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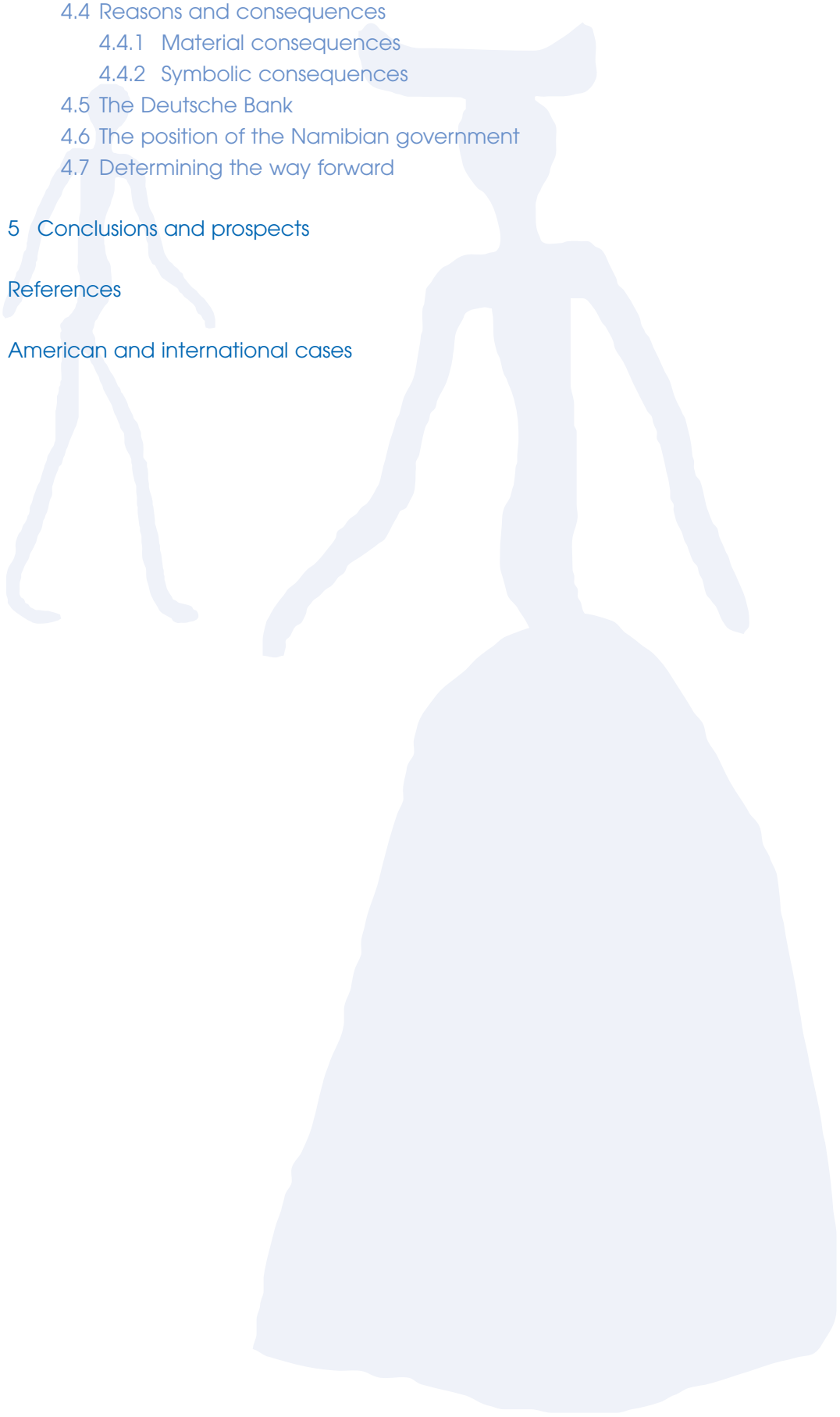

1 INTRODUCTION

During the 18th and 19th centuries, the European powers competed with each other in the race to colonise Africa. The Europeans considered themselves superior and treated Africans accordingly. This attitude applied whether it was the Italians in Ethiopia, the French in Algeria, the British in Zimbabwe, the Portuguese in Mozambique, or the Belgians in the Congo. It was a time of violence and human rights abuse in the occupied countries, where the indigenous population usually had no rights. Rights violations occurred often and are mainly unaccounted for. Thus, the Europeans exploited the territories they occupied as well as the people that lived there. One of those territories was German South West Africa (GSWA), which comprised most of the territory known as Namibia today.

In a joint action by Imperial Germany and some of its economic power-houses, Germany occupied GSWA in the late 19th century. They had soon established their control over the region by means of *divide et impera*. The German Governor Theodor Leutwein signed treaties with several Chiefs, one of whom was Samuel Maherero of the Hereros, capitalising on the competitiveness amongst the various cultural communities in the territory (Drechsler 1984:342). Through the exercise of force and fraudulent trade by the Germans, the cultural communities lost more and more of their livestock (Zimmerer 2004). The steady influx of German settlers and the Empire's economic plans for the territory increasingly hemmed in the local population, diminishing their herds and land (Böhlke-Itzen 2004:37–40), and making it more and more impossible to live their pastoral lifestyles.

All of these forces bearing down on them culminated in the Hereros and Namas attempting to break free. During the battles that began in January 1904 and ended with a subjugated Herero nation, tens of thousands of Hereros either died or were displaced and forced into concentration camps. The Namas, under Chiefs Hendrik Witbooi and Jakob Morenga, launched their uprising in October 1904 and fought a guerrilla war against the Germans until 1907.[3] The German military, with its army of 14000 soldiers, overpowered the Namas in the end as well (Zeller 2004). As a result of the 1904–1907 war, the Nama and Herero rebels lost almost all their land to the Germans (Böhlke-Itzen 2004:53, 55). The war was followed by totalitarian German rule, forcing the subjugated population to work in mines, on farms or in railway construction. The principal beneficiaries of this turn of events were major German corporations: they paid minimal costs for labour, they had no concern for labour rights, and there were always ready labour replacements available.

