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THE JUDICIALISATION OF POLITICAL ORDER IN SOUTHERN AFRICA

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Thesis submitted for the degree of PhD

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Declaration for SOAS PhD thesis

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'That seeming disorder which in essence is bourgeois order in the highest degree'.

Fyodor Dostoyevsky, *Winter Notes on Summer Impressions*. (Evanston: Northwestern University Press [1863] 1988, 37).

'I have come to bring fire on the earth, and how I wish it were already kindled! [...] Do you think I came to bring peace on earth? No, I tell you, but division. From now on there will be five in one family divided against each other, three against two and two against three'

The Gospel According to Luke (NIV) 12:49, 51-2.

<u>Abstract</u>

The last three decades have seen courts and constitutional bodies worldwide expand their activities beyond the application of individual rights provisions and basic procedural justice norms into what Ran Hirschl (2008, 98) calls 'an elusive yet intuitive category of 'existential' national issues'. This study aims to describe, explain and assess the sub-Saharan African dimensions of this shift. Its focus is on the politics of three high-profile cases from the continent's Southern region. The first, *Campbell v Republic of Zimbabwe* (2008), was brought by farmers opposing Fast-Track Land Reform in Zimbabwe. The second, *Sesana v The Attorney General* (2006), challenged Botswana's decision to relocate the inhabitants of the Central Kalahari Game Reserve. The third, *The Herero People's Reparation Corporation v Deutsche Bank AG, et al. (2001)*, demanded reparations for colonial atrocity outside of bilateral relations frameworks. All three have had significant political consequences, and have provoked 'backlash' from regional governments. But none have shown any significant movement towards resolution.

The first part of this study describes this phenomenon. The second provides an interpretive explanation for it. Drawing on the work of Donald Davidson and Mark Bevir, it highlights the emergence of new human rights beliefs in the 1970s. These can be explained by dilemmas emerging from a dual crisis of socialist utopias and modernist administrative orthodoxies. Foucauldian and constructivist theories can account neither for the emergence of these new beliefs, nor for the impossibility of deriving new behavioural norms from them to resolve political disputes. There are particular weaknesses in constructivist 'norm spiral' models of transnational mobilisation, knowledge-gathering, and international institutionalisation. This study's third part argues that new rights beliefs have expanded into realms of fundamental political order. Drawing on the work of Bernard Williams it provides an evaluative argument for the moral priority of Hobbesian 'first questions'.

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Acronyms and abbreviations

ACHPR - African Commission of Human and Peoples' Rights

ACrHPR - African Charter of Human and People's Rights.

AI - Amnesty International

AIM - American Indian Movement

ANC - African National Congress [South Africa]

ARADP - Accelerated Remote Area Development Programme [Botswana]

ARM - African Reparations Movement [United Kingdom]

ATCA - Alien Torts Claims Act [United States]

BIPPA - Bilateral Investment Promotion and Protection Agreement

BCC - Botswana Christian Council

CANZUS - Canada, Australia, New Zealand and the United States

CBNRM - Community-Based Natural Resource Management

CC - Constitutional Court [South Africa]

CCFCOG - Coordinating Committee for the First Commemoration of the Ovaherero Genocide

CDU - Christian Democratic Union [Germany]

CFU - Commercial Farmers Union [Zimbabwe]

CKGR - Central Kalahari Game Reserve

CLA - Caprivian Liberation Army

COPAC- Zimbabwe Constitution Select Committee

CS - Cultural Survival

CSHRH - Council of the Six Herero Royal Houses

DFID - Department for International Development [United Kingdom]

DMP - Draft Management Plan [Botswana]

DTA - Democratic Turnhalle Alliance [Namibia]

DWNP - Department of Wildlife and National Parks [Botswana]

ECCHR - European Center for Constitutional and Human Rights

ECHR - European Convention on Human Rights

ECtHR - European Court of Human Rights

ECJ - European Court of Justice

ECOWAS - Economic Community Of West African States

FCO - Foreign and Commonwealth Office [United Kingdom]

FPK - First People of the Kalahari

FTLR - Fast-Track Land Reform [Zimbabwe]

GAPWUZ - The General Agricultural and Plantation Workers Union of Zimbabwe

GEP - Group of Eminent Persons [Organisation of African Unity]

GNU - Government of National Unity [Zimbabwe]

GOB - Government of Botswana

GOZ - Government of Zimbabwe

GPA - Global Political Agreement [Zimbabwe]

GSA - Government of South Africa

HCC - Herero Chief's Council

HPRC - Herero People's Reparation Corporation

ICC - International Criminal Court

ICJ - International Court of Justice

ICSID - International Convention on the Settlement of Investment Disputes

IITC - International Indian Treaty Council

ILO – International Labour Organisation

IMF - International Monetary Fund

IWGIA - International Work Group on Indigenous Affairs

JAG - Justice for Agriculture [Zimbabwe]

JSC - Judicial Service Commission [South Africa]

LAA - Land Acquisition Act [Zimbabwe]

MDC - Movement for Democratic Change

MLR - Ministry of Lands and Resettlement [Namibia]

NAU - National Agricultural Union [Namibia]

NIEO - New International Economic Order

NORAD - Norwegian Agency for Development Cooperation

NPA - National Prosecuting Authority [South Africa]

NPCC04 - National Preparatory Committee for the Commemoration of 1904 [Namibia]

NTC - Nama Technical Committee

NTLA - Nama Traditional Leadership Association

NUDO - National Unity Democratic Organisation [Namibia]

OAU - Organisation of African Unity

OCD-1904 - Ovaherero/Ovambanderu Council for Dialogue on 1904 Genocide

OGC - Ovaherero Genocide Committee

OOTC-1904 - Ovaherero-Ovambanderu Technical Committee for the 1904 Genocide

OSISA - Open Society Initiative for Southern Africa

OTA - Ovaherero Traditional Authority

PALU - Pan African Lawyers Union

PF - Patriotic Front [Zimbabwe].

RAD - Remote Area Dweller [Botswana]

RADP - Remote Area Development Programme [Botswana]

RAU - Research and Advocacy Unit [Zimbabwe]

RNFU - Rhodesia National Farmers Union

SADC - Southern African Development Community

SADCC - Southern African Development Co-ordination Conference

SALC - Southern African Litigation Centre

SGL - Special Game License [Botswana]

SI - Survival International

SPD - Social Democratic Party [Germany]

SWANU - South West Africa National Union

SWAPO - South West African People's Organisation

UDHR - Universal Declaration of Human Rights

UNDP - United Nations Development Programme

UNDRIP - UN Declaration on the Rights of Indigenous Peoples

UPC - Union des Populations du Cameroun

WCIP - World Council of Indigenous Peoples

WGIP - UN Working Group on Indigenous Populations

WIMSA - Working Group of Indigenous Minorities in Southern Africa

ZANU - Zimbabwe African National Union

ZANU-PF - Zimbabwe African National Union – Patriotic Front

ZAPU - Zimbabwe African People's Union

ZEF - Zimbabwean Exiles Forum

ZJRI - Zimbabwe Joint Resettlement Initiative

ZLHR - Zimbabwe Lawyers for Human Rights

<u>Part I</u>

Chapter 1: Introduction

1. Prelude

In 1988 game scouts forcibly evicted Maasai pastoralists from the Mkomazi Game Reserve in northeastern Tanzania. The move was motivated by the government's desire to improve wildlife conservation on the reserve (Widner 2001, 372). Tourism, as for many other states in sub-Saharan Africa, had become a promising means of attracting foreign capital in the wake of the imposed political and economic liberalisations of that decade (e.g. Derman 1995). The Reserve had become a significant asset. Maasai petitions to the Office of the President, the Prime Minister, the Minister of Home Affairs, the Office of the Attorney General, and the then ruling party all proved unsuccessful (Widner 2001, 372-3).

Five years after the eviction, however, circumstances appeared to shift in the evictees' favour. The numbers of 'land-grabs' - leases negotiated directly with the government by commercial farming interests, without consultation with those living in the area - had increased significantly elsewhere in the intervening period (Shivji 1998). Northern Tanzanian pastoralist NGOs began financing attempts to seek legal recognition of common title to land as 'native communities', as defined by Tanzanian Land Law. A series of test-cases was initiated in order to establish customary rights of occupancy (Tenga 1998). This was greatly facilitated by the international visibility of pastoralist concerns. In 1989 Moringe ole Parkipuny, a Tanzanian MP and long-time Maasai activist, had become the first African to address the United Nations Working Group on Indigenous Populations (Hodgson 2009, 1). (The word 'indigenous' had previously been considered, even by movement activists, as the reserve of non-European populations in former settler colonies.) The Cold War's end greatly hastened this recognition. International donors identified the 'scaling-up' of pastoralist NGOs as key to their support for civil society during the country's democratic transition, and the funding of high-profile legal cases was an ideal means to this end (Igoe 2003; 2006, 405).

The outcome of the Mkomazi Maasai's case, however, was a considerable disappointment. Judges were unwilling to take so firm a stand against government policy. One even refused to hear the case on the grounds that it was 'too politically difficult', thus implicitly recognising its legal merits (Igoe 2003, 879). The High Court Judge Eusebia Masuo recognised that individual plaintiffs had customary rights, but judged that restitution was no longer practicable, and that compensation should be paid. She rejected the plaintiffs' attempt to represent their community as a whole (Widner 2001, 373). The Court of Appeal then upheld this judgement, despite considerable debate over

whether observations by nineteenth-century German missionaries established claims to ancestral title. In an interview with the political scientist Jennifer Widner, the notably independent-minded Chief Justice Francis Nyalali later admitted he had been impressed by the evidence presented to him. But he confessed to what Widner describes as 'private concern about the public policy issues involved'. A different decision, in his eyes, would have unlocked the 'Pandora's box' of politicised ethnicity in a country famously free from such tensions. As Nyalali concluded, 'our national policy on this subject developed over years of national struggle. The nationalist struggle was a vote against sectarianism' (Widner 2001, 374).

2. Introduction

A number of features of this narrative illustrate some new and striking African aspects of a worldwide phenomenon. Courts and constitutional bodies now increasingly rule on 'political' questions that were previously decided by informal, administrative or legislative means. This is part of the phenomenon which political scientists call the 'judicialisation of politics' (e.g. Tate and Vallinder 1995; Angell, Schjolden and Sieder 2005; Blichner and Molander 2008). Much of it is familiar to Western social science. It can be explained by later twentieth-century fears of the discretionary power acquired by modern states (see chapters 5 and 6). Formulae such as 'reasonableness' and 'proportionality' were promoted as tools for courts to use in new areas of activity. These notions were not intended to involve judges in the detail and policy-making and administration, but rather to help them promote decision-making based on rational and objective criteria. In the earlier part of century, as Max Weber described, such principles had been implicit in administrative practice, but had not yet been formulated as legal rules,

> for the field of administrative activity proper, that is, for all state activities that fall outside the field of law creation and court procedure, one is accustomed to claiming the freedom and paramountcy of individual circumstances. General norms are held to play primarily a negative role as barrier's to the official's positive and 'creative' activity, which should never be regulated […] Yet … the rule and the rational estimation of 'objective purposes', as well as the devotion to them, always exist as a norm of conduct (Weber [1922] 1978, 979).

By the 1970s, however, Western administrative orthodoxies no longer trusted 'creative' administration. This is well illustrated by experiences with constitutionally-protected socio-economic rights. These constitutions may grant citizens access to housing and other necessities, but judges themselves have been unwilling to dictate exactly how resources should be deployed to this

end (e.g. Langford 2013, 194-7). Instead, they have deployed 'reasonableness' and notions of legal procedure, seeking to ensure that administrative policies are indeed rationally calculated to achieve constitutional objectives (see generally Eliya-Cohen and Porat 2013).

Such issues, however, differ clearly from those that confronted Francis Nyalali. The Mkomazi Maasai's case exemplifies what Ran Hirschl (2008, 98) calls 'the judicialisation of mega-politics'. These judicialisations involve, broadly, cases which are unlikely to be resolved to legal-professional satisfaction through procedural technique. They have as their inevitable corollary the politicisation of judiciaries and judicial appointments (see Malleson and Russell 2006). As Raymond Geuss (2008, 93) has argued in a different context, responses to these questions cannot be derived from abstract principles. This is because 'power, interests, priorities, values and forms of legitimation concretely interact'. In Hirschl's words (2008, 99) 'adjudicating such matters is an inherently and substantively political exercise'. There was no specifically legal sense in which the Tanzanian Chief Justice could justify his 'private concern' about the potential political implications of his judgement.

Hirschl (2008, 98) lists several subcategories of 'mega-political' judicialisations. These include the 'judicial scrutiny of executive-branch prerogatives in the realms of macroeconomic planning or national security … [the] judicialization of electoral processes; judicial corroboration of regime transformation; [and] fundamental restorative-justice dilemmas' (for election disputes as 'pure politics' see R.A. Miller 2004). These topics have already attracted some interest from Africanist political science (e.g. Steytler 1995; VonDoepp 2009; Ellett 2013). There is, however, an 'elusive yet intuitive distinction' between these processes and a final item on Hirschl's (2008, 98) list: 'the judicialization of formative collective identity, nation-building processes, and struggles over the very definition or raison d'etre of the polity as such'. In Tanzania, Francis Nyalali refused to open this particular 'Pandora's Box'. Elsewhere, however, courts have not always been so reticent. Since the 1980s, for example, the Israeli Supreme Court has begun to rule on *which* Judaism is referred to by the country's constitutional self-definition as a 'Jewish and democratic state'. (This formulation had previously been the object of fierce confrontation between liberal secular and Orthodox political interests.) Meanwhile in Canada, similarly, the Supreme Court ruled in 1995 that unilateral Quebecois secession would be illegal even following a majority vote, and that secessionist claims had no basis in international law (for these examples Hirschl 2004).

In the cases above, rulings over the definition of polities did not *directly* threaten economic-structural and distributional change. In Tanzania, by contrast, as Jim Igoe notes, the precedent set by

satisfaction of the pastoralists' demands would have triggered a wholesale decentralisation of the judiciary. All foreign investors and agencies would have been obliged to negotiate contracts directly with local communities. This would have involved the 'dismantling of established state and donor institutions' and the placing of 'severe restrictions on foreign investment'. It would have amounted to 'nothing less than a radical restructuring of Tanzania's place in the global economy' (Igoe 2003, 881). Perhaps unsurprisingly, therefore, the courts preferred more symbolic acknowledgement of the pastoralists' grievances. (In this respect their decision echoed the Australian High Court's famous ruling in *Mabo v Queensland* (1992), which acknowledged aboriginal communities' ancestral title, but without drawing the radical consequence that European settlement was itself illegal [Reynolds 1996]).

3. Fundamental political order

To anticipate somewhat, the conclusion to this study will take these arguments a stage further. I will advance an argument for the *moral* priority of fundamental political order. Following Bernard Williams, I see the establishment of this order, in Hobbesian terms, as an answer to the 'first' political question. This is because 'solving it is the condition of solving, indeed posing, any others' (Williams 2005, 3). I take fundamental political order to be established when those conflicts over the very 'structure of authority', which Lund and Boone describe, have been settled. For Hobbesians, of course, Leviathan can solve this 'first' question through straightforward coercion. For Williams, by contrast - who follows Weber on this point - polities must legitimate themselves in some fashion that 'makes sense' to those subject to their authority (Williams 2005, 11). Considerable 'consensus building', of the kind that Boone describes, is obviously necessary to achieve this. *Pace* Williams' critics, however, we need not insist that every single member of a given society accept the legitimation offered them (contrast Freeden 2012). Williams' (2005, 10) notion of fundamental political order is thus inevitably 'scalar'; or of 'variable magnitude', in Geuss' (2008, 22) terms. 'In some states', as Hall (2013, 8) writes, 'it may be impossible to legitimate power to all and we may have to accept that some people are simply being subordinated'. Nonetheless,

> despite the inherently contextualist nature of judgements about who must be satisfied by the legitimation story, the difference between situations in which a story is offered and generally accepted, and those in which the powerful either fail to offer a justification at all or offer one that fails to make sense to their subjects, should in principle be clear.

In terms of practical politics, my central argument here is that judicialisation can in fact undermine efforts to answer 'first questions', by both Hobbesian *and* Weberian means. This first observation is an obvious one. The justification for many expansions of legal jurisdiction in the twentieth-century has been to offer some possibility of redress to those confronted with the brute power of Leviathan. As my case studies emphasise, however, such expansions have also facilitated challenges to the kinds of broad consensus-building necessary for legitimation. This point is perhaps illustrated most dramatically in chapter 2, which describes how a small number of expropriated farmers in Zimbabwe have been able to continually impinge upon the emerging political settlements brokered by country's major political forces in Zimbabwe, and which many have seen as necessary for establishing new orders in land. This is not to say that conflicts surrounding fundamental political order need always be of so great a magnitude. On occasion lawsuits may be useful components of broader campaigns to build consensus via socialisation. As chapter 4 illustrates, there have been times when it appeared as if judicialisation might indeed play such a role in Botswana; rather as some have hoped *Mabo* might catalyse broader reconciliation processes in Australia (although for sceptical comments see Gunstone 2012). By the very nature of such conflicts, however, even if courtrooms *are* used in this way, they will only ever represent a small part of the political and institutional landscape that such consensus-builders must mobilise.

Even at this early stage, this argument must now be qualified with some additional caveats. Even if, firstly, as Lund and Boone demonstrate, the current absence of such orders is a particularly distinctive feature of politics in sub-Saharan Africa, this is not to say that it is not also found elsewhere (for Indonesia, for example, see Lucas and Warren 2003; for Nicaragua Finley-Brook and Offen 2009; for other African examples Greiner, Bollig and McCabe 2011; Camara 2013). As the scale of the controversy provoked by *Mabo* has illustrated, however, it is now highly unusual in the West. For Williams (2005, 62), indeed, it is precisely because these societies are comparatively 'settled' in this respect that they have tended to overlook the priority of order over rights. Or as Geuss (2014, xi) puts it, whilst it is 'natural for thinking people in the West to start by assuming that the world is (finally) 'in order'', societies lacking 'generally intact and recognised authorities' may have very different political priorities[1].

As should be clear from my emphasis on judicialisation's potential for dysfunction, this is in no sense a teleological account. Contrary to the assumptions of modernisation theorists, there is no claim here that fundamental political order will inevitably be established as a by-product of other long-run processes of social change. And nor, in fact, does establishing it necessarily require the elimination of all intermediary authorities between the state and the citizen - as such theories also

once tended to assume (for an overview Klinghoffer 1973, 9-10). As some critics of the World Bank's recent proposals have argued, for example, conflicts over the structure of authority in rural Africa could, in theory, be mitigated by more, not less, decentralisation and complexity in institutional design (Nugent 2010, 66). The key point, however, once again, is that for political order to be established these decentralised institutions must either be enforced by Leviathan, or have attained legitimacy in the eyes of those subject to them[2].

4. Conceptual clarification

None of this should be taken to imply, however, that judicialisations of fundamental political order have been immune from political challenge. This is far from the case. To borrow a term from international relations scholarship, these cases have all in fact triggered 'backlash' from governments jealous of their prerogatives (e.g. Helfer 2002; compare Sikkink 2013, 152). This may lead some to conclude that the term 'judicialisation' is mis-leading when applied to the cases here. In Zimbabwe, for example, as I will describe in the next chapter, courts began to rule on fundamental political questions during the same period that the ruling party elite began limiting the power of judges (and bureaucrats) to constrain its actions. To be clear, therefore, I am not claiming that 'judicialisation' characterises national politics as a whole in any of the countries studied, nor that the law has become, or has ever been, free from political influence. In each case, rather, I trace a historical shift in the fora where *one* (albeit central) political dispute has, historically, been decided. In a number of cases, moreover, courts adjudicating these disputes have in fact been situated outside the relevant country's borders.

As Blichner and Molander (2008) argue, therefore, an unusual degree of conceptual precision will be necessary to navigate this terrain. Judicialisation has a variety of meanings, all of which need to be distinguished (see also Roussel 2003). In this study, as should now be clear, I use it only to denote 'increased conflict-solving with reference to law' (Blichner and Molander 2008, 44). This is an empirical process by which 'political' questions leave informal, legislative and bureaucratic arenas, and enter courtrooms. I do *not* use it to refer to increased judicial power, the creation of new legal institutions and bureaucracies (sometimes referred to as 'legalisation'), law's expansion and differentiation (sometimes referred to as 'juridification'), or to 'legal framing' (sometimes referred to as 'juridicalisation') (Teubner 1987, 9; Habermas 1987, 164-179; M. Shapiro 1994a; Russell 1994, 166; Abbot et al. 2000, 402; Finnemore and Toope 2001, 744; Blichner and Molander 2008, 39-43, 45-7).

This latter process of 'legal framing', as Blichner and Molander (2008, 48) write, takes place when 'society develops a legal culture that extends beyond or even replaces other background cultures'. Without it 'disagreement on legal matters would tend towards disagreement on the standing of the legal order and as such may threaten its stability'. 'Backlash' in Southern Africa can indeed be partially explained by this lack of legal framing[3]. But in my conclusion I argue that scholars have under-estimated the obstacles confronting political attempts to definitively exit legal regimes. The case studies illustrate how the proliferation of human rights courts, and the new enforcement possibilities they offer, have allowed litigating groups and individuals to continue contesting adverse decisions beyond the borders of their state. In one interviewee's words, analysed in the next chapter, 'as one door closes, another opens'.

5. Case selection

The following three chapters thus describe an empirical process of judicialisation, and conclude by illustrating constraints on backlash. The truly systematic selection of 'real-political' cases has, however, not been possible. The 'intuitive' quality of the distinctions Hirschl draws between his sub-categories largely precludes their quantification. VonDoepp (2009, 11), for instance, has attempted to use Hirschl (2004) to explain judicial autonomy in Southern Africa. He does this using quantitative methods, and rendering judicialisation as a variable; to the best of my knowledge the only scholar to do so (VonDoepp 2009, 25-6). Here, however, he is parasitic on the intuitions of local 'legal experts', who classify his sample of cases according to whether they are of high or low 'interest' to the government (see also Kapiszewski 2011, 490). Even these approximations, however, are unsuited to this study. As VonDoepp and others have shown, a wide range of 'mega-political' cases may be of high 'interest' to the government, perhaps most notably those involving election outcomes. But only a very few will strike at the heart of formative collective identity and fundamental political order. Following VonDoepp's method, therefore, would have involved an even greater dependence on local experts and their finer-grained perceptions.

The three cases were initially selected in late 2009. The first pitted a commercial farmer, Mike Campbell, against the government of Zimbabwe which had expropriated his farm (chapter 2). The second, largely decided in American courtrooms, involved demands by Herero and Nama groups from Namibia for reparations from Germany (chapter 3). The third has seen a 'Bushman' representative, Roy Sesana, challenge the government of Botswana's decision to relocate the inhabitants of the Central Kalahari Game Reserve (chapter 4). Another then much talked-about case - also considered in 2009, and which has now been treated by Alter (2014, 260-267) - was

Hadijatou Mani Koraou v The Republic of Niger (2008). Here the ECOWAS (Economic Community Of West African States) Court of Justice found against the government of Niger, ruling that the applicant was living illegally as a slave. The political implications of this judgement were potentially very significant, since tens and possibly hundreds of thousands of Nigériens had similar statuses (depending on the definitions used). The Court's decision to order only that the applicant be liberated, however, limited its scope (a cautious strategy similar to that adopted in my Botswanan case). More importantly, furthermore, whilst *Hadijatou* did represent a profound challenge to an existing social order, it did not involve the same formidable clutch of issues associated with land and national identity as those eventually chosen. Concentrating on one region was not, in short, integral to the study's original design. The initial intention was to draw tentative conclusions which might be generalisable, after further research, to a wider range of sub-Saharan situations. The Mkomazi Maasai cases, as well as the *Enderois v Kenya* case recently highlighted by Lynch (2012), might also have suited.

In the event, nonetheless, a narrower regional focus has brought significant advantages. One is that it has allowed me to control, to some extent at least, for some common normative biases induced by the identities of key participants. In Southern African politics it is rare, to say the least, for the Botswanan and Zimbabwean governments to be analysed as participants in the same process. And this is to say nothing of comparing white farmers with the 'Bushmen' of the Kalahari. A second set of advantages is practical. Financial constraints ensured that I could travel to the region only twice, for two six-week periods. Good road transport connections, however, allowed me to conduct 30 interviews - in Zimbabwe, Botswana, Namibia, and South Africa - with an almost equal number of participants in each case. Interestingly, some interviewees had indirect connections with, and opinions about, the other case studies. This was a happy consequence of my narrow regional focus. However, it also pointed towards how South African lawyers' regional dominance, and their particular traditions of 'cause lawyering', may overdetermine judicialisation in the region. I briefly discuss this possibility in chapter 7, and plan to investigate it further in forthcoming research.

6. Method and materials

Both the choice of interview method and interviewees were almost entirely dictated by the study's design. At the project's outset, semi-structured interviews were identified as necessary to supplement the small quantities of material available. Court transcripts, notably, were unavailable. In the Namibian case they were located in the United States, whilst political sensitivities

surrounding the Botswanan case meant they could not be accessed in-country. (Some researchers believe that Survival International may have copies of these transcripts in London, but my efforts proved unable to confirm this.) A distinct advantage of supplementing my material this way was that it removed the need for sampling. All three case studies were naturally bounded, and I could reasonably hope to contact almost all of those directly involved in them: lawyers, litigants, advisors, expert witnesses, financial supporters and close observers. Once in-country a number of contact names and details could be volunteered by other interviewees: the 'snowballing' method (famously Bertaux and Bertaux-Wiame 1981). (In the event, of course, not all were available for interview, and successor lawsuits before and after fieldwork somewhat expanded the pool of potential informants.)

Predictably, however, the secondary literature on these cases has grown exponentially since 2010[4]. My interviews, whilst still extremely valuable, have not therefore proved quite so empirically central as first envisaged. By contrast, they proved vital for the explanatory and evaluative sections of this study (part II and conclusion). As outlined in chapter 5, I adopt an interpretive approach to explanation, focusing on the changing beliefs of actors and the judicialisation strategies. These beliefs and strategies were the focus of my interviews. There is, of course, no 'logic of discovery' which allows us to recover beliefs and strategies in pristine form (Bevir 1999, 79-86). And lawyers often pose particular problems, since their political beliefs and strategies must simultaneously be justified as legal ones (cf. M. Shapiro 1994b). But Pierce (2002) has sought to persuade political scientists that even interviews with senior judges can reveal a great deal. I was encouraged by his conclusions when designing my study, and my own interviews largely confirmed them. My cases, however, were both sensitive and in some respects ongoing. A small number of interviewees preferred, as a result, to talk entirely off the record. Approximately half (very reasonably) requested to expressly approve any quotations used. Their concerns explain why reference to interview material is frequently indirect.

7. Structure

The organisation of the study presented numerous difficulties and is unorthodox as a result. If gathered together, the empirical material relating to each case study would extend well beyond the length of two conventional chapters. The theoretical material, meanwhile, would considerably exceed the length of a conventional introduction. This would be difficult to read, and would most likely be forgotten before it was illustrated. Part I of this study, therefore, is empirical and mostly comprised of 'thick description' (Geertz 1973, chapter 1). It describes the judicialisation process

that will later be explained, and illustrates the constraints facing backlash against it. It is only stylised explicitly to highlight periodisation and, occasionally, to anticipate arguments in part II. This second part's theoretical chapters supplement earlier descriptive material with additional empirics necessary to explain it.

8. Summary

The study as a whole makes three claims. The first is descriptive: the judicialisation of fundamental political order is now a significant feature of Southern African politics. The second is explanatory: this judicialisation can be explained by the emergence of new rights beliefs in the 1970s - beliefs from which determinate behavioural norms cannot be derived, and with which governments cannot comply. The third claim is evaluative: these beliefs have obscured the moral priority of basic political order.

My descriptive claims are addressed in part I. Chapter 2 illustrates how courts have recently begun to rule on the substance of Zimbabwe's famous 'land question'. It concludes by demonstrating the lengths to which the government has had to go to prevent them doing so; a reflection of a new international order where international courts play greatly expanded roles (see Alter 2014). Chapter 3 describes the process by which American courts could be asked to rule on contested principles of chieftaincy selection and rural authority in Namibia. The German and Namibian governments, as it shows, have been consistently obliged to seek negotiated solutions to the reparations claim that first gave rise to these cases. In both countries, I argue, *neither human rights laws nor human rights cultures* would have sufficed to resolve disputes (for human rights cultures see Rorty [1993] 1998, 170). Chapter 4, for its part, tells the story of *Sesana* (2006), the longest and most-expensive court case in Botswana's history. This saw judges rule on the 'mega-political' question of whether some Botswanans could be more 'indigenous' than others.

Part II explains this phenomenon. Chapter 5, its theoretical introduction, outlines my interpretive approach and justifies it against some constructivist and Foucauldian competitors. In the rest of part II I will argue that these competitors - most particularly the famous 'norm spiral' model developed by Thomas Risse, Stephen Ropp and Kathryn Sikkink (1999; 2013) - are unable to explain why norms, legal or behavioural, cannot be developed to govern cases like mine. To be clear, I will not claim this model has no value. Indeed, I adopt its basic structure, using chapters 7-9 to track three of the norm spiral's early stages: the emergence of activist networks, information-gathering about violations, and the process leading to international norm institutionalisation (Risse

and Sikkink 1999, 20). I do this, in part, to show how this model *can* account for normative change in the domain of individual subjectivities. I also do so, however, in order to highlight how its shortcomings in other domains become visible even at its earliest stages. It fails, most notably, to explain how institutionalisation has failed to clarify the content of certain norms, most notably those requiring the definition of groups. This shortcoming I ascribe to its failure to explain (rather than simply assume) norm emergence; a weakness it shares with other constructivist and Foucauldian accounts. The ideational context for this emergence, I argue throughout, is crucial for understanding norms' later dysfunction and indeterminacy.

This objection, it should be noted, differs from those which Risse, Ropp and Sikkink (2013) have sought address in their recent revision of their model. These revisions concede that compliance with norms can be enforced via international coercion, sanctions, and a variety of other more 'realist' mechanisms (Risse and Ropp 2013, 10-15; compare Simmons 2009). A number of related scope conditions for compliance have also been added, most notably a new emphasis on states' capacity to enforce laws, and their 'material vulnerability' to external pressures (Risse and Ropp 2013, 15-20). The only modification to the model's ideational content, however, is its new emphasis on 'regime-based counter discourses and narratives' - such as East Asian Values and the Bush administration's 'War on Terror' - which some states have been able to use to defuse pressures from new human rights norms (Risse and Ropp 2013, 15, 21). This revised model thus says nothing about the ways in which compliance may prove impossible because of the nature of the rights norms themselves.

Chapter 6 begins to prove this case by explaining the emergence of new beliefs about human rights; an analytical advance over the norm spiral model, which largely assumes their existence. It holds that their emergence in particular ideological contests of the 1970s lent them new kinds of structural indeterminacy. Chapter 7 shows how these new beliefs explain the emergence of the transnational movements with which Risse, Ropp and Sikkink begin their account. And it outlines how particular symbolic technologies, not abstract rights ideals, have served to mobilise wider constituencies behind these movements' causes. Chapter 8 finds that these historical dynamics have also had significant consequences for the knowledge practices justifying rights claims. The historical and anthropological professions, whilst shaped by the same new beliefs explaining the emergence of social movements, also possess distinctive disciplinary histories rendering them unwilling to justify rights-claims in ways that experts usually do. Chapter 9, finally, argues that the new indeterminacy of rights beliefs explains why international institutionalisation has failed to clarify their content, confounding constructivist expectations. In my conclusion I make my third

(evaluative) claim: these findings entail modifications to the normative assessment of rights. *Pace* sophisticated critical accounts, they do not simply re-shape subjectivities and behavior. They now regulate domains pertaining to fundamental political order, where even socialization and 'rights culture' cannot order society in a liberal fashion.

Chapter 2: Commercial agriculture and indigeneity in Zimbabwe

1. Introduction

In this chapter I tell one part of the turbulent recent history of commercial agriculture in Zimbabwe. I do this with three objectives in mind. The first is to illustrate the process which the previous chapter labelled 'the judicialisation of fundamental political order'. Here I describe how expropriated farmers, or those facing expropriation, have been able to make use of new opportunities offered by laws and courts. These have increasingly allowed them not only to challenge the process of expropriation, but the new constitutional order such expropriation has sought to create. My second objective is to show how political elites, of various stripes, have been relatively powerless to prevent the expansion of such opportunities for litigation. In one interviewee's words 'as one door closes, another one will open'. Finally, I outline the increasingly stark tensions between the outcomes of this ongoing litigation and current efforts to build political order in Zimbabwe. My focus is on the difficulties involved in adequately compensating expropriated farmers faced by a state which lacks the resources to do so. I conclude by highlighting how these tensions between the demands of law and politics have led global liberal actors to side against human rights in this case.

2. Judicialisation

(a) The pre-independence context

In 1978 40 per cent of land in Zimbabwe (then Rhodesia) belonged to white farmers. Whites as a whole made up less than 4 per cent of the population (Selby 2006, 117). Thanks to the Land Tenure Act of 1969, intensifying colonial segregation, Africans could not own land privately. They could only occupy communal land administered by 'tribal land authorities' (see Alexander 2006, chapter 5). The independence of neighbouring Mozambique in 1975, however - among other factors - had already convinced the white minority government that political transition was inevitable (Mtisi, Nyakudya, and Barnes 2009, 144). With insecure borders it could no longer successfully prosecute the 'Bush War' against African nationalist rebel forces. In a belated effort at controlled liberalisation, the Land Tenure Act was amended to allow African ownership in formerly white areas (ICG 2004, 25).

The influential Rhodesia National Farmers Union (RNFU) supported this move, but prepared itself for mass sales and/or expropriation (Pilossof 2012, 82). The RNFU's fears reflected

more widespread expectations at the time. During independence negotiations at Lancaster House (from 1960 to 1963), Britain had offered to 'buy out' white farmers in Kenya. Strong constitutional protections of property would be introduced, but the departing colonial power would provide grants and loans to help transfer one million acres of farmland to 25,000 African families. Most farmers sold their holdings (Harbeson 1971, 241-2). Many of those involved in Zimbabwe's own independence negotiations at Lancaster House in 1979 believed that Britain would offer a similar deal (e.g. Palmer 1990, 165; Kitching, 1st January 2009; Media Institute of Southern Africa, June 24th 2010). In the mid-1970s, indeed, Britain had pledged $75 million to an Anglo-American development fund specifically for this purpose (Palmer 1990, 165-6). And in 1976 Henry Kissinger had talked of $1 billion (Moyo 1991, 5).

For reasons are still hotly disputed, however, a Kenya-style deal did not materialise (e.g. ICG 2004, 28, n.50; Selby 2006, 112). The new Thatcher administration offered to fund resettlement programmes only (Palmer 1990, 167-8). The content of the new constitution's 'land clause' was highly contentious, and a priority for Patriotic Front (PF) negotiators representing the leading nationalist groups - ZANU (Zimbabwe African National Union) and ZAPU (Zimbabwe African People's Union). Negotiations broke-down over both the issue of resettlement financing and legal protections. Under pressure, notably, from Mozambique, however, which was concerned about regional instability, the PF eventually accepted a deal considerably below its original expectations (ICG 2004, 28, n.50; Media Institute of Southern Africa, June 24th 2010; Selby 2006, 111, 153; Mtisi, Nyakudya, and Barnes 2009, 165). Although a number of conference participants later reported that British negotiators promised various specific sums of money, none was committed to writing (Selby 2006, 141). The new 1980 constitution authorised expropriation (with compensation) 'to promote the public benefit', but qualified this with provisions protecting property that would be almost impossible to amend during a ten-year 'grace-period'. This is what has become known, somewhat simplistically, as the 'willing-buyer, willing-seller clause'. It was, broadly, the outcome that the RNFU, now CFU (Commercial Farmers Union), had lobbied for (Selby 2006, 111-112).

