Party under Ignatius Shixwameni including the issue on its 2009 election manifesto. The Rally for Democracy and Progress (RDP), a breakaway faction from the ruling SWAPO Party has not yet pronounced itself fully on the matter, but indications are that it will also do so. The leader of the Congress of Democrats (COD), Ben Uulenga even went as far as requesting the Head of State to

recall the German Ambassador to Namibia for trying to silence Namibians on reparations demands.⁹¹¹

Despite seemingly overwhelming support for the Herero/Nama reparations by most political parties represented in the National Assembly, there has been concerns that the ruling party is concentrating more of its energy on self-preservation and hijacking national holidays. Some opposition parties, particularly, SWANU Party lashed out at the ruling Swapo Party for using national events as a platform to launch their party programs and for parading their party colours.⁹¹² The leader of SWANU Party of Namibia remarked:

It is SWANU's submission that national events will have national characters and dimensions provided we honestly and courageously do away with political partisanship and allow history to be presented by national leaders drawn from all different political representatives. It has become necessary for a national dialogue to be held to distinguish between party, the government and state. Namibia's history is one sided because no statue has been erected to commemorate those that died as a result of the genocide which occurred between 1904 and 1908 when Germans killed people from the Ovaherero, Namas, Damaras and the San people. The United Nations has since classified the death of more than 150 000 Namibians mostly in concentration camps as genocide. Despite this irrefutable historical reality, neither the statutes in remembrance of genocidal atrocities nor aggressive reparations agenda as part of the justice are on top list of our government's political agenda.⁹¹³

SWANU recommended that the independence remembrance national museum that is currently under construction in Windhoek should be renamed to Genocide Remembrance Centre given the

⁹¹¹ Helvy Shaanika "Prime Minister praised on reparations", *New Era*, 13 February 2013.

⁹¹² Immanuel Shinovene "Swapo politicise national events – Swanu". *The Namibian*. 29-08-2013. Available online at: http://www.namibian.com.na/indexx.php?archive_id=113465&page_type=archive_story_detail&page=32

⁹¹³*The Namibian*, *ibid.*

fact that it is being constructed at a genocide site that was known as “*Orumbo rua Kajomondi*” which literally means a camp of horrific scenes.⁹¹⁴

6.5 The impact of the Herero/Nama genocide on the present German state

Until recently, little was said on the potential impact of the legacy of the 1904-1907 Herero genocide on the current German State. The failure by the German government to fully apologize for what they call “atrocities” complicates everything. Despite, pressure from left leaning parties in the German Bundestag, the government is adamant that no reparations should be paid to the Herero and Nama communities.

6.5.1 The official German Position

Though German has admitted that the Kaiser’s government had committed horrendous atrocities against the natives during the 1904-08 uprising, it has so far ruled out any form of reparations citing the large amounts of aid it gives to Namibia. However, there have been calls by some political parties in the German Bundestag and some NGOs for Germany to pay reparations to the victim of the Namaqua genocide.⁹¹⁵ The left party wants Germany, currently led by Chancellor Angela Merkel of the Christian Democratic Union, to officially recognize the killing of the Nama and Herero people by colonial troops and to take full responsibility for these acts. The opposition party also urged the German government to pay reparations to the descendants of the affected communities, an appeal that the German government has so far ignored.⁹¹⁶

⁹¹⁴ *The Namibian*, *ibid*.

⁹¹⁵ Staff reporter “German NGOs slam genocide denial”. *The Namibian*. 28-March 2012.

⁹¹⁶ Toivo Ndjobela “Bundestag to vote on motion”. *New Era* .23 March 2012.

Moreover, the German government is not receptive to the Herero requests for monetary compensation and land redistribution. According to the Germans the events that the Herero requested compensation for happened 100 years ago, making it extremely difficult to apply modern legal arguments to the issue. In the words of the then German Ambassador to Namibia, Wolfgang Massing “the pending lawsuit will lead nowhere....we should move forward together and find projects to....heal the wounds.”⁹¹⁷

The German Government remains adamantly opposed to repaying the Herero People. Two German political parties, the Christian Democratic Union and the Christian Social Union, claimed that reparations would negatively affect German citizens and cost them billions in tax dollars.⁹¹⁸

However, attempts to interview German diplomats in Namibia regarding the matter proved futile.

6.6 CONCLUSION

Chapter 6 examined the legacy of the 1904-1907 Herero and Nama rebellion and subsequent genocide perpetrated by the Germans and its impact on the modern Namibian state. The extermination and enslavement of Hereros and Namas during the 1904-07 era partially led to the destruction of these communities cultural, economic, social and political wellbeing. The chapter further dealt with the complex land issue in Namibia and linked it to the 1904-07 genocide. After Hereros and Namas were expelled from their ancestral lands into the country’s hinterlands, they

⁹¹⁷ “Germany Urges Herero to Drop Lawsuit.” DW-world.de. April 25, 2009. Available online at <http://www.dw-world.de/dw/article/0,,1287663,00.html>

⁹¹⁸ Wolfgang Massing “Massing now Shocked and Puzzled” new Era. 19 August 2004. Available online at: <http://www.newera.com.na/article.php?articleid=2675>

were promptly replaced by European settlers. The Namibian land issue is complex and has been attributed in some quarters as one of the key impediments to the country's Policy of National Reconciliation. The German Government's intransigence to fully acknowledge that its colonial legacy currently defines the economic and political landscape of Namibia further aggravates the situation.

The so-called German-Namibia "Special Initiative" has been roundly rejected by the respective communities and several opposition parties. They claim that it was decided and implemented by the respective governments without consultations with neither member of the two communities. Chapter 6 also dealt with the potential impact of the Herero/Nama reparation claims on the so-called cordial and/or special relationship between the Namibian and German governments. It has been postulated in some sections of the country that the Namibian government is being blackmailed by its German counterpart to remain silent on the reparations issue or risk losing development aid.

CHAPTER 7: CONCLUSIONS AND RECOMENDATIONS

It has been stated by many political scholars and historians that the 1904-07 Herero-German War led to the commission of the first genocide of the twentieth century.⁹¹⁹The atrocities and/or war crimes committed by the German colonial authorities were declared as acts of genocide by the United Nations Whitaker Report of 1985. Though both sides have valid arguments with regard to the culpability and liability of the German government, the debate is far from finished. The Germans may have an “excuse” in insisting that the widely cited 1948 Genocide Convention does not have retrospective effect on the atrocities committed by its predecessor. Some legal scholars have constantly cited Article 28 of the Vienna Convention on the law of Treaties which provides that:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.⁹²⁰

However, what German cannot escape are several international conventions or/and treaties that it ratified and accessed to, namely the Berlin Convention, the 1890 Anti-Slavery treaty, both Hague Conventions of 1899 and 1907 respectively and other similar instruments. The German High Command committed war crimes and crimes against humanity while being co-founders of many of these treaties.

⁹¹⁹ Mamdani, M. (2001) *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, Princeton University Press, Princeton, p. 12; Samuel Totten, William S. Parsons, Israel W. Charny, "Century of genocide: critical essays and eyewitness accounts" pg. 51, Routledge, 2004; Kiernan, B (2007) *Blood and Soil, a World History of Genocide and Extermination from Sparta to Darfur*, Yale University Press, p. 36.

⁹²⁰ Vienna Convention on the law of Treaties, May, 23, 1969, U.N.doc. A/Conf. 39/27 (1969), Art. 28 [hereinafter "Vienna Convention on the Law of Treaties"].

The whole reparation debate can only be put to rest if a compromise is reached by both parties without making another party looking weaker. In acknowledging that the German imperial army committed atrocities against the Namibian natives, it becomes imperative for the German government of the day to morally and unequivocally address some of the grievances of the affected communities.

Though the amount of aid being poured in the country by the German government is commendable, but one is inclined to state that it is not enough to address most of the problems affecting the Nama and Herero communities such as poverty, landlessness, and other social evils many of whom are the consequences of the 1904-08 Namaqua genocide.

A tripartite agreement between the Germany government, Namibian government and the Herero/Nama coalition is certainly the way forward. This tripartite agreement should be in most instances be modeled along the lines of the Luxembourg Agreement which was signed between Germany and the State of Israel. This agreement paved the way for eventual German reparation payments to Jews affected by the holocaust.

The tripartite agreement can only come into being if all parties consent to enter into dialogue, as stated by DTA MP Mchenry Venaani “ a pre-dialogue’ and an “inter-dialogue” is needed in order to clarify the way forward that the Namibian Government, the opposition parties, and the affected communities would wish to entertain.⁹²¹ Whereas the former Deputy Minister

⁹²¹ Mchenry Vennani, cited in *Debates of the National Assembly of the Republic of Namibia* .18 October 2006, p. 104.

Kazenambo Kazenambo of Regional and Local Government, Housing and Rural Development, placed the need for dialogue in a wider national and international context:⁹²²

The best practical option necessary to exit out of the legacy of the distasteful past is to embark upon on a constructive dialogue between the descendants of the victims or the survivors of Genocide and the descendants of perpetrators of Genocide in order to try and reach a permanent amicable solution to the problem.....

The issue of reparation for human rights violations committed by the German colonial troops in the then German South West Africa will not die away and it is therefore counterproductive to try and avoid this issue. The more you try and avoid the issue, the more you harden views and contribute to the creation of a negative perspective which will undermine the Policy of National Reconciliation in this country. Let the various stakeholders get serious while the situation is very fresh and controllable.

Moreover, there have been calls for the Namibian government by reparations proponents to Amend article 16 in the constitution. The erstwhile provision is a platform for the so-called ‘willing buyer, willing seller principle’. However, amending the Constitution can also prove to be delicate. As stated by Geingob, mechanisms for amending constitutions should strike the right balance between rigidity and flexibility⁹²³. The Windhoek Assembly opted to entrench fundamental rights and freedoms. Further, the article stipulating specific majorities required in parliament or in a referendum for amending the constitution may not be repealed. Any other provisions of the constitution can be repealed or amended by a majority of two thirds of all the members of the National Assembly and two thirds of all the members of the National Council. In case an amendment or repeal of any of the provisions of the constitution secures majority in the

⁹²² Ibid. p.114.

⁹²³ Geingob, H (2004) ‘State Formation in Namibia: Promoting Democracy and Good Governance’. A dissertation Submitted in accordance with the requirements for the degree of Doctor of Philosophy. University of Leeds. School of Politics and International Studies.pp.141-142. Available online at: <http://www.hage.web.na/thesis.pdf>

National Council, the president has the option of subjecting the amendment or repeal of the relevant provision of the Constitution to referendum.

In the event of the German government agreeing to pay some form of reparations, the onus lies on the leaders of the affected communities to stipulate which mode of reparations is suitable and likely to improve their socio-economic conditions.