In these years of war and subjugation, about 35–80% of the Herero population of approximately 40,000 to 100,000 were killed. The Namas suffered a similar fate, with approximately 50% of the 22,000-strong population being killed (Zeller 2004). With almost no land and no cattle, these pastoral societies ceased to exist. Most of the survivors became labourers for the Germans. The surviving Herero and Nama leaders had gone into exile, while tens of thousands were dead and their families torn apart (Böhlke-Itzen 2004:55). Today, like many other historically disadvantaged Namibians, many Hereros and Namas are still without land or cattle; they remain impoverished as a result of the fate that befell their forebears.

[3] *On the Nama uprising, see e.g. Nuhn 2000.*

After Namibia's independence in 1990 and German reunification in the same year, the Hereros instituted claims for reparation from Germany. By then, however, the two states had already agreed to establish a special relationship due to their historical ties. For the German government, these special relations entailed providing Namibia with more developmental aid than any other country. At the time of writing, such aid had amounted to approximately 500 million Euros (FRG 2004). For its part, the Namibian government agreed that continuing German development aid, together with the German Democratic Republic's support for the South West Africa People's Organisation (SWAPO) during the struggle for independence against South Africa, made reparation payments void.

The German public was largely unaware of the details of the colonisation of Namibia until the issue resurfaced on the national agenda in September 2001. The Herero People's Reparations Corporation (HPRC) and individual Hereros filed two separate lawsuits in the United States: the first against the Federal Republic of Germany (FRG), as the legal successor of Imperial Germany, and the second against three German corporations: the Deutsche Bank, Terex Corporation and the Woermann Linie. The three companies as well as the FRG are each being sued for US$2 billion for their prominent role in the genocide of the Herero people. In the court papers the claimants stated, without further legal assessment, that German actions breached international law and constituted crimes against humanity, genocide, slavery and forced labour.

The lawsuits have since suffered some setbacks. After the case against the companies was initially dismissed in the District Court of Columbia because the judge did not consider her court had sufficient jurisdiction in terms of the subject matter, the cases were filed in a New York court – this time with the claimants being ethnic Hereros with American citizenship. Another setback came in late 2003. The lawsuit against the Federal Republic of Germany was put on hold for formal legal reasons. Currently, the case is resting, but the claimants can file it again at any time. The case against the German corporations is still in court.

This paper will try to assess the chances all these cases have for a positive outcome, as well as the potential problems that will be encountered along the way, but most of the focus will rest on the trial against the German corporations. Legally, one needs to distinguish between two questions: firstly, whether the lawsuit is admissible on formal grounds; and secondly, whether material law has been breached.

2 FORMAL HURDLES

Lawsuits not only have to show that the law has been breached; they also have to be admissible in court in respect of procedural rules. In order to comply with the latter requirements during the trial, the defendants elected to take the case to the federal court, thereby changing the formal setting. Since such changes might reoccur, this paper will only deal briefly with the formal problems of the case. Nevertheless, the question of procedural rules is crucial, because human rights trials often teeter on the brink of dismissal for one or other reason – as outlined later herein.

2.1 The Alien Tort Claims Act and statutory limitations

The claims have not been brought forward in Germany because the lawsuits stand very little chance of success: it has fallen beyond the statute of limitations for some time already, making a civil liability lawsuit void (Paech 2004:16). Thus, the claimants had to turn elsewhere – in this case, opting for a recently "popular" choice with regard to human rights claims: the United States of America (Sarkin 2004). The very advanced US civil liability law is based on the principle of universal jurisdiction. This principle "provides all states with jurisdiction over a limited category of crimes deemed to be of universal concern. Under this principle, the nature of the offence itself, rather than the location where the offence takes place or the nationality of the perpetrator or victim, entitles a court to exercise jurisdiction" (Harvard Law Review 2001). Among such offences are genocide, crimes against humanity, and torture. Several US laws protecting human rights, the most important one at present being the Alien Tort Claims Act (ATCA), give rise to jurisdiction over perpetrators of the aforementioned crimes. The ATCA could also provide jurisdiction in the Herero case, therefore. Being 213 years old, the ATCA was almost forgotten (Bolchos v. Darrel), until the Filartiga case (Filartiga v. Pena-Irala) in 1980 brought it back to life. The latter trial is a landmark case in human rights litigation, as it opens the door to US courts for civil liability claims (Blum & Steinhardt 1981:98). Since 1980 more than 30 lawsuits have been brought to trial under the ATCA. Especially in the very recent past, class action suits based on the ATCA against prominent corporations and countries have caused a stir in the media. These include the Holocaust lawsuits and others against companies that supported the apartheid regime in South Africa.

Still, the crimes at issue in Namibia were committed a century ago. For this reason it is crucial to establish whether they fall within the scope of the statute of limitations in international law. Although there is no treaty-based international law on this, statutory limitation is still a principle of international customary law, as manifested in the Gentini Case *(in United Nations Reports of International Arbitral Awards, Vol. X:551),* resulting from the principle of fairness: the damaging party shall only be threatened by a possible claim for a certain amount of time. After that, a legally secure position, not subject to possible claims, is deemed appropriate, i.e. the right to institute legal proceedings lapses, since the damaged party did not take action within a fair amount of time. In terms of this principle, therefore, it was held that, after more than 30 years of not asking for reparations the applicable limitations period had expired. In the Gentini Case Italy's claim against Venezuela was thus dismissed.

Similar arguments have been applied to the Namibian case: with the German actions after the Herero uprising having occurred 100 years ago, the claims appear to have lapsed due to an expired limitations period. However, the opposite opinion has also been held, namely that the statutory limitation under international law does not apply in this case because it is based on the principle of fairness. In the Herero case, they were simply not able to institute the claim until Namibia's independence in 1990, since the country had been occupied by South Africa since 1915 (first on behalf of the Commonwealth, then on behalf of the League of Nations, and then illegally). In this line of rea-

soning, therefore, it would be unfair to claim that the lawsuit fell under the statutory limitation. On the contrary, it should be assumed the case could only be presented after Namibia's independence, and that the case has not yet come under the statute of limitations (Paech 2004:17).