(b) 1980-1990: informal negotiation

Despite these legal wranglings, however, in the first decade of Zimbabwean independence the fate of commercial agriculture was almost entirely determined by informal contacts between the government and the CFU. The question was not handled by the higher courts (for landmark decisions Dumbutshena 1998; De Bourbon 2003). The early 1980s saw some significant

resettlement, often in land vacated or not cultivated during the Bush War. But a difficult economic climate, experienced across the continent, soon helped ensure that comparatively little attention was paid to land reform and rural matters (Palmer 1990, 169-170; Selby 2006, 129). Governing orthodoxies, moreover, were largely modernist and welfarist (Alexander 2006, chapter 6). Health and education were central priorities (Muzondidya 2009). As a result 'recession-inspired cuts in the resettlement programme were far deeper than those in other redistributive programmes' (Alexander 1994, 335). The government had identified commercial agriculture as a crucial source of foreign exchange. Its priorities dovetailed closely with the CFU's not only on agricultural policy but also on security, notably the eviction of 'squatters' occupying farmland (Herbst 1990, chapter 4; Palmer 1990, 170-171; Alexander 2006, chapter 6, 8; Pilossof 2012, 28-29). In 1989 the CFU President went so far as declare that the new black nationalist government was the best farmers had ever seen (Selby 2006, 182). In short,

> despite legal ways in which land redistribution could have been brought about without violating the letter of Lancaster House, it can be informed that a political decision was taken not to contest the spirit of the agreement, tied in as it was with the whole complex of aid, trade and investment (Stoneman 1988, 45, in Selby 2006, 140).

(c) 1990-1997: polarisation and the technocratic response

In 1990 the 'grace-period' contained in the Lancaster House constitution elapsed. This year 'proved to be a watershed in government/farmer relations'. The 'working partnership' of the 1980s 'quickly eroded and was replaced by antagonisms on both sides' (Pilossof 2012, 29). For most of the decade that followed, however, crucial decisions about land ownership continue to be made outside the courts. As described below, bureaucrats and ruling-party technocrats largely succeeded in maintaining overall control of the policy-process, despite a rapidly polarising political climate.

In addition to new legal freedoms, a variety of new pragmatic considerations help explain the government's eagerness to politicise the land question in this period. 1987 saw the signing of the Unity Accord, which dissolved ZAPU into ZANU to produce ZANU-PF. It put an end, notably, to a period of brutal ZANU-led repression of 'dissident' ZAPU supporters in Matabeleland (*Gukurahundi*) (CCRJ and LRF 1997). Within three years, however, President Mugabe faced a serious electoral threat from Edgar '2-boy' Tekere of the Zimbabwe Unity Movement. Tekere denounced corruption, opposed plans for a one-party state, and called for land redistribution (Sachikonye 1990, 94). This resonated with some rural constituencies (Muzondidya 2009, 190). To

communal area farmers, in particular, 'ZANU(PF) appeared increasingly corrupt and out of touch […] the pressures that lay behind the various practices of 'squatting' … went unaddressed' (Alexander 2006, 182). In response, both the President and Vice-President went on the rhetorical offensive. Mugabe declared that 'there shall never be a 'no' which we shall accept ever again from landowners we approach for land' (Alexander 2006, 181; Selby 2006, 182-3).

After the 1990 elections the government unveiled a National Land Policy. *Any* land could now be designated for acquisition, and compensation would no longer have to be paid in foreign currency (Pilossof 2012, 29). This provoked an immediate reaction from the CFU. A new leadership worried its predecessors by making land an issue for public debate. The largest ever gathering of white farmers (more than 4,300) was assembled in central Harare to discuss tactics and express opposition to designation (Selby 2006, 201-2; Pilossof 2012, 32, 94). This 'new-found preparedness to confront aspects of government land policy' was echoed, to some extent, by the new Chief Justice (Selby 2006, 203). In a 1991 speech given to mark the opening of the new legal year, Anthony Gubbay outlined a doctrine of 'essential features' which would limit parliament's ability to amend the Constitution. In response the President asked Gubbay to resign, and Attorney General Patrick Chinamasa criticised him for pre-judging the validity of forthcoming legislation (Horn 1994, 144-5).

Even at this time, however, there considerable dispute over whether the government was in fact more than rhetorically committed to land reform (cf. Moyo 1991, 22). The 1992 Land Acquisition Act (LAA), which provided a statutory basis for the National Land Policy, was certainly poorly drafted, even according to leading ZANU-PF technocrats (Selby 2006, 205, n.17; Tendi 2010, 82-3). It created provincial committees to identify land for acquisition, staffed by ZANU-PF, the CFU, and Agritex (the Department for Agricultural, Technical and Extension Services). Seemingly, however, they could not agree on the criteria for designation (Alexander 2006, 181). Kumbirai Kangai, the Minister for Lands, Agriculture and Resettlement, generally considered a technocrat, complained that 'land designation should be a technical matter and not up to politicians' (Selby 2006, 222). The criteria eventually used proved vague and unclear. To the anger of the government, individual designations were often defeated in court on procedural grounds (Selby 2006, 222, 238; Pilossof 2012, 95). The CFU President declared it could 'live with' the LAA, and declined to challenge the substance of the policy in courts. Throughout this period the courts, themselves, furthermore, declined to rule on the central political questions behind the act. Only one case challenged the constitutionality of designation under the LAA: *Davies and Others v Minister of Lands, Agriculture and Water Development*. But both the High Court and the Supreme Court

dismissed the challenges (Magaisa 2011, 204).

In response to the LAA's shortcomings, technocrats, notably those on Mandivamba Rukuni's Land Tenure Commission, sought to de-politicise the land question. They recommended a range of market-based interventions, including subdivisions and land taxes, favoured even by the World Bank (World Bank, 1991; Rukuni Commission 1994; for criticisms Moyo 1995). Their proposals dovetailed to some extent with ZANU-PF's new stated intentions to change the racial composition of the Zimbabwean middle-class, notably in the commercial farming sector (Muzondidya 2009, 191-2). Such a move was rational to some degree given new budgetary constraints. In 1990 Zimbabwe had adopted a 'home-grown' Structural Adjustment Programme (SAP) that drastically reduced public expenditure, lowering incentives to invest in more populist land reform measures (cf. Tshuma 1997). Less charitably, moreover, the new focus on the middle-class may also have served to justify allocation of land to the politically-connected. In 1994 discontent over such alleged practices erupted into controversy when a former Agriculture Minister was revealed to have been awarded a resettlement farm acquired for 33 families. Mugabe responded by revoking all state leases and 'the credibility of government's reform program plummeted' (Selby 2006, 223). According to broad scholarly consensus, however, land reform in this period had in, in any case, received nothing like the attention and investment that ZANU-PF rhetoric appeared to demand (e.g. Muzondidya 2009, 190; Alexander 2006, 181; Miles-Tendi 2010, chapter 4).

(d) 1997-2001: political crisis and domestic judicialisation

By the late 1990s economic difficulties placed severe strain on the modernising orientation favoured by ZANU-PF technocrats, and land reform returned to the political agenda. Donors failed to propose a 'legalistic' variant of such a programme that was politically attractive to the government. The CFU, meanwhile, continued legal challenges in response to radicalising government policy. By 2000, however, ZANU-PF publicly disavowed legal routes to land reform in the face of serious electoral challenge. As we will see, the CFU then brought the substance of the land question to courts, precipitating a wholesale replacement of the judiciary on political grounds, and effectively putting an end to domestic judicialisation for the foreseeable future.

In the later 1990s the government began facing strikes and opposition in urban areas, most particularly from trade unions, students and other losers from structural adjustment (Raftopoulos 2009, 202-3). Veterans of the bush war, meanwhile, demonstrated violently in 1997 and threatened ZANU-PF (for both movements see McCandless 2011). This widened divisions between ZANU-PF

technocrats and those committed to a more populist anti-colonial nationalism (Kriger 2003, 191-208). In late 1997 Mugabe acceded to their demands for improved pensions linked to ex-combatant status, 'thereby ushering in a new period of economic chaos and political re-alignment that heralded a new politics of land' (Alexander 2006, 183). On November 14th, 'Black Friday', the unbudgeted Z\$4 billion settlement with the war veterans saw the Zimbabwean dollar fall 75% in the space of a few hours (Ramsamy 2006, 520). Land was now almost the only resource the government could promise the discontented. Almost immediately 1,471 commercial farms were listed for compulsory acquisition (Alexander 2006, 183).

Some in the CFU hierarchy were initially reticent about challenging these designations and remained unwilling to damage their working relationship with the government. 'In response to member concerns', however, a central legal fund was created. This was to be used to challenge individual designations, and not overall policy (Selby 2006, 239). As Kumbirai Kangai conceded at the time, the criteria used for designations were largely 'political' (Selby 2006, 237). 40 per cent of farms were de-listed and the 'vast majority' of remaining designations were then defeated in the courts using the new legal fund. Kangai had asked the CFU not to make these challenges, implying that further politicisation of land might thus be avoided (Pilossof 2012, 34). Earlier in the 1990s he had accused farmers of 'token comprises', implying, in a similar fashion, that voluntary designation might have pre-empted government action (Selby 2006, 235)[5].

The government, meanwhile - despite the growing popularity within its ranks of 'political' approaches to land - now turned to international donors (Alexander 2006, 184). Technocrats including Mandivamba Rukuni liaised between policy-makers and farmers, producing a detailed and costed plan for a high-profile conference in 1998 (Selby 2006, 268). This proposed to transfer 5 million hectares of land with due legal process and compensation, and obtained promises of funding for technical assistance from the United States, Norway, Netherlands and Sweden, and the promise of a loan from the World Bank (Cliffe et al. 2011, 912). The UNDP, meanwhile, co-ordinated discussions about a new national policy. The recommendations of its 'Shivji report' included subdivision, land taxes and a number of other technocratic measures already mooted at other workshops and by the Rukuni Commission in 1994 (Selby 2006, 274). At a late stage, however, Britain, which had been heavily involved in technical discussions, decided not participate. (Clare Short, Secretary for International Development in the new Labour administration, had famously written to Kangai to disclaim any 'special responsibility' for land reform, claiming the new government was 'without links to colonial interests' [Tendi 2010, 87-93].) Almost immediately the ZANU-PF conference listed 841 farms for acquisition, violating agreements reached at the

conference. The government justified this by pointing to Britain's abdication of its historical responsibilities. Others, however, have alleged that it was by this stage no longer sincerely committed to technocratic measures or land reform by legal process (Cliffe et al. 2011, 912; Selby 2006, 270-271; Pilossof 2012, 35, 51).

It was electoral competition, however, which finally precipitated ZANU-PF's radicalisation on the land question. 1999 saw the formation of the Movement for Democratic Change (MDC), which emerged from the associational and trade union opposition politics of the 1990s. It participated, alongside white farmers, in the 'no' campaign in the constitutional referendum of 2000, advocating the maintenance of checks on executive power (Dorman 2001). ZANU-PF's defeat in this vote 'forced an immediate and dramatic shift' in its tactics and legitimation strategies (Alexander 2006, 185). Within a matter of weeks there was a wave of (sometimes violent) 'occupations' (or 'invasions') of commercial land. The number of these had certainly been increasing since 1998. But there is considerable debate, however, over whether this latest round was co-ordinated by ZANU-PF, or was in fact led by radicalised war veterans and peasants (for an overview Cliffe et al. 2011, 913). Circumstances certainly varied dramatically in different locales. War veterans rarely constituted a majority of 'occupiers' (or 'invaders') (cf. Marongwe 2008, chapter 5). Contrary to rumours in some commercial farming circles, moreover, it is clear that the central government - even if it 'closely orchestrated' the 'remaking of the state' in this period - had little input into the detail of occupations (Alexander 2006, 180; Laurie 2012). As illustrated later in this chapter, attempts to understand and rationalise new patterns of land ownership continue to the present.

The government, in any event, now refused to evict those it had previously described as 'squatters', and began encouraging future occupations. After (disputed) parliamentary elections in June 2000 it labelled the process 'Fast-Track Land Reform' (FTLR), and identified two classes of beneficiaries: smallholders (on 'A1' land), and medium-size farmers (on 'A2' land). FTLR became a key political symbol of 'patriotic history' (Ranger 2004; Blessings-Miles Tendi 2010). This narrative, omnipresent in the state-controlled media, portrays the occupations as redress for colonial injustice and dispossession. Those opposing it, notably commercial farmers and the MDC, are labelled as 'sell-outs' and puppets of Western imperialism. The side-lining of ZANU-PF technocrats was now definitive. In the words of one famous slogan, coined by the party's manifesto for the June 2000 elections, 'the land is the economy and the economy is the land'.

Within the CFU there was, unsurprisingly, division and uncertainty over how to proceed. In

July a number of occupations were challenged in the courts. The only immediate effect this produced, however, was to induce backlash from the government (Pilossof 2012, 52). Mugabe now announced that 3,000 farms would be acquired. A further set of challenges in September elicited what would soon become a familiar form of response. (Alexander 2006, 188). The President, like many party heavyweights, is a trained jurist, and ZANU-PF has rarely sought to disparage the law *per se*[6]. As Kibble (2013, 93-4) observes, 'there has always been a tendency in ZANU-PF to maintain the semblance of legality (even if post-hoc on occasion) despite its methods' (see also Booyson 2003). The party has consistently produced reasons - some taken from public law doctrine - why it should not apply to particular situations or used by particular groups. Now it urged Zimbabweans not to let 'unrepentant and unapologetic Rhodesians … use the courts and the constitutions against the masses'. Mugabe declared that whites would be tried for crimes in the liberation war (Alexander 2006, 188).

Reactions such as these triggered a shift in the CFU away from confrontation and towards compromise (Selby 2006, 299, 309-310). The most notable of the initiatives to result was the Zimbabwe Joint Resettlement Initiative (ZJRI), which offered one million hectares of land in exchange for orderly settlement. The ZJRI was devised by farmers who were close to ZANU-PF, and it was backed by a resurgent older generation of CFU leaders who had previously enjoyed such close relationships. It was even agreed to by Zimbabwe at a Commonwealth meeting in Abuja in September 2001 (Pilossof 2012, 52, 55; Selby 2012, 310, n.781). Nonetheless, no action whatsoever was forthcoming. These doomed efforts at negotiation were opposed by more intransigent farmers. In November 2000, a case funded by the CFU finally challenged the substance of ZANU-PF land reform. Advocate Adrian de Bourbon argued that the stated objective of acquiring 75 per cent of Zimbabwe's white farms could *only* be achieved by violating legal process; a direct attack on a central theme of 'patriotic history', and a judicialisation of 'formative collective identity' (Blair, 7th November 2000; Hirschl 2008, 98)[7].

Like many of those analysed in more detail elsewhere in this study, the CFU case was not designed, primarily, to obtain a legal judgement that would be effectively enforced. The objective was, rather, to publicise perceived moral outrages perpetuated by governments. The Supreme Court, similarly, did not anticipate compliance with its decision. It criticised ZANU-PF's use of 'political' criteria for designation, citing '[racial] discrimination in contravention of the constitution'. It directed the government to 'restore the rule of law in commercial farming areas no later than July 1st 2001', but there was no prospect that its orders would or could be carried-out (Pilossof 2012, 54). The government was, predictably, incensed, and it sought to alter the composition of bench in order

to obtain a more favourable result (see Southall 2013, 149). In a reflection of its legitimation as a law-respecting regime, ZANU-PF used methods which were, strictly speaking, legal - even if the Court was 'invaded' by war veterans on November 24th (Matyszak 2006). Under severe pressure, Chief Justice Gubbay was eventually obliged to resign in early 2001. He was replaced by the more 'executive-minded' Godfrey Chidyausiku. A new Supreme Court bench he headed ruled that FTLR was constitutional after all (ICG 2004, 90; Chan 2003, 155, 167). The 4-1 majority included three judges appointed only two months previously, and excluded senior judges including Wilson Sandura, Simba Muchechetere, and Nicholas McNally. In the year following Gubbay's forced retirement seven Supreme Court judges stepped down (Widner and Scher 2008, 262-5; also Marongwe 2008, 194). In some cases this followed threats from politicians in the media, and in other cases when rulings against the government were overturned by Executive orders (see generally Southall 2013, 148-150). Domestic possibilities for legal challenges the new order were now significantly restricted. And splits within the commercial farming community would soon lead new litigants to pursue international routes.

(e) New litigants and global judicialisation

By 2002 the CFU had decided to longer fund legal challenges to FTLR. It would only support farmers contesting individual acquisitions. Some of its leaders, meanwhile, continued to advocate negotiations with ZANU-PF. This became increasingly unpopular with their membership, the majority of whom had now been evicted from their farms. In mid-2002 a breakaway group was founded to continue legal action: Justice for Agriculture (JAG) (Selby 2006, 310-311; anonymous interview, April 2012). Its first mission statement described how it would continue challenging FTLR in Zimbabwean courts, but also made reference to the need for 'unbiased application of just and constitutional laws that have received international approval' (JAG, 3rd August 2002). Domestically JAG, unlike the CFU, would continue to challenge the constitutionality of the LAA (Mukaro, November 12th 2004; Zimbabwe Human Rights NGO Forum 2010, 12). This was consistent with its stated belief 'in fully publicising injustices and bringing the deeds of darkness into the light' (JAG, 2nd April 2003).

By 2003 JAG's primary activity had become the collection of affidavits and the documentation of losses and human rights violations. The scope of these was large for many reasons. Perhaps most importantly, at this stage, JAG sought future compensation for a wide range of damages. It began documenting not only losses to land and improvements, but also those pertaining to (amongst other things) trauma, relocation, and 'non-trading consequential losses'

(JAG, 2nd April 2003). Furthermore, JAG announced its intention to counter ZANU-PF's insistence that its actions had been legalised by its retrospective legislation. If it could 'convincingly prove that the rule of law has broken down in Zimbabwe [South African President Thabo] Mbeki and the rest of this regime's apologists will then find it a lot more difficult to say, 'Zimbabwe is complying with its own laws''. Perhaps even more ambitiously, finally, 'if our courts fail us in Zimbabwe', it announced plans for 'pioneering legal challenges' at the International Criminal Court and intended 'international lobbying' in 'order to garner support for the cause of justice' (JAG, 2nd April 2003). (Neither case would in fact materialise).

These latter statements are among the first indications of commercial farming groups formulating a political programme for life in Zimbabwe after FTLR. The CFU's legal challenge in 2000 had been primarily intended as symbolic challenge to ZANU-PF's vision of Zimbabwe, and not as an intervention in political processes determining new property rights regimes. It thus constituted a judicialisation of 'mega-politics', but not yet one of fundamental political order (see chapter 1). JAG however, now began, tentatively, to argue for a new constitutional order:

> JAG sees the current situation as an opportunity to create full independence of the individual by giving him security of tenure, bankable title and full land ownership rights that have always been denied to the communal and resettlement farmers in the past (JAG, 2nd April 2003).

Thanks to struggles internal to the organisation, however, individuals would do most to press these demands. A key figure here was English-born farmer Ben Freeth; one of the strongest critics of the CFU's 'appeasement' of ZANU-PF (see Freeth 2011, chapter 10). In 2011 he recalled farmers being instructed, at a CFU congress in 2001, to be 'part of the solution and not part of the problem'. For Freeth, given the nature of ZANU-PF, this view was 'naïve' and his own idealism practical, 'if we stood by the law and God's principles, we would be part of the solution' (Freeth 2011, 97). The CFU hierarchy had 'appeased the evil aggressor' (Freeth 2011, 104). In September 2002 he was controversially suspended as Mashonaland West Chairman for circulating an email which criticised the government, and told farmers, amongst other things, to 'use all just means to attain justice! Do not compromise' (Selby 2006, 311; Freeth 2011, 188).

Freeth left the CFU and joined JAG to work on the proposed 'rule of law' case (Freeth 2011, 143). At JAG Freeth argued not only for private land rights regimes in a future Zimbabwe, but also, even more optimistically, for the prior restitution of these rights to evicted farmers. This brought him and the leadership into conflict with a new group, Agric Africa (Selby 2006, 312). This

commercial enterprise offered to compensate Zimbabwean nationals for land and improvements only, more comprehensive damages claims relating to property covered by bilateral investment agreements. Freeth objected, *inter alia*, that

a) Agricafrica [sic] is NOT planning to challenge in the courts any of the injustices relating to the expropriation of farms belonging to Zimbabwean citizens (as opposed to foreign nationals protected by International agreements).

b) Agricafrica [sic] is NOT planning to assist in documenting and getting compensation for the vast area of 'other losses' not included in 'land and improvements'.

c) Agricafrica [sic] is NOT interested in restitution claims (through 'other losses') to rebuild the commercial agricultural sector in Zimbabwe once good title is recognised again (*JAG Open Letter Forum*, March 12th 2004).

It would soon become clear, however, that Freeth's programme could no longer be pursued in Zimbabwe. In November 2004 the Supreme Court rejected JAG's challenge to the constitutionality of the LAA, with only one dissenting opinion (*JAG Open Letter Forum*, 12th November 2004). In June 2005 the government finally dispensed with Act, the complex drafting of which had so often been criticised. The Constitution of Zimbabwe Amendment (No. 17) Act, which became law three months later, took all lands previously listed for acquisition and vested them in the state with full title. Section 16B(3) forbade farmers from challenging acquisitions in court, whilst the regulations that gave effect to the Amendment made it clear that no compensation needed to be paid for title to be transferred (Jones and Dunn 2010, 1390; Dore 2012-3a, 7-8). This represented a momentous shift in the constitutional order. Since at least 2002-3 some official voices had recognised that the need for 'some form of title' in resettlement areas was 'supremely urgent' (Presidential Land Review Committee, 25th November 2003, 88)[8]. And the plan was now to subdivide and lease commercial farmland, vested in the state, to a variety of new owners and occupiers. In Boone and Lund's (2013) terms, communal land rights now notionally co-existed with a new tenure regime, combining private rights - enforced by the market - with user rights - policed by the state.

Amendment 17 escalated commercial farmers' campaigns. Action was delayed, however, by

crippling 'internal battle[s]' within JAG (Freeth 2011, 152). The Chairman, John Worsley Worswick, had long been 'seen by many to be too dominating and confrontational in his leadership style' (Selby 2006, 311, n.878). After more than a year of professional mediation and compulsory arbitration Freeth and some of his supporters eventually resigned from the organisation (JAG, 28th September 2005)[9]. By this time, moreover, the farm which Freeth managed had itself been listed for acquisition (one of the last in Mashonaland West to be so). This meant, crucially, that Mike Campbell, Freeth's father-in-law and the man who actually owned the farm, now had *locus standi* to launch legal challenges in his own name (see Freeth 2011, 147). Freeth severed formal links with farmers' groups and now, with the help of David Drury - his family lawyer and an experienced opponent of FTLR acquisitions - began assembling his legal team for a more comprehensive challenge to ZANU-PF land reform (Ben Freeth, interview, 5th April 2012). He had soon secured the services of Jeremy Gauntlett, one of the best-known Advocates in South Africa. Gauntlett was a some-time chair of the General Council of the Bar in South Africa and vice-president of the Bar for the International Criminal Court. His willingness to do work even *pro bono* was a real coup for Freeth's campaign (for this mobilisation see chapter 7).

Both Freeth and Drury have confirmed the outline of their early litigation strategies (David Drury, interview, 4th April 2012; Ben Freeth, interview, 5th April 2012). Once again, there was no initial expectation of success, given the probable composition of the bench. But now the objective was not merely to publicise perceived moral outrages perpetuated by governments; 'publicity is the very soul of justice' as Freeth puts it (Freeth 2011, 165; interview, 5th April 2012). Freeth's team also hoped, in legal terms, to 'exhaust domestic remedies' and thus acquire the right to bring their case to a (as yet unspecified) supranational court. They heard of such an opportunity whilst awaiting the Supreme Court's judgement on their challenge to Amendment 17, argued in April 2007. With no judgement by August, they discovered their case might be admissible before the Southern African Development Community (SADC) Tribunal in Windhoek, due to open the next week (see also Freeth 2011, 154, 163-4; Dube and Midgely 2008, 305). After numerous delays, in July 2008 the Tribunal eventually held that the ouster clause of Constitutional Amendment number 17 did not exclude its jurisdiction. It ruled in favour of the applicants on both the issue of compensation and (more controversially) racial discrimination (for analysis of the judgement Zongwe 2009; Ndlovu 2011). It rejected the government's assertion that FLTR constituted a legitimate 'public purpose' in a post-colonial state, reasoning (with only one judge dissenting) that,

We wish to observe here that if: (a) the criteria adopted by the respondent in relation to the land reform programme had not been arbitrary but reasonable and objective; (b) fair compensation

was paid in respect of the expropriated lands, and (c) the lands expropriated were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups, rendering the purpose of the programme legitimate, the differential treatment afforded to the Applicants would not constitute racial discrimination (Zongwe 2009, 23).

Most immediately, the government was 'directed to take all necessary measures through its agents to protect the possession, occupation and ownership of the lands of the Applicants', and thus to safeguard what remained of Zimbabwe's private land rights regime for the 77 farmers now joined to the case. Whilst even more controversially, as it would prove, the government was directed to pay 'fair compensation' to those who had already been expropriated.

3. 'As one door closes, another one will open': FTLR and international law
(a) Introduction

The Government of Zimbabwe (GOZ) did not initially respond to *Campbell* by openly challenging the new liberal order that the Tribunal represented. Instead, it deployed James C. Scott's 'weapons of the weak'. Behind 'the façade of symbolic and ritual compliance' it used 'foot dragging, dissimulation, false compliance, [and] feigned ignorance' (Scott 1985, 304). Some international relations constructivists believe that rights-abusing states only make 'tactical concessions' such as these after first challenging them with 'allegedly more valid' norms such as national sovereignty (Risse and Sikkink 1999, 24). In chapter 9 I will argue that such theories fail to understand why such concessions do not lead to compliance. Here, by contrast, I will note only that concessions *preceded* the invocation of allegedly more valid norms. Faced with determined opposition from Freeth's litigation team, the GOZ now openly re-asserted national sovereignty. Yet even their boldest attempts at 'backlash' have proved unable to protect them from further consequences (for backlash Helfer 2002). By persuading other regional governments to suspend the Tribunal, the GOZ hoped to have isolated itself from international legal interference in its politics; a road that some other African governments wish to follow to avoid the International Criminal Court (see Mills 2012). Such hopes, however, are founded upon misunderstandings of new global legal orders. Litigants have been able to pursue the GOZ in an ever expanding variety of internationalised-domestic, regional, sub-regional and parallel international fora (a phenomenon analysed as 'interlegality' in chapter 9). Even the most determined 'backlash' now struggles to extricate a government from the full range of these entanglements. The situation has been aptly characterised by Marc Carrie-Wilson, legal advisor to the CFU: 'rights don't go away. As one door closes, another one will open' (interview, 5th April 2012).

(b) 'Weapons of the weak'

The GOZ's first reaction to *Campbell* was to delay proceedings. In late May 2008 it agreed to take all reasonable and necessary steps to protect the applicants' property during the case, but gained a month's breathing space by failing to file papers on time, reportedly blaming a broken fax machine in the President's office (Dube and Midgely 2008, 306; Freeth 2011, 164). Then, in late June, when accused of not protecting farmers joined to the *Campbell* claim, the GOZ lodged a counter-affidavit 'substantially to the effect that there is a state of lawlessness prevailing in the country and that the authorities have difficulty in addressing the problem of intimidation and violence committed by certain people'. This counter-affidavit was rejected when the Tribunal heard the main case in mid-July. This prompted the government's legal team (led by Minister of Justice and Legal Affairs Patrick Chinamasa) to ask for a one hour delay to consult 'their principals' in Harare. On their return they GOZ asked for yet another delay, and more time to produce evidence challenging that used to reject their counter-affidavit (see *Campbell v The Republic of Zimbabwe*, ruling on urgent application, 30th July 2008, paragraphs 2-4).

At this point Jeremy Gauntlett, exasperated, claimed that his clients 'were at the end of their tether' (*Mugabe and the White African* 2009). The Tribunal sympathised. Dramatically, and as shown in a documentary about the trial (*Mugabe and the White African*), this ruling prompted the GOZ's legal team to walk out of court. The applicants' evidence - which included graphic images of injuries inflicted in retaliation for their lawsuit - was heard without objection (see chapter 8). It was only challenged by Gerald Mlotshwa, a lawyer representing farmers resettled on the applicants' land, who accused Freeth of 'stage-managing political violence to ratchet up pressure on Harare'; an absurd accusation in light of subsequent evidence (*The Herald,* 23rd July 2008).

(c) Backlash

The GOZ's re-assertion of sovereignty began immediately. The *Campbell* judgement was delivered in November 2008. Deputy Chief Justice Malaba used a speech at the 2009 opening of the legal year to denounce the Tribunal's jurisdiction (*The Herald*, 13th January 2009). These arguments were developed later that year as a response to the litigation team's unsuccessful attempts to 'register' the *Campbell* judgement in Zimbabwe. The GOZ now argued that the Tribunal was illegally constituted because the relevant protocol of the SADC Treaty had not been ratified (see Hondora 2010, 9). I am in no position to comment on the technicalities of this dispute (for an

overview Matyszak 2011, 2-3). Publicly, however, the GOZ's position appeared to constitute a remarkable *volte face*. Contrary to the assumptions of constructivists and other international relations scholars, as I will argue in chapter 9, ratification had reflected an almost total lack of long-term strategic thinking about how to deal with international institutions (cf. Brett and Gissel 2013). Most remarkably of all, in 2005 the GOZ had even sent a judge (Antonina Guvava) to a Tribunal it now claimed to be illegally constituted (Hansungule 2013, 137). During *Campbell* Deputy Attorney-General Prince Machaya declared that 'our Minister of Justice concurred in my discussion with him that Respondent had an obligation to comply at the international level with the orders of this Tribunal and that he was going to inform his Cabinet colleagues accordingly' (*The Zimbabwean*, 12th July 2009). Yet only a week later, a leaked Cabinet memo, a summary of which was then itself leaked by *Wikileaks*, reported that:

> Cabinet dismissed the order and noted that the [interim] injunction, "the effect of which was to reverse the sacrosanct land reform programme, amounted to blatant negation of the country's history and it's liberation struggle," and did not override Zimbabwean law. The Cabinet asserted that the country's laws relating to land "should remain in force" and left further "interface" with the SADC Tribunal to the Minister of Justice [...] The memo directed the police to disregard the SADC injunction, based on the Cabinet position that the injunction was a result of Western interference and [...] grounds a basis for the enemy to fight on because it has been proven to be worth it by a SADC body (U.S. Embassy, Harare, 28th July 2008).

Time was of the essence if the GOZ was to protect itself from the Tribunal. The success of *Campbell* had led to a flurry of applications from other commercial farmers being made in Windhoek[10]. The CFU itself, meanwhile, no longer insistent on purely negotiated solutions, had obtained a case number for an application to obtain more clarity about the 'fair' compensation prescribed in Campbell (Marc Carrie-Wilson and Ben Purcell-Gilpin interview, 5th April 2012)[11]. In July 2009 Chinamasa sought to persuade SADC Ministers of Justice and Attorneys-General - meeting to discuss non-compliance with *Campbell* - that the Tribunal was illegally constituted (see Matyszak 2011, 3, n.18; Cowell 2013, 159). The Council of Ministers, responding to Zimbabwe's objections, recommended that the 2010 Summit of SADC Heads of State commission a report reviewing the role, functions and terms of reference of the Tribunal. The Summit agreed. During this review period the Tribunal would take on no new cases for six months and all but one of the five *Campbell* judges' terms of office were not renewed. Despite the Secretariat's protestations to the contrary, this amounted to a temporary suspension (Gauntlett 2010b; The Southern Africa Litigation Centre and Ditshwanelo, The Botswana Centre of Human Rights, 4th November 2010,

paragraphs 3-7). For President Mugabe, meanwhile, backlash was complete,

> We [the Summit] are the creators of this monster and we said we thought we had created an animal which was proper, but no, we had created a monster. We understand that there was interference or interventions by some countries (such as Britain) that the tribunal would be in place and the farmers would come to it. [But] now the house has collapsed and all those decisions which it made on Zimbabwe will become invalid (in Nathan 2012, 119).

The SADC's report, however - written by Cambridge University academic Dr Lorand Bartels (2011) - recommended that the Tribunal's powers be reinforced. These findings were discussed at an Extraordinary Summit in Windhoek in May 2011 (Nathan 2013, 878). This, in turn, decided that the Tribunal now be suspended until August 2012, amid allegations by some NGOs that Namibian police had turned a blind-eye to harassment by Zimbabwean security officials and the distribution of anti-MDC propaganda by ZANU-PF youths (The SADC Lawyers' Association, 23rd May 2011). This final Summit, held in Maputo, Mozambique, was the nail in the Tribunal's coffin. The assembled Heads of State, again to the dismay of international observers and campaigners including Desmond Tutu, restricted individual access to the Tribunal, stripping it of its human rights jurisdiction (e.g. SADC Tribunal Rights Watch, 14th August 2012; Melber, 17th August 2012; Cowell 2013).

(d) Other new legal avenues
(i) The legal institutions of the African Union

The litigants' first response to the Summit's actions was to bring the first ever legal action by individuals against more than one head of state. In July 2011 fourteen SADC leaders were accused of having illegally suspended the Tribunal's proceedings[12]. The case, prepared by Jeremy Gauntlett and Frank Pelser, was brought in the name of Ben Freeth and Luke Tembani, one of the first (according to his legal team *the* first) black Zimbabweans to have acquired freehold to agricultural land after 1980 (SADC Tribunal Rights Watch, 19th May 2011; Gauntlett 2012)[13]. Tembani and Freeth's lawyers had wanted to approach the African Court of Human and People's Rights; an institution established in 2004 as part of the African Union's symbolic shift away from a continental order founded purely on state sovereignty (cf. Touray 2005).

This, however, encountered procedural difficulties. The litigants had hoped to have the case passed on to the Court by the African Commission on Human People's Rights (Jeremy Gauntlett,

personal communication, 7th May 2011). Only 26 states had ratified the Court's protocol, however, and Zimbabwe was not among them[14]. The Commission refused to pass the case on to the court, preferring to hear the case itself as a quasi-judicial body (Mike Campbell Foundation, February 2013; Gauntlett and Pelser, 17th January 2013). After long deliberations it did 'not find any Charter obligation on the respondent states to guarantee the independence, competence and institutional integrity of the SADC Tribunal', but only one to guarantee such for national courts (Spies and Freeth, 5th March 2014)[15]. Freeth and his team are now 'initiating an application to the UN Human Rights committee regarding the illegal closure' (Mike Campbell Foundation, June 2014). None of this is to say, however, that their case has been without real-world effects. In the words of one NGO activist engaged with these questions, SADC states have been infuriated by still being 'faced with this mess from Zimbabwe' (anonymous interview, May 2012). Tanzania and Mauritius - often considered liberal states supportive of the international legal order - made technical objections to the case's admissibility. And every state had to go to the effort and expense of responding to the case (heard in Banjul, Gambia) (see Gauntlett and Pelser, 17th January 2013, paragraph 12). For the NGOs dedicated to building new Pan-African institutions, moreover, the case was of considerable significance (Makanatsa Makonese, interview, 30th April 2012). Some of them informed the litigants at an early stage that the case risked endangering the larger project of socialising African states into accepting oversight from liberal institutions (Lloyd Kuveya, interview, 3rd May 2012). In November 2012, two months before Gauntlett and Pelser's submission was heard, the Pan African Lawyers Union (PALU) and the Southern African Litigation Centre (SALC), supported by the International Commission of Jurists and Southern African Lawyers' Association, approached the Court and asked for a simple advisory opinion on the matter; a move clearly devised to minimise confrontation between member states and new institutions (Open Society Initiative for Southern Africa, 4th August 2011; Pan African Lawyers Union and Southern Africa Litigation Centre, 26th November 2012).