7.1 Findings

- During the course of this research I discovered that the majority of Hereros and Namas support the call for reparations to be paid by the German government.
- The legacy of the genocide is still being felt today on the Hereros and Nama communities, with a significant percentage of members of these communities living in dire poverty.
- The social consequences of the 1904-1907 genocide can be summed up as follows: Herero and Nama peoples have difficulty in believing in themselves as dignified and capable human beings as they were diminished to being lower than an animal by the Germans at the time. The Hereros and Nama peoples were deprived of their right to innovative thinking, their right to independent existence free of slavery and their right to make decisions for themselves. The impact of the indoctrination by the Germans cannot be underestimated as it was carried over from generation to generation and Herero and Nama people have difficulty in finding their strength and equilibrium again.
- Economic consequences: Most productive land is currently in the hands of few white farmers, mostly of German descent and it is safe to conclude that it was forcefully “stolen” from the affected communities. As stated by anonymous: “who owns land in

Namibia? And from whom was this land taken in exchange for a bottle of wine or a plate of food or perhaps, if lucky, for a rifle? From the Nama people of course, especially in the southern, central and north western regions. The Namas now form part of the poorest of the poor in Namibia and have no prominence in economic activity and they own very little land in the country.

- Most of the Hereros and Namas interviewed dismissed the so-called German special initiative agreed between the Namibian and German governments to develop areas which were affected by German colonial rule, saying they were not consulted when such an initiative was agreed upon by the respective governments.
- Their loss of population means they have lost political and economic power, as in Africa the notion of strength in numbers is still valid.
- Their loss of cultural identity is still visible, as most of the affected communities have adopted elements of the cultures of the former oppressors. Such as the Herero dressing code which is influenced by early German missionaries and soldiers. Moreover, about 80% of towns and settlements in the Southern part of the country colloquially referred to as Namaland bear German names.
- The Namibian government is still reluctant to support the Herero and Nama cause of action against the German government. Most of the senior government representatives approached by the author were not willing to discuss the matter openly. Again, as stated by anonymous (an ethnic Nama) the reason for this is as follows: “the Namibian government is reluctant to assist the Herero and Nama communities in their quest to claim reparations because, firstly, it does not recognize Namas as the first and authentic

indigenous group of Namibia, hence reluctance to assist in the reparations. The government is also not representative of the Nama people. Sad, but true.”

- The German government on its part still stands by its assertion that it is not bound by any international legal instrument to pay reparations to the affected communities.
- The Namibian government is seemingly hesitant to engage the German government on the reparations issues for fear it will endanger the so-called “cordial” political and economic relationship currently enjoyed by the two States. In other words, there is this fear that should the Namibian government insist on reparations, the German government may cut aid.
- The constant factional infighting within the OvaHerero and Nama tribal groups has undermined their efforts to fully engage the government on the reparations issue.
- There is a potential threat that the whole reparations debacle may be hijacked by some political parties for their own selfish gains.
- In the international legal sphere, the odds are stacked against the Herero/Nama claims as claims of this nature are rarely entertained by international courts and tribunals due to their complexity and passage of time.
- Internationally, support for reparations for historical injustices and/or wrongs emanates mostly from smaller political parties and NGO’s with “leftist leanings”.
- There is a possibility of opening a Pandora’s Box in the event the Herero/Nama reparations claim becomes successful. With the British finally agreeing to pay compensation to surviving members of the anti-colonial militia in Kenya, the *Mau Mau* recently, the possibility of similar claims is no longer imagined but it is now real.

- There is evidence that few if any significant reparations have ever been paid to people of African descent for historical injustices. In the words of New African Magazine contributor Baffour Ankomah “today, neither Germany nor Belgium is offering any compensation for killing African people in Namibia and Congo, yet Germany is happy paying compensation to the Jews”.

7.2 Recommendations

- To constructively deal with the whole reparations debacle, there should be, in the words of Professor Hinz, a “Reparations Commission” involving the government of the Republic of Namibia, Federal Republic of Germany as well as the Herero/Namas. The commission will initiate dialogue between the parties and discuss ways of finding a lasting solution to this issue. This reparations commission should be modeled along the lines of the “Luxembourg Agreements” between Germany and the Jewish State of Israel.
- Where possible, German corporations such as Deutsche-Bank that are alleged to have aided in the commission of the genocide should also be engaged either individually or alongside the German government.
- In acknowledging that indeed the then German colonial authorities perpetrated war crimes against the “natives”, it is incumbent upon the current German government to at least set up projects such as the German-Namibia special initiative to help alleviate the plight of the descendants of the genocide victims. This initiative may include the construction of roads, clinics, museums, classrooms etc. The German government may also help set up scholarship programmes for the affected communities.

- It is incumbent upon the German government to deal with the reparations issue with sensitivity and due diligence so as not to be labeled as racist. As postulated by one of the Herero activist and scholar, Omo Kustaa, “The Germans managed to pay the Jews and the State of Israel billions of dollars because of the actions of the Nazi party, yet they cannot do the same to the Hereros, is it because Jews are white and Hereros are black?”.
- The German government should become a participating party to Namibia’s ongoing land reform programme. The federal government should funnel funds to assist the Namibian government to fastrack its land reform programme as it is a foregone conclusion that the current land crisis afflicting the nation is as a consequence of earlier German colonial rule.
- A genocide memorial should be built in both Namibia and Germany as a remembrance to those who perished during the Namibian war of national resistance. The building of such a memorial will also foster a spirit of reconciliation between the German people and the Herero as well as Namas.
- Efforts must be made to encourage public debates on the Namaqua genocide in both Namibia and Germany.
- History textbooks in both Germany and Namibia should be expanded to include more information on the Namibian genocide. It is so disheartening that millions of Germans are unaware of the atrocities committed by their country during its colonial period.
- Factional infighting and constant bickering among the affected communities should cease if they really want to succeed in their quest to claim reparations. Moreover, the

existing three reparation committees, one (1) for the Nama group and two (2) for the Herero group should be consolidated in unison to bargain better.

- A full and unequivocal apology from the German government should be made, as it is widely believed that the so-called 2004 apology was not sincere enough. However, as stated by most scholars such an apology would not necessarily mean that reparations should follow.
- The Government of Namibia should fully pronounce itself where it stands with regard to the reparations claims, so far, its performance has been at best mediocre. It is quite saddening that more than a decade after the communities took their case to the ATCA the government of the day has no official position and policies relating to one of the saddest chapters in Namibia's history.
- Mechanisms should be put in place to prevent certain political groupings from hijacking the reparations project for their own political expediency.
- Affected groups should pronounce themselves what mode of reparation is suitable to them, either through monetary compensation or something in kind.
- Though Germany may have the edge when it comes to international legal opinion, it nevertheless has a moral obligation to the welfare of the affected communities.
- And last but not least, if all fails, it is the duty of the Namibian government to institute legal proceedings against the Federal Republic of Germany at the International Court of Justice, since it is a fact that non-state actors like the Herero/Nama groups have no jurisdiction to appear before that court.

BIBLIOGRAPHY

BOOKS

- Abbott, A. Helmoed-Romer Heitman and Paul Hannon (1991). Modern African Wars (3): South-West Africa. Osprey Publishing.
- Allot, P. (1990) Eunomia, New Order for a New World .Oxford University Press, pp-372-73.
- Amerasinghe, C.F. (1990) Local Remedies in International Law. Cambridge. Grotius Publications Limited.
- Amerasinghe, F.C. (2003) Jurisdiction of International Tribunals 393-94 (analyzing the ECtHR's practice under Article 41);
- Ashworth, A. J. (1987) Defining Criminal Offences Without Harm' in Smith 8
- Babbie, E. and Mouton, J. (2001). The Practice of Social Research, Cape Town: Oxford University Press
- Bassiouni, M.C. (1999) Crimes against Humanity in International Criminal Law. 226. 2nd ed.
- Barker, J. (2010).The Different forms of Reparation: Compensation. In Oxford Commentaries on International Law. The Law of International Responsibility. Oxford University Press
- Beaten, A.M. (1991) Newly Independent and Separating States' Succession to Treaties: Considerations on the hybrid dependency of the Republic of the Former Soviet Union. Boston University.
- Bedau, H. A. (1972) Compensatory Justice and the Black Manifesto. The Monist Vol. 56, No. 1, Philosophy and Public Policy. Oxford University Press pp. 20-42.
- Bernard, H. Russell. (1988). 'Research Methods in Cultural Anthropology'. Newbury Park, California: Sage.

- Brownlie, I (1963) *Internantional Law and the Use of Force by States*. Clarendon Press. Oxford. pp-3-4.
- Brownlie, I. (1990) *Principles of Public International Law*. Fourth edition. Claredon Press. Oxford.
- Buscher, F. M. (1989) *The US War Crimes Trial Program in Germany, 1946-1955*, Westport, CT: Greenwood Press.
- Buchanan, A. (1991) *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*. (Boulder: Westview Press, 1991), pp-88-89
- Clapham, A (2006). *Human rights obligations of non-state actors*. Oxford: Oxford University Press.
- Cohen, S. (2001) *States of Denial: Knowing About Atrocities and Suffering* Polity Press. p.225.
- Cooper, A. (1982) *'Economic Power and Political Influence in Namibia,' 1700-1982. (West view Press, Boulder CO, 1982)*.
- Crawford, J. (2002) *'The International Law Commission Articles on State Responsibility: Introduction, Text and Commentaries'*, Cambridge, Cambridge University Press
- Deakin, F.W. (1962) *'The Brutal Friendship: Mussolini, Hitler and the Fall of Italian Fascism'* 9-17.
- Denzin, Norman K. & Lincoln, Yvonna S. (eds.). (2005). *The Sage Handbook of Qualitative Research* (3rd ed.). Thousand Oaks, CA: Sage.
- De Renzio, P. (2005). *Can more aid be spent in Africa? Opinions*. London: Overseas Development Institute.
- D'Amato, A. (1971) *The Concept of Custom in International Law* Cornell University Press.
- Drechsler, H. (1980). *Let us die fighting: The struggle of the Herero and Nama against the German Imperialism (1894-1915)*. London. Zed Press, 1980.

- Dugard, J. (2005) *International Law: A South African Perspective*. 3rd ed. Juta. p. 27.
- Du Pisani, A. (1986) *SWA/Namibia: the politics of continuity and change*. Jonathan Ball Publishers. p. 5.
- Francioni, F. '*Reparations for Indigenous Peoples: Is International Law Ready to ensure Redress for Historical Injustices?*' In Lenzerini, F. (2008) '*Reparations for Indigenous Peoples*'. Oxford University Press.
- Gaeta, P. (2009) *The UN Genocide Convention: A Commentary*. Oxford University Press.
- Gewald, J.B. (1995) '*Forced Labour in the Onjembo, the Herero –German War of 1904-1908*', *Itinerario, XIX, 1*.
- Gewald, J.B. (1999), '*Herero Heroes: A Socio-Political History of the Herero of Namibia 1890-1923*'. Oxford University Press.
- George, D.L. '*The Truth About the Peace Treaties*', Vol. I. London.
- Goldblatt, I (1971) *History of South West Africa from the Beginning of the nineteenth Century*, (Cape Town, 1971), pp. 150-154.
- Gray, C. (1987) '*Judicial Remedies in International Law*.' OUP, Oxford.
- Greenwood, C. (2008) "*Historical Development and the Legal Basis of Humanitarian Law* "in *Fleck, D. 'The Handbook of International Humanitarian Law'*, Oxford University Press.
- Heinrich, L. *Die christliche Mission in Suwestafrika. Zur destruktiven Rolle der Rheinschen Missionsgesellschaft beim Prozess der Staatsbildung in Sudwestafrika (1842-1893)* (Berlin 1963).
- Higgins, R (1994) *Problems and Process: International law and how we use it* Oxford: Oxford University Press. pp.48-49.
- Hochschild, A. (1998) *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonialism*. Houghton Mifflin; 1st Edition (PB) edition (October 1999).