2.2 State immunity

The sovereignty of a state is one of the most important principles of international law. Thus, courts normally do not rule on the internal acts of a foreign state – which grants far-reaching immunity to foreign state officials. Under US legislation, for example, the Foreign Sovereign Immunity Act (FSIA) protects foreign governments and their representatives against civil liability suits. However, the FSIA generally does not protect individual plaintiffs. It also only protects state agents acting lawfully, and within their authority. Even though the acts in question in then GSWA were committed jointly by German officials and corporation employees, state immunity is not of much relevance here since the focus is on lawsuits against the German transnational corporations.

2.3 Individual claims

As regards individuals, the general principle of mediation on their behalf applies. This principle regards the individual as a mere object, thus denying him/her rights and duties on the level of international law. Only through mediation by the state of which the individual is a citizen can the individual be linked to international law, where s/he still remains an object of (Seidl-Hohenveldern & Stein 2000: No. 927). This means that an individual is primarily a citizen of his/her state; the individual's connection to international law lies in his/her domestic law.

Regarding legal persons, we face the same situation. In 1970, the International Court of Justice decided that the legal personality of a transnational corporation was equal to that of a regular citizen (Barcelona Traction, Light & Power Co). Thus, in international law, liability claims usually need to be pursued by the host state, not by the individual; but since the ATCA is a domestic US law giving the damaged party an individual claim, this problem under international law does not arise in the Namibian claim.

2.4 The Act of State and Political Question Doctrines, and the question of *forum non conveniens*

The Act of State Doctrine prevents US courts from admitting lawsuits in which the official acts of a foreign governmental representative on its own territory would need to be declared invalid or illegal (WS Kirkpatrick & Co). Generally, it is only when officials with sovereign authority act in an official capacity that the Act of State Doctrine applies. In the few cases where the Act of State Doctrine was used in a human rights trial, the court dismissed it (Stevens & Abrams 1997:139). Thus, it seems unlikely that it will be a tough hurdle for plaintiffs.

According to the Political Question Doctrine, a defendant can claim that the case is a political question and can, thus, not be judged by a court. Again, this claim has so far been dismissed every time it was used in connection with the ATCA and human rights cases, since the US government supports the idea of furthering human rights protection by means of creating civil liability for perpetrators of human rights violations (Memorandum for the United States 1980:585). This doctrine, therefore, poses no threat to the claims.

On the contrary, the question of *forum non conveniens* poses a grave danger to the Herero case. This motion empowers a judge to dismiss a case although the parties meet all the admissibility criteria, if the trial would be more appropriate and more just in a different forum (Gulf Oil Corp. v. Gilbert). To prevent this, the claimant has to prove two things: firstly, that an appropriate alternative forum does not exist; and secondly, that the private and public interest in having the trial before a foreign court does not outweigh the interest to have it in the US (Piper Aircraft Co. v. Reyno). Thus, it is largely left to the judiciaries' discretion to decide if the latter two criteria have been met. With the second criterion of *private and public interest* being left relatively vague, the danger of the case being dismissed is high. The judge could argue that the case should be heard elsewhere (e.g. Namibia) or that there is no interest in having the case heard in a US court. To prevent the case from being dismissed, it has already been filed once more in the District Court of Columbia with new claimants who are American citizens of Namibian descent. It remains to be seen whether this will convince the judge to deny the motion of *forum non conveniens.*

3 IN BREACH OF THE LAW?

Regardless of the court and differing formal hurdles, one issue that is common to all the possibilities known to the author is that the actions allegedly committed by the defendants must constitute a breach of international law or US treaty law, and specifically need to contravene provisions extending the scope of protection of either law to the plaintiffs. This condition alone will be able to invoke enforceable civil liability for a non-American citizen in a US court. Since Imperial Germany and its commercial allies formed, *de iure* and *de facto*, a German commercial enterprise in GSWA, the parties are responsible for each other's actions as well as their own. In any event, some of these actions cannot be separated or regarded as separate. The question we now face is this: where did the alleged breach of international law occur? Several possible breaches exist, each of which will have to be checked.

3.1 The General Act of the Berlin Conference, 1884

The actions in question could constitute a breach of the articles of the General Act of the Berlin Conference. This Conference divided Africa into spheres of interest among 14 signatory states.[4] According to Articles 6 and 9 of this Act, the signatories had to treat the indigenous people well, e.g. abolish slavery and the slave trade in Africa. Many German actions constituted a breach of these two Articles. In the Herero claim, one needs to understand what rights have been violated and, thus, who the injured party is. Here, the delict lies within the General Act of the Berlin Conference: a multilateral treaty of international law drafted in line with the prevailing international customary law, binding on and creating duties and rights for the signatory states only. If Imperial Germany had violated the rights granted under this Act, it would simply have created a liability towards the other signatory states, but not to Namibia or the Hereros. Therefore, a breach of the General Act does not help the Hereros in their legal battle for reparations.

3.2 Conventions (II) and (IV) with Respect to the Laws and Customs of War on Land

In 1899, several codifications of humanitarian law were drafted in The Hague. These constituted "the first

[4] *Austria–Hungary, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden–Norway, Turkey, and the USA.*

significant modern treaties on *jus in bello"* (Ratner & Abrams 1997:45). One of the codifications was Convention (II) with Respect to the Laws and Customs of War on Land, and its annex, the Regulations concerning the Laws and Customs of War on Land. According to the Otjiherero-speaking political activist Mberumba Kerina (Harring 2002; Möllers 2001:11) Germany breached this treaty, thereby committing a breach of international law. The Annex to this Convention stipulates many rules of humanitarian law that found their way into the Geneva Conventions after World War II. For example, Article 4 in the Annex provides for prisoners of war to be treated humanely. According to Article 7 of the Annex, "prisoners of war shall be treated as regards food, quarters, and clothing, on the same footing as the troops of the Government which has captured them". Moreover, Article 23(c) of the Annex prohibits the killing or wounding of a defenceless enemy or an enemy that has surrendered by his/her own free will.