(ii) Crimes against Humanity and the Rome Statute

The efforts of SALC and Freeth's team have, by contrast, dovetailed neatly in another area: making use of South Africa's 'domestication' of the Rome Statute of the International Criminal Court (ICC). By passing its 2002 'ICC Act', South Africa had become the first African country to oblige its courts to prosecute perpetrators of crimes against humanity when such persons 'after the commission of the crime ... [are] present in the territory of the Republic'[16]. And in 2012 SALC launched the first case testing the scope of these obligations[17]. Politically, it was designed both to highlight ZANU-PF repression and to hold South Africa to its proclaimed liberal ideals. It was argued by Wim Trengrove - who had represented Nelson Mandela, prosecuted Jacob Zuma, and

successfully argued for the abolition of the death penalty - and Max du Plessis, an academic who had written about how the international community should respond to political transition in Zimbabwe (if and when it comes) (see Beresford, 26th November 2006; du Plessis and Ford 2009).

The case dealt with alleged torture of MDC activists arrested at the party's headquarters, Harvest House, in March 2007. In 2008 SALC and the Zimbabwean Exiles Forum (ZEF) passed evidence to the South African National Prosecuting Authority's (NPA) Priority Crimes Litigation Unit. This evidence related to Zimbabwean officials who are regularly 'present' in South Africa on personal and official business. 14 months later the NPA informed SALC and ZEF that they would not investigate. The subsequent litigation in the North Gauteng High Court challenged their reasons for refusal. Very broadly speaking, the NPA's arguments about jurisdiction centred around three contentions: crimes could only be investigated once perpetrators were present in South Africa, such investigations violated Zimbabwean sovereignty, and such investigations would also, on a more practical level, undermine police co-operation between the two countries and South Africa's role as a 'mediator' between the MDC and ZANU-PF. The Court, however, refused to accept these arguments, and ruled that the NPA must investigate these crimes against humanity (for this paragraph see n.15 above).

The NPA, in response, continued to cite diplomatic tensions between the two countries as reasons not to comply (Bell, 3rd December 2013). Patrick Chinamasa, for his part, castigated the decision, declaring that the 'same forces who took the government to the so-called Land Tribunal in Namibia with the aim of reversing the land reform programme are the same forces trying to fulfil their agenda through the back door' (Zimbabwe Broadcasting Corporation, 8th May 2012). This claim was not wholly correct. The Harvest House case was not jointly devised by SALC and ZEF, and Ben Freeth and his team. Nevertheless, in November 2013, a week after the Supreme Court of Appeal had upheld the original ruling on Harvest House, Ben Freeth and Afriforum (see chapter 7) did indeed submit their own evidence to South African police. This evidence has now been passed to 'the Hawks', South Africa's highest investigatory body. It implicates '58 named perpetrators' - including high-ranking Ministers, officials, and military personnel - in violence against farmers and farmworkers amounting to crimes against humanity (Bell, 3rd December 2013). (The case is currently ongoing, and has been appealed by the South African Police Service to the Constitutional Court [Mabuza, 4th February 2014].)

This case had been long in the making. Freeth, JAG, and GAPWUZ (The General Agricultural and Plantation Workers Union of Zimbabwe) had earlier pursued similar data-gathering

initiatives (see Zimbabwean NGO Forum 2007; JAG and GAPWUZ 2010; Laurie 2012). But in 2008 some of Freeth's sympathisers began to approach the project with the ICC in mind. (Zimbabwe had not itself ratified the ICC treaty.) The background to this move was rapid disenchantment with the MDC in commercial farming circles, following its acceptance of power-sharing following the 2008 elections. One interviewee, who must remain anonymous, described this work in the following terms 'We're trying to cut out [the] MDC … Ben and I are working along same paths … I am doing human rights … he's doing land' (interview, April 2012). This work was encouraged by rulings by British immigration tribunals that violence against farmworkers did indeed constitute a crime against humanity (JAG, 7th November 2010). According to Freeth, the Supreme Court of Appeal's judgement now 'opens the door' for perpetrators 'to be arrested if they come to South Africa' and 'for us to put the case into other countries as well' (Mike Campbell Foundation, 12th September 2013). The domestication of international criminal law thus multiplies the ways in which it can be used, and even - in Southern Africa - provides it with some means of enforcement.

(iii) Enforcing *Campbell* in South African courts

The *Campbell* litigants have not only sought to restrict the movement of Zimbabwean officials. Within a month of the High Court's refusal to register their judgement in Zimbabwe, they obtained registration in South Africa; the first step towards its domestic enforcement (Jones and Dunn 2010, de Wet 2011, 591). The application was made to the North Gauteng High Court in the name of Mike Campbell and two other farmers (Louis Fick, Richard Etheredge) who had joined the SADC case[18]. (It was supported by AfriForum: an Afrikaner minority rights group, whose most high-profile campaign sought public donations for a hate-speech action against Julius Malema [see South African Press Association, 10th April 2011].) The organisation was approached by the CFU in 2009, and sought to create a 'legal framework' ensuring that property rights would not be 'left behind' by a future government (Willie Spies, interview, 8th August 2011). This team initially sought only punitive costs of US$5,816.47 which had been imposed by the Tribunal for non-compliance with its orders (for the rest of this paragraph, unless otherwise indicated, see Media Institute of Southern Africa, 26th March 2010; *Sokwanele*, 21st September 2012; Zhangazha, 5th July 2013; Koyana, 12th July 2013; Spies, 12th September 2013; Smith, 17th September 2013). After the ruling three Cape Town properties belonging to the GOZ were 'attached' (when property is seized to ensure satisfaction of a judgement). Two of these efforts failed when the GOZ occupied the buildings and claimed diplomatic immunity. A third property, however - the now famous 28 Salisbury Avenue, Kenilworth (worth approximately £300,000) - was successfully attached, and permission obtained to auction it off. In 2011 the North Gauteng High Court dismissed objections

from the GOZ on the grounds that 'the old doctrine of sovereign immunity has yielded to a more restrictive doctrine ... in human rights affairs' (*The Republic of Zimbabwe v. Louis Fick et al.* 2011). In September 2013, finally, after two unsuccessful appeals, and just a week before 28 Salisbury Avenue was listed for sale, the GOZ approached Spies with payment for punitive costs. This prevented a sale which, according to Afriforum, would have, for 'the first time in international legal history', allowed individuals to 'proceed with the legal sale of a property belonging to a state found guilty of gross human rights violations'. (The Zimbabwean Embassy in South Africa denied all knowledge of the transaction.)

After this 'first step' in its 'struggle for justice for Zimbabwean farmers' Afriforum now hopes to recover farmers' full legal costs, estimated at £192,344 (Smith, 17th September 2013). Other property previously identified for attachment includes the reportedly abandoned Zimbabwean consulate in Cape Town and, according to Jeremy Gauntlett, a GOZ aircraft 'pressed into service for the indispensible objective of a state visit to the Jimmy Choo shop in Sandton [a famously expensive residential and retail district of Johannesburg]' (Gauntlett 2011). As Willie Spies has described, moreover, the potential for this kind of extraterritorial enforcement of rulings in South Africa is particularly great since 'South Africa remains Zimbabwe's most important trading partner and goods and services flow through this country en route to and from Zimbabwe' (in Zhangazha, 5th July 2013). A report in *The Yale Journal of International Law* concurs*,* citing South African economic dominance as a reason to consider the SADC Tribunal 'a much more powerful force for human rights in the region than the tribunal's founders ever foresaw' (Hemel and Schalkwyk 2010, 517, 522). (Jurisprudence discussed in the next chapter, similarly, illustrates how the global dominance of the United States can grant some domestic courts unusually effective degrees of universal jurisdiction.)

(iv) Expanding the scope of diplomatic protection

'Realist' considerations of this sort may help explain why South African courts can play such 'activist' roles. But they cannot account for why and when they actually choose to do so. In chapter 5 I challenge such explanations, and provide an interpretive political science account of why courts have become willing to pronounce on 'mega-political questions'. A particularly striking example of this was provided by the judgement of the Traansvaal Division of the South African High Court in the matter of *Von Abo v The Government of the Republic of South Africa* (2009). The case was not one in which Freeth's team were involved, but was one they followed with interest (Willie Spies, interview, 8th August 2011). The applicant, a South African citizen, had arrived in

Southern Rhodesia (as it then was) in 1955. Justice Prinsloo noted how he had then, thanks to 'substantial personal sacrifice, business acumen, the ability to persist in correct decision taking, and unmitigated hard work' been able to assemble a 'considerable farming empire in Zimbabwe' (*Von Abo v The Government of the Republic of South Africa* 2009, paragraphs 3, 6 and 7). His property was then expropriated as part of FTLR. Surprisingly, Justice Prinsloo now ruled that the Government of South Africa was under a 'constitutional obligation to provide diplomatic protection to the applicant' and had sixty days to 'take all necessary steps to have the applicant's violation of his rights by the Government of Zimbabwe remedied' (paragraphs 14-16).

A hallmark of 'mega-political cases', and especially of judicialisations of fundamental political order, is that they cannot be resolved by establishing determinate principles with which governments can comply. There is simply no means to assess whether the GSA had taken 'the necessary steps' to ensure that the GOZ was no longer 'violating' Mr. Von Abo's rights. In a follow-up hearing on this issue Justice Prinsloo rejected the GSA's objection that it could not 'have persuaded the Zimbabwean Government to abandon or reverse their execution of the Land Reform Program'; finding, *inter alia*, that they could have 'relied on the judgement of the [SADC] tribunal to fortify their efforts to employ effective diplomatic interventions on behalf of the applicant' (*Von Abo v The Government of the Republic of South Africa* 2010, paragraphs 58, 66). This conclusion was reached on extraordinary grounds. 'The internationally recognised forms of diplomatic intervention', Justice Prinsloo held,

> have been designed to force offending states to tow the line. There is no room for an argument that diplomatic intervention becomes toothless, simply because the offending state exhibits no intention ever to co-operate [...] South Africa is the power house of the region. It is common knowledge that Zimbabwe is dependent on South Africa for almost every conceivable form of aid and assistance (paragraph 67).

Even for Willie Spies this judgement constituted 'quite a drastic intervention by the judiciary', and potentially transgressed the principle that there 'should be a separation between the judiciary and the executive' (Willie Spies, interview, 8th August 2011). The Supreme Court of Appeal, for its part, found that 'compliance with this order was impossible ... for any government in the world' (*Government of the Republic of South Africa and Others v Von Abo* 2011, paragraph 27).

(v) International commercial law and privileged litigants

Perhaps the most ambitious of Mr Von Abo's requests was that South Africa 'become party to the 'International Convention on the Settlement of Investment Disputes (ICSID), in order that the applicant might pursue a compensation claim against the government of Zimbabwe' (*Von Abo v. The Government of the Republic of South Africa* 2009, paragraph 16). He had hoped, thus, to follow in the footsteps of German and Dutch nationals. These farmers had exploited provisions in Bilateral Investment Promotion and Protection Agreements (BIPPAs) signed by these countries and Zimbabwe which allowed them to challenge expropriations at the International Centre for the Settlement of Investment Disputes in Washington D.C. In November 2009, after long negotiations, South Africa did finally sign a BIPPA with Zimbabwe in order to renew investor confidence (see U.S. Embassy, Harare, 30th November 2009). Despite legal challenges from Louis Fick, however, it offered no legal redress to 250 South African farmers expropriated by FTLR (see *CFU Calling*, 12th February 2010). This was a particular disappointment for them since, as described below, ICSID cases have elicited more compliance from the GOZ than the judgements of the SADC Tribunal, and have received more diplomatic support from their embassies in-country. Such support, of course, has not been available to Zimbabwean nationals. Legal commentators have pointed to the apparent unfairness of this situation; a departure from the equal treatment for foreign investors that such agreements were originally devised to promote (e.g. Petersen and Garland 2010, 14-15).

Since the beginning of FTLR the Dutch Embassy in Harare has been the most active on this issue. Their demands for enforcement of ICSID judgements were ongoing in 2012 (Dave Fish, interview, 19th April 2012). (The British government, notably, still prefers, in post-colonial fashion, to operate through informal channels.) In November 2000 it received a *Note Verbale* confirming that Dutch nationals' farms would be exempt from acquisition. These farms, however, were soon relisted (*Funnekotter v Republic* of *Zimbabwe* 2009, paragraph 31). In 2003 twelve Dutch nationals requested arbitration of their claims at ICSID in Washington, seeking €36 million in compensation for lost property and interest (*Funnekotter v Republic of Zimbabwe*, paragraph 1)[19]. A striking contrast with *Campbell* was evident in how the case was eventually decided. The ICSID arbitrators, presided over by a former President of the International Court of Justice (ICJ), chose to pronounce only on compensation, and carefully avoided ruling on public interest, racial discrimination, and (by implication) 'patriotic history' in Zimbabwe. It awarded the claimants approximately €8 million (market value); not the €800,000 suggested by the GOZ (covering improvements only) (*Funnekotter v Republic of Zimbabwe*, paragraphs 125-148).

Perhaps an even more striking contrast with *Campbell* was provided by the reaction of the GOZ. Although 116 out of 153 farms protected by bilateral agreements have indeed been expropriated, there has been little overt backlash against ICSID judgements, and much more 'foot dragging, dissimulation, false compliance, [and] feigned ignorance' (Scott 1985, 304; Doré 2012-3). In the Dutch case the government admitted liability from the outset (although it claimed to be in no position to pay at the time), offered to return the farms, and paid US$ 225,000 to ICSID (its share of costs) (U.S. Embassy, Harare, 18th October 2007). In 2013 these judgements led Lands, Land Reforms and Resettlement Minister Herbert Murerwa to approve the eviction of 55 resettlement farmers from Tavlydale Farm in Mashonaland Central (protected by a BIPPA agreed with Belgium) and to declare that 'Government will abide by the provision of the agreement and at the same time we do not want to increase our liability' (Doré 2012-3, n.51; *The Zimbabwe Mail*, 16th January 2013). Correspondingly, however, the GOZ was also swifter to pre-empt extraterritorial enforcement. In 2007 the U.S. Embassy in Harare identified a $44 million debt to the U.S. Export Bank as having been paid to prevent attachment of property (U.S. Embassy, Harare, 18th October 2007). And in 2010 the claimants sought to do just this, obtaining a confirmation of the €25million now owed (thanks to compound interest) in the Southern District Court of New York (C. Dunn 2010).

For our purposes, however, the most dramatic illustration of new political possibilities offered by international law was provided by the von Pezold family in 2010. Whilst also Swiss nationals, the von Pezolds were the largest German investors in Zimbabwe, and even persuaded the German government to threaten to stop aid to Zimbabwe if those occupying their farms were not evicted (Bell, 21st December 2010). When this was unsuccessful they filed ICSID claims under the terms of Germany and Switzerland's BIPPAs (for the rest of this paragraph, unless otherwise indicated, see Mowatt and Mowatt 2013). In March 2012 the Tribunal was contacted by the European Center for Constitutional and Human Rights (ECCHR), a Berlin-based NGO specialised in 'strategic human rights litigation ... setting precedents ... that strengthen the legal framework for global human rights accountability'. The ECCHR focuses on violations relating to gender, business, and crimes committed by Western states as part of the 'war on terror'[20]. Despite the von Pezolds' objections, it was allowed to petition the court on behalf of the traditional chiefs of four 'indigenous communities' living on or near the Claimants' land (the Chikukwa, Ngorima, Chinyai and Nyaruwa peoples). And it asserted their 'internationally recognised rights to the land' as indigenous peoples. In chapters 8 and 9 I will discuss some of the many controversies surrounding who can be legally classified as 'indigenous' to Africa. Suffice to mention here that very few authors argue that the national majorities celebrated by FTLR should be counted as such (eg. Chigara 2011, 206-8). The

Tribunal, certainly, appears to have dismissed the ECCHR's petition because of evidence that these 'indigenous communities' were connected with local ZANU-PF activists. Progressive international law commentators consider this ruling a setback for longstanding efforts to include 'human rights concerns' in arbitration[21].

4. Impossible compliance

Like ICSID, the SADC Tribunal could have decided to rule only on compensation. However, after discussing the issue right up until the day before the judgement, the majority (Justice Tshosa dissenting) also ruled on racial discrimination (Zongwe 2009, 22). As Jeremy Gauntlett (2010b) explained, 'a striking aspect of the SADC main ruling in Campbell was that it ruled on all three of the attacks - and sustained each. Often courts will not do that, if one is dispositive'. Some jurists have criticised them for choosing this politically more contentious option (Zongwe 2009, 25; Ndlovu 2011, 13). They allege that whilst new legislation might have been *implemented* in a way that discriminated on the basis of race, there was no direct evidence that its *enactment* was not motivated by a desire to eliminate colonial patterns of economic privilege. By ruling on discrimination, on their view, the *Campbell* judges thus risked removing a (desirable) exception to the international law of expropriations that has always been made for post-colonial land reform.

Nevertheless, it is far from clear whether and how the GOZ could have paid this compensation. No commentator has demonstrated convincingly, in practical terms, what compliance with such an order would entail. Even this most politically uncontentious of rulings - a world away from the activism of Justice Prinsloo's in *Von Abo* - still constituted a judicialisation of fundamental political order. There is considerable disagreement over whether, and by how much, the general principles of international law allow for compensation to be discounted in the interests of allowing states policy space or even maintaining public order (e.g. van Harten 2005; Wouters, Duquet, and Hachez 2012). And indeed, before the SADC Tribunal's suspension, both David Drury and the CFU had cases pending in Windhoek asking the Tribunal to clarify the measure and method of reimbursement (David Drury, interview, 4th April 2012; Ben Purcell-Gilpin and Marc Carrie-Wilson, interview, 5th April 2012). But in the case of Zimbabwe, as illustrated below, it remains unclear how the GOZ, even if granted the most generous discount permissible, could be held to its legal obligations.

The parlous state of public finances from 2008 onwards has, in fact, meant that almost any precise and obligatory ruling on compensation would involve a very significant redistribution of

resources - towards ex-commercial farmers and away from the basic government functions. The Tribunal's ruling represents a legal constraint on the basic political choices at the heart of state (re-)building in Zimbabwe. From 2006 hyperinflation accelerated in the country, peaking in January 2009 with the issue of a 100 trillion dollar note: the banknote with the most zeros on its face of any note in history (Pilossof 2009, 295). 'Dollarisation' - the introduction of a multi-currency system where US dollars and South African Rands became legal tender - soon stabilised this situation. But it did little to resolve basic economic difficulties. In 2013 Finance Minister Tendai Biti revealed that the country had an unverified sovereign debt of $10.7 billion (roughly equivalent to GDP), a ratio of exports to imports of between 1:3 and 1:4, and, famously, on one day had only $217 left in its public account after paying civil servants (*BBC News*, 30th January 2013; *The Zimbabwean*, 30th April 2013). In 2010 and 2011 it had current account deficits of $1140 million and $1842 million[22]. In these two years it could budget only US $5 million and US $2 million for compensating commercial farmers for lost improvements (CFU Legal Department, 28th April 2011).

Farmers' groups and their supporters have all condemned these inadequate sums. But very few of their alternative schemes have reflected political possibilities in Zimbabwe post-FTLR. As described above, JAG has been most insistent on comprehensive compensation (e.g. *JAG Open Letter Forum,* March 12th 2004). In 2003 its valuators estimated farmers' losses, including damaged property, at approximately $50billion; close to nine times the country's GDP for that year[23]. Recently the CFU, for its part, has sought similar sums but by other means. It even inquired into the legal liabilities of Britain: the ex-colonial power which the GOZ itself also holds responsible for compensation (Ben Purcell-Gilpin and Marc Carrie-Wilson, interview, 5th April 2012)[24]. By 2010, however, its draft Agricultural Recovery Proposal conceded that it had become:

> very clear to us early on in our deliberations with both the local and international community that:
>
> a) The government were not in any position to pay and;
> b) The donor community were not going to come up with a blank cheque to cover our damages (CFU Agriculture Recovery and Compensation, 18th June 2010, 1).

The CFU sought to solve this 'dilemma' by means of a complicated scheme. The GOZ first had to acknowledge its eventual liability for expropriated land values. This liability would then be underwritten by the International Financial Institutions, creating a central 'investment block'. An Agricultural Land Bank would then apportion land values to title deeds, creating, in effect, a market

in interest-bearing bonds that would provide a foundation for a new land market (CFU 2011, 5-6). The value to be acknowledged by Government was to be calculated by any 'legally endorsed methodology' that left farmers 'no richer or poorer than at the acquisition of the asset' (CFU 2011, 6). The (anti-)politics of the whole process was neatly captured in the following diagram (figure 1):

Figure 1: 'A Proposed Solution' for land compensation (from CFU 2011, 3).

Unlike most other proposals for compensation, this CFU scheme had the obvious merit of at least potential economic feasibility. MDC heavyweight Tendai Biti, however, dismissed it as an 'elitist solution' beyond the bounds of political possibility (Chivara, 24th January 2013). And supporters of Ben Freeth and his litigation team have accused it of political *naïveté*. Why, they ask, would the GOZ now demonstrate good faith in negotiations; good faith that it conspicuously failed to show at Abuja in 2001 and on other occasions (David Drury, interview, 4th April 2012; Dale Doré, interview, 13th April 2012)? One of Freeth's supporter is Dale Doré, an agricultural economist with a DPhil from Oxford University who provided significant input to the 1994 Land Commission. He provides compelling reasons for why compliance with compensation orders is impossible in practical terms:

the Zimbabwe Government has found itself trapped in a *cul-de-sac* of its own making. It cannot afford to keep paying for new farmers' inputs - but new farmers can only negotiate loans for inputs if they have secure title to the property. However, they can only secure title once compensation has been paid. But, compensation can only be paid once valuations for compensation have been completed and agreed. But, because the government does not have the funds, qualified staff, or sufficient time, it cannot carry out the valuations. Even if the government could achieve this Herculean feat, it would still fall far short of just compensation

under international law. The only veritable conclusion is that the government simply cannot pay compensation – at least in the short term (Doré 2012-3a).

But he does not see this as an argument for the primacy of a negotiated or democratic basis for a new political order. Rather, the GOZ should seek to abide to 'by the rulings of the SADC Tribunal and the ICSID Tribunal in keeping with its international treaty obligations and international law', pragmatic considerations notwithstanding:

Zimbabweans have been urged to be pragmatic and realistic, recognising that it is 'not a perfect world', that 'politics is the art of the possible', or that 'we have no other option'. I have argued that we should be guided by international law, human rights, and best international practice. Unless we adhere firmly to universal ethical principles, there is the ever present danger of first being drawn into negotiations, then into compromises, then into collusion with those who act in bad faith; and, finally, into accepting the unacceptable (Doré 2012-3a).

Doré is, finally, unapologetic about his refusal to describe how such compliance might actually be achieved:

even as I stand accused of idealism – for which I bear no shame – I believe the journey home begins along the narrow, rocky path towards democracy, human rights and the rule of law. It may be slow and arduous, but by following this road less travelled we will find our way back home … [to] the international community of nations, holding proudly to our shared ideals of democracy and human rights under international law (Doré 2012-3a).

5. The MDC, the 2013 constitution and democratic solutions

Unsurprisingly, Doré has been scathingly critical of some recent, often much-publicised academic work which has sought to challenge popular perceptions of FTLR as an unmitigated disaster (cf. Scoones et al. 2010; Moyo 2011; Doré, 7th December 2012; Hanlon, Manjengwa and Smart 2013). One of those he has criticised is Ben Cousins (2010, 21st May 2010), who has argued that both land restitution and the restoration of property rights are now politically unrealistic:

suggestions that a new Zimbabwean government should attempt to reconstruct the old, dualistic farming sector dominated by large scale commercial farming will encounter strong

political resistance from the many ordinary Zimbabweans who have benefited from land reform. In any event, a key component of the Global Political Agreement [GPA] is that land reform is irreversible (compare Doré 2010).

The GPA to which Cousins refers was the deal that the opposition MDC agreed with ZANU-PF in 2008, and which allowed for the formation of a Government of National Unity (GNU) after violent and disputed elections (see Chan and Primorac 2013). For Cousins and others this represented an opportunity for a new political settlement. In 2012, for example, Mandivamba Rukuni, who led the 1994 Land Commission, reported on the new possibility of democratic resolution to the land question:

> back in 2009 there was hardly an aspect of the land issue that the GNU partners agreed on. Today there is evidence of convergence (not necessarily agreement) on issues such as the need for secure land rights, compensation (at least for improvements), and the need for more intensive land use planning (Rukuni 2012-3b).

For Doré and other radical MDC critics this 'dirty deal' triggered an almost instant disengagement from party politics and a new interest in human rights litigation (*JAG Open Letter Forum*, 25th June 2009). Voice for Democracy, a group of such critics with whom Doré was associated, took both President Mugabe and Morgan Tsvangirai to court (see *SW Africa Radio News,* 17th May 2010). By 2009 Ben Freeth was publicly denouncing MDC leader Morgan Tsvangirai for refusing to even acknowledge receipt of his letters (Lamb, 11th October 2009). (Some equally scathing criticisms of the GNU were voiced by senior party figures, but typically as justifications for pressuring the organisation from the outside [e.g. Muzulu, November 27th 2011; see also Chipangura, 17th July 2012].) Despite consistent criticisms of FTLR, however, even those MDC figures most sympathetic to commercial farmers had, in truth, long been wary of its international judicialisation. Eddie Cross, for example - the MDC's former economic secretary and perhaps leading neo-liberal - was accurately predicting the threat it posed to existing political order as early as 2006:

> thousands of new cases will be forth coming as farmers, now spread across the globe take legal action to secure compensation in the currencies of their choice, and finally, no assets of

the Zimbabwe regime will be safe, aircraft, buildings and even embassy motor vehicles will be subject to legal attachment. It is a nightmare.

I have no idea how large the total liability will be but I am willing to bet it runs to many billions of US dollars and certainly exceeds our present international debt that we cannot service anyway! […] The confirmation of title rights by international courts will complicate the situation in Southern Africa as a whole (*JAG Open Letter Forum*, 16th December 2006; for Cross' neo-liberalism Bond and Manyanya 2002, 93).

In 2007, meanwhile, Shadow Justice Minister David Coltart - generally speaking another supporter of commercial agriculture - commended the *Campbell* case as it was filed in the Zimbabwean High Court. He was careful, however, to only criticise the unconstitutionality of the Amendment 17 'ouster clause', and made no reference to issues of discrimination, restitution and compensation; a position identical to that adopted by Zimbabwe Lawyers for Human Rights (ZLHR), by then Zimbabwe's leading NGO (Shadow Justice Minister, January 15th 2007)[25].

By 2008 these pragmatic concerns had started to dovetail with broader ideological re-orientation within the MDC[26]. Blessings-Miles Tendi (2010, 233), for example, has criticised the party for treating the international community and human rights as a 'silver bullet' in the early 2000s. This, he claims, led it to ignore the resonance of ZANU-PF's 'patriotic history' throughout large swathes of Zimbabwean society. The formation of GNU, by contrast, catalysed some MDC efforts to counter ZANU-PF's 'patriotic history' by also legitimating itself in terms of anti-colonialism and the liberation struggle (Tendi 2010, chapter 8; but cf. Zamchiya 2013, 958-9). For a time Zimbabwe 'gradually veered towards normalisation and convergence between the opposing domestic political … gladiators' (Moyo 2011, 256). Some new MDC stances were on view during the drafting of a new constitution for Zimbabwe. This would replace that agreed at Lancaster House in 1979, and update the legally ambiguous GPA (Matyszak and Reeler 2011). A number of the new provisions were agreed at least as early as 2008. Key questions however, notably those related to *Campbell*, remained controversial into the second half of 2012 (see U.S. Embassy, Harare, 30th October 2009; International Bar Association 2011, 23; Chan 2012)[27]. Despite the CFU's criticisms, the final draft reserved compensation for expropriated land owned by 'indigenous' Zimbabweans, or protected by BIPPAs ('agreement[s] concluded by the Government of Zimbabwe with the government of another country'). Other persons were 'entitled to compensation from the State only

for improvements that were on the land when it was acquired' (Mutenga, 10th August 2012; Magaisa 2012; Government of Zimbabwe, January 2013, section 295).

The MDC had opposed ZANU-PF amendments designed to insulate these and other provisions from challenge in international courts (removing 'international law' and 'the values that underlie a just, open and democratic society' from sources for the interpretation of rights) (see Amendments 38 and 39 reported in *The Herald*, 30th August 2012). But it was nevertheless keen to associate itself with the document as a whole. Some key figures who welcomed these new 'constructive relationships' with ZANU-PF also used the process to counter 'patriotic history'. They distanced themselves from gay rights provisions and narrated liberation 'struggles' (not 'wars') to emphasise the contributions of non-ZANU-PF figures from before the nationalist era (see remarks by Eric Matinenga and Douglas Mwonzora in International Bar Association 2011, 21-22; Mwonzora's comments Benjamin Burombo's legacy in Parliament of Zimbabwe, 6th February 2013, 6; for Burombo see Bhebe 1984). Crucially, moreover, they used the constitution to signal an acceptance, if not an endorsement, of FTLR. As Douglas Mwonzora, the MDC Co-Chair of the Zimbabwe Constitution Select Committee (COPAC) declared, 'in our view there was not wisdom in taking land from a deprived person to another deprived person' (Parliament of Zimbabwe, 6th February 2013, 39). The key provisions on agricultural land were all agreed to.

Almost immediately, unsurprisingly, Ben Freeth and Dale Doré attacked the MDC for agreeing to discrimination that violated human rights and offended 'natural justice' (Bell, August 16th 2012; Doré 2012-3b). Yet Brian Raftopoulos, a keen critic of 'patriotic nationalism', saw it as a 'central part of the mediation process' and 'a very good basis for moving forward' (Raftopoulos 2009, 231; *SW Africa Radio News*, February 28th 2013). Ian Scoones, one of Doré's critics, went further (see Scoones 2012b). For him, since 'national political consensus is clearly required on the land issue' all argument about 'the 'sanctity' of private property is insufficient' and all 'recourse to an individualistic rights discourse ... inadequate' (Scoones 2012a). On *Campbell*, he argued, 'obsession with this particular ruling forgets that the proposed constitutional provisions are actually in line with much international practice' (Scoones 2013). Yet as this chapter has sought to demonstrate, the reality of international politics is that this is no longer a wholly 'realistic' position. Compromise will indeed be necessary for the building of any kind of political order in Zimbabwe in the short-term. But Doré and Freeth may nevertheless be correct to insist on the capacity of *Campbell*, and similar judgements, to impinge on this process.

6. 'There's no right or wrong answer': liberals against human rights

Throughout this study I highlight two dimensions of global liberal actors' response to the judicialisation of fundamental political order. Like ZLHR and the MDC they have been fully cognisant of the dangers it represents for their projects. Yet, like Scoones, they have also consistently over-estimated politicians' capacity to isolate such questions from legal challenge. In the case of the UN and the international financial institutions, both dimensions became visible as soon as they accepted FTLR as a *fait accompli*. These organisations immediately began searching for new solutions to the land question which would avoid both confrontation with government and endless legal challenges to emerging forms of political order. One early initiative, in 2003, saw the IMF, World Bank and UNDP propose commercial farmers financial packages which would allow them to relocate to neighbouring countries, notably Zambia (Njini, 11th May 2003). Most efforts, however, centered around re-building technical capacity to enable national solutions. As Gareth Evans, President of the International Crisis Group, wrote in 2004, a 'non-partisan' Land Commission would have to,

> adjudicate rapidly a myriad of claims and counter-claims that have the potential to tie the legal system in knots for years. The international community will need to support a process of binding arbitration that allows reasonable payment to those farmers whose farms have been illegally seized, while acknowledging that any sensible policy will be a compromise balancing production, legal concerns, and fair compensation (ICG 2004, vi).

(It is of course precisely such a 'compromise' on 'legal concerns' that Freeth, Gauntlett, and Doré have been so desperate to avoid.)

In 2005, meanwhile, that the World Bank published *Agriculture Growth and Land Reform in Zimbabwe: Assessment and Recovery Options (Report No 3199 ZW)*. JAG (20th June, 2005) accused this of having 'all the hallmarks of the social scientists [sic] and technocrats [sic] approach to the land problem'. It is said to have studiously avoided the question of restoring private land rights regimes. (Some interviewees believed the author was Sam Moyo, an academic with more sympathy than most Zimbabwe scholars for ZANU-PF.) Later, under the GNU, the EU, World Bank and UNDP jointly funded land audit and land policy work. This was geared towards creating the

'national political consensus' on the land issue that Scoones and others had hoped for (see Rukuni 2012-3b). Policy papers built around the *Campbell* and ICSID judgements were rejected (Dale Doré, interview, 13th April 2012). Less legalist approaches, by contrast - which Mandivamba Rukuni advocated during the drafting of the World Bank's policy positions - were embraced. Rukuni (2012-3b) took a long view:

> the land audit should not be an event. It should be the means of creating a system that will catch the culprits down the road. I know politically you want to catch all your culprits today. But you need to ask how do you build a system which tenure wise, administratively, will continuously catch the culprits and rotate them until you have a brilliant, productive agriculture sector which transforms our society to where [sic] want to go.

The EU has funded the valuation of expropriated farms, perhaps reflecting interest from the Dutch and German embassies (*JAG Open Letter Forum*, 17th June 2011). And, more recently, after lifting sanctions on Zimbabwe, it has also donated $6.4 million for capacity-building to the Ministry of Lands, Land Reforms and Resettlement (Maposa, 28th February 2014). But even it refused to argue for restitution or comprehensive private rights in land.

Perhaps most interestingly, however, these technocratic approaches have also been endorsed by Britain, the ex-colonial power. By the late 2000s it was wary of public positions on the land question. It had drawn lessons from the political uses made of Clare Short's disastrous letter of 1998 (described earlier). In 2009 an Africa All Party Parliamentary Group report on the land question aligned itself almost entirely with UNDP prescriptions. Crucially 'it did not accept that it would be a good use of government aid to pay millions of dollars to former commercial farmers'. Using a figure from a manifesto produced by the MDC in 2007, it then estimated 'that compensating Zimbabwean commercial farmers could come to as much as US$8 billion. Given Zimbabwe's current financial crisis it will not be able to meet these costs. The expense is also beyond the means of the donor community' (AAPPG 2009, 43). Dave Fish, head of the DFID mission in-country, echoed these pragmatic assessments. 'Ideally', in Fish's view, the matter would be handled by the IMF and 'treated as debt relief, like in the rest of Africa ... So creditors might get 10% - no hard figure'. Although he was aware of the ICSID judgements in particular, thanks to conversations with Dutch counterparts, he himself viewed them as 'neither here nor there' in political terms. He did not even believe they had even been mentioned in the 18 months or so he had spent in-country. There was, he declared, 'no right or wrong answer' to the land question (interview, 19th April 2012). This

was politics.