Hovannisian, R. G. (1991) *The Armenian Genocide, History, Politics, Ethic's*, New York: St Martin's Press.

Howard, M et al (1994) *The Laws of War: Constraints on Warfare in the Western World*. Yale University Press. New Haven and London.

Jagers, N. (2002) *Corporate Human Rights Obligations: In Search of Accountability* Intersentia.p 36.

Jennings R., and Watts, A (1992) *Openheim's International law*. Oxford University Press. 346.

John Locke, Two Treatises of Government (London: Dent, 1977 (1690)).

Ijalaye, D. A. (1978) *The Extension of Corporate Personality in International Law*. Oceana Publications (Dobbs Ferry, N.Y.) pp.221-23.

Irlle, J. (1906) *Die Religion der Herero* (Sonderabdruck aus dem Archiv fur Gutersloh).

Katjavivi, P.H. (1988) *A History of Resistance in Namibia*. James Currey Ltd. p.1.

Kinahan, J and Wallace, M (2011) *The History of Namibia: From the beginning to 1990*. Written by HURST AND CO. London.

Kiernan,B. (2007) *Blood and Soil, a World History of Genocide and Extermination from Sparta to Darfur*, Yale University Press, p. 36.

Lau, B (1995) *The Hendrick Witbooi papers*. 2nd ed. National Archives of Namibia. p. 1.

Lau, Brigitte (April 1989), *"Uncertain Certainties: The Herero-German War of 1904"*, *Migabus* 2: 4–8.

Lauterpacht, H. in Oppenheim, H. (1955). *International law: A treatise*, Vol. 1: Peace (8th ed.) New York: David Mackay, 751.

Locke, J. (1698) '*Two Treatises of Government*' 395, (3rd ed. laslett rev. ed. 1963).

- Maho, J.F (1998) *Few People, Many Tongues: The Languages of Namibia.* Gamsberg McMillan Publishers.p.1.
- Mamdani,M. (2001), *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, Princeton University Press, Princeton, p. 12.
- Martin, F.F., Schnably, S.J. Wilson, R.J. Simon, J.S. Tushnet, M. V. (2006) *International Human Rights and Humanitarian Law. Treaties, Cases, and analysis.* Cambridge University Press
- Marek, K, (1954), *Identity and Continuity of States in Public International Law* Librairie E Droz p.5.
- Masson, J. (2001) *Jacob Marengo: An Early Resistance Hero of Namibia.* Out of Africa Publishers. p.6.
- Mcintosh, M., Thomas, R., Leopziger, D., and Coleman, G. (2003). *Living Corporate Citizenship: Strategic routes to socially responsible business.* London: Prentice Hall.
- Milton, M. (1993) '*A World History*', vol. II, 27-32.
- Minnow, M. (1998). *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence.* Boston: Beacon Press.
- Moleah, T. A. (1983) *Namibia: The Struggle for Liberation,* Wilmington, Delaware.
- Mullerson, R. (1994) *International Law, Rights and Politics,* London. pp.140-145.
- Mbuende, K. (1986) *Namibia, the Broken Shield: Anatomy of Imperialism and Revolution.*Liber Forlag. p.16.
- Naldi, G. (1995) *Constitutional Rights in Namibia. A Comparative Analysis with International Human Rights.* Juta and Co. p.4.
- Nersessian, D.L. (2010) *Genocide and Political Groups.* Oxford University Press.
- Nozick, R. (1974) *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 150f.

Okeke, C.N. (1973) 'Controversial Subjects of Contemporary International Law: An Examination of the New Entities of International Law and their Treaty-Making Capacity'. Rotterdam University Press.

Oppenheim, L.F.L. International Law. A treatise. Vol 1. New York, Bombay and Calcutta. Longmans, Green and Co.

Olusoga D and Erichsen W.C. (2010) Kaiser's Holocaust: Germany's Forgotten Genocide. Faber and Faber Ltd.

Orashekavli. A. (2009) Peremptory Norms in International Law. Oxford University Press.

Parry, C (1965) 'The Sources and Evidences of International Law' Manchester University Press.

Pool, G. (1991) Samuel Maharero. Gamsberg Macmillan.

Poewe, K. (1985) The Namibian Herero. A history of their psychosocial disintegration and survival. Lewiston/Queenstown, p. 65.

Sandoz, Y, Swinarski, C, Zimmermann, B. (1987) Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC/Martinus Nijhof, Geneva, 1987, p. 39 (para. 55).

Ratner, S.R. (2001) 'Corporations and Human Rights: A Theory of Legal Responsibility 111 Yale. L.J. 443 in International Human Rights and Humanitarian law. Treaties, cases and analysis'. (2006). Cambridge.

Rohrbach, P. (1909) Aus Sudwest-Afrikas schweren Tagen. Berlin, p. 167.

Sarkin, J.(2009) Colonial Genocide and Reparations Claims in the 21st Century: the socio-legal context of Claims under International Law by the Herero Against Germany for Genocide in Namibia, 1904-1908. London. Praeger Security International.

Sarkin. J, (2011) Germany's Genocide of the Herero: Kaiser Wilhelm II, His General, His Settlers, His Soldiers. James Currey. p.132.

- Schabas, W. A. (2000) *Genocide in International Law*. Cambridge University Press.
- Schachter, O. (1991) *International Law in Theory and Practice* 58.
- Schwabe, K. (1904) *Mit Schwert und Pflug in Deutsch-Sudwestafrika.* Berlin: E.S. Mittler. p. 67.
- Schinz, H. (1891) *Deutsch-Sudwest-Afrika. Forschungsreisen durch die deutschen Schutzgebiete Gross-Nama- und Hereroland, nach dem Kunene, dem Ngami-See und der Kalaxari 1884-1887.*
- Shank, G. (2002). *Qualitative Research. A Personal Skills Approach*. New Jersey: Merrill Prentice Hall.
- Shaw, M.A. (1997) *International Law*. 4th ed. Cambridge University press. p.677.
- Shaw, M. A. (2008) *International Law* 6th ed. Cambridge.
- Shelton. D. (1999). *Remedies in International Human Rights Law*'. New York: Oxford University Press.
- Singh, N and McWhinney, E. (1989) *Nuclear Weapons and Contemporary International Law*, 2nd ed., Martinus Nijhof, Dordrecht.
- Slick, J.K and Coughlin, B. (2003) *The Politics of Regret: Analytical Frames, in J. Torpey (ed), Politics and the Past*, 37.
- Soogot, D (1986) *Namibia: The Violent Heritage*. Rex Collings. London p.1.
- Steinmetz, G. (undated) *The devil's handwriting: Pre-coloniality and the German Colonial State* in pp. 147-149, 185-186 and 209.
- Thompson, J (2002) *Taking Responsibility for the past: Reparation and Historical Justice*. Polity Press, Cambridge, United Kingdom. pp.104-107.

- Tillman, S. P. (1961) Anglo-American Relations at the Paris Peace Conference of 1919, Princeton: Princeton University Press.
- Tofalo, I. (2006). 'Overt and hidden accomplices. Transnational Corporations' range of complicity for human rights violations. In O.D. Schutter (Ed.), 'Transnational Corporations and Human Rights' (pp. 335-358). Portland: Hart Publishing.
- Troup, F. (1950). In face of fear: Michael Scott's challenge to South Africa. London: Faber & Faber, 63.
- Vedder. H. (1937) 'Die Voorgeskiedenis van Suidwes-Afrika. Gebeurtenisse in Suidwes tot aan die dood van Maharero in 1890'. Windhoek.
- Von Francois. H. (1937) "Nama und Damara. Deutsch-Sud-West-Afrika". Magdenburg, 1896.
- Wallace, D. C. (1983) Legal Control of the Multinational Enterprise Martinus Nijhoff Publishers) p.1.
- Wallenkampf, A. V (1969) The Herero Rebellion in South West Africa, 1904-1906: A Study in German Colonialism, University of California, p. 79-81.
- Weinberg, G.L. (1994) 'A world at arms: a global history of World War II. Cambridge University Press, 597-99'.
- Welman, Kruger and Mitchell (2005) Research Methodology. Oxford University Press.
- Wellington, J.H (1967) South West Africa and its Human Issues. Oxford University Press. pp.198.
- Wellington, J, and Szzerrbinski, M (2007). Research Methods for the Social Sciences continuum International Publishing Group.
- Werner, W. (1967) 'An Economic and Social History', pp. 48-49; Ngavirue, 'The Land Theft', in Segal, R AND First, R. (eds). SWA Traversty of Trust, (Harmondsworth).
- Werle, G. (2005) Principles of International Criminal Law. The Hague: Asser Press.

Woller, H. '*Geschichte Italiens IM 20*'. JAHRHUNDERT 163 (2010); Schneider, T. Italien vom ersten zum zweiten Weltkrieg, in *Geschichte Italiens* 447, 484 (Michael Seidmayer ed., 2d ed. 1989)

JOURNALS

Bayzler, M. (2002) "*The Holocaust Resitution Movement in Comparative Perspective*"²⁰ Berkerly J. Int'l. L. 11, 41.

Berat, L. (1993). "*Genocide: The Namibian case against Germany*". *Pace International Law Review*, 5, 165, 207.

Blum, Y. (1992) "*Russia Takes over the Soviet Union's Seat at the United Nations*", 3 EJIL, p. 354.

Brenckert, G.C. (2009). "*Google, human rights, and moral compromise*". *Journal of business Ethics*, 85, 453-478.

Bridgewater, P.M. (2005) *Ain't i a Slave: Slavery, Reproductive Abuse, and Reparations*. UCLA Women's Law Journal. pp. 90-161.

Browne, R. (1972) "*The Economic Basis for Reparations to Black America*", 2 REV. BLACK POL. ECON. 67, 72-73.

Charney, J. (1983): "*Transnational Corporations and Developing Public International Law*", *Duke L.J.* 748, 764 (Chisolm, T.E. (1999) *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*," 147 U. PA. L. REV. 677, 684.

Cerone, J. (undated) "*The ATCA at the Intersection of International Law and U.S. Law*." *New England Law Review*. Vol. 42.

Clapham, A., and Jerbi, S. (2001). "*Categories of corporate complicity in human rights abuses*". *Hastings International and Comparative Law Review*," 24, 339-349.