Many German actions violated Convention (II) Articles. However, this codification is irrelevant in the context of the Herero case for the same reason that the Articles of the General Act of the Berlin Conference were irrelevant: they did not apply. Article 2 states that "the provisions contained in the Regulations mentioned in Article 1 are only binding on the Contracting Powers, in case of war between two or more of them …". Leaving aside for the moment the question of whether the territory was already a German colony at the onset of the rebellion or only after the total subjugation of the inhabitants of the occupied territory, it is clear that neither the territory in question nor the Herero nation were among the "Contracting Powers" in the sense intended in Convention (II) and its Annex. With only one such "Contracting Power" being involved in a dispute relating to this codification, it cannot apply to the case in question.

In 1907, the 1899 Convention was revised and superseded by Convention (IV). Much of the earlier Convention remained unchanged, e.g. Articles 4, 7 and 23(c) of the Annex. The most important difference, however, was the revised Article 2. Its amended wording left room for the interpretation that acts of warfare within one of the signatory countries fell under Convention (IV), as did cases of rebellion and uprisings. Unlike Convention (II), therefore, here the actions against the Hereros by the Germans could be defined as a breach of international law. However, Convention (IV) was only signed in October 1907, which was after the end of the Herero rebellion in early 1907. This might collide with the principle of *nullum crimen sine lege, nulla poena sine lege* ("no crime without law, no punishment without law"). This principle is fundamental to international criminal law: it prohibits the assigning of guilt to an act not considered as a crime at the time it was committed. The maxim is established in many ways in most legal systems (Ratner & Abrams 1997:19,20). Examples include international human rights instruments prohibiting the prosecution of acts not regarded as criminal at the time of their perpetration, or judicial rules of construction limiting the use of analogy in interpreting criminal laws (Bassiouni 1992:87–107). The principle dates back to Roman law and is widely accepted throughout the world. Thus, in respect of the Herero case, actions up to 1907 – before Germany became a signatory to Convention (IV) – are specifically

excluded from applying on the grounds of the *nullum crimen sine lege* principle. Moreover, since rebellious acts and armed resistance on the Herero side had stopped after the battle at the Waterberg (which had ended by mid-1905 at the latest), classifying the forced labour, extrajudicial killings and other atrocities as actions against belligerents would be absurd. The Hereros were totally subjugated by then, and could no longer be regarded as belligerents. Thus, the actions constitute no breach of international law – in this case, the provisions of Convention (IV).

3.3 Customary law, international law, and *nullum crimen sine lege*

As we have seen, no international law codification existed prior to German colonisation of the territory that could have protected the Hereros. In addition, due to the principle of *nullum crimen sine lege*, codifications after the end of German rule in 1915 do not apply.

Experience has shown that most codifications arise from customary law. Indeed, there is a tendency to codify customary law in a multilateral convention to be signed by numerous states: the law is thus clarified, more precise, and easier to handle (Wüst 2001: No. 35). This means that the delicts laid down in codifications drafted after the German atrocities had occurred might also have been crimes under the customary law prevailing at the time the acts were committed. The crimes mentioned in the Statement of Claim are genocide, crimes against humanity, slavery, and forced labour. By tracing their legal development, it will be possible to see whether any one of the aforementioned atrocities constituted a crime under international customary law in the early 20th century.

3.3.1 Genocide

The legal concept of *genocide* as such is a relatively new one that only developed after the gruesome atrocities that the Nazis committed against millions of people, especially Jews, during 1933–1945. The term *genocide* has its origin in the works of Raphael Lemkin (1944:79):

The objectives of such a plan would be 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. 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.

In 1946, the United Nations initiated the drafting of the Genocide Convention. This bore fruit two years later in the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide. The definition of *genocide* in Article 2 of the latter Convention is regarded as having been derived from international customary law (Anderes 2000:180). It has now been incorporated as Article 6 of the Rome Statute of the International Criminal Court Statute.[5]

The claim by the Hereros that the Germans committed genocide in the occupied territory is almost uncontested in historical scholarly writings.[6] However, seeing that the first mention of this legal concept only occurred in Lemkin's work in 1944, it is impossible for it to have been a crime in customary law during the occupation of GSWA. Perhaps the separate actions were regarded as crimes under customary law at

[5] *Cited in Grote 2002:Appendix I.*
[6] *The few dissenting voices and the superior argument by the majority on the question of whether the Germans' actions are to be defined as genocide from a historical – not legal – point of view are summed up by Böhlke-Itzen (2004:59).*

is not correct. As shown above, this was common practice back then, and posed no problem legally. Thus, the system of forced labour was also not a breach of international law. Summing up the results shows that the Germans' actions did not breach the customary law prevailing at the time.

3.4 Natural law and the Statutory Limitations Convention

True law is right reason in agreement with nature, universal, consistent, everlasting, whose nature is to advocate duty by prescription and to deter wrongdoing by prohibition. Good men obey its prescriptions and prohibitions, but evil men disobey them. It is forbidden by God to alter this law, nor is it permissible to repeal any part of it, and it is impossible to abolish the whole of it. … There is now and will be forever one law valid for all peoples and all times. (Cicero 52 BC, cited in www.neo-tech.com)

This, then, was Cicero's definition of *natural law*: he states a theory claiming that all law is derived from the nature of humankind. This source – and, thus, natural law – is above all laws made by humans. Grotius derived the so-called contract theory from this in the Middle Ages, arguing that a contract for their own safety exists between the people and their state. He also developed the concept of the *law of nations* from this theory.