7. Conclusion

Again, however, as this chapter has sought to show, 'realist' perspectives such as these under-estimate the new political possibilities of international law. Whilst litigating FTLR has little prospect of building political order in any currently conceivable future Zimbabwe, it will nevertheless continue to provide an avenue by which efforts - by global liberals and others - to build such orders can be subverted. No simple political decision by lawyers or diplomats can end this 'nightmare' (to use Eddie Cross' term). Contrary to some critical and Foucauldian variants on such arguments, moreover - introduced in chapter 5 - there is not even a long term prospect that human rights practices will govern and discipline individuals in ways that ultimately preserve deeper kinds of liberal order. Some authors, it is true, have made suggestions about how to resolve fundamentally political questions via socialisation. The editor of one recent volume on land and law in Southern Africa, for example, has talked of 'the need to de-school agents [from] … entrenched culturalization' and thus 'oust the sense of victimization that some white farmers have used to seize the courts in opposition to land reform' (Chigara 2011, 202, 224). But such suggestions are so woefully inadequate that they require no further comment.

After expanding on these theories of *resistance* in chapter 5, in part II I will argue that new beliefs about law and politics which emerged in the 1970s explain key three conditions for the judicialisation of fundamental political order in Zimbabwe. The first is the formation of incipient social movements such as that which coalesced around Ben Freeth (bringing together a perhaps unlikely coalition of Jeremy Gauntlett, Afriforum, and Desmond Tutu). The second is the visibility of the commercial (and especially white) farmers' plight in British and South African politics. The third condition is, of course, the very existence of institutions such as the SADC Tribunal; a fact which I argue is largely explained by the diffusion of European institutional models after 1989.

Chapter 3: Rural order in Namibia: history, recognition, and traditional authority

1. **Prelude**

JAG, Ben Freeth and the CFU have not been the only commercial farmers to bring lawsuits against the Zimbabwean government. In 2002 Maria Stevens, the widow of the first commercial farmer to be killed during FTLR, sued the President himself. Her co-plaintiffs were MDC politicians and their relatives, including those of MDC National Youth Organiser Tafuma Chiminya Tachiona who had been tortured and killed (*Tachiona v Mugabe* 2002, background). They filed their case in the Federal District Court in Manhattan, alleging violations of the Alien Torts Claims Act (ATCA); a controversial piece of legislation often used to prosecute governments and businesses with assets in the United States (including the government of South Africa) for crimes committed abroad (Poullaos 2002, 327-8; Jenkins 2009; Ku and Yoo 2012, 179-185). According to David Drury, who has himself been involved in a separate ATCA case, President Mugabe was served with court papers en route to the United Nations building (interview, 4th April 2012). *Tachiona v Mugabe* (2002, conclusion) eventually saw the plaintiffs awarded an unenforceable $71,250,453.00. The chapter follows Namibian efforts to make use of ATCA. As with *Campbell*, this litigation has challenged fundamental principles of national rural order. And as also with *Tachiona*, it has failed to elicit compliance. The events it referred to, however, were, unfortunately, among the most grotesque in the recent history of mankind.

2. Introduction

In January 1904 war broke-out throughout the German colony of South-West Africa (Namibia). An uprising in Herero territory had left 123 Germans dead, amid (unfounded) rumours of the mutilation of women and children. The new governor, Lother von Trotha opposed negotiations. He sought to 'encircle the masses of Hereros at Waterburg, and to annihilate these masses with a simultaneous blow' (Gewald 1996, 206). In August Trotha was victorious at the battle of Hamakari, and surviving Herero - including women, children, and their herds of cattle - were forced to escape into the surrounding Omahake desert. German soldiers occupied the waterholes surrounding it and Trotha issued his now notorious proclamation:

I, the great general of the German soldiers, send this letter to the Herero people. The Herero are no longer German subjects … Within the German frontiers every Herero, armed or unarmed, with or without cattle will be shot dead. I shall take no more women or children. I

shall drive them back to their people or have them fired upon (Gewald 1996, 207).

By the beginning of 1905 'Herero society, as it had existed before 1904, had been destroyed' (Gewald 2000, 211). These acts persuaded Nama leaders to abandon their alliance with Germany and begin guerilla war. Their resistance thus lasted considerably longer than that of the Herero, but the German military again occupied watering places and commenced mass internment. Many prisoners were held in concentration camps including women, children and the elderly. On Shark Island in Lüderitzbucht, most notoriously of all, the skulls of many who died from starvation, over-work and exposure were sent to Germany as specimens for scientific analysis (Erichsen 2007). 7,682 prisoners died during the war, somewhere between 30 and 50 per cent of those interned (Zimmerer 2007, 58). Many others throughout the colony were affected by the violence, both directly and indirectly (Wallace 2011, 165-172).

3. The judicialisation of recognition
(a) From informal to bureaucratic arenas: the South West-African 'homelands'

After World War One the Allied powers used these atrocities to help justify the confiscation of Germany's colonies (Sylvester and Gewald 2003, xv). The League of Nations handed South-West Africa to Britain and South Africa to be run as a 'sacred trust of civilization'. After 1945, however, South Africa claimed that the collapse of the League justified the incorporation of its Namibian 'mandate' into its territory. This triggered decades of confrontation at the United Nations (see Cooper 1991). By the 1960s South Africa was seeking to persuade its international critics that racial segregation was compatible with the principles of self-determination that had driven decolonisation (Barber and Barratt 1990, 95). The apartheid government designed new 'homelands' policies which designated particular rural areas for particular 'tribes'. The consequences of this for South-West Africa were set-out in the Odendaal Commission's Report of 1964. 'Native reserve' policies from the 1950s were to be intensified, and ethnographic 'science' was supposed to supplant administrative discretion as the basis for land designations (compare Posel 2001). As the Commission stated, baldly, 'separate groups are distinguished from one another by their different languages, cultures and physical appearance, and to a large extent also according to the areas in which they … now live' (Wallace 2011, 262-3).

This 'homelandization' intensified an emerging dynamic in relationships between South African administrators and Herero traditional authorities. The very concept of paramountcy was alien to the Otjiherero-speaking societies observed by the first missionaries. The most significant

vertical distinction they had observed was between the rich, especially in cattle (*omuhona,* plural: *ovahona*) and the poor (*omusyona*, plural: *ovasyona*). In the inter-war period, however - as these societies began to reconstitute themselves in new ways following the genocide - South Africa largely followed the British practice of indirect rule (for Herero 'resurgence' see Gewald 2000). It preferred to deal with paramounts and councils of headmen whilst maintaining administrative veto over their appointments. The 1960s saw this formalization of traditional authority reach its apex (Bertout 2003, 121-124).

Simultaneously, a refusal to recognise the legitimacy of liberation movements led South Africa to embrace almost any political organisation willing to accept its constitutional politics. Perhaps the most critical but significant of these organisations was the Herero Chief's Council (HCC), which had co-ordinated the first wave of domestic opposition to incorporation at the United Nations in the 1950s (e.g. Henrichsen, Jacobsen and Marshall 2010, chapter, 1). When the latter became a modern political party in 1964 (the National Unity Democratic Organisation (NUDO)) it was regarded as a privileged interlocutor. NUDO, however, was dominated by headmen, who in turn dominated homeland administration. Even locally legitimate *ovahona* leaders, already marginalized in the pre-war period, were, consequently, ignored by an administration increasingly bent on stabilizing its authority in rural areas. This exclusion was perhaps especially acute for those representing the Mbanderu sub-group (sometimes called 'green flag' in reference to the colour worn at their particular annual commemoration (*omazemburukiro*) of the genocide). Munjuku Nguvauva, for example, son of an Mbanderu *omuhona* exiled after the genocide, returned to Namibia from Botswana in the 1950s but was eventually refused a paramountcy and subordinated to Herero headman within the administrative structure of the homelands (Bertout 2003, 121-124).

(b) 1990-2000: Independent Namibia and limited judicialisation

Formally speaking, the 'homelands' were swiftly abandoned with the end of apartheid. In 1990, after the country's negotiated transition to democracy, the South West African People's Organisation liberation movement, better-known as SWAPO, formed the first Namibian government. It proclaimed a commitment to socialism and the undoing of apartheid legacies. International observers, however, had long doubted its elites' sincerity (Melber 2010). This has been reflected in the (much-discussed) glacial pace of land reform (e.g. Melber 2005; Shinovene, 27th September 2013). The future of commercial agriculture was not planned for, on the (mistaken) assumption that white Namibians would leave after independence (Kaapama 2007, 34). One informed observer has claimed that its policies were drafted, essentially in the interests of expediency, by a 'small cadre of

top SWAPO leaders assisted by some foreign academics … mostly associated with the UNIN [United Nations Institute for Namibia]' (Dobell 1995, 175). In 1991 a major Lands Conference in Windhoek did resolve that 'there was injustice concerning the acquisition of land in the past and something practicable must be done to rectify the situation' (Harring and Odendaal 2002, 31). But it also adopted a 'willing-seller-willing-buyer' (WSWB) principle. SWAPO apparently believed, incorrectly, that this had been constitutionally mandated by the terms agreed during transition (Kaapama 2007, 36-8).

SWAPO has certainly thus far done little to test its powers in this area. 209 farms were purchased in the first 17 years of independence, via market mechanisms but using preferential procedures (Kaapama 2007, 39). Expropriations, thus far limited to a handful of cases, began only in 2005, under political pressures created by developments in Zimbabwe (Melber 2005)[28]. And even some of these, to the considerable embarrassment of the Ministry of Lands and Resettlement (MLR), have recently been successfully challenged in the Namibian High Court. The Court, typically somewhat deferential towards the Executive, disagreed with the National Agricultural Union (NAU) that the transfer of functioning farms to untrained farmers violated the 'public interest' (see VonDoepp 2009, 136). And like the SADC Tribunal in *Campbell*, the Court carefully stressed its support for the ends of land reform. But unlike the Tribunal, however, it refused to place concrete limits on the means to achieve it (e.g. by prohibiting racial discrimination). It ruled expropriations illegal on purely procedural grounds (Harring and Odendaal 2008, 22). The MLR has, at least formally, accepted this as requiring significant changes to its land reform programme (U.S. Embassy, 13th August 2008; U.S. Embassy, 8th May 2009; VonDoepp 2009, 136; Hoaës, 15th March 2012.).

The Ministry's objective, in principle, has been to create user rights regimes in the resettlement areas. As Boone (2007) describes, however, this political choice requires significant bureaucratic capacity. Rights have not been clarified in practice (see Kapaama 2007, 41). SWAPO has demonstrated neither the willingness nor the capacity to exercise this kind of oversight. Beneficaries have been poorly informed of their legal status, and there has been criticism of corrupt allocation practices for over a decade (e.g. Harring and Odendaal 2002, 100-101). Some more traditionalist Herero politicians hostile to SWAPO, for example, have alleged that Oshiwambo-speaking Namibians - who comprise approximately half the national population, and are often identified as a key SWAPO constituency - have benefited disproportionately in non-Owambo-speaking rural areas. Meanwhile the South West Africa National Union (SWANU) - a former rival liberation movement now restricted to a largely Otjiherero-speaking support-base - has criticised the government for not favouring the 'sons and daughters of the never-to-be-forgotten victims of von Trotha's Extermina-

tion Order' (Gargallo 2010, 161-2, 172). In the face of these attacks, the government has consistently maintained that it rejects the drawing of ethnic divisions between Namibians, and has only the nation's interests at heart.

SWAPO was indeed, initially, sincerely opposed to all assertions of political authority on ethnic grounds. Its early decentralisation initiatives abolished the homelands, and redrew the boundaries according to geographic and economic, rather than ethnic criteria (Gargallo 2010, 157-8). Unsurprisingly, such policies were resisted by those Herero leaders who had benefited from the South African preference for paramount chiefs and headmen at the expense of *ovahona*. At the 1991 Land Conference Herero paramount Kuiama Riruako disparaged the nationalists' anti-colonial credentials, and claimed a leading role for the Herero, 'we fought alone against the forces of German colonialism [...] at home we pursued, alone, the political policy of national unity' . But he came out especially strongly against the new government's intentions to re-organise communal land along non-ethnic lines. Fearing 'tribal hegemonic deployment' of Oshiwambo-speakers, he claimed to be 'aware of the sinful conduct of some members of the Namibian community who continue to rejoice in the genocide of my people and who came [sic] up with skilful plans to take away the remaining land portions of original Hereroland ... a declaration of war against my people (Riruako 1991, 2-5). As Gewald (2003, 298) explains, the genocide now 'became the preserve of Herero elites opposed to the new government'. Whilst it is unclear if Riruako was the first of this group to connect the event with new reparations ideas, he was almost certainly the first do so in such a public forum[29]. He informed the Lands Conference that:

> we, the Herero, are now left with two options as to the land reform and the land question in Namibia. They are as follows: 1. The return of our stolen holy land; 2. The just compensation from the German Government. But, the Herero Royal House and the entire leadership of the Herero people opted in favour of compensation from the German Government in order to promote the spirit of peaceful co-existence between the Herero and Germans in Namibia ... [compensation] will not bring back the lives of those who perished in the genocide, but may to a certain extend [sic] help heal the wounds of the victims of the Herero holocaust, their land and their livestock (Riruako 1991, 7-8).

Riruako thus tacitly endorsed the Conference's eventual resolution that 'given the complexities in redressing ancestral land claims, restitution of such claims in full is impossible', but nevertheless recommended 'immediate recognition of the right to ownership of communal lands by their communal farmers throughout Namibia, including Reheboth' (Riruako 1991, 8; Sarkin 2008, 54).

The 1990s saw a variety of other groups contest the early centralist thrust of SWAPO's new rural order. Some Reheboth Baster politicians, to whom Riruako alluded, had supported the brand of federalism which was proposed by the South-African backed opposition coalition - the Democratic Turnhalle Alliance (DTA) - but rejected by the new constitution. Immediately after independence a former Minister in South Africa's failed Interim Government of National Unity, Captain Johannes Diergaardt, led an unsuccessful bid for a separate state in Reheboth. This led to a year-long occupation of government buildings and failed attempt in 1995 to obtain recognition from the High Court of communal land rights (Suzman 2002, 19-20). In 1994, meanwhile, DTA parliamentarian Mishake Muyongo helped form the Caprivian Liberation Army (CLA) in the far North-East of the country. In 1999 the CLA attacked an army base and police station, and the government responded by declaring a state of emergency (Melber 2009a). In 1998, finally, as the government began to make its first substantial concessions to devolved rural governance, Riruako and 100 other traditional leaders marched on Windhoek demanding recognition (Harring 2002, 413). These vigorous assertions of group autonomy may help explain why Sidney Harring (2002, 409) interpreted the early Herero reparations campaign as similar to Native American land restitution claims; 'an assertion of Herero nationhood' within Namibia.

Over the course of this decade, after pressure from donors combined with that from some rural constituencies, SWAPO gradually compromised on its centralism (Bertout 2003, 126; Gargallo 2010, 157; more generally Friedman 2011, 179-235). The Traditional Authorities Act of 1995 allowed nomination of chiefs according to customary law (albeit after confirmation from Windhoek). This was followed by the National Land Policy of 1998, which permitted chiefs to exclude members of other communities from their lands, and the Communal Land Reform Act in 2002, which gave them limited rights to grant the land itself (Bertout 2003, 125-7; Gargallo 2010, 157-8, 162-3). These changes, unsurprisingly, have increased the political significance of chieftaincy appointments. SWAPO has thus recently sought to re-establish the authority of chiefs on a territorial basis, challenging efforts to build ethnic 'nations' (Sasman 2012, 27th February 2012). Earlier it had designed rules governing nominations of chiefs to the advantage of *Ovahona* marginalized during South African rule. Using justifications conceived by the All-Herero/Mbanderu Traditional Committee, notably, the government decided that membership of a royal house, rather than election as a headman, would henceforth constitute the central condition for recognition (Bertout 2003, 125-6). Traditional authorities, according to this vision, would once again be accorded some legitimacy, but only in ways increasing central control. All these developments provide crucial context to under-

standing the tensions between 'Mbanderu' and 'Ovaherero' leaders that have dogged the Herero reparations claim, and which are described in greater detail below

In response, Riruako and others turned towards the courts. Once again, however, the Court chose to challenge government policy on procedural grounds. In *Kuaima Riruako and 46 others v Minister of Regional and Local Government and Housing, and The President of Namibia* (2001), Riruako (the NUDO President) and a number of Otjiherero-speaking Koakoland chiefs loyal to the DTA (with which NUDO was then affiliated) alleged non-recognition by the SWAPO government for political reasons. The Court ordered reconsideration, but not satisfaction, of these demands (Friedman 2011, 215-7).

(c) 2000-: The global judicialisation of struggles for recognition

As John Friedman (2011, 216) has written, the Namibian High Court case formed part of a 'larger countrywide strategy' by Riruako 'to re-unify the Herero nation under the guidance of his own paramount leadership'. The campaign he has led for reparations has been primarily imagined alongside these demands for recognition, even if it has formally been accompanied by demands for a land compensation (e.g. McNeil Jr., May 31st 1998; Sarkin 2008, 193). Both the size of early claims, and the ways in which they were lodged, testify to their intended publicity functions. In 1995 Riruako and three-hundred other Herero marched on the German embassy and presented the visiting German Chancellor, Helmut Kohl, with a demand for $600 million in reparations. Kohl refused to meet, and Riruako threatened to take the matter to the United Nations (Harring 2002, 394-5). After a similar snub in 1998 from Federal President Roman Herzog - who, like Kohl, had been addressing German-speaking Namibians at the time - the Riruako group escalated its campaign (Melber 2007, 266). Two months later a *New York Times* article alleging Owambo appropriation of German development aid cited veteran nationalist (but then DTA) politician Mburumba Kerina calling for 'a mini-Marshall Plan' for Herero in Namibia (McNeil Jr., May 31st 1998). Then, in April 1999, Riruako approached the ICJ on behalf of the 'Herero nation'. The Court responded, coolly, that 'only states may be parties in contentious cases before the ICJ and hence submit cases to it against other states' (Gewald 2003, 301).

Whilst many have viewed this episode as evidence of political naïvety by Riruako, Jeremy Sarkin, his legal advisor, sees it, plausibly, as proof of savvy (Jeremy Sarkin interview, 12th August 2011). 'I look to be simple, but I'm not that simple as you see', as the Chief would later declare (Morgan 2010, 87). His claim certainly 'ruffled a few feathers' in Namibia and finally got the atten-

tion of German diplomacy (Gewald 2003, 301). The 2001 Riruako and his circle made a move even more dramatic in intent, demanding no less than \$2 billion from the German government and a range of large multi-national corporations. Two legal cases, alleging violations of ATCA, were lodged in the District of Columbia in the name of the 'Herero People's Reparation Corporation' (HPRC) (see Cooper 2007). The suits alleged that the Federal Republic of Germany, with the complicity of three German companies (Deutsche Bank AG, Terex Corporation, and Woermann Lines), was responsible for the 'genocidal destruction of the Herero tribe in Southwest Africa [now Namibia]', and should thus pay reparations to the HPRC (*The Herero People's Reparation Corporation et al. v. Deutsche Bank AG et al.* 2001, Complaint at 21). This internationalisation strategy, even if it is still to produce a final judgement, has fundamentally altered the stakes in domestic struggles for recognition; a phenomenon social-scientists refer to as 'bargaining in the shadow of the law' (see Alter 2014, 56). And it has set the stage for more a decade of debate, both in and outside of foreign courtrooms, over who represents the Herero in Namibia.

4. Human rights are not rules: 'compliance' with new reparations norms
(a) Introduction

The history of the campaign for reparations in Namibia between the early 1990s and 2004 can be understood, with only some minor modifications, within the constructivist 'norm spiral' framework established by Thomas Risse and Kathryn Sikkink (1999; Risse, Ropp and Sikkink 2013). Activism originated within the country and then became effective as external actors joined the social movement to pressure the government: Risse and Sikkink's (1999, 18-21) 'boomerang effect'. The German government initially reacted by denying the applicability of new and universal reparations norms to the Namibian context. *Both* governments, however, subsequently made tactical concessions in order to stave off further criticism. After 2004, the history of the reparations campaign begins to depart from the norm spiral framework. This model predicts that tactical concessions will be seized-upon by activists who then socialise states into compliance, precipitating a 'norm cascade'. States then internalise norms which become part of domestic legal and bureaucratic routines, leading to 'rule-consistent behaviour' (Risse and Ropp 2013, 8-11). New reparations norms, however, lack determinacy and cannot be used to socialise governments into new behaviours. This helps explains why the German government, for example, has not been keen to create reparations precedent and initiate a 'norms cascade'. The material and structural-political consequences of such an action are impossible to anticipate. In the short-term, moreover, reputational concerns provide little incentive to do this, since the opposition would be unlikely to de-mobilise. Durable political solutions remain elusive.

(b) Denying the validity of universal norms and 'tactical concessions'

The Herero People's Reparation Corporation's claim encountered the same jurisprudential difficulties as those faced by the litigation of apartheid in other U.S. courts (Jenkins 2009). Despite some adverse decisions about the timeliness of the action, courts have not generally ruled that groups, in general, are ineligible for reparations from states. Amongst other reasons, the precedent created by German payments to Jewish groups is much too obvious (Sarkin 2008, 139-144). Instead, they have pointed to supposed practical difficulties with documenting the Herero claims, and have endorsed cautious interpretations of relevant technicalities (Sarkin 2008, 151-154). Contrary to the expectation of the plaintiffs' Washington attorney, therefore, judges have not invoked the (increasingly-criticised) 'political question' to disbar the claim (Zeller 2003; Hirschl 2008, 98; Cohn 2011, 678-9).[30]. Furthermore, like the African National Congress (ANC) in South Africa, SWAPO initially strongly opposed the lawsuit. Prime Minister Hage Geingob is reported to have declared in 1998 that 'it was wrong for the Ovaherero to demand reparation for the Ovaherero alone, as they were not the only one, who were affected by the German atrocities and that all Namibians suffered' (National Assembly of the Republic of Namibia 19th September 2006, 10-11). Mocks Shivute, the Permanent Secretary of Foreign Affairs, Information and Broadcasting, made identical arguments, pointing to the fact that Germany remained Namibia's largest bilateral donor (*SouthScan,* 9th September 2000). In 2003, finally, Nahas Angula - future Prime Minister but then Minister of Education and Culture - advanced the well-known 'Pandora's box' argument:

> if you want to return to the past, fine … But we must know about the consequences of that. You will never stop anywhere. You will have to go all the way from the crimes committed from the Berlin Conference up to 21 March 1990 [Namibian independence] (in Zuern 2012, 499).

Like the U.S. courts, SWAPO made 'tactical concessions'. It only denied the validity of the ways in which universal norms were applied, and did not subordinate them to other 'allegedly more valid' norms such as national sovereignty (or the 'political doctrine') (Risse and Sikkink 1999, 24).

Perhaps the most obvious of SWAPO's 'tactical concessions' to reparations norms, however, has been its support for rival organisations commemorating the genocide. Whilst the lawsuits have certainly raised the profile of Riruako's campaign for recognition, their assertion of a unified Herero identity (under his leadership) has not served to build a cohesive nation. They were originally sup-

ported by the opposition DTA, and by important figures within it such as Mburumba Kerina (a former Herero petitioner at the U.N.) (*SouthScan,* 9th September 2000; Yates and Chester 2006, 193). But from 2003-4 the DTA suffered a number of splits, after a decade in which it had 'constantly and dramatically lost voter support', failing to successfully re-articulate its federalist agenda (Boer 2005, 17). Riruako now decided to pull NUDO out of the DTA (eventually winning 4.2% of the vote in the 2004 presidential elections, and three seats in the National Assembly). Fractures within Herero politics were not, however, only visible within federalist parties. Outside SWAPO strongholds party allegiances are famously fluid in Namibia, and events soon illustrated the numerous ways in which national party-political competition intersects with local cleavages (see Bertout 2006, 74; Hopwood 2008).

At one time it appeared as if the centennial commemorations of the genocide in 2004 might overcome divisions in Herero politics; an echo of the 1923 burial of Samuel Maharero, which was instrumental in post-genocide 'reorganisation of the Herero' (Gewald 2007). Preparations for these events had, however, been lengthy and involved elaborate efforts to reconcile a variety of views and interests. Two national planning committees emerged, each with different links to local churches, traditional authorities and cultural organisations (some of which had long helped to organise annual commemorative rituals (*omazemburukiro*). Delicate compromises had to be reached over the content of key events. The Coordinating Committee for the First Commemoration of the Ovaherero Genocide (CCFCOG), most notably, commemorated a genocide committed against the *Herero* people. Whilst the National Preparatory Committee for the Commemoration of 1904 (NPCC04) primarily commemorated *Namibia's* dead in a war of resistance against German colonialism. These differing narratives, unsurprisingly, largely corresponded with differing attitudes towards new reparations ideas and the SWAPO government (Morgan 2010, 38-65).

The precise nature and scope of high-political involvements in these groups is a matter of controversy. Some CCFCOG activists, for example, but not all, trace its origins directly to the aftermath of the 2001 Durban conference and anger amongst Riruako's supporters with Germany's refusal to pay reparations (Morgan 2010, 44-45). It has certainly been instrumental in taking the concept of genocide from the national political arena and (literally) 'vernacularising' it for Otjiherero-speaking society (see generally Merry and Levitt 2009). The word was now translated as 'otjitiro otjindjandja tjOvaherero' or 'the mass death of Hereros'. At the 2004 Okakarara centenary celebrations of the Battle of Ohamakari - the pivotal moment in the year - the Committee produced a dazzling 'proliferation of depictions of victimhood'. Here 'Herero-speaking Namibians reappropriated the image of their suffering'. Plays were produced illustrating the captivity and execution of

Herero prisoners, t-shirts were sold printed with an image of emaciated Herero refugees, and a 'Miss Genocide' beauty pageant was even organised (Förster 2008, 184-193). While 'outsiders were irritated and repelled by this seemingly macabre, tasteless distinction', Larissa Förster (2008, 187, 190) argues that 'the live and vivid bodies of the beauty queens were … embodiments of the recovery of the Herero nation and the restoration of Herero culture'.

The NPCC04 was seen by some in CCFCOG as simply a SWAPO device for co-opting the reparations campaign (Morgan 2010, 46). German-speaking activists involved in the NPCC04's creation, by contrast, described the impetus as coming instead from churches in Germany and their local Lutheran counterparts. On this account, the NPCC04 was originally intended to prevent (famously-conservative) German-speaking Namibians from feeling 'attacked' during the centennial commemorations (Morgan 2010, 52; Kössler and Melber 2013). SWAPO thus became involved for largely contingent reasons. After deciding to try and involve well-known Herero figures in their efforts, a natural point of contact for these church figures was Zephania Kameeta, an Otjiherero-speaker and now bishop of the Evangelical Lutheran Church in the Republic of Namibia (Morgan 2010, 52-3). But Kameeta was also a former member of the SWAPO Central Committee (Dierks 2004a). When they soon learned of existing divisions between Herero groups planning commemorative activities, the churches sided with 'more or less SWAPO people', keen to avoid confrontation with government over this emotive issue (Morgan 2010, 54). Whatever explanation is correct, as German-speakers withdrew from the organisation SWAPO sympathisers and members clearly became pre-dominant in the NPCC04 (see Bertout 2006, 77; more generally Kössler 2008).

It is perhaps unsurprising, therefore, that prominent NPCC04 members were initially just as hostile as German diplomats towards Riruako's efforts. Their own demands were radical in content, but traditional in form. At a March 2004 exhibition launch in Cologne, Kameeta called for a German 'Marshall Plan' to bring lasting material change to Namibia (Kössler 2006, n. 33). A new German willingness to make tactical concessions, however - a result of pressures both in Namibia and at home - soon saw this radicalism downplayed. It also led, temporarily, to something approaching a united front in Herero politics. In late July the German Embassy announced, crucially, that the German Minister for Economic and Technical Co-operation, Heidi Wieczorek-Zeul, would attend the commemorations at Okakarara (Hintze 2004). This was followed by Ambassador Wolfgang Massing attending a debate in Windhoek on the 6th of August. Whilst Massing remained forthright in opposing action outside bilateral channels - 'forget about the court case, it will not help anything' - he nevertheless declared himself open to an alternative devised by University of Namibia law professor Manfred Hinz (Kuteeue, 6th August 2004). This was intended to deal with reparations claims on

the 'political-ethical level', and to prevent German officials from 'hiding behind a crumbling legal façade' (Hinz 2010, 405, 408)[31]. Its rationale was that 'legal obstacles' would 'in all probability' frustrate the legal claim, which was in any case greeted with 'political unease' by some in the 'Ovaherero community' (Hinz 2010, 400, 404). Hinz recommended a 'mediation process' entrusted to 'a bilateral Reconciliation Commission comprising German and Ovaherero/Ovambanderu representatives, established with the blessing and support of the German government' and eventually accommodating other interested parties such as the 'Nama and Damara nations' (groups also affected by the genocide) (Hinz 2010, 408, n. 64). One panellist at the debate, Festus Muinjo, rejected all such negotiated solutions, claiming that 'the Herero issue … will continue ad finitum'. And after Massing endorsed Hinz's plan both CCFCOG and NPCC04 announced, forthrightly, that they would 'join hands' and campaign jointly for reparations (*Deutsche Welle,* 5th August 2004).

It may be, as the constructivist model holds, that the German government's concessions can be understood in terms of ideas 're-constituting' interests (Klotz 1995). Unlike in Britain and France, however, reparations also offered German politicians possibilities for legitimation (see chapter 5). The history of the 1904-07 genocide had potentially partisan implications. In Britain and France neither Left nor Right had anything approaching a moral monopoly over the condemnation of repression in Algeria and Kenya, most notably (e.g. M. Evans 1997; D. Anderson 2005, 326-7). The German centenary of 1904-07, by contrast, allowed the Left to attack the historical role of the Right. In a 2004 Bundestag debate the ruling coalition of Social Democrats (SPD) and Greens (Bündnis 90/Die Grünen) avoided the use of the word genocide and played down the value of reparations - 'we will not be able to undo what has happened … we are aware of the special significance of what happened for the history of Germany' - but still emphasised Namibian national resistance to colonial rule (Kössler 2008, 323; Hinz 2010, 397). At her speech in Okakarara, moreover, Wieczorek-Zeul (a member of the SPD Left sometimes dubbed 'Red Heidi' in the German media) stressed how 'even at that time, back in 1904, there were also Germans who opposed and spoke out against this war of oppression. One of them, and I'm proud of that, was August Babel, the chairman of the same political party of which I'm a member' (G. Jackson 2009, 212; Morgan 2010, 83). (This referred to debates during the notorious 'Hottentot election' of 1907 where the Conservative-liberal block defeated the SPD and Centre Party by justifying repression in Namibia as necessary for the muscular 'world politics' (*Weltpolitick*) of a young nation [van der Heyden 2007].)

By far the most newsworthy aspect of Wieczorek-Zeul's speech, however, was her declaration that 'we Germans accept our historic and moral responsibility and the guilt incurred by Germans at that time … the atrocities committed at that time would have been termed genocide …

everything I have said was an apology from the German government'. She delivered these words with tears in her eyes, and perhaps even without a script (Kössler 2008, 328; Morgan 2010, 248). This had a considerable effect on proceedings. The then Minister of Lands and Resettlement (and now President) Hifikepunye Pohamba implored Namibians to accept Wieczorek-Zeul's apology (Morgan 2010, 86). A 'calmed down' Riruako did not even read the speech he had prepared, simply calling instead for Germans and Hereros to 'finish the unfinished business' (Kuteeue, 16th August 2004a; Morgan 2010, 248). Herero political unity was then underscored by statements from SWAPO-affiliated traditional authorities. Chief Munjuku II, for example, rejected bilateral approaches: 'we do not want a repetition of the chorus of the development aid to Namibia, a bilateral arrangement that Germany is enjoying with other governments worldwide' (Matundu-Tjiparuro, 23rd August 2004; Morgan 2010, 81; for Munjuku II *Africa Confidential*, 7th February 2003; for his opposition to the HCC in the 1960s see Tjosongoro et al., letter of 20th September 1961 [Ruth First Papers]). Although Chief Alfons Kaihepovazandu Maharero, an *ovahona* Herero leader from Eastern Namibia, and one of those most opposed to Riruako's claim to paramountcy, did come out in favour of bilateral methods, even he qualified this by stating that redress should nevertheless be targeted towards particular 'affected communities' (Matundu-Tjiparuro, 23rd August 2004; for Maharero's claims Mutjavikua, June 2008).

(c). 'You can't just litigate these things away': the norm spiral's final stages

Reparations advocates were soon dissatisfied with Germany's response to the events of 2004. Apology was clearly not going to lead to payment. Frustrated expectations radicalised demands, but ushered in new divisions. Commemorations continued throughout the year, but were often only attended by Otjiherero-speakers and the German and international media (e.g. Morgan 2010, 66). At one of these - held at Ozombuzovindimba in early November in order to commemorate the issuing of General von Trotha's infamous 'extermination order' - Riruako condemned Germany's 'no-pay attitude' and SWAPO's 'eleventh-hour pretensions … hypocrisy and double standards'. A declaration was read out vowing to petition the United Nations, the African Union, human rights organisations and international tribunals for reparations, and reserving 'a right as a suffering people to resort to other legitimate means of struggle against German interests anywhere in the world'. Former Attorney General Advocate Vekuii Rukoro, one of the few figures to collaborate with Riruako whilst a SWAPO member, cautioned campaigners against groups like the NPCC04 who facilitated German attempts at divide and rule (for Rukoro see Dierks 2004b). Where once German colonialists had come as saviours but became killers, now 'they are coming in a different form through churches and their message is reconciliation' (Kuteeue, 16th August 2004b). Later that

month a conference was organised in Bremen by a committee that included Manfred Hinz and German development aid officials. It was attended by those whom Riruako and Rukuro attacked, including Heidi Wieczorek-Zeul, Zephania Kameeta and Namibia's Minister of Information and Broadcasting, Nangolo Mbumba. Riruako, who was also present, became incensed at the emphasis placed on 'meaningful dialogue', including the Namibian government. To Wieczorek-Zeul's considerable distress he described the exercise as 'a second-round genocide' (Hälbich, 23rd November 2004).

In order to continue applying pressure on the Namibian government CCFCOG was transformed into a successor body: the Ovaherero Genocide Committee (OGC). In 2005, however, despite organising a march to parliament and protest against Germany's candidacy for the Security Council, the group had clearly lost much of its momentum (Dentlinger, 2nd October 2005; Morgan 2010, 59). The NPCC04, meanwhile, had transformed itself into the Ovaherero/Ovambanderu Council for Dialogue on 1904 Genocide (OCD-1904). This name reflected both its more welcoming attitude towards Germany's concessions and its support from SWAPO-affiliated Ovambanderu traditional authorities in Eastern Namibia (see Kössler 2008, 330). This was perhaps most dramatically illustrated by its choice of chairman: Chief Alfons Kaihepovazandu Maharero, one of Rirauko's strongest critics (e.g. Maharero 2012; Sasman, 24th August 2012). In May 2005 the first fruits of this 'dialogue' were announced: a €20 million German 'special initiative' that would implement development projects in areas inhabited by communities who were victims of 'what today is rightly termed genocide' (Kössler 2008, 329).