- Clapham, A. (2008) "Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups". 6 Journal of International Criminal Justice 899, 902.
- Clarke, R. (2002). "Retrospectivity and the constitutional validity of the Bali bombing and East Timor trials," Australian Journal of Asian Law, 5, 128, 140-141.
- Chandler, G. (1999). 'The new corporate challenge: Globalization requires companies to do more than seek higher profits'. Time, 68.
- Cooper, A. D. (2006) 'Reparations for Herero Genocide: Defining the limits of International Litigation. African Affairs', 106/422, 113-126. Oxford University Press.
- Collier, P. (1999). "Aid dependency: A critique". *Journal of African Economies*, 8, 528-54.
- Collste, G. (2010) '... restoring the dignity of the victims'. *Is global rectificatory justice feasible?* Ethics & Global Politics Vol. 3, No. 2, 2010, pp. 85-99.
- Dennis, M.J. (1998) "The Fifty-Third Session of the UN Commission on Human Rights", 92 AM. J. INT'L L. 112, 112.
- Dolzer, R. (1997) 'Libya Oil Companies Arbitration', in 3 Encyclopedia of Public International law 215, 216.
- Duruigbo, E. (2008) Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges. Northwestern University School of Law Volume 6, issue 2 (Spring 2008) Northwestern Journal of International Human Rights.
- Erichsen. W. (2005) "The angel of death has descended violently among them". *Concentration camps and prisoners of war in Namibia, 1904-1908*. African Studies Centre Research Report.
- Freeman, M. (1995). "Genocide, civilization and modernity". British Journal of Sociology, 46, 207-225.
- Garnett, R. (1999) "Should the Sovereign Immunity be Abolished?". Australian YBIL. p. 190.

Greenawalt, A.K.A. (1999) "Rethinking Genocidal Intent: The Case for a knowledge-Based interpretation", 99 *Columbia Law Review*. 2259.

Harring, S. (1996) "German Reparations to the Herero Nation: An Assertion of Herero Nationhood in the Path of Namibian Development?", 104 *West Virginia Law Review* 393-497-393-398-, 401-410.

Harring, S. (1996) "The Namibian Constitution and the "Rights and Freedoms" Guaranteed Communal Land Holders: Resolving the Inconsistency Between Article 16, Article 100 and Schedule 5," 12 *South African Journal on Human Rights*), pp. 467-484.

Herman, S. (1995) "The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana," 56 *La. L. Rev.* 258, 276 n. 69.

Hillebrecht, H. (2007) "'Certain uncertainties' or Venturing progressively into colonial apologetics?" *Journal of Namibian Studies*, 1. 73-95.

Hinz, M.O. (n.d) "More than one hundred years after Ohamakari, or: How to deal with the genocide committed by Imperial Germany" *Namibia law Journal*, Volume 04-Issue 02, December 2012.

Jackson, J.R. (2009). "Alien Tort Claims Act cases keep coming". *The National Law Journal*,

Kaplow, L and Shavell, S (1996) "Accuracy in the Assessment of Damages,"39 *J. L. & ECON.* 191

Lauterpacht, H. (1951) "The Problem of Jurisdictional Immunities of Foreign States" 28 *BYIL*, pp. 220-271

Lauterpacht, E. (1997) "International Law and Private Foreign Investment", 4 *IND. J. Global Legal Studies*. 259, 274

Leach, P. (2005) "Dawn for Redress Before the European Court of Human Rights?" 10 *Eur. Hum. RTS. L. REV.* 148.

- Lee, L.T. (1983) "The Law of the Sea Convention and Third States". 38 AM. J. Int'l law. pp.541-545.
- Lemkin, R (1947) "Genocide as a Crime under International Law" 41 AJIL 145, 147.
- Lutz, E. L. (1995) 'After the Elections: Compensating victims of Human Rights Abuses, "in Transitional Justice: How Emerging Democracies Reckon with Former Regimes, vol. 1, General Considerations, ed. Kritz, J.N. (Herndon, Va: United States Institute of Peace Press, 1995), p. 557.
- Madley, B. (2005) "From Africa to Auschwitz: How German South West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe", European History Quarterly, 35, 429-464 (451).
- Matsuda, M. J (1987) "Looking to the Bottom: Critical Legal Studies and Reparations", 22 HARV. C.R.-C.L.L. REV. 323, 380 n. 31.
- Meron, T. (1995). "International Criminalization of Internal Atrocities." American Journal of International Criminal Justice, 1, 39-63.
- Mummery, D.R. (1964) "The Content of the Duty to Exhaust Local Judicial Remedies", 58 AM.J. IN'L. L. 389, 391.
- Nash, M.L. (1981) "Contemporary Practice of the United States relating to International Law", 75 Am. J. Int'l. 142, 147.
- Orakhelashvili, A (2002) "State Immunity and International Public Order," 45 German Y.B. INT'L L. 227, 258.
- O' Sullivan, M. (2005). "Past violations under international human rights law: The Indigenous 'Stolen Generation' in Australia. Netherlands Quarterly of Human Rights, 23, 243-272, 255.
- Ozer, I.M. (1998) "Reparations for African Americans," 41 HOW. L.J. 479, 482.
- Eric A. Posner, E. A & Adrian Vermeule,A. (2003) Reparations for Slavery and Other Historical Injustices, 103 COLUM. L. REV. 689, pp. 696-98.

Eizenstat, E. S. (2003) Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II. New York: Public Affairs.

Ratner, SR. (1998) The Genocide Convention After Fifty Years: Contemporary Strategies for Combating a Crime Against Humanity' 92 ASILPROC 1, 7.

Riddle, R. (1978) The Land Question, London, p.3; Cliffe and Munslow, 'Editorial: The Prospects for Zimbabwe', Review of African Political Economy, 18, 1981, p.2.

Roberts, R.C. (2003) "The Morality of a Moral Statute of Limitations on Injustices" J. ETHICS 115, 117.

Strydom, H.A. (1989/90) "Namibian Independence and the Question of the Contractual and Delictual Liability of the Predecessor and Successor Governments". Vol. 15. SAYIL. p.111.

Sarkin. J. and Flower, C. (2008) "Reparations for Historical Human Rights Violations: The International and Historical Dimensions of the Alien Torts Claims". Human Rights Review.

Schabas, W. A. (2003). "National courts finally begin to prosecute genocide, the 'crime of crimes'". Journal of International Criminal Justice", 1, 39-63, fn 73.

Scott, M. (1958). "The International Status of South West Africa". International Affairs, 34, 318-329, 321.

Shelton, D. (2003). "The World of atonement: Reparations for historical injustices". Netherlands International law Review, 60, 289-325, 319.

Sherwin, E. (2001) "Restitution and Equity: An Analysis of the Principle of Unjust Enrichment", 79 TEX. L. REV. 2080, 2083, 2095.

Spitzer, R.M. (2002). "The African Holocaust: Should Europe Pay reparations to Africa for Colonialism and Slavery?" In Vanderbilt Journal of Transnational Law.

Vedder, H. "Bedeutung der Stammes-und Ortsnamen in Sudwestafrika." Journal, SWA Scientific Society, IV, 1928-1929, p. 18.

Vedder, H: "*Bedeutung der Stammes-und Ortsnamen in Sudwesafrika.*" Journal, SWA Scientific Society, IV, 1928-1929, p. 18; H. Vedder: Die Voorgeschiedenis van Suidwes-Afrika, p. 153.

Verdun, V. (1993) "*If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*", 67 TUL. L. REV. 597, 600.

Volkovitsch, M.J. (1992) "*Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts*", 92 Colum. L. Review. 2162, 2173-74.

Werner, W. (1993) "*A Brief History of Land Dispossession in Namibia*". Journal of Southern African Studies, Vol. 19, No.1.

Westley, R. (1998) "*Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?*" 40 B.C.L. REV. 429, 453-54.

Yamamoto, Y.K. (1998) "*Racial Reparations: Japanese American Redress and African American Claims*", 40 B.C. L. REV. 477, 490.

ONLINE JOURNAL ARTICLES AND OTHER INTERNET SOURCES

Adams, M.E and Devitt, P. (undated) '*Grappling with Land Reform in Pastoral Namibia*'. available online at: <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5383.pdf>

Brophy, A. L. (2004) "the Cultural War over Reparations for Slavery", 53 *DePaul Law Review* 1201-12. Available online at: <http://www.Academic.udayton.edu/race/02rights/repara29c.htm>

Brockman-Hawe, B. E. (2008) '*A Comment on State Succession to International Responsibility*' Selected works. Available online at: <http://www.works.bepress.com/cgi/viewpoint.cgi?article>

De Schutter, O. (2006) "*The Challenge of Imposing Human Rights Norms on Corporate Actors, in Transnational Corporations and Human Rights*" in: O. De Schutter (Ed). *Transnational Corporations and Human Rights*. Oxford University Press.

De Zayas, A. (n.d) *'The Genocide against the Armenians 1915-1923 and the application of the 1948 Genocide Convention'*. Available online at:

http://alfreddezayas.com/Law_history/armlegopi.shtml

Ebenroth, C.T and Kemner, M.J (1996) *'The Enduring Political Nature of Questions of State Succession and Secession and the Quest for objective Standards'*. Vol. 17. University of

Pennsylvania Journal of International Economic law.p.756. Available online at:

[https://www.law.upenn.edu/journals/jil/articles/volume17/issue3/EbenrothKemner17U.Pa.J.Int'lEcon.L.753\(1996\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume17/issue3/EbenrothKemner17U.Pa.J.Int'lEcon.L.753(1996).pdf)

Gewald, J.B. (undated) The Great General of the Kaiser. Botswana Notes and Records, Volume

26. Available online at: <https://openaccess.leidenuniv.nl/bitstream/handle/1887/4819/asc-1293873-029.pdf?sequence=1>

Hamber, B (undated) *'Repairing the Irreparable: Dealing With Double-Binds of Making Reparations For Crimes of the Past'*. INCORE. Available at

<http://www.income.Ulst.ac.uk/research/projects/thepast/repair.html,3> .

Hessbruegge, J. A. (2012) *"Justice Delayed, Not Denied: Statutory Limitations and Human Right Crimes"*. Academic journal article from *Georgetown Journal of International Law*, Vol. 43, No.

2. Available online at: <http://www.questia.com/library/1G1-299535990/justice-delayed-not-denied-statutory-limitations>

Horowitz, D (2001) *'Ten Reasons Why Reparations for Blacks is a Bad Idea for Blacks-and*

*Racist Too.'*available online at: <http://dfamily.com/philosophy/teach/hswtl/extras/ten-reasons-why-reparations-is-bad-idea-for-blacks.pdf>

Peter H. Katjavivi. P.H.(2012) 'The Significance of the Repatriation of Namibian Human Skulls'

p. 11-12. Available online at <http://www.pambazuka.org/en/issue/577>

Narib, G. (undated) *'Is there an absolute right to private ownership of commercial land in*

Namibia?'. Available online at: <http://www.lac.org.na/projects/lead/Pdf/privateownership.pdf>

Nersessian, D.L. (2002) “The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals.” Texas International Law Journal. Vol.37. p.248. Available online at: <http://www.tilj.org/content/journal/37/num2/Nersessian231.pdf>

Orb, A, Eisenhauer, L. Wynaden, D (2000) “Ethics in Qualitative Research”. Journal of Nursing Scholarship. p.93. Available online at: <http://www.columbia.edu/~mvp19/RMC/M5/QualEthics.pdf>

Peresztegi, A. (*Undated*) *Reparation for Holocaust-Era Human Rights Violations*. Available at: <http://web.ceu.hu/jewishstudies/yb03/13peresztegi.pdf>

Pottins, C. (2011) ‘Historical passages: Armenian Holocaust’. Available online at: <http://historicalpassages.blogspot.com/2011/06/armenian-holocaust.html>

Razzano, F.C (2011) ‘The Alien Tort Statute: Are French Companies at Risk of Suits in the United States for Torts Committed Overseas?’. A Publication of Pepper Hamilton LLP.p.1. Available online at: http://www.pepperlaw.com/publications_update.aspx?ArticleKey=2155

Rolling, V.A. (undated) Criminal Responsibility for Violations of the Laws of War. University of Groningen. pp. 14-15. Available online at: <http://rbdi.bruylant.be/public/modele/rbdi/content/files/RBDI%201976/RBDI%201976-1/Etudes/RBDI%201976.1%20-%20pp.%208%20%20C3%A0%2026%20-%20Bert%20Roling.pdf>

Romanowsky, R (2009) “*Analysis of an Apology: A Critical Look at Genocide in South West Africa and its Effects on the Herero>Nama People*”. Available online at: <http://www.history.ucsb.edu/faculty/marcuse/classes/133p/papers/096RomanowskyHereroGenocide.htm>

Ruggie, J. (2008). *Promotion and Protection of all Human rights, civil, political, economic, social and cultural rights, including the right to development. Clarifying the concepts of “sphere of influence” and “complicity”*. Human Rights Council. Eighth Session, Item 3. Available online at: www2.ohchr.org/english/bodies/hrcouncil/.../A-HRC-8-5.doc

Sepinwall, A. J. (2006). Responsibility for Historical Injustices: Reconceiving the Case for Reparations. *Journal of Law & Politics*, 22(3), 183-229. Retrieved from https://repository.upenn.edu/lgst_papers/66;

Shelton, D. (n.d) *'Righting Wrongs: Reparations in the Articles on State Responsibility'*
Available online at: www.asil.org/ajil/ilcsymp5.pdf

Silvester, J. Hillebrecht, W. & Erichsen, C. (n.d) *'The Herero Holocaust? The Disputed History of the 1904 Genocide'*.