Today, some authors who are adherents of natural law claim that some crimes breaching legal rights under international law are and have always been inherent to humans in general, e.g. genocide, crimes against humanity, and slavery (Möllers 2001:11). This would mean that, irrespective of their date of occurrence, the actions of the Germans in GSWA constituted crimes under international law. According to the aforementioned authors, the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity supports this theory. The first sentence in Article 1 of this Convention states that "no statutory limitation shall apply to the following crimes, irrespective of the date of their commission". One interpretation of this statement is to assume the Convention applies to delicts of the past. This interpretation is soon dispelled, however, by the wording in Article 2: "If any of the crimes mentioned in Article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals …". The Convention notably does not say "were committed", but "is committed". This shows that the convention is only applicable on future crimes under Article 1, and not past offences. In addition, it is naïve to believe that any state would have signed this Convention if it had opened the door to civil liability for, possibly, centuries-old crimes. Furthermore, this law would be applicable regardless of signatories and convention: that is supposed to be the nature of natural law. The intention of the signatories, therefore, could only have been to prevent future crimes against humanity and war crimes from falling under a statute of limitations.

Thus, the Statutory Limitations Convention does not offer any help on the idea of a broadly defined *natural law*. As a result, there is no legal contemporary source supporting this natural law theory, and even in the best case scenario, it is clearly a minority opinion in legal writing. The idea of rights being inherent to humans is a logical notion, but in a moral rather than legal dimension.

3.5 The Treaty of Protection and Friendship, 1885

In 1885, the German Empire and the Herero nation co-signed a Treaty of Protection and Friendship. In international law a breach of such a bilateral treaty is a delict, causing a liability of the damaging towards the damaged party. Only a grave breach causes the automatic termination of the contract. The questions, here, are these:

- Could the Hereros be regarded as constituting a state under international law, comprising three elements, namely territory, people and the exercise of power by a single entity (Seidl-Hohenveldern & Stein 2000: No. 622)?
- Could the Germans' actions therefore be regarded as a delict under international law?
- When did the territory become a German colony?
- From what date, therefore, did German law apply in GSWA?

Delictual acts prior to German law applying in the occupied territory might be subject to international law, thus providing the breach of international law necessary to invoke civil liability under US laws.

In this respect, there are arguments both for and against a late occupation of the territory by the Germans. An **early** occupation of the land is only possible if it was a *territorium nullius,* i.e. land not belonging to anyone (Gloria in Ipsen 1999: § 23, No. 26). According to this opinion, the pastoral society of the Hereros was changing constantly, with groups splitting up, and structures and powers unclear (Schildknecht 2000:199). If this was the case, there was no exercising of power by a single entity or a united people. Thus, GSWA was a *territorium nullius* only once it was occupied by Germany: they sent and installed an official administration, provided soldiers to control the territory, and claimed the region internationally at the Berlin Conference. By performing acts of occupation **and** showing the will to occupy, Germany had thus met the requirements for land occupation under international law (Gloria in Ipsen 1999: § 23, No.'s 28–30). This means the territory became a German colony around 1890 (Schildknecht 2000:235), after which date only German law applied, and only acts from 1885–1890 might be breaches of the Treaty of Protection and Friendship, causing a delictual liability.

The second opinion (Hesselbein 1996:28, as well as contemporary scholars Zorn, Ullmann and Bendix, all cited in Schack 1923:101,107,116) supports a wider definition of the three elements constituting a state and, thus, a **late** occupation. According to this opinion, there had always been a core territory of the region around the main kraal[10], which, however small, constituted the territory of the state. Secondly, there was a core group of people, namely the community and their leaders, which constituted the people of the state. Thirdly, a single entity exercised the power of the state, as vested in the supreme leader of the community and his/her family. The leadership levied taxes on people passing through their territory, and concluded treaties and fought wars with other communities. It can, therefore, be argued that there was a Herero state and that the treaty it had entered into was one that obtained under international law. It follows, then, that a breach of such a treaty would thus cause a delictual liability.

If one regards acts like stealing land for railroad construction and agriculture by fraudulent means or by

[10] *A kraal is defined as an "enclosure or group of houses surrounding an enclosure for livestock" (Encyclopaedia Britannica 2002). The main kraal the residence of an ethnic community's ultimate leader, e.g. Hoornkranz for the Witbooi nation.*

threat, or if one regards extrajudicial killings, grievous physical harm or cattle theft only as breaches – albeit not as grave breaches that would terminate the treaty, then the treaty would be seen as remaining valid until the Herero nation declared war on the Germans in January 1904. From this perspective, then, the actions by German officials and corporate employees are delicts under international law because they breach the Treaty of Protection and Friendship, causing a liability for acts committed prior to the declaration of war. The declaration of war resulted in the treaty being terminated; thus, the worst crimes committed during and after the war – the battle at the Waterberg, the shoot-to-kill order, the concentration camps and the forced labour – do not breach the treaty because it had already been terminated.

3.6 Summary of points discussed in this section

Even if one supports the second opinion, i.e. arguing for a late occupation of the territory by the Germans, the difficulty of claiming reparations legally is quite clear. International law does not offer a remedy for the crimes committed from January 1904 onwards, which were the worst and most disastrous of them all. Only the acts breaching the Treaty of Protection and Friendship, dating back to 1885 might cause a delictual liability, perhaps opening the way to the US courts. However, all acts after the start of the rebellion do not constitute acts that breached that treaty or any other international law instrument.

This means that, even if the formal obstacles are overcome, the legal team will have a problem proving that law has been breached – which is essential opening the door to civil liability in a US court.

4 POLITICAL IMPLICATIONS AND RECENT DEVELOPMENTS

The legal papers of the Herero lawsuit were handed to the court in September 2001, more than three years ago. As outlined earlier, this lawsuit faces tough legal problems from a formal and material point of view. Despite these difficulties, the case has survived for three years already – whereas it could easily have failed by now.