Criticisms of the 'special initiative' were voiced immediately, from the OGC and others. Some pointed out that its economic focus and narrow geographical scope meant it could do nothing to alleviate suffering in the diaspora, or to address the specific needs of women and those undergoing trauma (Johanna Kahatjipara, interview, 30th August 2011). Other disputes emerged between the affected communities and the Namibian and German governments, with many branding the initiative as inappropriately top-down and even overly beneficial to consultants and Chinese firms involved in the bidding process (e.g. M. Ngavirue, 11th January 2007; Sasman, 4th September 2012). For Esther Muinjangue, chairperson of the OGC, it was 'another nonsense' (interview, 23rd August 2011). Bilateral solutions, however, clearly threatened the Committee's reparations campaign. New, more collaborative strategies were needed. As Riruako explained to me, 'I found out it's good for me to take this case to the government, it's the time. They benefit from it, and I cannot just keep on doing things independently' (interview, 27th August 2011). Most importantly, he tabled a parlia-

mentary resolution demanding that the government reject the 'special initiative' and campaign for reparations itself:

> Namibians through their legitimate government has [sic] the right to decide ... The one sided special initiative by the self proclaimed ayatollahs who decided to kill us in our country in the first place, now are deciding for themselves what we are worth of [sic]. Let us support the legal position and demand for reparation as I have spearheaded (National Assembly of the Republic of Namibia 2006, 10).

A number of other political actors embraced this opportunity. The most significant of these was SWAPO Secretary-General Ngarikutuke Tjiriange, who surprised many by calling for 'reparation for the 1904-1906 Herero Genocide' (Kössler 2008, 330). Once again, however, these concessions would not fully satisfy Riruako's demands. Tjiriange presented a bilateral reparations campaign as a bulwark against the 'trivial politicization of grief and torment'; an accusation levelled against the OGC and the (rather ephemeral) 'Opuwo Genocide Committee', which he saw as closer to the DTA than Rirauko's NUDO. He concluded that 'although the extermination mentioned only the Herero, all other ethnic groups were not spared and the debate must be nationally centered' (Weidlich, 29th September 2006). Leaders of smaller political parties also embraced Riruako's move and sought inclusion in a reparations campaign that some felt excluded from. DTA President Katuutire Kaura supported the motion enthusiastically. Justus //Garoëb, a Damara traditional leader and President of the small, Damara-dominated United Democratic Front, minimised the importance of ethnic distinctions during the genocide: 'there were only two black groups during the war time, namely the Ovaherero and the Damaras, and the Germans could not differentiate between the two at a distance' (Kangueehi, 5th October 2006). Whilst McHenry Venaani, Deputy Chair of the section of NUDO still affiliated to the DTA, hoped that parliament might oversee bilateral negotiations in a way that would ensure funds would be used not as hand-outs but to promote commercial agriculture; an issue close to his heart (Kangueehi, 19th October 2006; interview, 2nd September 2011). The motion was adopted unanimously.

New alliances were also forged internationally, and again reflected a diverse range of political agendas. The 2005 German federal elections saw the SPD enter a 'Grand Coalition' with the Christian Democratic Union (CDU), preventing a more radical parliamentary grouping entering government (Proksch and Slapin 2006, 551). This re-alignment was triggered by the emergence of *Die Linke* (the Left Party), formed by a merger between a Left SPD faction and the former ruling party of old East Germany. It swiftly positioned itself as the official critic of German colonial amnesia. In

August 2006, at the annual Heroes Day commemorations in Okahandja, Left Party parliamentarian Hüseyin Aydin declared that 'Wieczorek-Zeul's 'brave speech' at Ohamakari had not been followed up by adequate political action'. He described the reparations campaign as essential for educating the German public about the genocide. After the Namibian parliament's resolution Aydin then planned a new Bundestag motion on reparations, believing that the (relatively unproblematic) payment of development funds might now be substituted for cash payments (Kössler 2008, 329). Unsurprisingly, however, even this motion was rejected. The Left Party was accused by SPD politicians of trying to 'instrumentalise' suffering, and by their CDU counterparts of representing 'minority views' as public opinion (*Deutsche Welle,* 15th June 2007). (Some Left Party veterans of East German politics were also uneasy of launching initiatives not supported by SWAPO [Kössler 2008, 330].)

These Bundestag debates obliged SWAPO to articulate its new position. Peter Katjavivi, author of the classic *A History of Resistance in Namibia* (1988)*,* and now Namibian ambassador to Germany, declared that reconciliation should 'firstly be done within us and our society and secondly between Namibia and its partners, in this case, Germany' (Weidlich, 18th June 2007). The Namibian government thus for the first time conceded at least rhetorical space to the claims of groups. It no longer sought to subsume them entirely within the (narrow) anti-colonial resistance narrative it still hoped to impose upon public memory (cf. Melber 2003; Saunders 2007; Zeurn 2012; more generally Werbner 1998). It suggested, however, that the practical complexities involved could only be negotiated by the central state. Speeches by leading politicians now illustrated SWAPO's determination to make the reparations campaign, and its language, its own. In February 2007, for example, Prime Minister Nahas Angula gave a speech to the OCD-1904 in which he declared not his only support for the Special Initiative (restorative campaigns), but for reparations campaigns in general:

those affected by the crime of colonial genocide should define how the restoration programme should be developed … If the Germany Special Initiative is well resourced it will go a long way to bring about restorative justice … Any Namibian who feels wronged has a right to seek justice ... Reparation demands should form part of a global campaign for reparations against those who perpetuated slavery; colonial genocide; other forms of colonial abuses and exploitation against the African people [...] restorative justice and reparation demands are not mutually exclusive. They form a continuum (Office of the Prime Minister, 2007).

To stress the national character of these demands, Angula made pointed reference to his grandfather's death at the battle of Onamutuni. This took place during the Namibian War of 1904, and followed from a request for intervention against the German Army from Samuel Maharero to Ondonga King Nehale lya Mpingana. Nehale was an important ruler in the Oshiwambo-speaking North who recently has had a gate named after him at Etosha National Park - Namibia's primary tourist attraction (for criticism Eino, 25th November 2011). For SWAPO Onamutuni has become a particularly important piece of 'usable past' (Ranger 1976). In 1981 the movement's official history had stated clearly that 'the Germans, preoccupied with their subjugation of the Herero and Nama and deterred by Owambo numbers and military power, left them [the Owambo] alone' (in Melber 2014, 159). Historians and OGC activists, indeed, still insist that Oshiwambo-speakers were comparatively less affected by the War (Wallace 2011, chapter 6; Esther Muinjangue, interview, 23rd August 2011; Miescher 2012, 3)[32]. But in 2010, in a speech in Kuiama's Riruako's political heartland of Aminius, the First President of Namibia Sam Nujoma pointedly stressed the 'strong bonds of cooperation' between Ondonga King Nehale and Samuel Maharero that were demonstrated at Onamutuni (Sam Nujoma Foundation, 18th July 2010). And the Governor of the Bank of Namibia has recently suggested that the battle might be commemorated on a banknote (Shiimi 2012). Confronted with attempts to contest its nationalist narrative, SWAPO has thus, on occasion at least, broadened its canon of anti-colonial resistance heroism; perhaps the reparations campaign's most significant achievement[33].

The contrast between SWAPO's position, and that of OGC, had thus now become a subtle one. In a reflection of new political alliances, reparations campaigners close to Riruako also broadened their historical narrative, placing the Nama alongside the Herero in the ranks of German colonialism's victims[34]. *Contra* SWAPO, Herero and Nama leaders argued that the complexities of history should not distract from their stronger legal and empirical claims to compensation. (Whilst Damara political and cultural leaders had begun to mobilise around the issue in 2005 they have remained outside this developing alliance [Kössler 2008, 331; Erichsen 2008, 11-20].) Esther Muinjangue, chairperson of the OGC, provided me with a rationale for this decision: 'If the Basters also know that they were targeted, let them come out and prove this to the nation ... because half of the Namas died … we have joined forces with them' (Esther Muinjangue, interview, 23rd August 2011). A 2007 'joint position paper from the Nama and Ovaherero people' pointed out, similarly, that 'by 1907 approximately sixty (60%) percent of the Namas and eighty (80%) of the Ovaherero were exterminated by the German Imperial war machinery'. It re-stated the claim that parliament should push for direct redress to affected groups, and not substitute itself for bilateral relations, 'we do not

accept that we have initially raised the issue and now it should be *about us* and yet *without us*' [emphases in original] (Nama and Ovaherero Traditional Leaders, 14th December 2007, 3, 5).

This *rapprochement*, however, did nothing to forge determinate norms that might govern reparations payments. Those Herero leaders most opposed to Riruako's claim to paramountcy continued to contest the legitimacy of his reparations advocacy explicitly. In late 2007, to Riruako's fury, the family of Luther von Trotha - the General who issued the infamous 'Extermination Order' - were invited to Namibia to apologise. The visit was largely organised by Festus Tjikuua, an OCD-1904 member and Secretary of the Council of the Six Herero Royal Houses (CSHRH): a body of *ovahona* leaders then led by Chief Alfons Kaihepovazandu Maharero. At a commemoration in South Africa Riruako declared that 'the person who is doing these things is playing with fire' (Weidlich, 1st October 2007). In parliament one of his allies in NUDO, Arnold Tjihuiko, made an allegation that SWAPO had often levelled at Riruako's own campaign: 'Why do they come here to apologise to only one language group?', Tjihuiko asked, 'what about the Nama, Damara and San, (who also suffered) - are they going to them as well to apologise … the Von Trothas have just come here to pursue their strategy of divide and rule' (Weidlich, 3rd October 2007). The German Embassy, unsurprisingly, endorsed the CSHRH's actions, seeing the visit as 'another step in the right direction with regard to reconciliation' (Weidlich, 1st October 2007).

In late 2008 it was Maharero's turn to express outrage at the actions of his adversary. To the surprise of many observers, SWAPO finally decided to recognise the Riruako-led Ovaherero Traditional Authority (OTA)[35]. (After reaching deadlock in their campaign for recognition in Namibia's courts, OTA chiefs had declared they had 'explored all avenues of Government' and were 'now left with one option only and that is to appeal to the United Nations and international human rights organisations' (Weidlich, 12th March 2008.) Outraged, CSHRH leaders wrote to the SWAPO Secretary-General attacking:

> the preposterous proposition for the recognition of the so-called 46 Ovaherero traditional chiefs under the leadership of Hon. Riruako, which was part of a grand strategy to undermine the political legitimacy of the new Namibian Government through provocations (*New Era*, 11th December 2008).

The Maharero Traditional Authority, for its part, publicly disputed the 'contentment' of Herero leaders with Riruako's 1978 promotion to paramountcy, and attacked the 'near violent effort to derail

the programme that was mounted in October 2007, during the occasion of the reconciliatory visit of the descendants of the German colonial General Lothar Von Trotha' (Mutjavikua, June 2008).

By this time international advocacy, however, had temporarily shifted towards a 'new wave of reparative claims'; focusing around objects of national cultural importance, such as Gandhi's glasses (H. Campbell 2009). In Germany similar claims were stimulated by a July 2008 documentary describing the use of Herero and Nama prisoners' skulls in 'research' by the racialist scientist, and future Nazi Dr. Eugen Fischer. Pioneering academic research into his topic was published and connections between the genocide and National Socialism were publicly debated in Germany (see chapter 7). The most significant of the documentary's findings was that 47 of these skulls were still stored at the Charité hospital in Berlin and at least 12 more at Freiburg University. Peter Katjavivi, in an interview for the programme, demanded the skulls' return (*Mail and Guardian*, 22nd July 2008; Katjavivi 2012). Once again, however, the German embassy in Windhoek re-iterated its commitment to bilateral relations, stating that a formal request from the Namibian would be required. And once again the OGC contested this, demanding direct involvement in the process. Speaking on Heroes Day, Esther Muinjangue stated that,

we demand these skulls back in order to bury them in dignity … these skulls did not belong to Germany when they were sent to Germany a century ago. Whom did they ask for permission then? … We shall continue to demand reparations from Germany even if it should take us another 100 years or more (Weidlich, 25th August 2008).

Divisions in Herero politics were now increasingly stark. At the same Heroes Day event at which Muinjangue spoke, Alfons Kaihepovazandu Maharero called once more for a negotiated solution to the question of the skulls, declaring that he would 'sensitise the Berlin government about our seriousness for a meaningful dialogue' (Weidlich, 25th August 2008). Furthermore, whilst the OGC was eventually bound to negotiate with SWAPO in order to be involved with the skulls' return, differences immediately emerged over the historical narrative which this was intended to re-enforce. Whilst the government wanted the skulls buried at Heroes Acre - a grandiose site dedicated to placing SWAPO at the centre of Namibian 'patriotic history' - Riruako, like SWANU more recently, demanded they be displayed at a 'genocide museum' in the capital (Weidlich, 2nd October 2009; Förster 2013). The site he proposed was one which the government had already earmarked for an Independence Memorial Museum - which, like Heroes Acre, was to be built by a North

Korean construction firm (see Zuern 2012, 497, 517, n. 18). (Reparations campaigners now insist that both Heroes Acre and the Independence Memorial Museum are unsuitable for the skulls of their dead. They are provisionally stored at the National Museum of Namibia whilst their future is decided (Förster 2013).)

Conflicts, however, had also arisen around the logistical arrangements for the skulls' return. Particularly intense debates surrounded the composition and representivity of the delegations bound for Germany. These discussions were reported to be 'near completion' in 2009 but lasted until mid-2011 (see Luqman, 1st October 2009). The Minister of Youth, National Service, Sport and Culture, Kazenambo Kazenambo, was the government's choice to co-ordinate proceedings. Kazenambo was a potentially satisfying choice for more radical reparations advocates since he was known as a 'firebrand', and his family had fled the genocide for Bechuanaland (Nyaunwa 10th February 2012; Melber 2014, 171, n. 11)[36]. (He has also, unusually for a SWAPO politician, apparently criticised the government for favouring Oshimwambo-speakers at the expense of Otjiherero-speakers (see Nunuhe, 2nd November 2011.) In March 2011 he asked Herero and Nama groups to formalise technical committees to plan the skulls' return (see Nunuhe, 25th March 2011). The OGC and Nama Technical Committee (NTC) asked for the 54 places available for delegates to be split three ways: between their two groups and that representing OCD-1904: the Ovaherero-Ovambanderu Technical Committee for the 1904 Genocide (OOTC-1904). To their disappointment, however, the OOTC-1904 - which, in a further twist, had formed its own agreement with more a politically sympathetic Nama body: the Nama Traditional Leadership Association (NTLA) - were allocated half the available places (Nunuhe, 12th April 2011; *Namibian Sun*, 27th July 2011). Government critics such as Pauline Dempers, meanwhile, were removed from the list of delegates (interview, 30th August 2011). Despite attempts at arbitration by Prime Minister Nahas Angula, complaints by the OGC and NTC eventually led the government to postpone the trip indefinitely, with the details only being finalised four months later (Poolman, 16th May 2011; Nunuhe, 16th May 2011).

In Germany the pressure to return the skulls, and linkage of the issue to reparations, came primarily from the Left Party and 'No Amnesty on Genocide': a coalition of German, diasporic and Pan-Africanist NGOs (see chapter 7). In May 2011 German Left Party MP Niema Movassat, and other Left Party politicians, submitted a 'minor interpellation' to the Federal Office which cited both OGC and OCD-1904 statements, and asked, *inter alia*, why the government continued to refuse the label 'genocide' and make no progress on reparations (German Bundestag language service, 15th

June 2011, 2-3). The interpellation, complete with official response, included the following exchange, which cuts to the heart of the key issues in reparations politics:

21. In the event that human remains are identified from countries other than Namibia, will the Federal Government make contact with these countries and offer to return the remains?

In the event that institutions in the Federal Republic of Germany approach the Federal Government in relation to the return of human remains which are not artefacts, the Federal Government will consider the issue of repatriation in consultation with the institutions' governing bodies and, if appropriate, make contact with the relevant country. The appropriate and rightful recipients of the remains will be determined on a case-by-case basis.

22. Is the Federal Government working towards the establishment of an international or European repatriation process for human remains stolen from former colonies? If not, why not? If so, how does the Federal Government intend to organize the process?

No. An international or European process for the return of human remains would require a uniform, or at least an agreed, position on issues relating to repatriation of human remains among the countries concerned. No such position exists, even within Europe, partly due to the countries' different approach to their colonial history, varying ethical positions and diverse legal systems (German Bundestag language service, 15th June 2011, 11).

In the restitution of cultural property, therefore, as with the compensation of atrocity, accepting the judicialisation of the colonial past threatens to open 'Pandora's box'. In both cases, moreover, it is difficult to imagine how determinate norms could produce 'rules' to govern the process. It might be possible, of course, as some have demanded, to return all objects in European museums originating from colonial territories to the national museums of states now governing those spaces (but for critique see Cuno 2001; J. Stuart 2004). Once again, however, as with legitimate recipients of reparations, this depends on either national museums or nationally-designated institutions being accepted as representative sites. The OGC contested such decisions over the skulls, and have of course challenged bilateral payments of reparations in even stronger terms (Weidlich, 2nd October 2009)[37].

The German government has sought to avoid all such situations with diplomatic language. Its apologies for the genocide have been carefully drafted to avoid triggering legal consequences.

One activist believes that the formula 'human remains which are not artefacts' was created by government lawyers to relegate skulls to the category of (natural) 'objects', and thus prevent the creation of a legal precedent for (manufactured) 'artefacts'; a strategy intended to guarantee at least the short-term future of objects like the Rosetta Stone in the British Museum and the Queen Nefertiti bust in the Ägyptisches Museum, Berlin (anonymous interview, 1st September 2011)[38]. As critics have pointed out, however, such strategies have been public relations disasters for the German government. And this situation might well have been mitigated by more sincere engagement with ritual and symbolic initiatives. Melber and Kossler (2012), for example, have pointed to Willy Brandt's apparently spontaneous kneeling before the Warsaw War Memorial as a meaningful German historical precedent for such an action. David Anderson (2005, 336), meanwhile, has recommended the creation of a Kenyan 'Heroes' Acre' to overcome similar memory conflicts produced by the Mau-Mau reparations campaign. However, the expansion of new international legal regimes ensures that symbolic initiatives can only ever complement, and never definitively replace legal claims. As Esther Muinjangue stressed to me, although some in Germany hope reparations can be dispensed with politically by a 'final stroke', this is 'wishful thinking' (interview, August 23rd 2011). In the words of Chief Riruako's legal advisor, reparations 'cannot simply be legislated away' (Jeremy Sarkin, interview, 12th August 2011).

As was so often the case over the previous decade, indeed, politics went some way towards blunting the symbolic impact of the skulls' return. The Federal Government sent no representative to meet the delegation that eventually travelled to the Charité University Hospital in September 2011. It also sent no high-ranking officials to a 'memorial and reconciliation service' conducted by Zephania Kameeta, or to a panel debate co-organised by the NGO coalition and attended by the SPD, the Greens and the Left Party (Hintze, 3rd October 2011; German Bundestag language service, 1st December 2011, 8-9). The Minister of State for the Foreign Office, Cornelia Piper, gave a speech at the handover ceremony, but did not apologise for the genocide and left soon afterwards by the back door (Hintze, 3rd October 2011). (The Federal government subsequently explained her actions by means of the 'incensed atmosphere and the general confrontational attitude of some participants' (German Bundestag language service, 1st December 2011, 9).) Whilst agreeing a N$660 (approximately) £48 million development finance agreement for land reform and infrastructure, the German Ambassador then accused the delegation of having a 'hidden agenda'; a thinly-veiled reference to reparations (Namibian Press Association, 17th November 2011). Minister of State Werner Hoyer, meanwhile, accused 'organizations in Germany' of presenting themselves as 'joint hosts' and of having 'openly incited' the delegation demanding reparations. When asked why the government had refused 'dialogue' at the NGO panel debate, Hoyer defended the principles behind bilateral rela-

tions: 'international negotiations and discussions on such complex issues simply do not work like that. Governments do not join independently initiated events to negotiate with foreign partners' (German Bundestag language service, 30th November 2011, 1-2).

Almost all of those associated with the delegation criticised the German government. Even the OCD-1904 spoke scathingly of the 'intransigence of the German Government to acknowledge the Genocide committed against the Namibian people and to meet our demand for appropriate restorative justice', and its apparently newfound opposition to 'Structured Dialogue between the affected communities and the German Government under the facilitation of the Namibian Government' (OCD-1904, 24th November 2011). A spokesman for the NTC went even further and attacked the German-Namibian development finance agreement reached after the skulls' return. The statement explicitly connected these demands with those for changes to the rural order. Quoting President Pohamba as having said that 'communities had no more say over their land', it prescribed an end to bilateral relations:

grants from Germany are not expended for the stated purposes, we feel that the bilateral relations carry no integrity and are in bad faith … it was a significant section of the German People who organised a fraternal connection between the two nations and who took the German State to task for its actions and policies. If the bilateral policy met its deserved fate it was largely due to the determination of Germans themselves (NTC, 28th November 2011).

Criticisms of the German government continued into 2012. In March the 'civil society alliance' declared that it had forced the Federal administration to adopt a more 'conciliatary approach' (AfricAvenir International et al., 7th March 2012). In February Ambassador Walter Lindner, Special Advisor on African Affairs in the Foreign Ministry, apologised for any insensitivity shown during the skulls' handover, and met with a range of Namibian groups including the OGC (Poolman, 2nd February 2012; Nicolai Röschert, personal communication, 29th July 2014). The Left Party and its allied NGOs now sought to navigate a new path between bilateral relations and development aid on one hand, and reparations and post-national diplomacy on the other. This 'restorative justice' approach prescribed the creation of a reparations fund co-managed by parliament, government and 'affected groups' (Sasman, 2nd March 2012). In the Bundestag Niema Mosavvat stated that this would redress 'structural inequalities' suffered by 'the Herero, Nama, Damara and San people', whilst helping to end the 'disgrace that streets in our towns and cities are still named after perpetrators of colonial crimes [a campaign pursued by coalition NGOs including Berlin Postkolonial]. (Applause from The LEFT PARTY, the SPD and ALLIANCE 90/THE GREENS)' (German Bundestag

language service, 1st March 2012; 22nd March 2012; Nicolai Röschert, personal communication, 29th July 2014). An accompanying motion, endorsed by the NGO coalition, asked the government to help not hinder Namibian unity on the issue, prompting it to 'enter into a dialogue with the Namibian Government and with the committees representing the descendants of the victims and to come to agreements on suitable financial and structural acts of compensation' (AfricaVenir International et al., 7th March 2012). These pressures the obliged the SPD and Greens to introduce their own, very similar motions, only marginally downplaying reparations components (Sasman, 26th March 2012).

As many commentators have bemoaned, however, the internal settlement upon which this 'restorative justice' approach is premised upon has yet to materialise (e.g. Kaure, 24th August 2012; Sasman, 28th August 2012; Kazondovi, 6th September 2012). Whilst the government and those associated with the OGC have continued to see tactical advantages in limited collaboration, relations between traditional leaders and politicians affiliated with different committees are yet to improve. The 2011 Red Flag Heroes' Day commemorations - parts of which I attended - were the first to be accompanied by a police presence. Disputes had emerged over the correct location of the Holy Fire: a site for rituals invoking the healing power of the ancestors, and a key symbolic resource in the construction of authentic 'Herero' tradition (see Wallace 2003). Supporters of Chief Maharero were told to extinguish a fire they had set-up. They then turned to DTA President Katuutire Kaura for intercession, who re-iterated claims that Riruako's paramountcy was illegitimate (Kazondovi, 29th August 2011). The next May, a month after Alfons Maherero's death, those responsible for appointing his successor were already calling on President Pohamba to intercede on their behalf if similar disputes resurfaced (Namibian Press Association, 14th May 2012). Such disputes did resurface, and commemorations were even suspended for a week (Sasman, 3rd September 2012). All of these difficulties were compounded by significant challenges to Riruako's authority from within NUDO, and even the Ovaherero Traditional Authority structures in his political heartland of Aminius (Sasman, 29th March 2012; Sasman, 16th May 2012).

5. Conclusion

The reparations campaign, in short, had not succeeded in unifying a Herero nation under Riruako's paramountcy. One notably critical observer has recently criticised the claims to 'biological authenticity' it has reinforced, and the 'sort of logic that allowed the paramount Herero leadership to claim the sole and authentic status of victimhood in relation to the Genocide' (Melber 2014, 161). Internal divisions, nevertheless, now seem enduring - even if 'discourse on the genocide' once promised to 'paper over' them (Gewald 2003, 303). Like those between SWAPO and its opponents,

these divisions cannot be overcome by legal principle or socialisation processes. The preconditions for this, as with the Botswanan disputes outlined in the next chapter, are good faith negotiations leading to political settlement. As Förster (2013) has written recently, 'the Namibian government will have to include and balance different ethnic, political and community identities and interests, but at the same time counteract exclusionism and claims to sole representation'. The German Special Initiative was, of course, criticised as a failed attempt to do just this.

Future proposals must therefore be imaginative ones. Phanuel Kapaama, for instance, an OCD-1904 member and political scientist at the University of Namibia, has proposed that reparations fund be paid into an international trust, preventing their instrumentalisation by German and Namibian interests (interview, August 30th 2011). Others have proposed a dedicated national NGO also including San and Damara groups (Förster 2013). There is as yet no sign, however, that even such a trust or NGO would be considered representative by enough parties to the dispute. Radicalised by recent setbacks and German government statements, reparations campaigners, certainly, remain undeterred. They will continue to challenge the principles governing bilateral relations and political order in rural Namibia. Their efforts represent a new stage in the judicialisation of Namibian politics and national identity, and have seemingly spurred other groups to launch similar initiatives. Even German-speaking conservatives now plan to sue the government, which is intending to replace an (infamous) monument celebrating German victory in the Namibian War with a statue of First President Nujoma (Haidula, 24th March 2014; for background Zuern 2012, 506-7; 514). Courts cannot possibly produce rules or norms to govern or even pacify such disputes. *A luta continua.*

Chapter 4: Who is indigenous to Botswana?

1. Introduction

Unlike Namibian demands for reparations, *Sesana v The Attorney General* (2006) was decided in Botswana itself. The case was the longest and most expensive in the country's history. It was also perhaps the most controversial. Survival International, a British indigenous rights NGO, used the case to condemn the human rights record of the government of Botswana; hitherto seen internationally as a beacon of liberal democracy in Africa. The dispute centered around the relocation of 'indigenous' San populations from the Central Kalahari Game Reserve (CKGR); a policy pursued as part of an ill-informed *mission civilisatrice* pursued by both colonial and post-colonial administrations. What was new was the use of courtrooms to challenge such policies. In subsequent chapters I explain the new indigenous rights beliefs which made this possible. Here I describe how 'indigenous' issues have moved from bureaucratic to judicial arenas. In Hirschl's (2008, 99) terms this represents a 'mega-political ... judicialisation of formative collective identity'. It publicly exposed challenges to elite self-understandings and national myths in Botswana. Thanks, partly, to 'gatekeeping' by lawyers, however, the case does not *yet* represent a judicialisation of fundamental political order (for gatekeeping see Bob 2009, 6-7). Compliance with court rulings is still conceivable. This presents revealing contrasts with the previous chapters, revisited in my conclusion.

2. Terms

The San of Southern Africa are among the most intensely studied peoples in world history. Debate over nomenclature is ferocious. 'Bushmen', commonly used in and outside the West, and 'Basarwa', commonly used in Botswana, are often considered pejorative. As Barnard (2007, 5-6) writes, even 'San', which I use, is often rejected as 'an imposed, 'politically correct' term not in use by any group of Bushmen]...] there are objectors to nearly every generic term in use'. All such generic terms, furthermore, conceal tremendous cultural, linguistic and social variation. As Saugestad (2001, 108-9) notes, indeed, 'the primary reference group for self-identification is usually a local group and/or speech community'. But ultimately, as she goes onto say, 'to ask whether one should use an inclusive category such as Basarwa, Bushmen or N/oakwe, or specific terms like Naro, Ju/'hoan, G/wi, G//ana, !Xóo, Kua, etc., is to ask the wrong question; they are simply different levels of precision'. Whilst I will be discussing events which have only directly concerned a few hundred G/wi and G//ana San - mostly living around Mothomelo and

Metsiamanong (see figure 2) - I generally use generic terms; a reflection of the imprecise political discourse I am analysing (for CKGR residency Zips-Mairitsch 2013, 309).
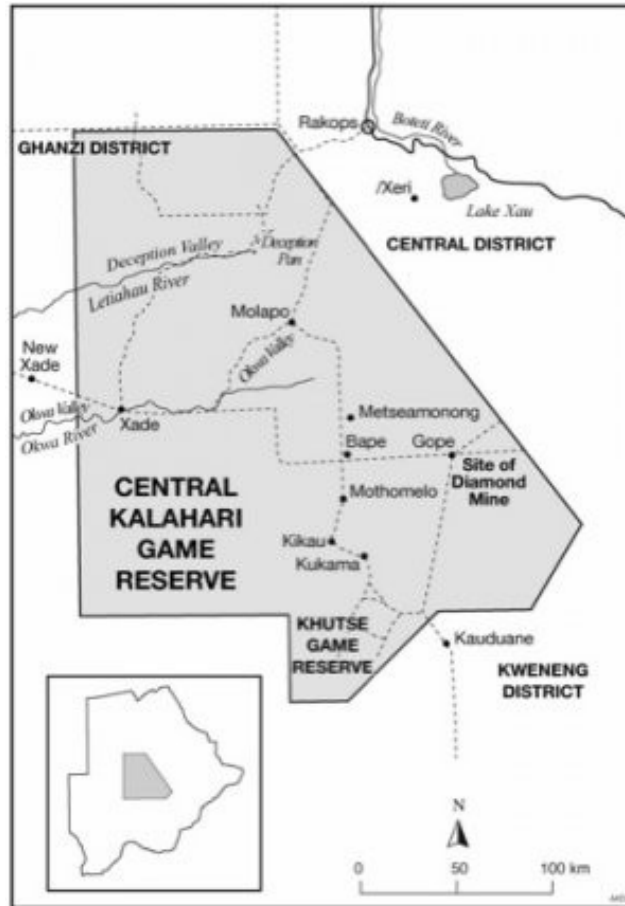
Figure 2: The CKGR today, with the diamond mine at Gope (still under development as of April 2014). Source: Workman (2009).

3. The pre-independence context
(a) Incorporation into Tswanadom

San populations have seemingly been present in the Kalahari as early as 500 AD (Denbow and Wilmsen 1986). The nature and scope of their interactions with other groups, however, has long been a matter of debate. Scholars disagree, notably, over whether nineteenth-century travellers' accounts show these groups to have been so enmeshed in war, trade and diplomacy that they should be considered to have lost their 'autonomy' (cf. Gordon 1984; Solway and Lee 1990; Barnard 2007, chapter 8; for commentary see chapter 8). Whatever the scale of these pre-existing links, however, it seems safe to say that political incorporation had begun to reach new levels by the second quarter of the nineteenth-century. This period saw the expansion and consolidation of highly stratified Tswana

kingdoms, left almost untouched by the British establishment of the Bechuanaland Protectorate in 1885 (Englebert 2000, 112-4). In this new order, the nation *(morafe)* was comprised of loyal subject peoples and the Tswana nuclear group. For the rest, as Datta and Murray (1989, 63) summarise, 'whether one became a client or a serf depended on proximity to the Tswana elite in terms of culture, economy and geography'. In this hierarchy the San peoples of the Kalahari were most distant of all. Today their position is reflected in the Setswana term 'tengnyanateng', which translates literally as 'those-who-are-deep-inside-deep' (Mogwe 1992, 3). By 1890, under Khama III, cattle-herding and living in villages had become the primary markers of social and economic status. 'Bushmen', as Wilmsen (2002, 829) writes, were 'increasingly consigned to a peripheral, wild, uncontrolled nature in Tswana ideology'.

(b) Colonial assimilation

Almost from its very beginnings, humanitarians and missionaries including David Livingstone had denounced these arrangements as equivalent to 'slavery' and called for their abolition (Silberbauer and Kuper 1966, 171-2; Solway 2009, 337, n.17). The first official British policy, by contrast, was 'to allow for the civilizing influences of magistrates and missionaries to bring about a gradual change' (in Russell 1976, 181). In 1925 the High Commissioner could still publicly declare that the San were not 'slaves' but 'a backward people who serve the Bamangwato [one of the principal Tswana tribes] for the food and shelter they receive [...] they are for the most part contented and they do not wish to change' (Silberbauer and Kuper 1966, 172). The next decade, however, saw a 'burst of agitation' around the issue, culminating in a 1932 Commission of Enquiry into the 'present subject position' of the San amongst the Bamangwato, led by E.S.B. Tagart, and an Affirmation of the Abolition of Slavery Proclamation in 1936 (Russell 1976, 178, n.3, 181). Tagart's proposals were a gradualist variant on the assimilationist programme which guided liberal states' attitudes towards their 'indigenous' minorities before 1950 (Saugestad 1993, 13, 19; compare Mill [1861] 1991, chapter 16). He suggested, imperiously, that whilst the San had 'so far shown little aptitude for civilization', the difference 'between them and the Bamangwato' was in fact 'a difference in degree not in kind as the Bamangwato would have us believe' (in Russell 1976, 182).

(c) Colonial modernist integration and the creation of the CKGR

In chapter 6 I describe the triumph of modernist beliefs in Western public administration after 1945. Economistic modes of reasoning displaced the civilisational ones implicit in assimilationist thought. Welfare and 'development' were to be delivered to an undifferentiated

'people' on an equal basis. Liberal states began seeking to *integrate* their 'indigenous' populations; a process which rights-based critics later described as 'welfare colonialism' (cf. Paine 1977; for Norway and New Zealand, Saugested 1993, 13, 19). As the Resident Commissioner of Bechuanaland Forbes-Mackenzie declared in 1954, 'unless the Bushmen were given the opportunity of developing side by side with the rest of the indigenous inhabitants they could hardly be expected to survive for any length of time' (in Wilmsen 2002, 830).

In chapter 6 I also describe how anthropologists were almost alone in opposing these shifts. Even they, however, were obliged to legitimate this opposition in terms of prevailing modernist orthodoxies (for legitimation see chapter 5). This was no less true for anthropologists working in the Bechuanaland Protectorate (e.g. R. Hitchcock 2002, 804). In this case they could count, however, on the unusual degree of British political support generated by the extraordinary success of the films and writings of Sir Laurens van der Post. As early as the 1930s this Jungian mystic had become 'disillusioned with modernists as being out of touch 'with life and their own nature'' (in Wilmsen 1995, 205). Later, in 1956, and against a background of almost total public and professional ignorance of the topic, he produced a six-part series for BBC television on the Lost World of the Kalahari (cf. Wilmsen 1995, 203). Its viewing figures were then second only to the coronation of Elizabeth II three years earlier (Barnard 2007, 59). Van der Post used this film to lobby, in public and in private, for a 'Bushman' Reserve'. A week before its final episode Lord Ogmore asked Parliament about 'what arrangements were being made for the proper protection of the Bushmen in the Kalahari Desert' (in Wilmsen 1995, 218). And two years later the Parliamentary Under-Secretary of State for Colonial Relations recorded that:

> as a consequence of the great Parliamentary interest shown in the Bushmen of Bechuanaland, which in turn was roused by Colonel van der Post's television programme called 'The Lost World of the Kalahari', the High Commissioner proposed that a survey of the Bushmen in Bechuanaland should be carried out with the assistance of CD & W [Colonial Development and Welfare Act 1940] money (in Wilmsen 1995, 219).