Soifer, A. (1998) *"Redress, Progress and the Benchmark Problem"* 40 B.C.L. Rev. 525.
Available online at: <https://litigation-essentials.lexisnexis.com/.../app?...> - United States.

Steinmentz, G (2005) *"The First Genocide of the 20th Century and its postcolonial afterlife; Germany and Namibian OvaHerero"*. The Journal of International Institute. Vol. 12, issue 2.
P.1. Available online at
<http://quod.lib.umich.edu/j/jii/4750978.0012.201?rgn=main;view=fulltext>

Theissen, G. (undated) *"Supporting Justice, Co-Existence and Reconciliation After Armed Conflict: Strategies for Dealing With the Past"*. Berghof Research Centre for Constructive Conflict Management. Available online at: <http://www.berghof-handbook.net/articles/thiessen-handbook.pdf>.

Tomuschat, C. (undated) *"The International Law of State Immunity and Its Development by National Institutions"*. *Vanderbilt Journal of Transnational Law*". Vol. 44: 1105 available online at <http://www.vanderbilt.edu/jotl/manage/wp-content/.../Tomuschat.c.r.pdf>

Zegveld, L. (2003) *"Remedies for victims of violations of international humanitarian law."* Vol. 85 No. 851, p. 503.

Zimmer, E. M (undated). German South West Africa. Available online at [http://www.estherlederberg.com/Eugenics%20\(CSHL List\)/German%20South%20West%20Africa](http://www.estherlederberg.com/Eugenics%20(CSHL%20List)/German%20South%20West%20Africa)

LEGISLATION

Britain

British Foreign Compensation Act of 1950

Germany

The Federal Compensation Law of 1953

Law Number 59 on Restitution of Property Stolen in the Course of the Aryanization of the Economy

Namibia

Agricultural (Commercial) Land Reform Act, Act. No. 6 of 1995

Constitution of Namibia Act of 1990

South Africa

The Diplomatic Immunities and Privileges Act, 2001 (Act 37 of 2001)

The Foreign States Immunities Act, 1981 (Act 87 of 1981)

United States of America

The Alien Tort Claims Act (ATCA) of 1789

Civil Liberties Act, Pub. L. No. 100-383, 102 Stat. 903 (1988) (codified at 50 App. U.S.C. §1989b-1)

INTERNATIONAL TREATIES AND/OR AGREEMENTS

The 1815 Second Paris Peace Agreement

The 1841 Quintuple Treaty between England, France, Russia, Austria and Prussia

The 1885 Berlin West Africa Convention

The 1889 German-Dutch Agreement

The 1890 Anti-Slavery Convention

The 1890 German-Belgian Agreement to Criminalize Trade in Girls

The Hague Convention on the Laws and Customs of War by Land signed on July 29, 1899 and 1907

The 1904 Agreement on Administrative Regulation to Ensure Effective Protection Against Trade in Girls

The Geneva Convention of 1929

The Convention on the Prevention and Punishment of the Crime of Genocide, 09 December 1948

The 1953 London Agreement on German External Debts

The Luxembourg agreements of 1953

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 03 September 1953.

The Vienna Convention on Consular Relations, 24 April 1963

The International Convention on the Elimination of all forms of Racial Discrimination (1965)

The Convention for the Elimination of Racial Discrimination (CERD), 21 December 1965

The International Covenant on Civil and Political Rights, 16 December 1966

The Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity of 1968

The Vienna Convention on the Law of treaties 1969

The American Convention on Human Rights, 22 November 1969

The International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973

The Vienna Convention on Succession of States in Respect of Treaties, 1978

The 1990 Treaty on the Final Settlement with Respect to Germany (“Two-Plus-Four-Treaty”)

OTHER INTERNATIONAL LEGAL INSTRUMENTS GOVERNING THE RULES OF WAR

The Lieber Code of April 24, 1863.

The Martens Clause of 1899.

INTERNATIONAL STATUTE (S)

The Statute of the International Court of Justice.

DECLARATIONS

The Congo Basin Commerce Declaration of 1885

Universal Declaration of Human Rights in 1948,

Declaration of Basic Principles for Victims of Crime and Abuse of Power of 1985

The St. Petersburg Declaration of 1868

WORKING PAPERS AND OTHER RELEVANT PUBLICATIONS

Hanski, R. & Scheinin, M. (2003) 'Leading cases of the Human Rights Committee'. Turku/Abo (Finland): Institute for Human Rights Abo Akademi University, p.11.

Kruger, G. (2005) 'Coming to terms with the past. GHI BULLETIN NO.37'. University of Zurich

Land Policy: D.T.A of Namibia. Available online at:

<http://www.dtaofnamibia.org.na/files/754081901/policy.pdf>

Office of the Prime Minister, *Report of the Technical Committee on Commercial Farmland*, Windhoek, 1992.

Ryngaert, C. (2010) 'Finding Remedies for Historical Injustices: Dealing with Organizations and Corporations'. Working Paper No. 38-January 2010. Leuven Centre for Global Governance Studies.

Steinmetz, G. (2005). 'From 'Native Policy' to exterminationasim: German South West Africa, 1904. In Comparative Perspective, Theory and Research in Comparative Social Analysis', Paper 30, 4-5. Los Angeles: Department of Sociology, UCLA, 1.

Westlie, B. (1996) 'Coming to Terms with the Past: The Process of Restitution of Jewish Property in Norway' (Inst. of the World Jewish Congress, Policy Forum No. 12, 1996).

Werner, W. (1997) "Land Reform in Namibia-the first seven years." NEPRU Working Paper No. 61

DISSERTATIONS/THESES

Becker, H. in Schuring, E. (2004). 'History obliges: The real motivations behind German aid flows in the case of Namibia.' MA thesis (Law and Diplomacy), Fletcher School of Law and Diplomacy, Tufts University, 45.

Geingob, H (2004) 'State Formation in Namibia: Promoting Democracy and Good Governance'. A dissertation Submitted in accordance with the requirements for the degree of Doctor of Philosophy. University of Leeds. School of Politics and International Studies. pp.141-142

Haldorson, H. M. (1992) 'A philosophical Criticism of Genocide as it is defined in the United Nations' Convention on the Prevention and Punishment of the Crime of Genocide.' Master of Arts Thesis. Concordia University. Montreal, Quebec, Canada. pp. 52-62. Available online at: <http://spectrum.library.concordia.ca/3361/>

Kandunda, S.S. (2010) 'An analysis of the constitutional property clause in the Namibian constitution'. LLB Dissertation, University of Namibia. Available online at: <http://www.wisis.unam.na/theses/kandunda2010.pdf>

Rivera, A. M. (2012) 'Did the German Actions in the Herero Rebellion of 1904-1908 Constitute Genocide?'. Fort Leavenworth, Kansas. MA Thesis in Military Art and Science. pp. 40-41. Available online at www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA563131

Schuring, E. (2004). 'History obliges: The real motivations behind German aid flows in the case of Namibia.' MA thesis (Law and Diplomacy), Fletcher School of Law and Diplomacy, Tufts University, p.158.

Winterbottom, J.P. (2012) ‘Corrective Justice, Harm, and Reparations for Historical injustice’.

PhD Thesis. New Brunswick, New Jersey.p.2.Available online at:

<http://www.google.com/na/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CDAQFjAA&url=http%3A%2F%2Fmss3.libraries.rutgers.edu%2Fdlr%2Foutputds.php%3Fpid%3Drutgers-lib%3A39066%26mime%3Dapplication%2Fpdf%26ds%3DPDF-1&ei=1ghtUYitGOn40gWO7IGACg&usg=AFQjCNGaHIUoUfKR0zr6EwPaNDIz1gbbhw&bvm=bv.45175338,d.d2k>

NEWSPAPER ARTICLES AND OTHER PRINT AND ONLINE MEDIA SOURCES

- Absalom Shigwedha “Hereros v Germany”, New African Magazine, January 2001.
Available online at: <http://www.highbeam.com/doc/1P3-66802620.html>
- Asser Ntinda. “Sell or Else”. Swapo Party online. Available online at:
http://www.swapoparty.org/sell_land_or_else.html
- Brigitte Weidlich, “Government Supports Herero Reparation Demands,” in The Namibian, February 21, 2007. Available online at:
<http://allafrica.com/stories/200702210832.html>
- Catherine Sasman, “German NGOs throw weight behind genocide descendents”, in the Namibian, March 26, 2012.
- Elvis Muraranganda “Hage tears into German ambassador over genocide”, The Sun Newspaper, February 6, 2013.
- Christopher Munnion “Namibian tribe sues Germany for genocide”. The Telegraph, 31 January 2003. Available online at:

<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/namibia/1420687/Namibian-tribe-sues-Germany-for-genocide.html>

- Die Republikein, “Nam-German trade volume reached N\$990 million in first half of 2012”, 28 November 2012.
- Jo-mare Dudley “Land Tax Milks Farmers” The Namibian Newspaper. 05 October 2012.
- Jerry Fallstrom ‘Senate Ok’s \$2.1 Million For Rosewood Reparations’. Sun Sentinel April 9, 1994. Available online at: http://articles.sun-sentinel.com/1994-04-09/news/9404080701_1_rosewood-descendants-rosewood-bill-reparations
- J.K. Lowenstein, ‘Our limitless capacity for mass murder’. Chicago Tribune news. p.1. Available online at: http://articles.chicagotribune.com/2004-10-24/news/0410240032_1_herero-people-german-soldiers-german-army/2
- Helvy Shaanika “Prime Minister praised on reparations’, New Era, 13 February 2013.
- Henning Hintze, “German Parliament to Discuss Genocide,” in the Namibian, March 8, 2007.
- Immanuel Shinovene “Swapo politicise national events – Swanu”. The Namibian. 29-08-2013. Available online at: http://www.namibian.com.na/indexx.php?archive_id=113465&page_type=archive_story_detail&page=32
- Mabasa Sasa ‘Landless in the Land of the Brave’-New African Magazine, p. 38, February, 2013.
- Meundju Jahanika “Land Grab Is Inevitable in Namibia”, The Namibian newspaper, 31 August 2012.