It is important to understand that, under US civil law, the decision whether or not to dismiss a case is left largely to the judge's discretion. Decisive in this regard are the media and their influence on public opinion. With extensive media coverage many judges will hesitate to dismiss a case. This was the major reason for the out-of-court settlement reached between the Nazi Slave Labourers on the one hand and Germany and German corporations on the other. Public pressure and the threat of disastrous publicity about Germany and German companies led to the compromise. Due to immense public pressure, this case would surely not have been dismissed because of formal reasons. Furthermore, there was the possibility of losing the case and the threat of enormously high amounts of reparations.

Those two reasons, the media-related political factor and the legal, are both decisive in the success of a lawsuit of this kind. It is only with enough public pressure that companies will look for out-of-court settlements in order to prevent their images from being gravely tarnished. However, the media-related political factor is dependent on the legal factor of a lawsuit to lend some kind of moral authority to the whole venture.

4.1 The apology by the German goverment

On 14 August 2004, the German Minister of Development and Aid, Heidemarie Wieczorek-Zeul, attended the ceremony marking the 100th anniversary of the battle at the Waterberg. She was the first senior German politician to attend such a ceremony in this country's history. In her speech she asked the Hereros for forgiveness for the crimes her compatriots had committed a hundred years ago. She said that (2004a, cited in Mail & Guardian 2004; and in www.afrol.com 2004a) –

(w)e Germans confess to our historical-political and moral-ethical responsibility and guilt that Germans at that time took upon them. … I plead you as part of our common Lord's Prayer to forgive us our trespasses. … Everything I have said was an apology from the German government.

This speech was delivered at the site of the decisive battle of the Herero uprising and addressed all ethnic groups that had suffered under German occupation, but "especially the Herero and Nama" (Wieczorek-Zeul 2004a). This shows the intention to not only placate the Hereros, but also to include the other affected groups. If the Minister had not mentioned the other groups, including the Namas who lost about 50% of their population, the apology would have been perceived as incomplete and inadequate.

With this apology the HPRC, headed by Paramount Chief Kuaima Riruako, succeeded in furthering their cause: the Germans finally gave in to the request for an apology, which was always inseparable from the reparations request. This step came as a huge surprise because the German government had shied away from making an apology for years due to the potential implications such an act might have for the pending reparations lawsuit.

4.2 The German position prior to and after the apology

In the years since Namibia's independence and Germany's reunification, Germany has always used the term *special* to describe its relations with Namibia due to its historical ties, but it refrained from going further by, for example, offering an apology for the atrocities it had committed against the Namibian people in the past. Indeed, on his visit to Namibia in September 1995, the then Chancellor Dr Helmut Kohl ignored the Herero issue and avoided meeting with Herero leaders. Three years later the German President Prof. Dr Roman Herzog visited Namibia. Herzog met with representatives of the Hereros, disregarding the official timetable and protocol in this respect. He agreed to study their claims, but still declined to offer an official apology (Möllers 2001:11). This remained the German position for the next few years. Thus, in January 2004, when the German Ambassador to Namibia, Wolfgang Massing, attended a ceremony commemorating the launch of the Herero uprising, an apology was again not forthcoming. What he did express, however, was a "deep regret" for German crimes in Namibia (Kößler 2004:12).

On 16 June 2004, The German Bundestag[11] passed a resolution on Namibia stating the following:

The campaign against the African people and especially the victims from the Herero and Nama population are at the centre of our remembrance. … We recognise the special importance of these actions in German history.

[11] Parliament

It continues by praising the Namibian government for its development of the country to date. In the resolution, the Bundestag also said that it intended to offer its support to Namibia with regard to land reform (Bundestagsdrucksache 15/3329). In the final analysis, however, the resolution was a disappointment since it failed to mention the crimes Germany had committed or offer an apology for them.

The stance of not wanting to mention the words *apology or genocide* was finally discarded with the speech by Minister Heidemarie Wieczorek-Zeul. She offered a bona fide apology, which was a truly unexpected move. The official transcript on the Ministry of Development and Aid's website reports that she delivered this speech explicitly as the representative of the German government and the Bundestag (Wieczorek-Zeul 2004a). This revised stance is supported on the Foreign Ministry and official government websites,[12] where her position is adopted as Germany's official position. No reaction – whether in support or in opposition – has thus far been voiced publicly by any politicians, however. This is perhaps due to German public discussion currently being dominated by heated debate on the government's economic reform agenda, a topic not related to Namibia at all.

4.3 Reactions in Namibia

In Namibia, of course, the reactions have abounded. The crowd hearing the speech with the admission of guilt and the apology was moved. Former Deputy Foreign Minister Kaire Mbuende asked Germany to "own up to it (the apology)", indicating that the apology should not put an end to the topic, but should mark the beginning of dialogue (Kuteeue 2004b). His view was supported by the Former Deputy Minister of Prisons and Correctional Services, Michaela Hübschle, who welcomed the apology as "very good and important", and asked for dialogue (ibid.).

The highest-ranking member of the Namibian government to comment on the apology was Prime Minister Theo-Ben Gurirab. He asked his government to "seize the moment", adding that "the ball is now in our court and we must make the next move… All is well so far, but the real dialogue must now commence in earnest. The two sides would need henceforth to talk with each other and not past each other" (Gurirab 2004, cited in www.afrol.com 2004b).

As regards the Hereros, there have been mixed reactions. Although the apology was welcomed as a huge step forward, there was no clear opinion on whether or not to continue the lawsuits. Some Hereros leaders reportedly wanted to drop the lawsuits or at least consider this move. The official position was finally made public on 16 August 2004 by Paramount Chief Riruako, who denied that the HPRC wanted to drop the lawsuit, saying that "(w)e still have the right to bring the Germans to court" (Riruako 2004, cited in www.afrol.com 2004a).