The man who eventually carried out this Survey was young District Commissioner George Silberbauer; later a prominent anthropologist of the Kalahari and, dramatically, a key witness in *Sesana*. Silberbauer recommended the creation of a Reserve because he hoped to create a 'retreat for hunters and gatherers' (Zips-Mairitsch 2013, 293). As he wrote in his final *Bushmen Survey Report* (1965), the reserve was not intended 'to preserve the Bushmen of the Reserve as museum curiosities and pristine primitives, but to allow them the right of choice of the life they wish to

follow' (in Sapignoli 2009, 256). But as he later explained on the witness stand, modernist orthodoxies meant this could not be made explicit for 'diplomatic reasons' (Sapignoli 2009, 264). 'Already at that time', as Zips-Mairitsch (2013, 295-6) notes, 'some administrators criticised Silberbauer for creating a 'human zoo''. He had therefore stressed the 'danger of extinction' and corresponding need for San involvement in development projects (Sapignoli 2009, 264). Further legitimation requirements were imposed by the geopolitical context: 'although it is said that Silberbauer had South African Bantustan policy in mind, it would have been quite inappropriate for the British authorities to be instituting a kind of apartheid, particularly in the year in which South Africa left the Commonwealth and became a republic' (Barnard 2007, 60). The upshot of this was the creation, in 1961, of the Central Kalahari *Game* Reserve [emphasis added]. Hunting was, *de jure*, illegal. And in 1963 Silberbauer produced a Control of Entry Regulation stipulating that 'no person other than a Bushman indigenous to the Central Kalahari Game Reserve shall enter the said Reserve without having first obtained a permit in writing from the District Commissioner, Ghanzi' (Zips-Mairitsch (2013, 294, 297). As we shall see, this context was crucial when the case later came to court.

4. Judicialisation
(a) 1966-1989: San development in bureaucratic arenas: modernist 'integration' in Botswana

At independence Botswana retained much of the personnel of its colonial predecessor, whilst deepening its modernist orientation (Charlton 1991, 274-5). Its subsequent developmental record is famous, and has attracted interest from some of the world's best-known economists (Acemoglu, Johnson and Robinson 2003). Some political scientists have explained it by the (in African terms) unusual continuity between pre- and post-independence elites (e.g. Englebert 2000, 112-4). As Nugent (2010, 41) remarks, however, this does not explain how states based on personal ties become bureaucratic ones. Here Botswana specialists have provided useful insights. Roberts (1985, 76), for example, notes how modernist bureaucracy could easily be justified with the prevailing beliefs and idioms and Tswanadom. In the 'Tswana polity', he writes, government was seen 'quite explicitly as a managerial task, likening the governing of men to the management of cattle'. (This, of course, echoes Foucault's (2007, chapters 8-10) account of how modern states drew on Christian and Renaissance discourses of pastorship and household management.) Charlton (1991, 277) has characterised the resulting assemblage with the 'deliberately clumsy' concept of 'developmental paternalism'. Ever since the pre-independence years ruling elites have enjoyed close personal and ideological ties with modernist bureaucrats (Charlton (1991, 271-6). But these have co-existed alongside a separate set of patronage ties, assimilationist beliefs and civilizational modes of reasoning (for

cattle-based patronage generally see Kuper 1982; and for contemporary Botswana specifically see Pitcher, Moran and Johnston 2009, 146-8). As shown below, however, this assemblage has in fact proved an unstable one.

No policy area has illustrated the tensions inherent in developmental paternalism more vividly than the Remote Area Development Programme (RADP): the primary means for state intervention in San societies. Its first incarnation dates from 1974. At this time Botswana was still, famously, among the world's poorest states. For pragmatic reasons, accordingly, despite its modernist orientation, the state had entrusted San 'integration' to a (rather bizarre) variety of Western private initiatives (see Saugestad 2001, 115-6). (A well-known dispute between two of them - one co-ordinated by H.J. 'Doc' Heinz, and another by left-wing anthropologist Liz Wily - seemed to centre around 'whether the !Xoõ might be better regarded as communists or capitalists' (Barnard 2007, 71). This was characteristic of the ideological pluralism which preceded the triumph of indigenous rights ideas in the later 1970s, described in chapter 6.) In 1972, however, the official responsible for 'Bushmen Affairs' began noting the coordination difficulties these initiatives created. The government, he advised, 'must start a settlement scheme herself' and 'keep a very close watch' on 'outside people' (in Saugestad 2001, 117; see also Ministry of Local Government and Lands 1978, 66). The RADP was thus created, officially, 'to foster the self-reliance and development of Bushmen citizens, and to facilitate thereby their great(er) integration with the wider society of Botswana'. It was entrusted to Liz Wily, the first Bushmen Development Officer (in Saugestad 2001, 114).

The RADP's name from 1974 to 1978 - the Bushmen Development Programme - testifies to its distinctive character under Wily's leadership. Like Silberbauer before her, she was obliged to legitimate the programme in terms of the modernist and anti-apartheid beliefs dominating government (see, for example, Ministry of Local Government and Lands 1978, 92; 1982, 10, 16). Privately, however, she hoped to 'challenge the prevailing conception of how Basarwa/RADs [Remote Area Dwellers] should be 'developed'', and to design interventions catering to the distinctive culture of the 'Bushmen' (Wily 1994, 15-16 in Saugestad 2001, 121). Her second priority was to secure maximum 'access to resources (land and water)' via the user rights allocated by tribal land boards (Ministry of Local Government and Lands 1978, 122; Saugestad 2001, 120-121). At the time, as she later noted, it would have been simply 'unthinkable' to pursue these objectives as part of an 'explicit land rights programme', similar to those which later animated *Sesana* (Wily 1994, 15-16, in Saugestad 2001, 121). In the event, however, political pressures proved too intense. Wily thought an 'emphasis on making the San like the settled (and more civilised) agricultural Tswana' was 'seeming to reassert itself' (Wily 1979, 208 in Saugestad 2001, 122). In 1977 she resigned, arguing for the

programme to be overhauled lest it be abolished (Saugestad 2001, 123). Government-employed an-thropologists who argued against 'villagisation', such as Robert Hitchcock, became dissident voices (Ministry of Local Government and Lands 1981, 156).

The Government of Botswana (GOB) replaced 'Bushmen' with 'Remote Area Dwellers' (RADs) in the new programme title. This signalled its intention to deliver development on an equal basis. (Norway, in its modernist phase, had, likewise, referred to Sami minorities as 'Inhabitants of Inner Finmark' [Mathieson 1978].) It took control of partially incorporated private initiatives, and began displaying a 'painstaking, almost compulsive concern about appearing to single out, favour or disfavour one or another of the country's ethnic groups' (Ministry of Local Government and Lands 1979, 129; Ministry of Local Government and Lands 1981, 11-13; Guenther 1986, 300 in Saugestad 2001, 125; see also Werbner 2002, 737). RADs were defined as those living:

> outside the traditional village structure in a geographic or socio-economic sense … in small (5-100) communities without leaders, without livestock, far from basic services … without cash income and generally in dependent relationships […] up to three-quarters of the total numbers of RADs rely, until this day, on hunting and gathering activity (Ministry of Local Government and Lands 1978, 4; see also Kann, Hitchcock and Mbere 1990, 14).

This desire to target San for development without calling them by name reflected difficulties posed by the legitimation requirements integral to 'developmental paternalism' (for 'dilemmas' see chapter 5). Various statements by RADP staff have made its paternalist dimensions obvious. Some have even complained that San cannot be 'domesticated' for a 'civilized life in the villages' because 'they remain living among wild animals' (Gulbrandsen 1991, 130-131, in Saugestad 2001, 103; for interviews from 1978-1982 see R. Hitchcock 2002, 805). In 'public debate', however, 'the concept of 'domestication' has been replaced with the more politically correct 'integration'' (Saugestad 2001, 103). The Ministry of Local Government and Lands has thus addressed the RADP in ul-tra-modernist terms, telling staff to 'go into the remote areas, scout around for the Remote Area Dwellers, settle, develop and finally integrate them into the entire population of the country' (Min-istry of Local Government and Lands 1979, unpaginated). And it has informed the Programme that 'time is past when man can any longer rely on prayer or nature to unfold itself'. RADS should be taught 'to bury their ethnic differences and animosity' and (perhaps most astonishingly) 'to look at their life objectively' (Ministry of Local Government and Lands 1981, 3, 8). The parallels here with colonial reforming efforts have not gone unnoticed. As early as 1976 Margo Russell criticised an emerging tendency for GOB officials to deploy the same rhetoric about San 'slavery' and 'feudal-

ism' once used by colonial reformers (Russell 1976; for examples Ministry of Local Government and Lands 1981, 9; R. Hitchcock 1999, 107). More recently Keitseope Nthomang (2004, 421) has attacked the RADP for 'colonial forms of development practice that privilege the world view, interests and needs of the Tswana-dominated government rather than those of the Basarwa'[39].

In the years around 1980 bureaucratic and governmental pressures for relocation from the CKGR combined with calls from conservationists. Most notably the famous lion and hyena researchers Mark and Delia Owens, authors of *Cry of the Kalahari* (1984), identified San hunting as a cause of declining wildlife populations (R. Hitchcock 1999, 106-7; 2002, 805; Zips-Mairitsch 2013, 300*;* for environmentalism's importance at this time Conklin and Graham 1995, 697-8)[40]. In 1984 the newly-founded Kalahari Conservation Society also proposed relocation, provoking heated media debates (Zips-Mairitsch 2013, 300). These demands had been catalysed by the (bureaucratically-controversial) creation of Special Game Licenses (SGL) in 1979, allowing subsistence hunters to kill certain amounts of certain kinds of wildlife (R. Hitchcock 2002, 805). In practice, these licenses were only granted when San used 'traditional' methods (such as poisoned arrows) and not hunting aids (such as horses or vehicles) (Zips-Mairitsch 2013, 298; for critique of such requirements Ulbricht 2015, chapter 6).

The government was confronted with considerable San reluctance, and the creation of SGLs exemplified its slowness to implement villagisation (R. Hitchcock 2002, 805; Zips-Mairitsch 2013, 305). In 1982 it even built a school and health centre inside the Reserve at !Xade, the largest settlement. This followed migration to the area provoked by the availability of year-round clean water, leading, in turn, to the cultivation of crops and the acquisition of livestock (Saugestad 2005, 2). In 1986 a GOB White Paper used these apparent sedenterising trends, combined with conservationist concerns, to justify relocations (ignoring its own fact-finding mission which had identified this as the 'least preferable' option) (Zips-Mairitsch 2013, 302-3). Survival International formally protested against this decision, asking supporters to write to President Masire. This angered senior civil servants, who associated assertions of San autonomy with the regional 'destabalisation' policies of apartheid South Africa (R. Hitchcock 2002, 806; for reinforced 'Bushman' identities during apartheid J. Taylor 2009). Ministers, however, failed to persuade the CKGR's inhabitants to leave (R. Hitchcock 2002, 806). Only a 1989 relocation plan finally 'confirmed … [their] ambitions' (Zips-Mairitsch 2013, 305). By this time, however, geopolitical trends accompanying the end of the Cold War had opened new political space for the indigenous rights ideas which had emerge in the 1970s (see chapter 9). Survival International, for the first time, issued an Urgent Action Bulletin opposing forced relocations (for analysis Resnick 2009, 62). The contest over San development had

begun to shift from bureaucratic to globalised judicial arenas.

(b) 1989-1996: Indigenous rights and new judicialisation strategies in Botswana

Norwegian aid to Botswana exemplifies similar shifts. In 1988 the country was the largest recipient of Norwegian aid in per capita terms (Saugestad 2001, 141). Following GOB funding difficulties the Norwegian Agency for Development Cooperation (NORAD) agreed to fund an *Accelerated* Remote Area Development Programme (ARADP) [emphasis added] (Kann, Hitchcock and Mbere 1990, 5). This terminology, however, reflected differences in opinion. NORAD's name for the programme - *BOT 022: Minoritetsgrupper i utkanstrøk* (minority groups in remote areas) - included a reference to ethnicity that was anathema to the GOB (Saugestad 2001, 139). By this time Norway had rejected its earlier modernist commitments to strict equality of treatment, following, especially, the 1981 Alta-Kautokeino conflict over Sami rights (see Minde 1984; chapter 6). Thanks to the geopolitical stasis of the Cold War, however, these new beliefs could only be promoted in a 'very cautious' manner, showing 'deference for Botswana's non-racial policy' - even if this meant 'swallowing some camels' along the way, as one programme officer put it (Saugestad 2001, 146-7). The definition of RADS in the ARADP agreement illustrated how NORAD sought to combine its own view with the GOB's: 'RADS are under this Agreement understood to be people living permanently outside established villages. They will mainly be descendants of ethnic minority groups living under poor conditions in remote rural areas' (in Saugestad 2001, 138). Relocations to settlements were the most overtly divisive issue. Whilst NORAD conceded that these would 'facilitate the establishment of social services in centralised locations', they would only agree to them if 'people have been properly consulted and agreed to be resettled' (Kann, Hitchcock and Mbere 1990, 56).

The very first efforts to exploit geopolitical new freedoms did not, in fact, refer to indigenous rights. These critics sought to promote rights by encouraging culture change. Like some of the rights theorists discussed in the next chapter they discounted rights' specifically legal qualities. *Let Them Talk* (Kann, Hitchcock and Mbere 1990, 101), for instance - a report on the RADP submitted to NORAD and the Ministry of Local Government and Lands - concluded that:

> it is a challenging and difficult task to change the lifestyle and attitude of a large number of people from dependency and passivity to creativity and productivity. And, above all, it is a long term process. There are obstructing attitudes among almost everyone involved in the RADP, among the RADs themselves as well as among government officers and the general

public. The lead in changing these attitudes has to be taken by those in high enough position to do so.

The Botswana Council of Churches (BCC's), meanwhile - which in 1981 had 'fully support[ed] the Government's philosophy' that 'RADs' be 'integrated in the Botswana societies [sic]' - now started to focus on 'conscientizing the nation about human rights […] on issues afflicting the Basarwa' (Ministry of Local Government and Lands 1981, 205; Botswana Christian Council, February 1993).

Litigation, however, was soon identified as the best means of achieving conscientisation. This shift accompanied the gradual emergence of progressive jurisprudence in the country, and was greatly facilitated by the new international promotion of, and funding for, indigenous rights causes. The institutionalisation of indigenous rights also enabled activists to apply norms designed for Latin America to African situations (all of these developments are discussed in chapter 9). In 1993 Alice Mogwe founded Ditshwanelo ('Human Rights' in Setswana), which soon became the country's leading NGO[41]. The previous year she had become the first Motswana to write a report on the San, commissioned by the BCC (Zips-Mairitsch 2013, 305, n. 96). Mogwe's 1990 Masters dissertation had favourably compared Indian-style 'social action litigation' with legal aid models. And now she recommended that challenges to Botswana's 'dominant, exclusive [Tswana] culture' could be 'facilitated by the use of the constitution to support a case in court' (Mogwe 1992, 10, n.21; 24-5). For this, she wrote, 'experiences of indigenous (First Nation) peoples ... could be a useful and relevant source of inspiration' (Mogwe 1992, 32).

Such experiences were, indeed, now in no short supply. 1993 was the International Year of the World's Indigenous Peoples. This was declared by the UN after indigenous organisations, opposed by Spain and the United States, had failed obtain official commemoration of 1992 as the five-hundredth anniversary of European colonisation and oppression (Saugestad 1993, 11). 1992 in Botswana had seen the creation of the first San indigenous rights organisation: First People of the Kalahari (FPK). In 1993 it secured funding, via the Danish International Development Agency, from the International Work Group on Indigenous Affairs (IWGIA), and it received more funds from that body than any other indigenous organisation in Africa (Dahl 2009, 133-4). These contacts were facilitated by a series of dramatic conferences, which brought San spokesmen face-to-face with government ministers, and helped formulate new demands, notably for land rights (Saugestad 2001, chapter 11; Mazonde 2004, 136-7; M. Taylor 2004, 155). (Regional follow-up events in 1995 led to the creation of the Working Group of Indigenous Minorities in Southern Africa (WIMSA) [Saugestad 2001, 198-9].) NORAD also supported these new NGOs and activities (Saugestad 2001,

175). And Sidsel Saugestad (1993, 23) - the ARADP's Research Facilitator, seconded from the University of Tromso - outlined how recent experience from Norway and elsewhere had proved 'that constructive negotiations must be based on consultations within the legal systems, and the use of courts […] legal systems have proved to be invaluable mediators between conflicting interests, taking the heat out of complex political issues by careful consideration of the legal aspects'.

This new San assertiveness undermined 'developmental paternalism' amongst the ruling elite, just as external support for indigenous rights ideas undermined its international legitimation as a non-racial democracy. In constructivist terminology the government refused to make 'tactical concessions' and continued to assert that universal norms were not applicable to Botswana (Risse and Sikkink 1999, 22-25). (It should be noted that at this time Amnesty International classified Botswana as a better protector of rights than the United Kingdom [Stedman 1993, 1].) In parliament MPs attacked Alice Mogwe's report for the BCC, current Vice-President Ponatshego Kedikilwe ('PTK') asking what the 'human rights of the Motswana [has] got to do with who might have got there first or whatever?' (Mogwe, February 19th 1993). Officials from the Ministry of Lands, Local Government, and Housing rejected the International Year of the World's Indigenous Peoples on the grounds that 'all Batswana are indigenous to the country' (*Botswana Daily News*, March 5th 1993). And they publicly attacked NORAD for promoting apartheid-style 'separate development', helping trigger the end of Norwegian support for the ARADP (*Botswana Gazette* 20th January 1993; Saugestad 2001, 240-242).

The Permanent Secretary of Ministry of Local Government Lands and Housing attacked donors in more overtly paternalist terms, angered by their promotion of San representative organisations: 'Botswana owns the Basarwa and it will own Basarwa until it ceases to be a country; they will never be allowed to walk around in skins again' (in Hitchcock and Babchuk 2010, 164). Dr. Jeff Ramsay, for his part, a professional historian and government spokesman, sought to substitute anti-colonial resistance for rights and victimhood:

today many academic historians reject the notion of history as an account of heroes … [but] instances of violent resistance also occurred among the Naron-Khwe [a San people], whose land had been alienated by Ghanzi [Afrikaner] settlers. A 1929 colonial report noted that, out of fear of the Basarwa, 'no Dutchman in Ghanzi will reside alone at night' … It was the historic institution of *bolata* [for Ramsay a form of 'slavery'], not the neo-colonialist concept of some Africans being more indigenous than others, which divided Khwe from other 'tribesmen' in the past, while denying all of us their heroes (Ramsay, 9th July 1993)[42].

(I describe the eclipse of such historiographical trends in chapter 8, focusing on the Namibian War.)

(c) 1996-2002: Judicialisation in the CKGR or negotiated solutions neglected?

In the aftermath of these confrontations, the GOB continued asking CKGR populations to relocate, but with only limited success. The situation began to escalate in 1996. In an interview with the *Guardian,* soon-to-be-President Festus Mogae even referred to the inhabitants of the reserve as 'Stone Age creatures who must change, or otherwise, like the dodo, they will perish' (Good 2003, 16). In March 1997 parliament voted 6,000,000 Pula (approximately $1.4 million) to develop the New !Xade settlement. And in May-June it moved decisively, resettling three-quarters of the CKGR there and in Kaudwane in north-eastern Kweneng District (see R. Hitchcock 1999, 113-6; Hitchcock and Vinding 2001, 63; Zips-Mairitsch 2013, 306-7). Almost immediately controversy erupted over the sufficiency of consultation, information provided, (promised) compensation paid, and whether threats had been made about the use of force in future (Saugestad 2011, 41; Zips-Mairitsch 2013, 308-312). FPK now convened a CKGR workshop at D'kar and a 'Negotiating Team' was formed to engage with government. The Team was comprised of 14 delegates from the CKGR, 3 from San organisations (FPK, WIMSA and Kuru Development Trust), and (non-voting representatives) from major NGOs based in Gaborone (Ditshwanelo, the Botswana Council of Non-Government Organisations, and the BCC) (Hitchcock and Vinding 2001, 63; Zips-Mairitsch 2013, 311). Its legal advisor was Glyn Williams from Chennyls Albertyn in Stellenbosch; a firm which would soon win a famous land rights victory for South Africa's ?Khomani San in the Kalahari Gemsbok Park (see Robins 2001; Chennels and du Toit 2004, 104).

Some of the facts about what followed are relatively uncontested. Initially, the Negotiating Team struggled to arrange meetings with government officials (Hitchcock and Vinding 2001, 64; Suzman 2002, 4; Zips-Mairitsch 2013, 311). Developments in the CKGR, however, helped change this situation somewhat. Significant compensation packages had been provided to those settled at New !Xade. New inhabitants were given monthly food rations, and a choice between 5 cattle or 15 goats, and 4.4 million Pula ($900,000) was offered to 730 households to help rebuild houses (M. Taylor 2004, 154; Zips-Mairitsch 2013, 310-311). By 2002 the state had spent an estimated 50,000 Pula ($11,110) on each inhabitant in New !Xade (Zips-Mairitsch 2013, 318). This, however, did not help beneficiaries as the government intended. Notably, those unused to managing large amounts of disposable income spent almost all of it on 'consumer goods (clothes, cassette recorders and simple status symbols) and alcohol' (Zips-Mairitsch 2013, 311). With the onset of rains many chose to

return to the CKGR. By 2000 as many as 650 San and Bakgalagadi were living in the Reserve (Suzman 2002, 4). Partly in order to prove themselves as legitimate representatives of these populations, the Negotiating Team now began registering those inhabitants who wished to claim rights of residence in the CKGR, and mapping their ancestral territories (Hitchcock and Vinding 2001, 65; for some results see Albertson 2000). These findings provided the basis for constructive engagement with the Department of Wildlife and National Parks (DWNP). Eventually, the Team was able to agree a Draft Management Plan (DMP) for the Reserve. This did not guarantee land rights, but, encouragingly for the Team, it did distinguish zones for tourism and conservation from those set aside for Community Based Natural Resource Management (CBNRM) (Zips-Mairitsch 2013, 311-2; see generally R. Hitchcock 2004). On the 31st August South Africa's *Mail and Guardian* described a leaked version of the plan as a 'stunning success' (Suzman 2002, 4).

For Stephen Corry, however, the Director-General of Survival International (SI), the failure to guarantee land rights - as per International Labour Organisation Convention 169 (see chapter 9) - constituted a 'slap in the face' for the San (Corry, 16th September 2001). SI immediately organised vigils across Europe, and protests outside the Bostwana High Commission in London and Durban World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Suzman 2002, 5). It also began to frame its advocacy in terms of 'conflict diamonds'; a move which could hardly have done more to enrage the government (see chapter 7). (Whilst there had been prospecting in the Reserve since the 1980s, mining had not then begun, and the government denied that it would in the near future [Good 2003, 18-20, 35-39].) Negotiations ceased, and in October the GOB announced that expired Special Game Licenses (SGLs) would not be renewed. Services, including water, would no longer be provided to the CKGR (Hitchcock and Vinding 2001, 67). In January 2002 (armed) police and DWNP staff removed water storage tanks, closed the last remaining borehole (in Mothomelo), separated some families, and dismantled (sometimes bulldozing) property; relocating all but a few households to the new resettlement villages (Saugestad 2011, 42; Zips-Mairitsch 2013, 314). In August the DMP was officially rejected (Solway 2009, 328). The Minister of Local Government, Margaret Nasha, justified this approach in a letter to Alice Mogwe: 'all we want to do is treat Basarwa as humans not game, and enable them to partake of the development cake of the country' (in Hitchcock and Vinding 2001, 67). The Team was left with no alternative but to bring the case to court.

It is at this point that participants' and observers' accounts begin to diverge. Some maintain that SI's dramatic intervention - branded 'neo-colonialist' by a government proud of its international image and anti-apartheid credentials - was responsible for the official *volte face*. Glyn Williams, for

example, informed me of documents he believes prove that the DMP had in fact been accepted by other branches of government (interview, 12th August 2011)[43]. Manuela Zips-Mairitisch (2013, 318), in this connection, argues that the ideas underpinning earlier drafts of the Plan had already been incorporated in hunting regulations - 'clearly' proving that the DMP had been accepted before SI's intervention. Others, by contrast, believe that central government reacted as it did because it had not authorised the DWNP's initiative. For Mathambo Ngakaeaja, for example, a San activist and representative working with WIMSA, the problem stemmed from 'a lack of knowledge of what the right hand was doing from the left hand'. With the DMP's leak to the South African press, the central government 'suddenly' realised what DWNP was doing and began making 'terrible accusations' against it (interview, 12th September 2011). Nkakaeaja's view is shared by Stephen Corry of SI and Gordon Bennett, the British attorney who later took over the case from Williams and his team on SI's behalf (for Corry, see Solway 2009, 328, n.9). For Bennett the hierarchical culture of Tswana government also helps explain the ferocity of government's reaction towards a junior department (interview, 9th March 2012). (This is not wholly implausible, given earlier controversies surrounding the DWNP's creation of SGLs, and, in particular, the lowly status of the RADP [Ministry of Local Government and Lands 1978, 92; 1979, 10, 12; R. Hitchcock 2002, 805])

For Corry (2003, 1), meanwhile, the accusation against Survival 'originates with the local 'human rights organisation' [Ditshwanelo]'. Whatever the truth of Corry's claim, Alice Mogwe, in particular, has certainly sought to draw very clear lines between her organisation's tactics and those of SI. In 2002 she declared a continuing preference for negotiations. Whilst the Batswana 'cultural understanding of conflict resolution' placed 'an incredible emphasis on talking through problems', SI was 'located in a completely different cultural context and they will, of course utilise approaches which make sense within their cultural context' (Ditshwanelo 2002, 34-5). More recently, she has re-iterated her view that the Negotiating Team as a whole believed in the wisdom of negotiations, even if 'the legal route had always been one of the options at [its] inception' (Mogwe 2011, 169, 173). 'The court', she has concluded, 'is severely hampered in using a purely Western-based legalistic tool to unravel [culturally relative] threads of meaning' (Mogwe 2011, 164).

This, however, is misleading. By 2002 Ditshwanelo and the Negotiating Team had in fact spent significant time and energy preparing their now 'pending' court case (Saugestad 2011, 42). As noted above, indeed, in the early 1990s Mogwe had even herself recommended a shift towards litigating San issues. At a CKGR workshop in February 1997, moreover, three months *before* the first round of relocations, Glyn Williams and Chennels Albertyn had been mandated to pursue constitutional land rights claims on behalf of San and Bakgalagadi willing to sign a registration

form (see figure 3). Seemingly despite the Western biases of courts, 'participants expressed a wish for urgent legal representation by lawyers' (Hitchcock and Vinding 2001, 63). Registration and mapping initiatives facilitated this exercise, and in April 2000 the Negotiating Team met at Ditshwanelo's offices where 'the legal strategy was discussed' again (Hitchcock and Vinding 2001, 66).

PETITION AND REGISTRATION OF LAND CLAIM

I.....................

Hereby petition the Government of Botswana to recognise and acknowledge:

1. My and my family's right of ownership to and the use of land in the Central Kalahari Game Reserve (CKGR)
2. My and my family's constitutional rights to the provision of services and in particular to water, health and education in the CKGR.
   I authorise the Negotiation Team representing the residents of the CKGR to negotiate these rights on my behalf. IF these negotiations fail, I further authorise the Negotiation Team to take whatever steps may be necessary to institute my claims in the High Court of Botswana

Name, Date, Place.......................

Figure 3: 1997 registration form for CKGR land claim (reproduced in Saugestad 2011, 42).

A further difficulty with Mogwe's claims is the lack of serious evidence that the GOB had in fact been willing to negotiate. The three academics who have followed this case most extensively largely agree on this point. Saugestad (2011, 55) believes that 'evidence from two rounds of relocation (1997 and 2002) ... can in no way be said to reward this position'. Hitchcock and Vinding (2001, 70), meanwhile, have noted that by February 2002 even the most optimistic members of the Negotiating Team 'privately … admitted that it was unlikely that the government would allow people to return to their homes'. The real differences between the organisations were, therefore, matters of style, audience, and rhetorical framing, rather than fundamental disagreements over culture and the appropriate role of (international) law in African politics. As Sethunya Tshepho Mphinyane (2002, 82) points out - in a comment about non-legal matters - even in the late 1990s Ditshwanelo's (highly confrontational) statements on the CKGR 'could as well have been in a Survival urgent action bulletin'. Supposed cultural differences were thus discovered late in the day as an exercise in 'gatekeeping'. 'The issue here', Mphinyane (2002, 83) suggests, 'is one of control'. SI, in short, was not solely responsible for the judicialisation of San development in the CKGR.

(d) 2002-6: *Sesana* and the judicialisation of mega-politics in Botswana

The Negotiating Team's decision to litigate the CKGR relocations thrust the 'developmental paternalism' of the Tswana elite into international spotlight. As illustrated below, in 2006 Judge Dow sought to rule it incompatible with international legal trends. This constituted a 'mega-political ... judicialisation of formative collective identity' (Hirschl 2008, 99). The case also risked, however, judicialising fundamental political order. The notion of 'indigenous peoples', which Dow used to challenge to 'developmental paternalism', could also have been used to demand new land rights regimes. As Lund and Boone (2013, 1) anticipate, this would have had significant consequences for the very 'scope and structure of authority' in rural Botswana (see chapter 1). In Saugestad's words (2001, 188), the CKGR case had the potential to combine 'interwoven issues of land rights, traditional land-use, compensation and leadership, and the wider framework of international jurisprudence'. Lawyers, however - whose primary interest has been in actually eliciting compliance from government, unlike the cases examined in previous chapters - have functioned as gatekeepers, preventing such arguments from being made. 'Resistance' from litigants (SI and CKGR activists) has been contained thus far (see chapter 7). In contrast to Namibia and Zimbabwe, therefore, liberal actors have been successful in preventing challenges to fundamental order.

One of the most striking aspects of *Sesana v The Attorney General* was how a relatively conservative legal strategy survived a wholesale change in legal team and funding base. Funding was initially provided via the CKGR 'Legal Rights Support Coalition': 'a loose coalition including international human rights NGOs such as International Work Group for Indigenous Affairs (IWGIA), Norwegian Church Aid, Dutch Global Ministries, the Saami Council (representing the Saami of Norway, Sweden, Finland and Russia), and others, with Ditshwanelo, as its secretariat' (Saugestad 2011, 42). At its first hearing in the High Court Judge Dibotelo rejected the case on procedural grounds. One particular problem, which would become significant again later on, was that Roy Sesana - the lead applicant and First People of the Kalahari activist - only had signatures authorising him to institute proceedings from 16 of the 241 applicants (Ng'ong'ola 2007, 105). (Gordon Bennett would later argue that this was because registration took place during relocations [Piet, 11th January 2011].) As on many other occasions, the government's legal team argued this point in a way that revealed their sensitivities about external interference in San affairs: 'the contents of Mr. Sesana's affidavit were too complex to have been within the knowledge of an illiterate person' (Saugestad 2011, 43). Although the Court of Appeal did refer the case back to the High Court for trial, it failed to rule on whether Roy Sesana represented the CKGR San as a whole, or merely the named applicants (Ng'ong'ola 2007, 107). These delays, and the immense practical difficulties of working in the

CKGR, contributed to funding difficulties for Legal Rights Support Coalition. In July 2004, and after two weeks of the new proceedings, the legal team asked for more time to raise funds. It was at this point that SI offered to fund the case alone, on condition that it be argued and led by its own British barrister, Gordon Bennett. Whilst there is some controversy over whether the applicants as a whole had in fact asked for such a move, FPK, at the very least - SI's partner organisation - clearly supported it (Saugestad 2011, 44; Glyn Williams, interview, 12th August 2011; Gordon Bennett, interview, 9th March 2012).

As in 2002, the applicants asked the Court to rule on four key issues:

(a) whether the termination with effect from 31st January 2002 by the Government of the provision of basic and essential services to the Appellants in the Central Kalahari Game Reserve was unlawful and constitutional [sic].

(b) whether the Government is obliged to restore the provision of such services to the Appellants in the Central Kalahari Game Reserve;

c) whether subsequent to 31st January 2002 the Appellants were:

(i) in possession of the land which they lawfully occupied in their settlements in the Central Kalahari Game Reserve;

(ii) deprived of such possession by the Government forcibly or wrongly and without their consent.

(d) whether the Government's refusal to:

(i) issue special game licences to the Appellants;

and

(ii) allow the Appellants to enter into the Central Kalahari Game Reserve unless they are issued with a permit

is unlawful and constitutional (*Sesana v The Attorney General* 2006, judgement of Dibotelo,

paragraph 3).

The question of lawful occupation of land was decided in the applicants' favour - Judges Dow and Phumaphi ruling with them, and Judge Dibotelo against them. This was the issue with the most obvious potential connections with fundamental political order. SI, indeed, had initially advocated for the applicants be granted land rights to the CKGR in line with I.L.O. Convention 169 and emerging trends in the international law governing indigenous peoples. As Suzman (2002, 5) argued, however, 'granting Bushmen full ownership of the Central Kalahari would establish a precedent that would lead to the collapse of Botswana's communal land tenure system'. (This system most closely approximated to Boone's (2007, 559) 'user-rights' ideal-type. Land boards, ultimately controlled by the state, distributed land and grazing rights in response to applications made under customary or common law (see Adams, Kalabamu and White 2003). The widespread perception of San as nomads has often worked against them in such processes [Nyati-Ramahobo 2009; Hitchcock, Sapignoli and Babchuk 2011, 71, 78].) Although the change of legal team created an 'expectation that land rights would be introduced into the case as a more explicit claim for ownership, not only for lawful occupation', this more radical strategy never actually materialised. As Judge Phumaphi noted, Bennett even steered away from the less politically-explosive issue of lawful occupation, despite the fact that:

> nearly all the Applicants who gave evidence claimed the CKGR to be their land, from which they did not want to be moved. Sometimes I wondered during the trial, whether there was a breakdown in communication between Mr Bennett and his clients (*Sesana v The Attorney General* 2006, judgement of Phumaphi, paragraph 60).

In an interview with me Gordon Bennett stressed how he was more interested in obtaining immediate results for his clients than in any wider political or jurisprudential objectives SI might have had (interview, 9th March 2012). For Saugestad (2011, 55) he was 'meticulously loyal'. But Bennett also insisted that SI had never actually pressured him to change legal strategy (interview, 9th March 2012). Phumaphi, however, decided to investigate lawful occupation nonetheless. He established it with the aid of the Australian High Court's famous judgement in *Mabo and Others v The State of Queensland* (1992), which held that 'native title' had not been extinguished when the British Crown claimed possession of relevant lands (*Sesana v The Attorney General* 2006, judgement of Phumaphi, paragraphs 69-79; Stephenson and Ratnapala eds. 1993). In Clement Ng'ong'ola's (2007) words this was 'sneaking aboriginal title into Botswana's legal system through the side door' (for this 'horizontal diffusion' see chapter 9).