- Robinson, L. (1997)'Righting a Wrong; Among Black Americans, The Debate is Escalating over Whether an Apology for Slavery is Enough', SEATTLE POST-INTELLIGENCER, June 29, at E1.
- Shinovene Immanuel. "Caprivi is no more". The Namibian. 09-08-2013. Available online at:
http://www.namibian.com.na/indexx.php?archive_id=112767&page_type=archive_story_detail&page=89
- Staff reporter, "Development aid no substitute for reparations", in the New Era of 12 Oct, 2011.
- Staff reporter "German NGOs slam genocide denial, "The Namibian. 28 March 2012.
- Staff reporter. "Let's have a steady path on land reform: COD". The Namibian, 24-05-2004. Available online at:
http://www.namibian.com.na/indexx.php?archive_id=7493&page_type=archive_story_detail&page=5576
- Staff Reporter "Now Moongo wants Aandonga reparations". The Sun, 14 March 2013.
- Sun Reporter. "Kamburona calls for faster land reform programme". The Namibian Sun. 15-06-2012. Available online at: <http://sun.com.na/content/agri/kamburona-calls-for-faster-land-reform-programme>
- Sun Reporter. "Pohamba Mandume's remarks sparks outcry". 07-03-2013. Available online: <http://sun.com.na/content/national-news/pohamba%E2%80%99s-mandume-remarks-sparks-outcry>
- Staff Reporter. "Swanu warns against 'fake solution' on land question". The Namibian. 24-02-2004. Available online at:
http://www.namibian.com.na/indexx.php?archive_id=4687&page_type=archive_story_detail&page=5677

- Tim Johnston ‘Australia apologizing to aborigines. New York Times, 03 November 2003. Available online at: http://www.nytimes.com/2008/02/13/world/asia/13iht-13aborigine-copy.9995732.html?_r=0
- Toivo Ndjebela “Bundestag to vote on motion” New Era 23 March 2012.
- Tom Leonard and Simon Tomlinson ‘14 Caribbean nations sue Britain, France and Holland for slavery reparations that could cost hundreds of billions of pounds’. Mail online. 10 October 2013. Available online at: <http://www.dailymail.co.uk/news/article-2451891/14-Caribbean-nations-sue-Britain-Holland-France-slavery-reparations.html>
- Wolfgang Massing “Massing now Shocked and Puzzled” New Era. 19 August 2004. Available online at: <http://www.newera.com.na/article.php?articleid=2675>

List of people interviewed

1. Paramount Chief Kuaima Riruako: Member of Parliament and President of the National Union Democratic Organization. (Consent obtained to publish name)
2. Honourable Nahas Angula: Former Prime Minister and now Minister of Defence, Republic of Namibia. (Consent obtained to publish name)
3. Honourable Katuutire Kaura: Member of Parliament and President of the Democratic Turnhalle Alliance. (Consent obtained to publish name)
4. Honourable Usutuaije Maamberua: Member of Parliament and President of the South West Africa National Union. (Consent obtained to publish name)
5. Mr. Festus “Garvey” Muundjua: Member of the OvaHerero Reparations Committee. (Consent obtained to publish name)
6. Ms. Uitjuwa Muinjangwe: Chairperson of the OvaHerero Reparations Committee. (Consent obtained to publish name)
7. Anonymous 1. Herero Activist and descendant

8. Anonymous 2. SWANU Party member
9. Anonymous 3. Mid-level government official
10. Anonymous 4. Nama speaking Namibian
11. Anonymous 5. Senior government official

TABLE OF CASES

Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) Preliminary Objections, Judgment, 24 May 2007, para 10.

Al-Adsani v. U.K., 2001-XI Eur. Ct. H.R. 79, 111-112

Aleut case United States Court of Appeals, Federal Circuit. - 702 F.2d 1015, March 17, 1983

Aloeboetoe v. Suriname (1994) 15 Inter-Am. Ct. H.R. (ser. C), para. 49

Ambatielos Case (Greece v. U.K.), preliminary Objections, 1952 I.C.J. 27, 40 (July 1).

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), ICJ Reports 2005,

Application of the Genocide Convention, ICJ Reports 2007,

Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), second Phase, 1970 ICJ REP.3, 40,

Barrios Altos Case (Reparations) (2001) 87 Inter-Am. Ct.H.R. (ser.C) at para 41.

Blake Case (Reparations) (1999) 48 Inter-Am. Ct. H.R. (ser. C)

Bolchos v. Darrell, 3 F. Cas. 810 (No. 1,607) (S.C.1795).

British Claims in the Spanish Morocco 1 May 1925, 2 RIAA 615, 722

Bucheron v. Federal Republic of Germany, Cass. Ieciv. Dec. 16, 2003, Bull. Civ. 02-45961.

Burnett v. New York Cent. R.R. Co., 380 U.S. 424, 428 (1965).

BP Exploration Co. v Libyan Arab Republic (1973) 53 ILR 297, (1974) 53 ILR 375.

Castillo Paez Case (Reparations), 43 Inter-Am. Ct.H.R. (ser. C), para. 76

Cato v. United States, 70 F. 3rd 1103 (9th Cir. 1995).

Certain Criminal Proceedings in France (Republic of the Congo v France), Provisional Measure, Order of 17 June 2003, ICJ Reports 2003.

Congo v. Belgium (ICJ Feb. 14, 2002), 41 ILM 536 (2002.)

Corfu Channel Case (UK V. Alb.), Merits, 1949 ICJ REP.4, 23-24 (April. 9).

Corrie v. Caterpillar, 503 F. 2d 974 (9th Cir. 2007.)

Del Caracaso Case (Reparations) (2002) 95 Inter-Am. Ct. H.R. (ser. C) at paras. 86-7

Deutsche Bank and Woermann Line (now known as Deutsche-Afrika Linien GmbH & Co) (S.D.N.Y. Filed Feb. 13, 2003)

De Wilde, Ooms and Versyp (“Vagrancy”) v. Belgium (Article 50), App. Nos. 2833/66, 2835/66 and 2899/66, 1 Eur, H.R. Rep. 438 (1972).

Doe v. Unocal 248 F.3d 915 (9th Cir. 2001)

Eichmann (TC) 1961 36 ILR 5 (Isr Dist Ct) 238.

El Salvador v. Nicaragua, Court of Justice of Central America (1917) 11 AJIL 674

Embga Mekongo Louis v. Cameroon, African Commission on Human and Peoples’ Rights, Comm. No. 59/91, 1995

Factory at Chorzow (Germany v. Poland), 1928 P.C.I.J (ser. A), no. 17 at 29 (September 13).

Farmer-Paellman v. Fleetboston Corp No. 1:02-cv-1862 (NGG) (E.D. N.Y. filed Apr. 3, 2002).

Filartiga v. Pena-Irala 630 F.2d 876, 885 (2d Cir. 1980).

Fisheries Jurisdiction (FRG V. Ice.), Merits, 1974 ICJ REP. 175, 203-05

Fisheries Jurisdiction (Spain v Canada), ICJ Reports 1998, p 432.

Government of the Republic of Namibia v. Cultura 2000 1994 (1) SA 407

Great Belt (Finland v. Denmark) provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991, p.12

Guzzardi v. Italy, App. No. 7367/76, 3 Eur. H.R. Rep. 333, ¶ 114 (1980)

Forests of Central Rhodopia case U.N.R.I.A.A., vol. III, p. 1405 (29 March 1933).

France et al. v. Goering et al., (1946) 22 IMT 203

Henry Kalenga v. Zambia, African Commission on Human and Peoples Rights, Comm. No. 11/88, 1994

Hohri v. United States, 586 F. Supp. 769 (D.D.C. 1984), AFFIRMED IN PART, 782 f. 2d 227 (D.C. Cir. 1986), vacated, 482 U.S. 64 (1987), on remand, 847 F.2D 779 (D.C. Cir. 1988).

Interhandel (Switz v. U.S.), 1959 I.C.J. 6, 27 (Mar. 1959)

In Re Agent Orange' Prod. Liab. Litg., 373 F. Supp. 2d 7 (E.D.NY. 2005)

In re African Am. Slave Descendants Litig. 471 F.3D 754, 759 (7TH Cir. 2006).

Iran-U.S. Claims Tribunal, Award No. 115-33-1, 22 June 1984, in: 6 Iran-U.S. C.T.R.,

Island of Palmas (U.S. v. Neth.), 2. R.I.A.A. 829, 845 (Perm. Ct. Arb. 1928).

Jawara v. The Gambia Comm. Nos. 147/95 and 149/96 (2000).

Johnson v. MacAdoo 45 App. D.C. 440 (1916), aff 'd, 244 U.S. 643 (1917).

Kalogeropoulou et al. v. Greece and Germany Decision, 4 German L.J. 477, 486-488 (2003)

Kayishema (TC) 1999 ICTR 115-116

Korematsu v. United States, 323 U.S. 214, 218 (1944)

Khukumani v. Barclay National Bank, Ltd

L'affaire de la Societe Radio Orient, 2 April 1940, 3 RIAA 1871

LaGrand Case (Ger. v. U.S), Merits, para. 48 (ICJ June 27, 2001), 40 ILM 1069, 1082 (2001).

Landgraf v. USI Film Products¹, 511 US 244, 265 [1995]

Loayza Tamayo Case (Merits) (1997) 33 Inter-Am. Ct. H.R. (ser. C) at paras. 155-8 (merits)

Loayza Tamayo Case (Reparations)) (1998) 42 Inter-Am. Ct. H.R.

*Leo Handel et al. v. Andrija Artukovic, US District Court for the Central District of California
Us 601 f. Supp. 1421.*

Lusitania" Cases (U.S./Ger.), 7 R.I.A.A. 32, 39 (1923)

Martini, 3 May 1930, 2 RIAA 975

Mavrommatis Palestine Concessions Case, 1924 PCIJ (Ser. A.)

Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S), Merits, 1986 ICJ REP.14, 142 (June 27);

Moxon v. The Fanny, 17 Cas. 942 (No. 9, 895) (Pa. 1793).

Minister of Defence, Namibia v. Mwandighi 1992 (2) SA 355 (NmS)

North Sea Continental Shelf cases, Judgment, ICJ Reports 1969,

Nuclear Tests (Australia v France), ICJ Reports 1974

Ntsebeza v. Daimler Chrysler Corp., 504 F. 3d 254 (2nd Cir. 2007)

Nuclear Tests (New Zealand v. France), ICJ Reports 1974

Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348 (1944)

Polyukhovich v Commonwealth (1991) 172, CLR 501

Prefecture of Voitia v. Federal Republic of Germany, No. 137/1997 (Ct. 1st Inst. Levidia, Oct. 30, 1997)

Prosecutor v. Akayesu, Trial Chamber, 2 September 1998, 497

Prosecutor v Furundzija (Case No. IT-95-17/1-T), Judgment, 10 December 1998, para. 195.