4.4 Reasons and consequences

The positive and surprising delivery of an apology can be regarded as the result of media attention to the topic since January 2004. Since the year started, there have been many reports throughout all sectors of the media commemorating the centenary of the launch of the Herero uprising in 1904. New academic books have been published,[13] many newspapers have reported on the centenary of the uprising, and conferences and exhibitions have been and are still being held across Germany and in

[12] *Government: http://www.bundesregierung.de/dokumente/-,413.697133/Artikel/dokument.htm Foreign Affairs: http://www.auswaertigesamt.de/www/de/willkommen/deutschlandinfo/nachrichten_dtl/nachrichten_archiv_html?wb=2*

[13] *See e.g. Böhlke-Itzen (2004), Bühler (2003), Förster/Henrichsen/Bollig (2004), Hartmann (2004) and Zimmerer (2003).*

Namibia.[14] In Germany, this heightened awareness led to the topic being discussed at all levels. This was combined with the media coverage of possible land expropriations and the impact of the latter on German-speaking Namibian farmers.

Without a doubt the Hereros have secured a huge success in finally attaining the overdue formal apology from Germany. Their apology is a step almost unequalled in recent history by former colonial powers in Africa: only Belgium has so far apologised for its rule over Rwanda that created the separation of the Hutu and Tutsi and, thus, led to the genocide (BBC 2004). This German apology will surely bring immense pressure to bear on France, Britain, and Portugal. In many of their former colonies, discussions on the crimes of the past have not subsided, and legal actions are increasingly being instituted against the former rulers (Sarkin, forthcoming).

4.4.1 Material consequences

For the Hereros, however, a distinction can be made between the possible material and symbolic consequences of this apology. Will it make a financial difference to the Hereros? Could the apology be legally relevant to the lawsuit? In all likelihood it will not: Germany has so far only publicly accepted a moral-historical responsibility. Even Phil Musolino, the US lawyer for the Hereros, thinks that an apology "would surely not be used as proof in a lawsuit against Germany" (Winkelmann 2004). From a legal point of view, therefore, Germany's position – to reject all individual financial claims – remains as strong and unthreatened as ever.

4.4.2 Symbolic consequences

On a symbolic level, on the other hand, the Germans' apology has been important for the descendants of the massacred and otherwise ill-treated Hereros. In the words of Judge Richard Goldstone[15] (2000:x) –

(t)he public and official exposure of truth… is itself an important form of justice… Common to all forms of justice is public acknowledgement for the victims. I have witnessed time and again in South Africa, Bosnia and Rwanda the importance of that acknowledgement to victims. It is frequently the beginning of their healing process.

In the words of Namibian Prime Minister Theo-Ben Gurirab (2004, cited in www.afrol.com 2004b), "It has taken a full century for (the) German authorities but now finally we have heard the words that we had all along waited to hear and that mean so much to the recognition of human dignity and to the soul of our people".

This German apology acknowledged the damage that was done and the suffering that had been caused. It represents the keystone of achieving reconciliation and peace and will allow old wounds to be soothed and eventually healed.

4.5 The Deutsche Bank

There has been no reaction as yet from the Deutsche Bank, the most prominent corporation being sued by the Hereros for its involvement in the colonial exploitation of GSWA. The bank has so far rejected all claims for reparations in court. Also, no apology of any kind has ever been offered. Therefore, it appears like the Deutsche Bank will keep on following the strategy it has adopted to date

[14] These include, in Germany, a conference from 24–26 September 2004 at the Evangelische Akademie Hofgeismar entitled "Namibia – Freedom with a shadow"; a conference on 2 October 2004 at the Potsdam University entitled "German colonial rule in Namibia and the anti-colonial liberation struggle – Past, present and future in a common world"; and an exhibition until 3 October 2004 at the Rautenstrauch Joest Museum in Cologne entitled "Namibia–Germany: A divided history". Many similar conferences, exhibitions and publications mark the centenary in Namibia as well.

[15] Former Chief Prosecutor of the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda; at present Judge at the South African Constitutional Court

and will simply remain silent on the topic in general.[16]

The bank's financial situation starkly illustrates the inequality between Germany's and Namibia's respective positions: the turnover of the Deutsche Bank in 2000 was 918 billion Euros (see Grofe 2002: App. II) compared with Namibia's gross domestic product of 3.1 billion Euros in 2002 (Albrecht & Reindel 2002:566).[17] Thus, it looks as if the Deutsche Bank will simply wait for the Hereros to concede defeat. The Deutsche Bank not only appears confident it will win the case against it, but does also not seem threatened by its image being tarnished.

In general, however, despite the extensive media coverage of the Herero topic, very few details surfaced in the media on the involvement of the corporations per se. Thus, although many people know about the lawsuit and the history of German occupation of GSWA, few know how German corporations were involved.

4.6 The position of the Namibian goverment

With the support of the Namibian government the corporations' optimism regarding not coming under pressure could be under threat, but the chances for any sudden turnaround are small. Although the Namibian government might support dialogue, it still opposes the Herero lawsuit, quite rightly stating that all ethnic groups under German rule suffered – not only the Hereros; thus, they believe no ethnic group should be treated preferentially above another. Also, Germany has been offering important developmental aid ever since independence and the SWAPO cadres have not forgotten the German help from the former German Democratic Republic during their armed struggle for Namibia's liberation. Nonetheless, things remain a bit unclear with regard to the Namibian government's position, mainly because President Sam Nujoma himself has so far not yet commented on the Germans' apology.

The Namibian government's hesitant stance on the Herero topic to date is in all likelihood influenced by its possible political implications for the country. The Herero leadership, who still currently head the main opposition party in Parliament, namely the Democratic Turnhalle Alliance (DTA), might benefit politically from a successful lawsuit against Germany. Moreover, although the Hereros are a clear minority in Namibia, many of them support the opposition and not the ruling SWAPO Party, which claims the Ovambo-dominated north-central regions of the country as their stronghold. In addition, as regards German development aid to Namibia, the Hereros regularly lament that it always benefits only the Ovambo.

In response to the speech by Prime Minister Gurirab in 2004 (in www.afrol.com 2004b), the Member of Parliament McHenry Venaani of the DTA asked why President Sam Nujoma had allegedly declined an invitation to commemorate the centenary of the Herero uprising. He also asked whether Prime Minister Gurirab thought the developmental aid from Germany at present benefited the descendants of the victims of the 1904–1907 Herero–German war (Möllers 2001:12; Gurirab 2004, cited in www.afrol.com 2004b).