A second set of questions related to the termination and restoration of services: weekly drinking water, borehole water, food rations for orphans and destitutes, and healthcare via ambulances and mobile clinics (Ng'ong'ola 2007, 107). This issue was decided against the applicants, Judge Dow ruling in their favour, and Judges Phumaphi and Dibotelo ruling against them. Before the case GOB had argued that it was too expensive to provide services in the CKGR (Hitchcock and Vinding 2001, 67). Judge Dibotelo highlighted additional difficulties, including an affidavit from one local government official arguing that 'it is cheaper for Government to pool its resources in one village' (*Sesana v The Attorney General* 2006, judgement of Dibotelo, paragraph 36). And the GOB did, it is true, eventually incur additional expense by providing services both in *and* outside the CKGR. These expenditures, however, were not of the same order as those which would have been involved in compensating expropriated commercial farmers in Zimbabwe, for instance. They would certainly not have impinged on fundamental state-building processes. Hitchcock and Vinding (2001, 67), indeed, calculated that in 2001 the government was actually spending less on services in the CKGR that it would had it provided for its inhabitants under its own Destitutes Policy. Margaret Nasha, meanwhile, publicly stated that the GOB would refuse international aid money to cover any shortfall even if offered it (Hitchcock and Vinding 2001, 69).

Judge Phumaphi's decisive ruling in favour of applicants on this issue was grounded in the doctrine of legitimate expectations. This doctrine was invented by Lord Denning in 1969, and has been used extensively by liberal public and administrative lawyers in Britain and South Africa to combat bureaucratic discretion (Hlophe 1987; Forsyth 1988; Quinot 2004; for critique S. James 1996; for these lawyers and Zimbabwe see chapter 7). Put briefly, it holds governments should not violate express promises to their citizens or reasonable expectations which their actions create. In *Sesana*, however, Judge Dow had sought to expand its usual meaning in an 'activist' manner (for critique Ng'ong'ola 2007, 109-110). She not only ruled that the applicants would have expected to have been consulted about the termination of services, but would have expected certain specific services 'essential' for their 'survival' to have been continued (*Sesana v The Attorney General* 2006, judgement of Dow, paragraph 228). She thus handed down an order for 'specific performance', instructing the government about exactly which services they should restore (*Sesana v The Attorney General* 2006, judgement of Dow, paragraphs 236-7). Anticipating such a judgement, based on 'activist' trends elsewhere in the common-law world, Christopher Forsyth - a leading British/South African follower of Denning's - delivered a lecture at the University of Botswana months before the judgement in *Sesana* was due (Forsyth 1999; 2006, 5). This was devoted to 'Some Pitfalls for Botswana to Avoid' and warned against using the doctrine of legitimate expectations as an 'inchoate

substitute for fairness'. Forsyth argued that 'substantive' readings such as Dow's, which mandated 'specific performances' by government, risked involving the judiciary in the details of day-to-day administration. Judge Phumaphi then used Forsyth to argue that 'the Court should be loathe to enter the arena of allocation of national resources' (*Sesana v The Attorney General* 2006, judgement of Phumaphi, paragraphs 55-6). Since the applicants produced no evidence of actually having expected even a consultation, he ruled the termination of services lawful and their restoration unnecessary (*Sesana v The Attorney General* 2006, judgement of Phumaphi, paragraphs 27, 30-31). Once again, therefore, in this instance, gatekeeping by lawyers helped serve to check judicialisation.

The questions of Special Game Licenses and permits to enter the Reserve clearly had only minimal wider political implications. Given tourists' (much-criticised) fascination with 'authentic' San, even if hunting did reduce wildlife stocks - as Mark and Delia Owens had claimed - allowing it would hardly harm the economy (for tourism's perverse consequences Robins 2001, 839; Guenther 2002; Sylvain 2006). On these issues, as on the others, Judge Dibotelo ruled for the government and Judge Dow against it. Judge Phumaphi cast his deciding vote in favour of the applicants. Dibotelo decided, firstly, that the DWNP had complete discretion to issue entry permits. The British decision to designate the CKGR as a 'Game Reserve', secondly - taken for diplomatic reasons described above - meant there could be no legitimate expectation of being able to hunt inside it. Phumaphi, by contrast, ruled that the DWNP had not exercised its discretion over permits rationally and in accordance with the evidence before it. Dibotelo's arguments about the expectations created by the Reserve's designation, meanwhile, were absurd given that such rules had not been applied before 2002 (Ng'ong'ola 2007, 114-120). As George Silberbauer testified, the British themselves had turned 'Nelson's eye' to hunting by the San (*Sesana v The Attorney General* 2006, judgement of Phumaphi, paragraph 88).

Inevitably, however, it was not these practical political matters which so fascinated the Botswanan and international media (for an overview Molosiwa 2008). Courtroom drama, as well as legal argument, revealed how the very notion of a San litigant challenged Bostwanan 'formative collective identity'. The centre of attention was lead counsel for the state, Sidney Pilane. He burst out laughing when one of the applicants declared that she wished to remain near the graves of her ancestors, explaining that 'he had not been aware that they buried their dead'; he was enraged by a foreign lawyer being engaged on their behalf, being instructed by Dow that 'Mr Bennett ... can fly from England as often as he wishes'; and, when it became clear the case might be lost, he was even sent to prison for contempt of court, after refusing to stand up on Dow's instruction (Chwaane, 2nd October 2005; U.S. Embassy, Gaborone, 7th September 2005; *Pilane v The Attorney-General* 2005;

Sesana v The Attorney General 2006, judgement of Dow, paragraphs 191, 206).

Judge Dow was, by a distance, the keenest to rule on the sensitive questions behind such behaviour. Most strikingly she ordered, for the first time, that the government should treat different ethnic groups differently. She noted 'the Respondent's position that it does not discriminate on ethic [sic] lines, but equal treatment of un-equals can amount to discrimination' (*Sesana v The Attorney General* 2006, judgement of Dow, paragraph 210). More substantively, she ruled that proper consultations had not taken place because the 'relative powerlessness' of certain groups had not been taken into account:

> the Basarwa [San] and to some extent the Bakgalagadi, belong to an ethnic group that is not socially and politically organised in the same manner as the majority of other Tswana speaking ethnic groups and the importance of this is that programmes and projects that have worked with other groups in the country will not necessarily work when simply cut and pasted to the Applicants' situation (*Sesana v The Attorney General* 2006, judgement of Dow, paragraph 186).

Emphasising differential power is central to contemporary 'relational' theories of indigeneity (chapter 8). Dow justified her legal challenge to Botswanan modernist equality with other similarly contemporary notions. She declared, for example, that 'the current wisdom, which should inform all policy and direction in dealing with indigenous peoples is the recognition of their special relationship to their land' (*Sesana v The Attorney General* 2006, judgement of Dow, paragraph 117). And as she summarised, pointedly:

> this is a case that questions the meaning of 'development' and demands of the respondent to take a closer look at its definition of that notion. One of colonialism's greatest failings was to assume that development was, in the case of Britain, Anglicising, the colonised [...] Botswana has a unique opportunity to do things differently (*Sesana v The Attorney General* 2006, judgement of Dow, paragraph 272; compare Dow 2009).

Unsurprisingly, Sidney Pilane sought to defend Botswana's modernism against these charges by highlighting its anti-apartheid non-racialist credentials. In his cross-examination of George Silberbauer, for example, he suggested that the CKGR had been created as a 'human reserve', and not as a 'haven for the Basarwa [San]'. He alleged that this had been done at the behest of Afrikaner farmers frustrated with San 'squatters' (Tutwane, 14th July 2004). In response, Dow strived hard to

reconcile her position with these important components of nationalist narrative. 'The case being judged', she explained, 'is not whether slavery was brutish, which it was, or whether colonialism was a system fuelled by a racist and arrogant ideology, which it was, or whether apartheid was diabolical, which it was' (*Sesana v The Attorney General* 2006, judgement of Dow, paragraph 190). Modernism too, she conceded, even if in some ways responsible for a 'unique culture' now being 'on the verge of extinction', had also helped the country grow tremendously since independence, when it had been 'one of the poorest five in the world and boasted the legendary 12 miles of tar road, in a country the size of France' (*Sesana v The Attorney General* 2006, judgement of Dow, paragraph 189).

5. After *Sesana*: non-compliance as lack of socialisation

Despite Dow's censure of the Executive, the Court's ruling did not include orders with which it had to comply. Her 'specific performance' order on services was a non-binding minority opinion. As Judge Phumaphi concluded 'this judgment does not finally resolve the dispute between the parties but merely refers them back to the negotiating table' (*Sesana v The Attorney General* 2006, judgement of Phumaphi, paragraph 189). Some commentators on this case, like the constructivists and legal theorists discussed in the next chapter, have therefore concluded that 'compliance' in this case is more a matter of socialisation than of law. In Saugestad's (2011, 54) words, the case 'does not contribute to any solution of the underlying problem', which is the 'authoritarian and patronising model for development' that Dow attacked. This view is broadly endorsed by Delme Cupido, who has recently become engaged with CKGR matters for the Open Society Initiative for Southern Africa (OSISA). In his view any successful litigation would have had to be designed to resonate with and catalyse mobilisation around social questions raised by the case, as during the Civil-Rights era in the United States (interview, 2nd May 2012; compare Cover 1983, 47-8). Dow's new Tswana narrative, delivered *ex cathedra*, would presumably have comprised the centrepiece of such an effort. In Richard Rorty's words, ([1993] 1998, 176) human rights would thus involve getting 'different kinds sufficiently well-acquainted with one another so that they are less tempted to think of those different from themselves as only quasi-human' (see also chapter 5).

As a number of analysts have decried, however, the government has in fact largely succeeded in using the stridency of SI's campaign to justify branding *Sesana* as simply the product of outside interference. The organisation's choice of a 'conflict diamond' frame, especially, alienated its campaign from Tswana political culture. According to *Wikileaks* Bram Le Roux of the Kuru Trust complained that 'SI's approach was 'all about marketing' the plight of the San to potential

supporters and donors' and 'suggested that most of the San and their advocates in Botswana dis-agreed with the strategy of trying to connect the relocation with diamond mining' (U.S. Embassy, Gaborone, 14th July 2005). Dow, Ditswhanelo, and supportive ex-government officials all publicly distanced themselves from it in an effort to retain credibility (Botswana Press Agency, 19th November 2002; *Sesana v The Attorney General* 2006, judgement of Dow, paragraph 107; Manganu, 3rd February 2011). FPK, for its part, has been largely ostracised within Botswanan and even international civil society, and cannot function when funds from SI are unavailable (Saugestad 2011, 56; for extraordinary criticisms by the IWGIA see Dahl 2009, 135-8). For critics, the British NGO may even have 'eliminated virtually any space for compromise', and has led 'those who otherwise could have been the most likely supporters [to] rally behind the government in an attitude of 'right or wrong - my country'' (Solway 2009, 338; Saugestad 2011, 56). SI, however, has not been interested in negotiating or eliciting compliance via socialisation. For Stephen Corry *Sesana*'s greatest legacy is the legal precedent established by Judge Phumaphi's recognition of 'native title'; a development paving the way for more fundamentally political challenges at a later date (Solway 2009, 339, n.21).

As a whole, the government's behaviour since 2006 has certainly not reflected the internalisation of any new norms. In the immediate aftermath of the case, and whilst still in the glare of the international media, it announced that it would not be appealing the judgement (see Zips-Mairitsch 2013, 354-5). Since then, however, it has responded with 'restrictive interpretation[s]' and 'considerable ... foot-dragging' (Saugestad 2011, 50; compare 'weapons of the weak' in chapter 2). It announced that only named applicants could return to the CKGR without permits, and even they would need identity documents. Domestic animals and permanent structures were banned. Water from outside would be allowed if transported at the applicants' own expense. And applications for SGLs would have to be sent to the DWNP for individual assessment. As of March 2012 not a single one had been granted (Saugestad 2006, 2; Zips-Mairitsch 2013, 354-6; for water Workman 2009, chapter 15). For James Ananya, UN Special Rapporteur and leading indigenous rights scholar, whilst the government 'may or may not have been following the order of the Court in the Sesana case in a technical sense', it has violated the 'spirit and underlying logic of the decision' (United Nations General Assembly, 2nd June 2010, paragraph 73).

Official pronouncements on the matter, moreover, have revealed a refusal to shift on the fundamental issues. President Mogae visited the New !Xade settlement in the month following the judgement, and attacked those who wanted to go 'chasing wild animals barefooted' (Saugestad 2006, 2). Despite court orders, local government officials continue to plan San relocations at Ranyane, approximately 100km to the West of the CKGR, and have even warned of other relocations

inside the Reserve itself, because it 'is a game reserve' (Sapignoli 2012; Lee, May 22nd 2013; 18th June 2013; Ghanzi District, July 2013). A number of diamond mining concessions were also granted in the aftermath the case, infuriating critics who had alleged - probably incorrectly - that mineral extractions had been behind relocations in the first place (Piet, 21st June 2011; Saugestad 2011, 54; Sapignoli 2012). A luxurious game lodge, finally, was opened near Roy Sesana's former home at Molapo in December 2009 (Hitchcock, Sapignoli and Babchuk 2011, 77).

Supportive NGOs were, however, prepared for a long fight after *Sesana*. The CKGR support coalition was re-established in May 2006 with the objective of engaging government (U.S. Embassy, Gaborone, 6th June 2006). Under new President Ian Khama (from 2008) the government has declared its openness to 'dialogue' with this group as long as 'outsiders' are not involved (Motlaloso, 13th June 2013). The results have, nonetheless, been 'dismal' (Saugestad 2011, 52). A 'Central Kalahari Game Reserve Consultation Process' has comprised annual meetings with little to show for them (The Government of Botswana et al., June 3rd 2010; Saugestad 2011, 51; Zips-Mairitsch 2013, 357-8). As before, Ditshwanelo, the coalition's secretariat, remains the most vocal supporter of these negotiations - which it has co-ordinated alongside community mapping activities and attempts to secure San land rights within the existing land boards system (e.g. Ditshwanelo 2007a; Mogwe 2011; Ontebetse, 24th March 2013). The diplomatic community has certainly preferred to channel any funding in this area through Alice Mogwe and her organisation (Ben Luckock, interview, 29th March 2012; Ontebetse, 24th March 2013).

Almost immediately SI criticised the support coalition, and chose to remain outside it (Solway 2009, 338, n.20). It has also supported follow-up litigation relating to the High Court's unfavourable judgement on services. This was precipitated by two developments. Alice Mogwe, after lobbying Margaret Nasha, had secured the applicants rights to bring water from outside the reserve for their immediate families' use; reportedly citing 'this as a perfect example of how one-on-one compromise trumped the polarizing Western hard-line confrontational approach'. In 2009, however, the government revoked this permission, accusing the applicants of transporting water for others too (Workman 2009, chapter 15). The game lodge near Molapo also promised to undermine any claims the government might make about the expense and/or difficulty of providing water to the Reserve.

Survival's key argument - eventually granted on Appeal - was that the *Sesana* judgement did not prevent the applicants from sinking or re-opening boreholes at their own expense. SI was, in fact, willing to provide funds and engineers to do this. Preventing them from doing so would violate the right to life and amount to 'degrading and inhuman treatment' (*Mosetlhanyane* v *The Attorney*

General 2010, paragraphs 1, 38). Once again, lawyers' gatekeeping served to check judicialisation. SI's team was able to persuade the Court of Appeal that it was not arguing for the right to sink bore-holes 'willy nilly', as the government's lawyer had initially alleged (Piet, 19th January 2011; *Mosetlhanyane* v *The Attorney General* 2011, paragraph 16). Seranne Junner, who had now joined Bennett in arguing case, told me that Bostwana's 'very static and conservative' bench ensured that they had very carefully framed the case in terms of existing legislation (the Water Act), and not around the socio-economic and other rights which Judge Dow had sought to read into it (interview, 26th April 2012; for this judicial conservatism Dinokopila 2013, 118; for the 'human right to groundwater' Gavouneli 2011, 312, 318). This would prevent any 'snowballing effect'. Junner had sought to persuade the applicants' to 'pick their battles' and not litigate for the return of radio com-munication equipment lent by SI. Such equipment was not such an 'easily sympathetic issue' as wa-ter, and the public believed that the San 'just wanted to be left alone'. Bennett, for his part, she re-ported, had wanted to focus only the re-opening of existing boreholes. He was reticent even about trying to secure a more progressive interpretation of the Water Act (interview, 26th April 2012). Al-though Bennett believed the judgement could probably be enforced from a distance, both lawyers agreed that litigation in itself would not resolve the underlying issues (Gordon Bennett, interview, 9th March 2012).

6. Conclusion: human rights promotion as cultural change

Water rights litigation received support from some U.S Embassy officials (Jacob Johnson, interview, 24th April 2012; Seranne Junner, interview, 26th April 2012). As a whole, however, and as with all such representatives of the 'liberal project' examined in this study, Western diplomats and aid officials have been strongly opposed to judicialisation trends. During the *Sesana* case *Wikileaks* records the U.S. Embassy's frequent criticisms of SI and FPK's 'confrontational' approach in *Ses-ana*, which it saw as 'counter-productive' in the long run (U.S. Embassy Gaborone, 10th December 2004; 7th January 2005; 14th July 2005). In interviews, meanwhile, diplomats suggested that the case may have led to a disproportionate focus on a small segment of the CKGR population (Ben Luckock, interview, 29th March 2012; Gilles Roussey, interview, 29th March 2012; Jacob Johnson, interview, 24th April 2012). As the EU strategy paper for Bostwana (2008-2013) put it, this may have been 'to the detriment of wider issues of integration of non-Setswana speaking Batswana' (Government of Botswana and the European Commission, August 2007, 27). SI has collected a large number of statements from British ministers and politicians defending the government in let-ters to its supporters and fellow MPs. In 2002 Glenys Kinnock MEP even made a 'toe-curling' visit by helicopter to New Xade in order to publicise its successes (Glyn Williams, interview, 12th August

2011; Booker, 26th October 2013). Overall, diplomats, especially, saw the case as unfairly reflecting on Botswana's human rights record - a record they still largely defend, overall, against allegations of new authoritarianism under President Ian Khama (U.S. Embassy, Gaborone, 23rd June 2008; Anderson, 28th June 2011; Ben Luckock, interview, 29th March 2012; compare Good 2010).

Unlike in the other cases under examination here, moreover, and thanks to lawyers' gatekeeping, the 'liberal project' has largely had its wish. Despite having met with President Khama in 2008, Roy Sesana of FPK has occasionally spoken of wanting to take the case to the African Human Rights Commission and even the ICJ (Setsiba, 24th November 2006; Shore, 1st February 2010). Jeremy Sarkin - the legal advisor to Kuiama Riruako, who himself used this tactic - argues that even if the ICJ is formally only allowed to hear complaints from states, such a case would help 'cast further light upon the plight of the San' (Sarkin and Cook 2010-2011, 30). Given the poverty of the San, however, the simple truth is that the 'Government is perfectly right in stating - with growing irritation - that if it had not been for outside interference there would not have been a case' (Saugestad 2006, 2). Currently nothing can come of these plans for global judicialisation unless Survival or another organisation is willing to pay for them.

Thus far, therefore, courts have not been forced to rule on the questions of political order raised by the CKGR controversy. As a result, it is still feasible to imagine it being resolved, somehow, by socialisation and re-engineering political culture. Supporters of negotiated and litigated solutions, in fact, almost all agree that cultural change is a pre-condition for progress. In Saugestad's (2011, 57) words, a key difficulty with negotiations led by San communities is that 'the new type of leadership [necessary] requires an assertive demeanour that conflicts with traditional peer-based and consensual leadership'. For Mathambo Ngakaeaja 'the San Community' are 'disadvantaged including in skills of organisational government' (interview, 12th September, 2011). These difficulties are only intensified when the interlocutors are 'in suits getting out of helicopters' (Seranne Junner, interview, 26th April 2012). Ditshwanelo, for its part, has recently engaged in 'capacity-building' work (with some donor support) intended to help 'leaders to build their understanding and confidence regarding the laws, planning and negotiation skills' (Ditshwanelo 2007b; Ben Luckock, interview, 29th March 2012). In one diplomat's words, what is required in someone with 'a foot in both worlds'; someone familiar with the languages of (modern) government and (traditional) San culture (Jacob Johnson, interview, 24th April 2012)[44].

These social prerequisites for negotiations exacerbate, however, what Robins (2001) describes as 'double vision' towards the San. Liberal support for 'indigenous' causes incentivises stra-

tegic positioning as 'traditional', whilst, paradoxically, support for development projects is simultaneously intended to 'socialise' San 'into becoming virtuous modern citizens within a global civil society' (Robins 2001, 842). Amongst the ?Khomani San in South Africa, Robins (2001, 835) claims, such 'double vision' has 'contributed towards intra-community divisions and leadership struggles'. In the CKGR, meanwhile, U.S. Embassy officials have identified what they believe to be a 'split in the San community created by settlement, where younger members are more accustomed to a more modern way of living and seem less willing to live in a traditional manner while older members of the community still embrace the traditional way of life' (U.S. Embassy, Gaborone, 24th March 2009; see also U.S. Embassy, Gaborone, 22nd July 2005; compare Survival International, N.d.c). ('Industrialization', one claimed, ambitiously, may be necessary to propel the former out of poverty [U.S. Embassy, Gaborone, 20th March 2009].) These divisions have certainly not helped to heal those 'caused by disputes over the right strategy in the CKGR case' (Saugestad 2011, 56; for gender divisions Sylvain 2004).

As in previous chapters, moreover, representative political organisations have failed to overcome these obstacles. The question of 'who speaks for the San?' is not only a topic for fierce scholarly debate (e.g. Gagiano 1999; generally Clifford and Marcus eds. 1986). Donors have long been keen to support umbrella groups, such as the Khwedom Council, intended to represent San interests (U.S. Embassy, Gaborone, 7th January 2005; 29th July 2005; 30th July 2005; for lawyers' and NGO perspectives see Chennells, Haraseb and Ngakaeaja 2009). This, as one British official explained, is because when you visit the CKGR 'you can't phone ahead'. And on arrival they had always been confronted with only 'a series of individual experiences' - or a 'diversity of individual perspectives', in one U.S. official's words (Ben Luckock, interview, 29th March 2012; Jacob Johnson, interview, 24th April 2012). Unsurprisingly, such problems have also bedevilled the representativity of *Sesana*. As legal theorist Owen Fiss (1996, 21) writes, 'the class action … employs a peculiar concept of representation: self-appointment'. Even if the High Court had ruled that its decisions applied to the San as a whole, and not just to the named applicants, this would not have overcome internal disagreements (for the Court's reasoning Ng'ong'ola 2007, 22). As early as 2001, for example, 'some of the Bakgalagadi residents who remained in the reserve said that they were concerned that the focus of attention was on Bushman populations and not on the full range of people with rights in the Central Kalahari Game Reserve' (Hitchcock and Vinding 2001, 68).

None of this, it should be noted, is to say that the Kalahari San lack social organisation. On the contrary, as George Silberbauer's testimony made clear, at the level of the individual *band* these populations often possess consensus-building capacities that, in theory at least, would be uniquely

well-suited to this kind of litigation:

> it is not everyone saying that they agree or democracy, but it is a system where everyone con-
> sents to go along with the decision. The consent is made in the interest of group solidarity,
> even if necessarily at a cost to me or my interest (in Mogwe 2011, 174)[45.]

Beyond the face-to-face level of the band, however, indigenous rights activism requires 'an expan-
ded 'vocabulary' with which to speak of oneself internally as well as inter-culturally'; a potential re-
volution in collective selfhood (Eidheim 1992, 3, in Saugestad 2001, 231). Where this is lacking
legal victories by 'communities' are likely to have intended consequences. In 2002 a number of ?
Khomani San, for example, asked the High Court to intervene and help them manage land they had
been awarded. The Department of Land Affairs exercised 'benign curatorship' until 'good gov-
ernance' was restored (Chennels and du Toit 2004, 104). This is why Roger Chennels - who repres-
ented the ?Khomani San, and was also involved in *Sesana* at its early stages - has talked of the need
for capacity-building to accompany litigation. In 2001, for example, he saw the role of the Southern
African San Institute (an NGO he had founded) as:

> very much about culture and development, around the cultural imperative of actually creating
> a community. Because there's a landowner, a legal entity, which has not yet really been filled,
> it's a potential entity at this moment (in Robins 2001, 840; for Chennels' reflections on *Sesana*
> see Zips-Mairitsch 2013, 345, n.157).

Cases such as this one thus powerfully illustrate how human rights promotion can become more
about socialisation than law; part of a wider 'liberal project' of far reaching social and cultural
transformation. As argued in the next chapter, however, and as illustrated in the two preceding this
one, when rights are used to challenge fundamental political order, even the most determined of
civilising missions cannot help resolve the conflicts that result.

<u>Part II</u>

<u>Summary</u>

The preceding chapters have illustrated the judicialisation of fundamental political order in Southern Africa, and have shown how this has rendered compliance with some key rulings impossible. The four chapters that follow this one explain why. They explain the emergence of beliefs in indigenous rights, group reparations, and supranational courts; show how these beliefs nevertheless led anthropologists and historians to provide equivocal support to emerging campaigns via 'knowledge gathering'; connect these beliefs to more whole-hearted support from transnational social movements; and explain how the origins of these beliefs in 1970s dilemmas ensured, simultaneously, that they were fragmented not clarified by their international institutionalisation. This chapter justifies and outlines the interpretive approach that will guide this analysis, and draws some critical implications from it for Foucauldian and constructivist theories of rights. These theories, it argues, cannot account for the emergence or structural indeterminacy of new rights norms.

<u>**Chapter 5: Theoretical Introduction**</u>

1. Introduction

      In liberal political culture human rights are commonly understood as freedoms from the power of states and oppressive cultural traditions. Liberal theorists have typically derived these freedoms from natural reason, religious inheritances, or abstract principles such as human dignity or autonomy (e.g. Perry 2000; Griffin 2008; Tasioulas 2013; for an overview Dembour 2010). Such positions, however, have now come under sustained attack. Both critics and supporters of political projects couched in the language of rights increasingly stress how, ultimately, power must be used to effect cultural transformations if free individuals are to be *produced*. On this new account, human rights may superficially promise to protect various domains of personal freedom (conscience, property, speech and so forth), but in actual fact serve to define and construct new, properly 'human' subjectivities. This shift in focus from a 'liberation narrative' to a 'transformation narrative' may reflect a 'fundamental tension' that characterises liberalism as a whole (Williams and Young 2014, 22). But I will only be concerned here with those authors who claim that this tension does not in fact undermine or threaten liberal political projects. Whilst these authors concede that the 'liberatory' work of human rights may disrupt existing cultural and political orders, they see this constant disruption as functional to liberal governance.

2. Order in contemporary rights critique

      The best-known of such discussions is clearly that of Michel Foucault. Contemporary rights scepticism owes much to the central thrust of his mid-career thought on law and sovereignty: 'the "Enlightenment" which discovered the liberties also invented the disciplines' (Foucault 1977a, 222). Alan Hunt and Gary Wickham (1994, chapter 3) have referred to this as his 'expulsion of law'. For Foucault, in this mode, the advent of the modern liberal state and the 'accompanying age of constitutions and codes' saw subjects granted a wide range of rights that purported to circumscribe state power (Foucault 1979a, 89). These changes were accompanied, however, by a dramatic expansion in a 'continuum of apparatuses (medical, administrative, and so on)' that only served to entrench more insidious and asymmetrical kinds of regulatory 'micro-power' in society (Foucault 1977a, 222; Foucault 1979a, 144). This might appear paradoxical. The juridical state and its disciplinary apparatus sought to 'free' the subject with rights, but simultaneously used such

language to justify interventions deploying ever more detailed 'knowledge' about true 'humanity' (see also Foucault 2003, 38-9).

A Foucauldian corollary of law's penetration and capture by discipline is its unavowed incoherence. Modern law's self-presentation - as, *à la* Weber ([1922] 1978, 656), 'analytically derived … logically clear, internally consistent, and, at least in theory, gapless' - is constantly belied by its reality. Foucault never abandoned this theme. In his later reflections on human rights he mocked even the aspiration to consistency as an early Enlightenment fantasy. In answer to the question, 'can't one imagine that every political situation might be subjected to a human rights screening, so that no one could compromise these rights?', he replied 'there you have a wonderfully-eighteenth-century perspective in which the recognition of a certain form of juridical rationality would make it possible to define good and evil in every possible situation' (Foucault [1982] 2000, 471). Despite its jurisprudential pretensions, law has been 'reduced to the humdrum, meager, thankless tasks of social control' (Foucault [1978] 2000, 435). It has become shot through with discretion in the service of discipline and establishment of social order: 'it is for the sake of order that the decision is made to prosecute or not to prosecute; for the sake of order that the police are given free reign; for the sake of order that those who aren't perfectly "desirable" are expelled'. We should in fact say 'law *or* order', just as we ask for lemon *or* milk with our tea. (Conceptual) 'disorder', in this sense, 'produces [social] 'order'' (Foucault [1978] 2000, 437).

Unsurprisingly, a number of even Left and radical critics have attacked this 'expulsion of law'. Many have accused Foucault of under-stating law's constitutive functions and/or its relative autonomy from the disciplinary apparatus (e.g. Hirst 1986, 49; Poulantzas 2000, 77; de Sousa Santos 2002, 5; for an overview of this literature Cotterrell 1995, chapter 6; for critique Golder and Fitzpatrick 2009, chapter 1). Variants of his ideas, nevertheless, can be found in many of today's best known rights critiques. Giorgio Agamben (1998, 9), perhaps most famously, has sought to 'complete' Foucault's theory of 'biopower' - those disciplinary techniques aimed at 'the subjugation of bodies and the control of populations' (Foucault 1979a, 140). He sees these as inherent in Western sovereignty, not merely modern government (Agamben 1998, 181). Until the messianic arrival of a 'completely new politics', man-as-citizen will remain eclipsed by political power controlling even his 'bare' biological life (Agamben 1998, 13). For Agamben even the advent of *human* rights after 1945, which Hannah Arendt and others had seen as signalling the crisis of sovereignty, served simply to extend states power over the stateless. For Agamben, like Foucault,

the putatively legal and metaphysical characteristics of human rights are of no importance: 'it is time to stop regarding declarations of rights as proclamations of eternal, meta-juridical values binding the legislator (in fact, without much success) to respect eternal ethical principles ... declarations of rights represent the originary figure of the inscription of natural life in the juridico-political order of the nation-state' (Agamben 1998, 75). (With only minor modifications to such accounts it is, of course, also possible to construe human rights as helping entrench the power of an international constellation of forces that includes both states and 'global civil society' [e.g. Hammer 2007, chapters 5, 7].)

3. Taking rights theorists seriously

Such critics, however, often understate the extent to which liberals are, like them, increasingly happy to downplay the legal and metaphysical characteristics of human rights. After 1989 international lawyers in the Kantian cosmopolitan tradition certainly did begin to identify human rights as the future law of world government: Antonio Cassesse's (1990, part 1) 'Decalogue for five billion persons'[46]. They understood them as peremptory norms from which no derogation would be allowed, and which would occupy, more generally, the conceptual apex of a hierarchically organised system of laws regulating a cosmopolitan world community (cf. Tesón 1992). Clearly they saw nothing wrong with Foucault's 'wonderfully-eighteenth-century perspective'. Since then, however, wars in the name of rights, combined with 'backlash' by more illiberal elites - most notably against the European Court of Human Rights (ECtHR) - have persuaded others that the 'confrontation of deeply entrenched convictions of principle … hinder[s] socialisation processes' (Krisch 2011, 406). Now, one of the most determined Kantians writes, unlike in 'happy former times when law was associated with song and poetry ... an absolute universalism may produce the risk of unifying and freezing the world order in a hegemonic way' (Delmas-Marty 2009b, 3, 8). Durable order is perhaps best protected by political projects. Human rights jurisprudence can aspire merely to 'order pluralism' (see more generally Delmas-Marty 2009a).

Kantian visions for world government have thus converged with managerialist theories of global governance (for the latter Koskenniemi 2009). These theories have long been centrally concerned with 'socialisation' and other techniques reminiscent of 'micro-power' (e.g. Chayes and Chayes 1995, 228; Koh 2005). They typically treat human rights not as hierarchically-organised sources of law to be 'discovered', but rather as a language for 'dialogue' between judicial

'networks' (Slaughter 2004, 79-81). As at least one Foucauldian critic has pointed out, this more closely resembles rule 'through' law than the 'rule of law' (Rajkovic 2010). However, this is hardly a secret. It is even openly discussed. Anne-Marie Slaughter (2004, 91-104), for instance, recently Director of Policy Planning at the U.S. State Department, has made human rights 'dialogue' among judicial networks a central component of her 'new world order'. And she has spoken of how such an approach can be more effective than designing laws as formal checks on organized power:

> legalization can blunt the power of soft power. These networks do not operate through coercion, they are horizontal networks, networks of equals from different nations. The power they exercise is in information exchange, persuasion, deliberation, and socialization. It is important power, power that neither we nor many political scientists fully recognize (Scott, Slaughter and Kratochwil 2002, 296; for inequality in judicial networks see Buxbaum 2004).

For managerialists insisting on rights' metaphysical character risks the 'confrontation of deeply entrenched convictions of principle' which their approach seeks to avoid.

Unsurprisingly, some liberal political theorists have been even more forthright in opposing the claims of human rights to special metaphysical status (recently Raz 2010). Richard Rorty's 'anti-foundationalist' view of rights as sentimentality and anti-cruelty is well-known, as is - to a lesser extent - his 'realist' approach to law (Rorty 1983, 588). For him the key to human rights promotion was *inclusion* ('sentimental education'); a process that 'gets people of different kinds sufficiently well-acquainted with one another so that they are less tempted to think of those different from themselves as only quasi-human' (Rorty [1993] 1998, 176). Other liberals have gone even further towards critical positions, going beyond mere inclusion, and stressing how human rights institutions and language can also be used to enable a whole range of political and military interventions. As Jean Cohen (2008, 578) summarises:

> 'the traditional conception construes human rights as moral rights all people have due to some basic feature or interests deemed intrinsically valuable. This comported well with the revival of the discourse of human rights in the wake of atrocities committed during WWII. It served as a useful referent for local struggles against foreign rule and domestic dictatorship in the 1980s. Since 1989, human rights discourse acquired a new function: the justification of sanctions, military invasions, and transformative occupation administrations by outsiders, framed

as enforcement of international law against violators. The traditional conception doesn't fit this new function'.

This 'political' approach is encapsulated by John Charvet and Elisa Kaczynska-Nay's (2008, 5) understanding of human rights as the core value of a 'liberal project', which they define as the 'transformation of the basic structure of the separate modern societies and of the international society they together constitute, so that they all come to express liberal values'.

Tom Young and David Williams have urged scholars to take this 'liberal project' seriously for many years now. They have shown how much critique of liberal ideology - at any rate that which seeks to expose the narrow political agendas and interests lurking behind theories of purportedly universal scope - is in fact already explicit within it (cf. T. Young 2002). Cohen's assertion that after 1989 'human rights discourse acquired a new function' is here a case in point. The adoption of particular theories and traditions may confine liberal thought to some extent, but liberals' choices of which theories to espouse are (often unconsciously) shaped by pragmatic assessments of their political consequences. As Williams and Young have outlined, such a perspective is simultaneously wider and narrower than current writing in the Foucauldian tradition. It is narrower because it focuses on liberal thought and practice, rather than on the more encompassing *epistemes* significant in Foucault's early work. This reflects an 'understanding of liberalism precisely as a political project which has as its object the transformation of the social world rather than as simply one set of ideas that structure the broad possibilities of social life' (Williams and Young 2011, 3). It is wider, however, when it claims that liberalism's 'kinetic' aspect, 'its restless and relentless desire to remake the world in its own image … ultimately underpins the liberal project'. Foucauldians have focused too narrowly on government, and not enough on other avenues by which the transformation of individuals and societies can be pursued (D. Williams 2009, 10).