Prosecutor v. Krstic, Trial Chamber, Judgment, 2 august 2001, 580.

R. v. Finta (1989) 61 DLR (4th) 85.

Rainbow Warrior (New Zealand v. France) 74 ILR 241 at 256.

Rutaganda (TC) 1999 ICTR 53

Smith v. Hooey, 393 U.S. 374, 380 (1969).

Selcuk and Asker v. Turkey, 1998-II Eur. Ct. H.R. 891.

Sosa v. Alvarez-Machain 542 U.S. 692 (2004).

Stubbings v. United Kingdom (No. 18), 1996-IV Eur. Ct. H.R. 1487, 1502-03.

The Presbyterian Church of Sudan v. Talisman Energy, Inc., U.S. Court of Appeals for the Second Circuit, August Term, 2008, Docket No. 07-0016-cv, 2 October 2009.

Toussie v. United States, 397 U.S. 112, 115 (1970).

U.S. v. Alstoetter, III Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 (1951) 954, at 983.

United States of America v. Krupp et al.' (1948) 10 LRTWC 69 (United States Military Tribunal), p. 147.

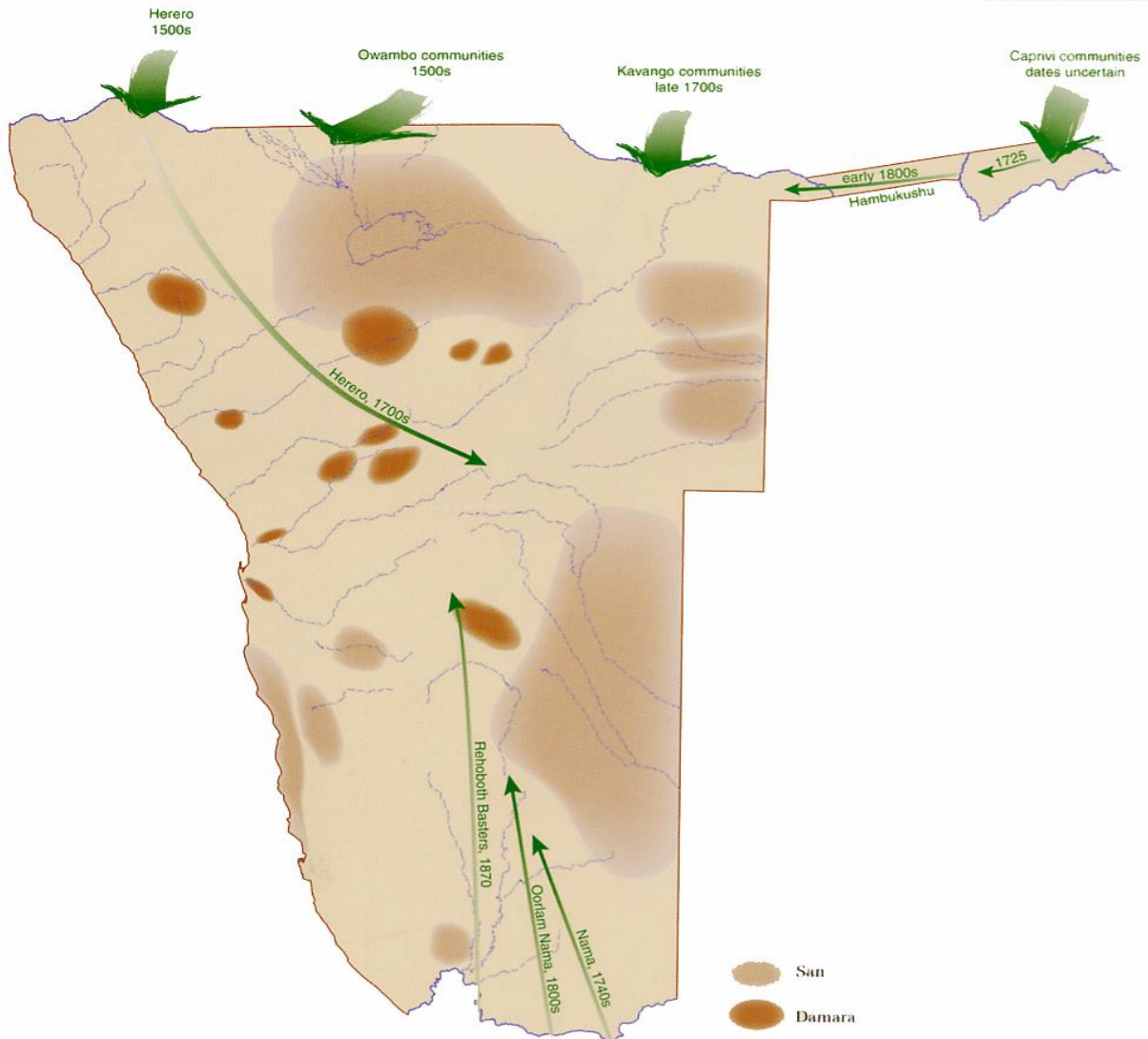
Ware v. Hylton, 3 U.S (3 Dall.) 199 (1796).

Wiwa v. Royal Dutch Petroleum Co., 2009 WL 1574869 (S.D.N.Y. April 23, 2009).

Ziat, Ben Kirran Case (GB v. Spain 1924), 2 UNRIIAA.

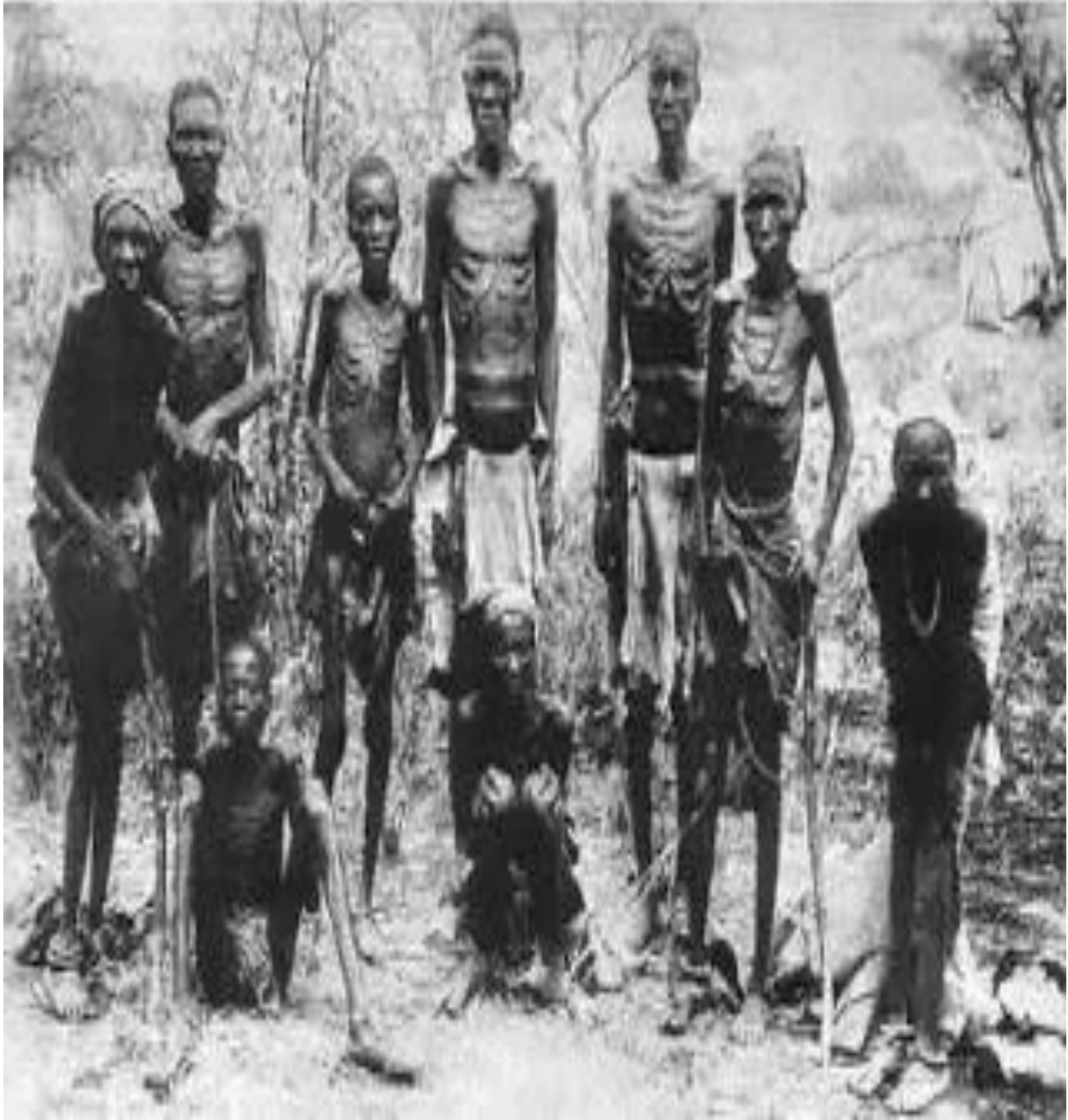
List of table(s), maps and figures

Map of early settlements in Namibia



Source: Atlas of Namibia

The colonial Map of German South West Africa



Source: National Archives

Captured Herero and Nama soldiers



Source: Namibian National Archives

Nama Heads sent to Germany for pseudoscientific experiments



Source: Namibian National Archives

Herero Hangings



Source: Namibian National Archives

Shark Island Concentration Camp



Source: Namibian National Archives

The *Reiterdenkmal* (English: Equestrian Monument) in Windhoek was erected in 1912 to celebrate the victory and to remember the fallen Germans with no mention of the killed indigenous population. It remains a bone of contention in independent Namibia



Source: Freddy Weber

Elements of the crime of genocide

Act:	Genocide by killing	Genocide by causing serious bodily or mental harm	Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction	Genocide by imposing measures intended to prevent births	Genocide by forcibly transferring children
Conduct	1. The perpetrator killed one or more persons.	1. The perpetrator caused serious bodily or mental harm to one or more persons	1. The perpetrator inflicted certain conditions of life upon one or more persons.	1. The perpetrator imposed certain measures upon one or more persons.	1. The perpetrator forcibly transferred one or more persons.
Note	Note: The term "killed" is interchangeable with the term "caused death".	Note: This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.	Note: The term "conditions of life" may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.		Note: The term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.
Consequences and			4. The conditions of life were calculated to bring about the	4. The measures imposed were intended to prevent	4. The transfer was from that group to another group.