[16] On the Deutsche Bank website, www.deutsche-bank.de, the word Herero cannot be found at all (using the search option); last accessed 20 September 2004.
[17] These figures give an idea of the possible problems regarding the lack of accountability in international law for transnational companies – not necessarily in this case, but in general. On the topic of the accountability of multinational corporations for human rights violations during colonialism and apartheid, see Sarkin (2003:174–204).

4.7 Determining the way forward

In the US, there are currently several lawsuits pending against transnational corporations for supporting the South African apartheid regime. Such corporations include British Petroleum, DaimlerChrysler, Deutsche Bank, Ford Motor, Barclays National Bank, Fujitsu ICL, Caltex, Royal Dutch Shell, and Exxon Mobil. The Deutsche Bank has a problematic history, which includes having supported the Nazi regime.[18] These lawsuits might draw media attention in the US as well as Europe, because apartheid crimes like the Sharpeville Massacre,[19] the infamous pass laws, and the inhumane treatment of the vast majority of South Africans in general are much more widely known in comparison with the history of crimes against the Herero. Also, since the spotlight will be centred squarely on these corporations, it has the potential to lead to growing public interest in the Deutsche Bank's human rights record as a whole, and would expand the focus of public scrutiny onto their activities in Namibia as well. This might put pressure on the Deutsche Bank to look at the option of out-of-court settlements. This, of course, is the optimistic outlook.

Seeing the weak position with regard to a breach of material law, to attempt to reach an out-of-court settlement with the German government seems advisable for the Hereros. The German government's apology is already more than most experts and journalists had predicted, and it constitutes a milestone for the Hereros in their struggle to have past wrongs addressed (Harring 2002, Möllers 2001, Winkelmann 2004, Zimmerer 2004). The Hereros and the Germans need to cross the divide and have a dialogue that includes the Namibian government. Germany has made it clear that it will continue granting development aid to Namibia, but that it will not support any individual claims.

One potential solution is for Germany to offer its financial support on condition that those specific ethnic groups that suffered under German rule should benefit from such aid, taking into account the special relations that Namibia and Germany have agreed on in bilateral talks. This would not be an attempt to meddle with Namibia's domestic affairs, but rather, would show that the apology was not merely paying lip service to the acceptance of responsibility for the wrongs of the past.

There is, in fact, talk of dialogue on all sides. Like Paramount Chief Riruako, Prime Minister Gurirab supports it, saying that "dialogue should happen right now to finish the business" (Gurirab 2004, cited in Kuteeue 2004b). On their part, the German government similarly supports dialogue and Minister Wieczorek-Zeul will take part in the international conference "The Herero War – 100 years after 1904. Realities, Traumata and the Future" in Bremen on 18th – 21st November. She is considering proposals by the Namibian bishops Zephania Kameeta and Reinhard Keding to set up a reconciliation committee (Wieczorek-Zeul 2004b).

In respect of the Deutsche Bank, it has not yet commented on the German Minister's apology in mid-August 2004. There has also been no public attempt by the German government to convince the Deutsche Bank to accept its share of responsibility for atrocities against the people of then GSWA. Nevertheless, the Deutsche Bank might want to consider offering help to undo some of the injustices. The potential solution here would be for the bank to use a fraction of its vast financial means to

[18] *On the history of the Deutsche Bank during the period 1933–1945, see James (2003).*
[19] *On 21 March 1960, at least 180 – some claim as many as 300 – black South Africans were injured and 69 killed when the South African Police opened fire on demonstrators protesting against the pass laws at the former black township of Sharpeville, which lies in the outskirts of the city of Vereeniging. Later that day, in Langa, a similar township township outside Cape Town, police station baton-charged protesters and fired tear gas at them, shooting three and injuring several others. The Sharpeville Massacre as the event became known, signalled the start of armed resistance in South Africa, and prompted worldwide condemnation of South Africa's apartheid policies.*

make a contribution – which would make a huge difference to the Hereros. For example, the bank could collaborate with the German and Namibian governments to implement rural development in education, e.g. to improve the literacy rate, or to provide economic support for start-up businesses. Supporting cultural projects would be another way to help.

If one weighs up the bank's financial gains against the inhumane way labourers were treated during the construction of railroads, the exploitation of mines, and the development of agriculture in Namibia, all of which left thousands dead, one could argue that the Deutsche Bank is morally obliged to demonstrate its com-passion towards those who suffered in the past for some of its profits today. However, with the legal situation being this complicated, and since media pressure on the Deutsche Bank is non-existent at present, it seems unlikely that the Deutsche Bank will be making any such concessions.

5 CONCLUSIONS AND PROSPECTS

In summary then, the Hereros have clearly had some success in the moral-ethical arena lately: they finally succeeded in exacting an apology from the German government, which will play an important role in the healing process of the victims' descendants.

A hundred years ago, the Hereros lost the battle for their land and cattle, and they were almost annihilated. Sadly, it seems as though they will most likely lose the legal battle for reparations as well: their chance of success in respect of achieving more than an official apology, i.e. by way of the pending lawsuits, are slim due to the difficult legal situation referred to above.

It should be noted that this lawsuit currently unites Paramount Chief Riruako's followers, giving them a common hope for a better future. Should it fail, their hopes would be dashed.

Therefore, the Herero leaders should consider uniting in their venture to receive development aid and should rather pin their hopes on successful dialogue to this end. Germany has made it clear that it will not entertain individual claims, and they have a strong legal position in this respect. Thus, the various parties, including the Namibian government, should try to settle the matter in open and honest dialogue that will prove beneficial for all involved.

In conclusion, and with specific reference to reparations by the Deutsche Bank, the corporation remains in a very comfortable situation from which it is unlikely to move. Still, they should consider acting on their moral obligations and get involved in the healing process in Namibia. They could make all the difference in the coming talks and for many Hereros in the decades ahead.

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