Circumstances			physical destruction of that group, in whole or in part.	births within that group.	
					5. The person or persons were under the age of 18 years.
					6. The perpetrator knew, or should have known, that the person or persons were under the age of 18 years.
	2. Such person or persons belonged to a particular national, ethnical, racial or religious group.	2. Such person or persons belonged to a particular national, ethnical, racial or religious group.	2. Such person or persons belonged to a particular national, ethnical, racial or religious group.	2. Such person or persons belonged to a particular national, ethnical, racial or religious group.	2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
Intent	3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.	3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.	3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.	3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.	3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
Context	4. The conduct took place in the context of a manifest pattern of similar conduct dire				

Source: Prevent Genocide International

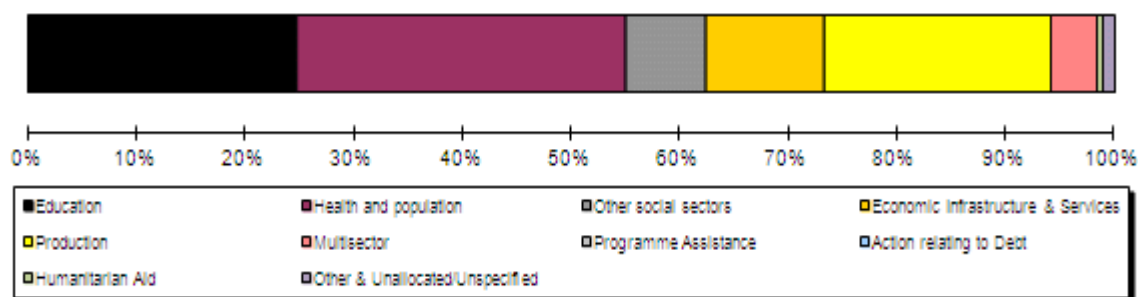
Namibia

Receipts	2008	2009	2010
Net ODA (USD million)	210	326	259
Bilateral share (gross ODA)	73%	76%	82%
Net ODA / GNI	2.4%	3.6%	2.1%
Net Private flows (USD million)	317	307	- 398

For reference	2008	2009	2010
Population (million)	2.2	2.2	2.3
GNI per capita (Atlas USD)	4 120	4 130	4 500

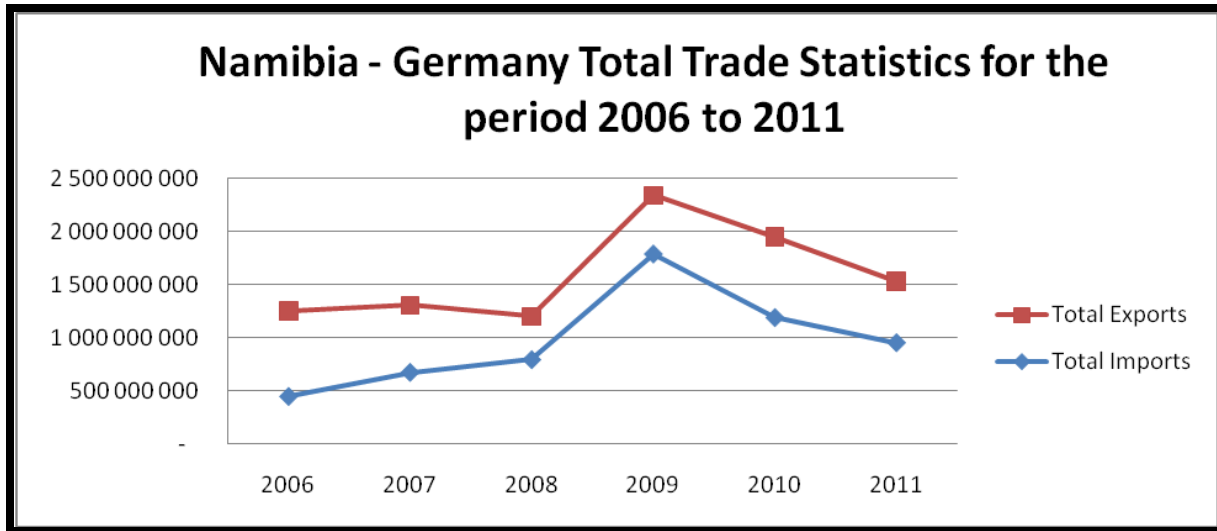
Top Ten Donors of gross ODA (2009-10 average) (USD m)	
1	United States 104
2	Japan 40
3	Germany 35
4	Global Fund 34
5	France 26
6	EU Institutions 22
7	Luxembourg 11
8	Spain 10
9	Finland 5
10	Sweden 3

Bilateral ODA by Sector (2009-10)



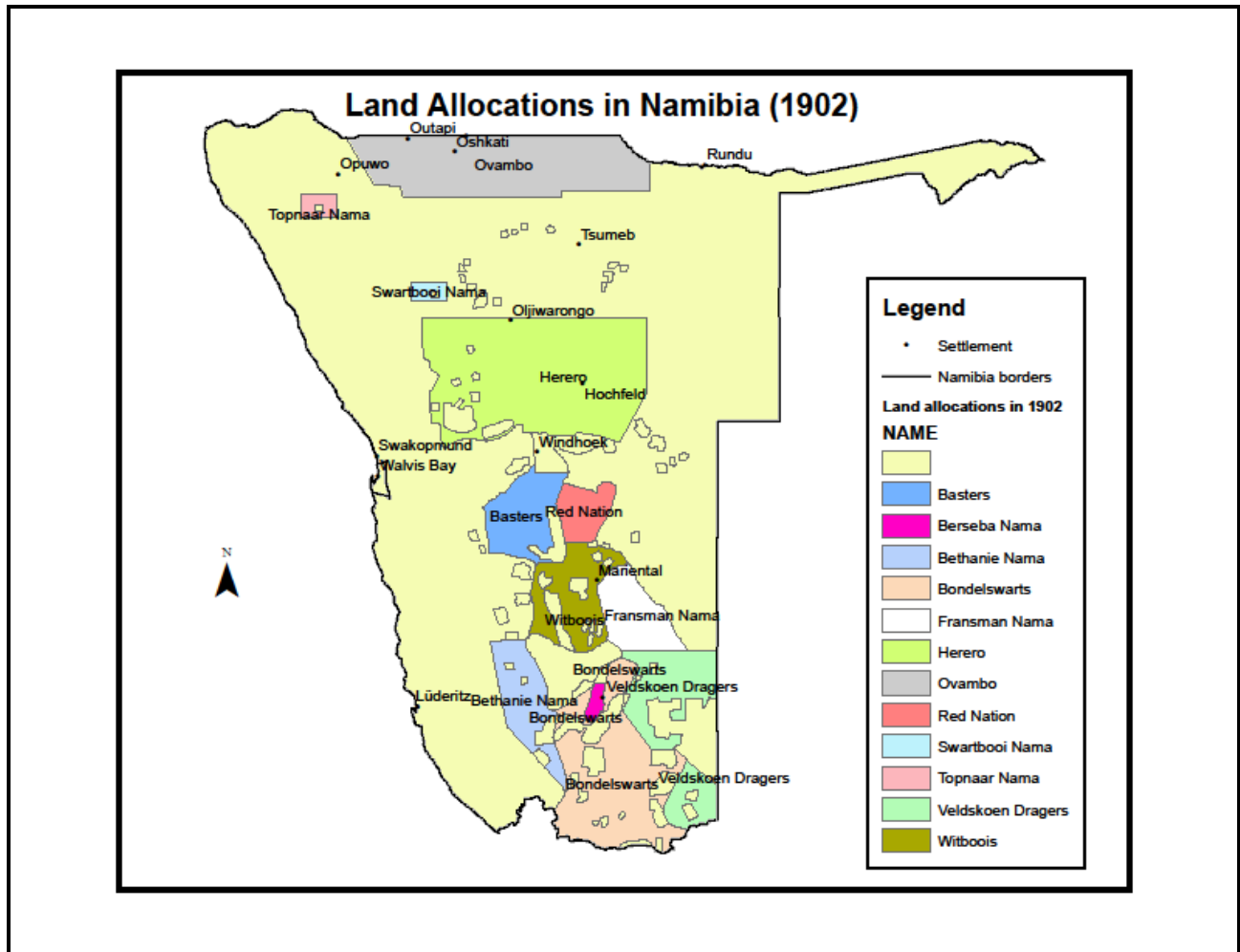
Sources: OECD, World Bank.

Namibia-German total trade Statistics



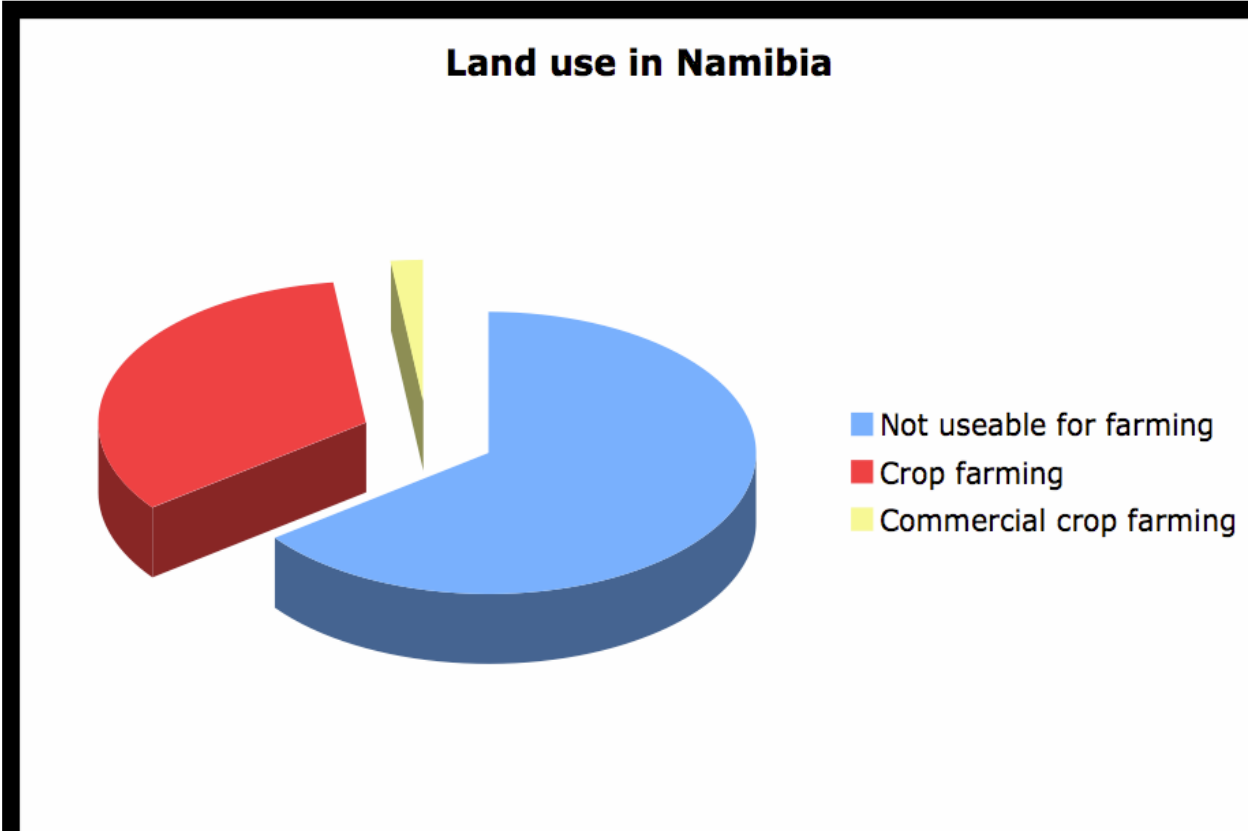
Source: National Planning Commission

Land allocations in Namibia (1902)



Source: Sinvula Lukubwe

Land use in Namibia



Source: Namibia Institute for Educational Development