4. How human rights can be dysfunctional for the liberal project

One of the great merits of this view is that it opens many of the explanatory questions some Foucauldian accounts foreclose. In his later work, as he departed from 'archaeology' and the *episteme,* Foucault stressed how the modern state derives its distinctive character from discourses of (Renaissance) sovereignty, (Enlightenment) discipline and (Christian) pastorship (cf. Foucault 2007). These discourses were, certainly, functional to long-run processes of 'human

individualization in the West' (Foucault 2007, 184). But there were no logical connections or elective affinities between them. 'Political rationality', rather, 'took its stand' on whatever was useful in prevailing political cultures; 'first on the idea of pastoral power, then on that of reason of state' (Foucault, 1979b, 256). Young has implicitly extended such arguments. He claims that the availability of useful discourses at critical junctures may even determine the liberal project's survival. The comparatively recent liberal abandonment of nationalism, for example, may fatally obscure the still urgent political necessity of somehow securing populations' emotional loyalties to states under (re)construction (T. Young 1995, 543). On human rights, likewise, the 'liberal project' accounts for contingency and explains change better than ahistorical 'archaeological' references to behemoths such as '(neo)-liberalism' and 'market discipline' which encompass such difficulties seamlessly (e.g. T. Evans 2005; Odysseos 2010). For Young, for example, liberal managers of the global system after 1989 required *a* discourse that would legitimate the new range of interventions which geopolitical shifts had made possible: 'the language of sovereignty is by no means dismantled, but going beyond it requires a new kind of political language with at least as much emotional charge and at least as much resonance with other features of modernity'. The 'old nineteenth-century language of more-or-less civilized', which did similar work during the colonial period, was clearly unavailable. So 'the only candidate would seem to be rights', despite the fact that 'they have no coherence as such at all' (T. Young 1998, 33, 35).

In this study I make an argument with some echoes of Young's suggestions for nationalism. The 'choice' of human rights *may* produce internal inconsistencies fatal for an important aspect of the liberal project: namely, containing dissent to the establishment of property rights regimes within durable political and constitutional orders. Both critics and supporters are therefore mistaken in describing human rights as seamlessly connected with ever-intensifying transformative (neo-)liberal projects. Young (1998, 33) himself raises the possibility I wish to explore: 'the sheer success and salience of rights discourse meant that it could become the vehicle for other projects ... including even those that bear no relation to the liberal project or indeed some that are hostile to it'. But he suggests that subversive appropriations are ultimately likely to be contained. This is because 'the staff officers of the liberal project (who do the drafting, man the institutions and so on)' are not, at bottom, constrained by any specific attachment to ideas of rights. Rather they deploy them strategically in order to further their objectives (even if self-deception will typically ensure that this strategic background remains unconscious):

the language of rights is almost infinitely flexible in terms of specifications of claimants, what is claimed and of whom. But whether claimants are children, women, 'indigenous' peoples, refugees or migrants, the general thrust is the same: first, to delegitimise existing practices [...] second to sanction new practices that corrode or dissolve obstacles to the liberal project (T. Young 1998, 36).

The implication here is not that the 'staff officers' are insincere in claiming to believe in human rights, but rather that unavowed deeper political agendas shape how these beliefs are formed. This is where I more generally depart from Young and Williams, and more broadly the genealogical tradition in which Foucauldians write (for this 'tradition' MacIntyre 1990, chapter 9). I treat the question of how far liberals' political agency is constrained by specific rights ideas as an open one. It is true that some liberals may have (even if unconsciously) adopted the discourse because of its political utility. Other influential actors, however - notably some lawyers and human rights activists - have taken the ideas so seriously that attempts to manage the discourse for political ends have been systematically undermined. One implication of this is obviously that some liberals must have come to adopt rights language for other reasons than Young identifies. Focusing on the 1970s, I seek to explain these adoptions as 'rational' responses to dilemmas posed by new circumstances to established webs of belief. I thereby hope to take up the challenge Graham Harrison (2010, 116) has presented to Williams, to avoid 'references to liberals [that] can tempt analysis into the abstract: a referencing of a form of agency that is deduced rather than identified'.

5. Justifying interpretivism

This use of the term 'rational' merits discussion since it is likely to arouse considerable suspicion. As David d'Avray (2010, 72) has stated in a work important for this study, it is now a common belief in social science that 'the claim to rationality is self-deception'. Nowhere in this more marked than in the genealogical tradition. Nietzsche, famously, saw man as fundamentally uninterested in establishing rational consistency between his beliefs about the world and his experience of it - even if the conclusions he draws from this view changed, however, towards the end of his life (B. Williams 2002, 12-19). And Foucault made similar insights central to his genealogical enquiry into 'regimes of truth' (see Foucault 1977b). He understood webs of belief as inconsistent assemblages imbued with a dangerous aura of self-evidence by 'the moving substrate

of force relations' (Foucault 1979a, 93; for Foucault and 'assemblages' see A. Hunt 2013). Here he linked discursive and non-discursive realms by 'power/knowledge', or what he had earlier referred to in more obviously Nietzschean terms as a generalised 'will to power' (Hacking 1986, 34-38). This was not say, of course, that individual subjects are insincere in the beliefs they hold - a formulation in any case wholly alien to Foucault's philosophical project - but rather that power's far-reaching consequences entail that self-deception is *in effect* integral to any claim to rational and coherent selfhood or identity uncontaminated by it (cf. Foucault [1980] 1984, 59-61).

Once again, my general strategy here will be to open the questions that such perspectives foreclose. It would be idle to contend that beliefs are always formed in ways uncontaminated by social forces. But likewise, as Mark Bevir (1999, 170) contends, only a 'vacuous ... nihilistic relativism' would contend that 'all beliefs, including apparently rational ones such as those associated with science, have an irrational origin epitomised above all by the will to power'. This is not to deny the need for a healthy, critical relativism that 'queries the strength and nature of our attachment to our view of the world', after it has evaluated the origins of that worldview (Bevir 1999, 18; see also Geuss 2002). It is only to stress the variety of psychological processes by which beliefs are acquired, and to stress the analytical implications of this diversity for social science. In the chapters that follow I will use this approach to distinguish actors (such as the 'staff-officers of the liberal project') who have acquired beliefs in rights via self-deception, from those who have acquired them for rational reasons or have deployed them in a consciously strategic fashion. As outlined in the next section, these distinctions help resolve analytical puzzles surrounding the adoption of rights discourse by various constituencies. I will argue that the mono-causal theories of belief formation implicit in existing explanations require that these puzzles remain mysterious.

I borrow these broad notions of rationality from Donald Davidson's criticisms of the later Wittgenstein, and the numerous anthropologists, historians, and social theorists who have sought to explore their implications (Davidson [1963] 2001, 10; [1987] 2004, 101; [1995] 2004, 117; 2001, xvi; see also Elster 1982, 125; Lukes 1982, 279-282; Bevir 1999, x; Skinner 2002, 31; Ludwig 2003, 6; d'Avray 2010, 17; contrast Winch 1958). For Davidson, famously, reasons can be causes. They do not merely redescribe the social, economic, linguistic, or evaluative context in which actions are conducted, as Wittgenstein had argued in the *Philosophical Investigations* (Davidson [1963] 2001, 10; for a defence of Wittgenstein's view Tully 1989, 180-182). Reference to context alone cannot explain why people *want* to act. Humean efforts to explain action purely in terms of

desires must also fail. Such theories cannot account for why people prefer rationalizing explanations to explanations in terms of desire alone (Davidson [1963] 2001, 15-16; also Anscombe 1957, 16; Hueur 2004). Social-scientific prejudices to the contrary, finally, no 'covering laws' can be devised which would reliably connect particular sets of desires and circumstances with actions (Davidson [1963] 2001, 15; [1976] 2001; cf. Hempel 1942). Thanks to the 'nomological irreducibility of the psychological', in short, 'any serious theory for predicting action on the basis of reasons must find a way of evaluating the relative force of various desires and beliefs in the matrix of decision' (Davidson [1963] 2001, 16; Davidson [1974] 2001, 230). There is thus no alternative to an open mind on such matters.

6. Irrational belief formation in social-science explanation

In contrast to Davidson, social-scientific explanations typically assume irrationality. Contrary to Cartesian prejudices, however, this phenomenon cannot be diagnosed by simply identifying (bodily) desires in the 'matrix of decision' (see Davidson [1970] 2001; Rawling 2003, 106). The key, rather, is whether the agent rationalises his actions in terms of the desires that actually motivated it: 'in standard reason explanations … the actual states of belief or desire cause the explained state of belief … In the case of irrationality … there is a mental cause that is not reason for what it causes' (Davidson [1982] 2004, 179). d'Avray (2010, 16), approvingly, associates this view with Jon Elster (1983, 15-6): 'a belief may be consistent and even true, a desire consistent and even conformable to morals - and yet we may hesitate to call them rational if they have been shaped by irrelevant causal factors, by a blind physic causality operating behind the back of the person'. Quentin Skinner (2002, 31), more famously, has also drawn on Davidson to make a similar case, 'a rational belief will thus be one that an agent has attained by some accredited process of reasoning. Such a process will be one that, according to the prevailing norms of epistemic rationality, may be said to give the agent good grounds for supposing (as opposed to merely desiring or hoping) that the belief in question is true'.

For our purposes self-deception is the most significant source of irrationality. Thanks to weakness of the will, our desires will routinely lead us to act contrary to our reasoned beliefs. I may, for example, believe it immoral to take the last chocolate but secretly take it nonetheless. Self-deception, however, differs from this in two important respects. Firstly, whilst 'the outcome of weakness of the will is an intention, or an intentional action ... the outcome of self-deception is a

belief' (Davidson [1985] 2004, 201; contrast Forrester 2002, 44, n.11; Lear 2014, 88). In contrast to weakness of the will, secondly, the irrational processes of belief-formation that characterise self-deception are in some sense *motivated* (Davidson 2001, 205; see also Pears 1984). This is what positivist political scientists describe when that they claim that elites provide new reasons for their actions merely to conceal new configurations of 'interests' (political or economic)[47]. (Some now rather antiquated variants on this argument do of course assume that political actors consciously deceive almost as a matter of course [e.g. I. Hall 2009].) But these are empirical questions, and the successes of such strategies are in any case parasitic on more general norms of sincerity (Bevir 1999, 28-30; Meirsheimer 2011, 28-9). As two leading positivist scholars of judicial politics explain:

> we posit no Oliver Stone-like conspiracy in regards to the legal profession..... Legal socialization, to say nothing of self-preservation, keeps even self-aware judges from admitting their attitudinal biases (Segal and Spaeth 1994, 10-12).

Young and Williams provide a much more sophisticated account of irrational belief formation via self-deception. This, however, is specific to liberals, and narrower than power/knowledge or a generalised will to power. It is governed by a 'restless and relentless desire to remake the world in its own image' which 'ultimately underpins the liberal project' (D. Williams 2009, 12). This 'kinetic' quality means that whilst liberal desires thus remain constant liberal beliefs are endlessly various. There can be, for example, no 'urge' to imperialism 'internal' to liberalism, as Uday Singh Mehta (1999, 20) claims. (And nor can there be a fundamentally anti-imperialist 'radical Enlightenment', as Jonathan Israel (2001, 79-82) has argued.) If desires to effect 'social transformation' are better served by anti-imperialist beliefs in particular circumstances then liberals will sincerely adopt such beliefs[48]. Like traditional ideology critique this approach therefore foregrounds the role of 'powerful social agencies' in seeking to change (and distort) wider beliefs, attitudes and preferences (Geuss 2008, 54-5). Unlike some cruder accounts, however, it doesn't suggest that liberals promote these (typically universalist) beliefs in order to serve their 'particular interests' - or not, at least, when these are narrowly construed as 'generative of political (and other) behaviour' (T. Young 2002, 189, n.28; Geuss 2008, 52). Relentless desires to transform societies and individuals must, rather, reflect some unavowed 'preference for greater power'; a preference which Bevir (1996, 120) proposes as characteristic of ideological belief in general.

I disagree only with the scope of these claims. Self-deception may characterise irrational belief formation among some of those promoting liberal ideas. But this need not hold true for liberals in general. As Bevir points out, 'although some of those who adhere to an ideology must hold it as a distorted belief, although their beliefs must be corrupted by a preference for greater power, not all the adherents need do so' (Bevir 1996, 121). Not all liberals need conceal from themselves the real causes of their beliefs (Pears 1984, 15-40; compare Davidson [1985] 2004, 206-210). Their views need not, moreover, reflect any kind of 'false consciousness', even according to minimalist versions of such theories claiming no privileged access to the truth (contrast Lukács [1923] 1972). Such people do not, that is, necessarily hold straightforwardly and factually incorrect views which they have acquired thanks to the 'manipulative framing of issues by those whose interest, profession, and mission it is to shape our perceptions' (Lukes 2011, 27). This diversity of liberal belief formation processes is, finally, granted some *a priori* empirical plausibility by the sheer variety of contemporary liberalisms. As Bell (2014, 8) has written:

> most inhabitants of the West are now *conscripts of liberalism* [...] most who identify themselves as socialists, conservatives, social democrats, republicans, greens, feminists, and anarchists, have been ideologically incorporated, whether they like it or not.

There are, obviously, other possibilities here. The structural sociology of Pierre Bourdieu and his followers, for instance, which I largely neglect in these pages, typically explains the adoption of new beliefs in terms of unavowed quests for status and struggles for position within narrow cultural arenas. On this view new 'fields' typically emerge thanks to the power of the states that back them, or the charisma and 'entrepreneurial' flair of 'prophetic figures' and 'missionary idealists' that promote them[49]. They then spread thanks to desires for self-preservation via conformity (e.g. Dezelay and Garth 1996, 35, n.6; 45; 71). In Nietzschean ([1873] 1954, 44-5) terms such 'herd-like' people 'do not flee from being deceived as much as from being damaged by deception'. Even sociologists can conceal from themselves that 'ressentiment, envy, social concupiscence, unconscious aspirations or fascinations, hatred, a whole range of unanalyzed experiences of and feelings about the social world' can shape their beliefs (Bourdieu 1988, 94-5; Wacquant 1989, 33). To the extent that quests for status motivate such irrationality, it constitutes what Davidson ([1985] 2004, 205) analyses as 'wishful thinking'; a species of self-deception distinguished only by its consistently pleasant consequences.

7. Rational belief formation

The process by which rational agents form their beliefs now itself requires a series of caveats and clarifications. Perhaps most pressingly, as may be clear by now, 'rational' is not here equated with 'deontological'. It differs from moral or scientific truth, and even - as with Habermasian concept of 'communicative rationality' (Risse 2000) - from forms of reasoning that are thought to possess special truth or consensus-establishing characteristics. Nor, avoiding radically opposed understandings common in disciplines strongly influenced by economics, is it simply 'utilitarian'. This purer form of rationality certainly exists - in informed consumers' choices, for example - but differs from that in domains more coloured by values. More explanatory significance should therefore be ascribed to beliefs in, say, pacifism, than to mere 'preferences' for various kinds of consumption (d'Avray 2010, 43-4). In Bevir's (1999, 28) terms, in short, 'we will define rational beliefs in terms of consistency, not in terms of objectivity or an appropriate means to any subjective end'. This reflects what Bevir (1999, 92; 2000, 30) describes as a 'semantic holist' brand of interpretive political science; one which I compare favourably to constructivism in the chapters which follow.

Put briefly, such interpretive approaches do not try and isolate particular norms of appropriate conduct and then analyse how agents may commend, propagate or otherwise seek to embed them in social institutions (for this constructivist tendency see Finnemore 2003, 57). They seek, instead, to show how agents' beliefs about appropriateness are always justified by other beliefs, and thus account for the tenacity with which they are typically held onto - evidence seemingly to the contrary. As Bevir (1999, 95) explains, semantic holism thus 'starts by rejecting pure experience and ends by insisting that beliefs confront reality only as interconnected webs'. This explains the tenacity of belief since 'observation entails theory, so if an observation disproved a favourite theory, we could rescue the theory by insisting that the observation rested on a false theory'.

Rational belief formation thus occurs when new understandings cannot be rationally accounted for using resources contained within existing webs of belief. Key to explaining change, therefore, is the identification of *dilemmas* posed to specifiable groups of agents. As Bevir (1999, 29) explains, 'dilemmas arise for individuals when they accept as authoritative a new understanding

that, merely by virtue of being new, poses a question for their existing web of beliefs'. They thus differ from those sources of change identified by positivists who 'equate dilemmas or pressures with objective facts about the world rather than the subjective beliefs of actors'. Such scholars often 'need an analysis of how these pressures lead to people to change their beliefs and actions' (Bevir 2010b, xxxvii). This is why, for example, I seek to distance myself from analyses - positivist, Marxian and otherwise - that explain new beliefs in human rights in terms of the objective growth of global culture, capitalism or 'globalisation' (e.g. Elliott 2007; Manokha 2009, 445-8).

None of this, of course, should be taken to intellectualist extremes. As d'Avray concedes, 'emotion, unthinking tradition, and free-wheeling, purely instrumental reasoning no doubt dominate much of the history of human thought and actions'. But beliefs and deontological convictions can set 'the parameters of instrumental rationality', and our specific investigations can hope to uncover emotionally-driven and purely habitual kinds of thinking (d'Avray 2010, 62; see also Weber [1925] 1964, II, 2, i). Such an approach does not entail, furthermore, that agents be conscious of their beliefs when acting upon them, nor that they constantly seek to establish consistency between them (see Billig 1991, 147). It merely claims that rational agents typically act in this way when new circumstances and/or determined interlocutors force them to become conscious of these inconsistencies. We should therefore assume rational agency until it is disproved (see Bevir 1999, 128). Conscious deception is only effective because it is parasitic on sincerity. The ideological adoption of beliefs, likewise, only furthers political projects because of wider assumptions that ideologists do not self-deceive.

Importantly, finally, even when we do identify insincerity this does not entitle us to move directly to an analysis of actors' self-interests (a point also holding true for irrational belief). As Quentin Skinner has insisted - in ways Bevir may have been too quick to dismiss - such moves neglect the inescapable role of legitimation in political discourse (Finlayson 2007, 551-2). Even the most hard-headed of positivists have, obviously, observed ways in which political actors' typically justify their behaviour in ways that diverge from their real 'interests'. Ran Hirschl (2004, 12, 49; 2009, 830-1) provides a pertinent example for present purposes. He describes elites' talk of human rights as simply 'rhetoric', used to conceal their real motives for action ('hegemonic preservation') and unworthy of attention from realist scholars. This, however, is to miss two crucial points. The first is that even the most cynical of politicians cannot choose just *any* language with which to legitimate their actions. They must show that 'some *existing* terms can somehow be applied as apt

descriptions of their behaviour'. Even 'revolutionaries', to this extent, are in fact 'obliged to march backwards into battle' (Q. Skinner 2002, 149-150). Positivists may not think this a particularly damaging point. After all, they do not believe the choice of any particular *ex-post* rationalisation of conduct to be of special significance. However, if a particular 'cloak' is chosen to conceal a hidden agenda, this will invariably be because it is thought to possess some mobilising and/or legitimating power in a given context. And the reasons why it might possess that power will only be explicable via an analysis of broader ideational and cultural trends. (How, for instance, have rights attained the 'near-sacred status' that Hirschl (2004, 1) laments?) What is more, as Skinner (2002, 155) points out, to the extent that critics remember what cynics say, cynics 'will find themselves committed to behaving in such a way that their actions *remain compatible* with the claim that their professed principles genuinely motivated them'. This means that, to the extent that political actors wish to avoid accusations of insincerity and/or hypocrisy, even the most self-serving of post-hoc rationalisations will have subsequent real-world effects.

An important corollary of the analyses above is that symbolic technologies typically reinforce existing beliefs, rather than creating new ones (see d'Avray 2010, 71). Rational agents reason in more-or-less utilitarian fashion about how to entrench and mobilise beliefs they, and others, in fact rarely change. As d'Avray (2010, 8-9) explains (using Weber's 'value rationality' in place of 'rational belief'): 'value systems are cemented by experience or simulcra thereof … a recurrent pattern is for value rationality to shape instrumental technique which in turn, among other things, reinforces the values through rituals, mental imagery, mass meetings, processions, education, etc.' This passage outlines how interpretivist insights can be combined with an attention to ritual, practice and established social roles. In theory, therefore, a focus on these things - of which Durkheim and Bourdieu have been the most influential advocates - need not preclude analysis of the causal role of ideas and beliefs (Bevir 2010a, 22). Practically speaking, however, and despite some attention to these matters in chapter 7, space will preclude a full account of how rights 'get their meaning through practice' (Hopgood 2006, 215).

8. Explaining human rights

This focus on the relational dynamics of belief formation comes with an explanatory pay-off. Clearly, *Pace* Foucault and Agamben, recent and discrete global phenomena cannot be explained by sole reference to the emergence of 'biopolitical' practices in the Ancient World,

Medieval Christianity, the Renaissance, or the eighteenth-century West. The 'judicialisation of mega-politics' that Hirschl (2008) describes can be dated with some precision to the later 1970s. International relations constructivists struggle with similar difficulties. Like Rortyean liberal theorists, and like Foucauldian critics, these scholars understand rights as social constructions with no specifically legal or metaphysical qualities (Finnemore 2000). They are created by rights activists via issue framing and other symbolic technologies (Sikkink 2002). Once 'constructed' in this way norms 'spiral'. After they have been accepted rhetorically activists can use governments' pronouncements to identify double standards: 'self-entrapment' (Risse and Sikkink 1999, 23). (Unless, that is, states can deploy 'regime-based counter discourses and narratives' which resonate with the post-9/11 political climate [Risse and Ropp 2013, 15]). 'Socialisation' and habit-forming then begin to translate rights into determinate guides for conduct. This elicits compliance and eventually 'rule-governed behaviour' (Finnemore and Sikkink 1998, 898; Risse and Ropp 2013, 8-10).

Like 'biopolitics', however, such practices clearly significantly pre-date the 1970s. Lynn Hunt's (2007) well-known history of human rights locates their origins in the eighteenth-century. Like Rorty ([1993] 1998) she places great emphasis on how novels and other symbolic technologies promoted new experiences of 'empathetic selfhood' and 'bodily integrity' that ultimately created these beliefs (L. Hunt 2007, 29)[50]. 'Equality', after all, 'had to be internalised in some fashion' (L. Hunt, 2007, 27). Rorteyan inclusion - 'everyone would have rights only if everyone could be seen as in some fundamental way alike' - entailed cultural agency geared towards the production of new subjectivities (see Rorty ([1993] 1998, 176).

In a recent high-profile work the 'agentic' constructivist Kathryn Sikkink (2011; 16, 255-6) has sought to connect these broad historical trends with a related phenomenon from the 1970s: the advent of fair criminal trials for violations of 'physical integrity rights' - most notably torture committed by state officials[51]. She proposes five levels of analysis: 1) 'Deeper ideational instincts in the human brain', most abstractly, explain 'an initial receptivity to demands for justice' found 'in a wide range of cultures and societies' (Sikkink 2011, 255, 261). 2) At a lower, but still massive level of generality, Sikkink highlights the global reach of the Enlightenment; 'liberal ideas about human rights, due process, and, in particular, individual responsibility for human rights violations … associated with liberalism and the West, but … not in any way limited to it' (Sikkink 2011, 255). In the 1970s, 'unique background conditions' then focused these deep instincts into specific cultural

phenomena (Sikkink 2011, 231). These conditions came in two varieties: 3) the geo-political, such as end of the Cold War, which allowed for the global diffusion of norms and policies (Sikkink 2011, 21), and 4) the ideational, such as the contemporaneous rise of new human rights movements; within which the demands of norm entrepreneurs were 'nested', and without which 'new practices of accountability would not have emerged' (Sikkink 2011, 20). 5) Variations in local political culture, finally, meant that countries with long histories of 'political trials' were most likely to adopt the new, fairer sort as 'common sense' responses to the end of dictatorship (Sikkink 2011, 46).

This study questions how the emergence of human rights movements in the 1970s can be explained by reference to Enlightenment liberal traditions, let alone facts of neurology. As Bevir insists, broad traditions do indeed constitute conditions for the emergence of specific beliefs. By trying to equate traditions with a 'fixed core' of ideas, however, such essentialist approaches fail to explain how there may in fact be 'no single idea that persists from start to finish' within them (Bevir 2000, 38)[52]. Traditions influence individuals 'only by virtue of being the initial background against which they set out'. In general terms, therefore, by identifying liberal, Judeo-Christian, or other precursors to human rights, scholars *explain* later manifestations only to the extent that the former provided the context in which the latter were actually conceived (contrast Blackburn 2011; Dubow 2012; Cmiel 2012, 29). A number of scholars, for example, have established parallels between modern subjective rights and Thomist theories of natural law (Tierney 1997, chapter 1; Wolsterstorff 2008, 48-50; contrast Villey 1983, 15-16; Milbank 2012, 225). But if those identifying as natural law thinkers did anything to shape later twentieth-century traditions they did so against a radically different 'personalist' backdrop from which Thomism was wholly absent (Moyn 2011, 90-91).

In Anglophone liberalism, meanwhile, as Bell (2014, 11-17) illustrates, by the nineteenth-century the triumph of nationalist, idealist, utilitarian and Darwinian ideas had ensured that Lockean subjective rights no longer formed part of the liberal inheritance. (In France the notion of *droits de l'homme* as a component of (imperial) republican citizenship was increasingly embattled, but continued to eke out a precarious existence (e.g. Fitmaurice 2012, 125-6).) In Europe, more generally, where liberal cosmopolitanism survived it was other forms, such as in emerging humanitarian efforts to 'civilise' war and international relations (Fine 2009, 13-14; Hopgood 2013, chapter 2)[53]. The Lockean subjective rights 'tradition' was, very broadly speaking, only rediscovered by political theorists and academics in the United States as part of a mid-century effort 'to define and defend a holistic 'Western' civilization based on 'liberal' values, and as such it 'was of 'strategic'

value in fighting totalitarianism (Bell 2014, 23)[54]. Without this 'ideological labour' liberal rights traditions would not even have provided the conditions for later belief formation (Bell 2014, 18). They were certainly not extracted from some unchanging 'fixed core' of 'liberal ideas'.

By contrast, this study does find that the 'unique background conditions' Sikkink identifies in 1970s are significant in explaining new kinds of judicialisation. It too focuses on the diffusion of new norms and institutions after 1989 (chapter 9), and on the emergence of new human rights movements and their facilitation by local traditions of political lawyering (chapter 7). But it insists these new movements were not simply 'conditions' for but *causes* of judicialisation (contrast also Erdos 2009, 807). They therefore require separate explanation. 'Altruism' alone, no less than greed, can hardly explain activism for indigenous rights and colonial reparations (contrast Finnemore and Sikkink 1998, 898). In chapter 7 accordingly, the origins of these movements will be explained by reference to other existing beliefs.

In the next chapter I argue that the human rights beliefs of the post-war period were transformed significantly in the 1970s. This argument will be made with the aid of Moyn (2010), who explains the 'human rights revolution' in terms of the global de-legitimation of socialist utopias that followed, notably, the 1968 invasion of Czechoslovakia. Moyn describes how the failure of various utopian alternatives in the next decade (Eurocommunism, Maoism, anti-colonial nationalism etc.) left human rights stranded as the sole survivor of an intense period of ideological competition. The utopian provenance of these new converts transformed human rights beliefs, and gradually shifted their focus away from 'catastrophe prevention' (Moyn 2010, 226)[55]. Human rights, even whilst continuing to 'draw on the claim that their source of authority transcended politics', thus became a language for 'maximalist' demands; even becoming a 'dominant framework of government and improvement of human life in far-flung global locales', and being used to express such demands as 'rights' to 'culture, indigeneity and environment' (Moyn 2010, 223). Whilst Sikkink sees agents extracting human rights ideas from unchanging cultural and biological essences, therefore, the next chapter treats them as mutable products of ideological competition[56].

9. Explaining dysfunction

It is ultimately this 'maximalist' expansion of rights discourse which explains how human rights have become dysfunctional for Young and Williams' 'liberal project'. The preceding chapters

had a dual objective. The first was to identify the empirical phenomenon to be explained in the chapters that follow: 'the judicialisation of fundamental political order'. The second was to describe how the expansion of rights into these intrinsically political realms of decision-making has made compliance impossible. It is this inherent indeterminacy which explains why constructivists are wrong to understand rights as functioning like (socially constructed) *rules* governing behaviour. Chapter 9 will illustrate these contentions by analysing the international institutionalisation of the new rights deployed in my case studies. On the constructivist account such institutionalisation clarifies norms, reduces indeterminacy, and thus helps produce determinate 'rules' for behaviour that elicit compliance. As I show, however, the very opposite has been the case. Analysts who wholly discount the ideational content of rights will find these failures of socialisation difficult to explain.

In the rest of this section I will briefly outline the context in which new beliefs created this dysfunctional indeterminacy; a context clarified in the next chapter. From our perspective, in short, the 1970s were in fact characterised by a dual crisis. The collapse of socialist utopias now coincided with a crisis of liberal modernist beliefs about administration. This period saw the crystallisation of creeping disenchantment amongst Western *liberal* elites with the productivist orientation and discretionary power of the tutelary state (Jobert 2000, 130-1). This posed dilemmas for adherents of theories which presented law as a technology of state intervention in economy and society, and it favoured the rise of new 'managerialist' theories which presented law as a steering mechanism for the co-ordination of largely autonomous social spheres (Nonet and Selznick 1978; Bevir 2010a, chapter 2). Great stress was placed on the capacity of devices such as 'reasonableness' and 'proportionality' to limit the excesses of regulatory discretion. Absolutist conceptions of legal rights, already rejected by modernist theories of the early twentieth-century, were likewise de-emphasised to prevent dangerous interference with other social domains (see Duguit 1917, 10-26; Teubner 1983, 255; Cotterrell 1995, 173-4). For managerialists the internal complexity of social subsystems was such that identifying law with 'morals', as human rights ideas often do, would be a disaster (Teubner 1983, 271-2).

This was of course a demanding tightrope act. It has not been possible to restrict human rights discourse to the simply moral sphere. In the 1980s philosophers from a variety of traditions criticised the tendency for rights-talk to displace ethical decision-making from locales possessing genuinely 'thick' understandings of social practices (MacIntyre 1981, 68-71; Rose 1985; J. Dunn

[1988] 1990, 50; B. Williams [1989] 2005, 47-50). More recently, meanwhile, some of their liberal counterparts have sought, vainly, to police and insist upon the distinction between legal and moral rights (Nagel 1995, 85; Tasioulas 2007; Griffin 2010, 352-5). One of the key explanations for their difficulties has been the very different sets of dilemmas that the 1970s posed for socialist beliefs. The collapse of old utopias at the hands of Soviet dissidents, combined with the perceived failures of other utopian projects that had emerged after 1968, now triggered dramatic transfers of political energies on the Left (Horvath 2007; Moyn 2010, chapter 4). Ex-socialists thus came to embrace the absolutist legal notions of individual freedom espoused by early Cold war Christian conservatives, but maintain beliefs in the directive capacity of state that liberals viewed with scepticism and conservatives with hostility. These persons saw human rights not as a 'thin' master frame, but rather as an indeterminate language through which an almost limitless set of political goals could be pursued. Rights language and concepts have provided managerialists with no resources to prevent litigants from using these new opportunities to their advantage. Their ideas have served, ultimately, to dilute legal and political actors' working distinctions between law, politics and administration. Chapter 7 locates these dynamics in Southern African traditions of political lawyering crucial to my case studies.

As anticipated by the 'liberal project', and Foucauldian approaches more broadly, in the face of such potential dysfunction some liberal elites have therefore abandoned absolutist beliefs in human rights. Such actors have sought to develop various ways of managing dangerous entanglements in inherently political areas. Others, however - lawyers especially - have retained these more absolutist views; 'convictions' in Weber's sense (see d'Avray 2010, 15-17, 92). This helps explain the continued embedding of rights beliefs in national and international legal architectures. Donors, politically-connected NGOs, and other elite figures have not therefore been able to prevent various non-elites from *resisting* realistic efforts to address vital questions of political order in Southern African rural areas. For them, the difficulty has been that deploying the language of human rights ultimately deepens dependence on legal establishments. Alasdair MacIntyre's (1988, 344) 'clergy of liberalism' thus replaces the 'staff officers of the liberal project'[57]. Unlike Lockean theories of subjective rights, for example, liberals cannot simply use these ideas to de-legitimate existing political orders (compare I. Shapiro 1986, 88-89). They must simultaneously regulate those currently in existence. As illustrated in chapter 8, moreover, this dependence of lawyers has entailed a concomitant dependence on historical and anthropological establishments; required as expert witnesses in courtroom battles. These groups, whilst typically

sympathetic to liberal projects in political terms, often retain other commitments (explicable by particular histories of their disciplines) which consistently render them unreliable allies.

There is, finally, at least one important implication of this argument, and one important qualification to be made to it. Social scientists, firstly, and particularly social movement theorists, are wrong to describe human rights as simply another 'frame' or legitimation device that actors can use to attract international support (e.g. Keck and Sikkink 1999, 95; generally Benford and Snow 2000; contrast Rao 2010, 172). Frames are not simply interchangeable. Choices between them are politically significant. Different frames mobilise different international coalitions with distinctive beliefs and 'repertoires of action' (Tilly 1978). Environmentalist frames, for example, typically appeal to traditions of protest and direct action, on the one hand, and scientific communities with preferences for informing policy through expertise on the other. Rights frames, meanwhile, via their appeal to lawyers, possess a distinctive link to *concrete legal orders* with significant political ramifications.

But this should not be taken to imply, secondly, that lawyers' specifically legal beliefs render them wholly impervious to political considerations. They are political too. In my conclusion I discuss new quasi-legal concepts of 'meaningful engagement' which have been conceived, in large part, as responses to the trends I describe. This is just one of the many respects in which the judicialisation of politics also entails a politicisation of law more generally (Tamahana 2006). The vast majority of lawyers remain, nevertheless, profoundly convinced of the normative value of a law/politics binary; a distinction with profound performative consequences (Zenker 2012, 138-140; for an extreme formulation Luhmann 1986). As described in the next chapter, furthermore, over the least three decades legal sociologists have devoted considerable energy into accounting for the significance of these effects. Any plausible theory, they have concluded, must account for lawyers' political savvy whilst not reducing their specifically legal beliefs to mere rhetoric and epiphenomena (for overviews Cotterrell 1995, chapter 5; Novkov 2008, 628-9).

10. Resistance beyond transgression

In Southern Africa, therefore, human rights institutions certainly have become 'vehicles for other projects' (T. Young 1998, 33). Liberal actors have not been able to contain or appropriate them. The strikingly heterodox beliefs of Ben Freeth, Roy Sesana and Kuiama Riruako illustrate

this well. This conclusion entails modifying the standard normative assessment of resistance found in critical work on human rights. This scholarship, as we have already seen, increasingly follows more mainstream accounts in downplaying the specific legal and metaphysical characteristics of human rights. It tends, however, to see resistant subalterns, and not elite liberals, as those most likely to use rights to contest existing social orders (see the Gramscian 'oppositional' definition in de Sousa Santos and Rodríguez-Garavito 2005, 14). This 'bottom-up' thesis sometimes comes with a Foucauldian anti-humanist twist. In his later years the great philosopher engaged intensively with the debates about rights that so divided the Parisian intellectual scene in the late 1970s (Horvath 2007, 895-905). He began to see more political value in them than he had before. A later interview made it clear that he held to his earlier genealogical critique, 'through these different practices - psychological, medical, penitential, educational - a certain idea or model of humanity was developed, and now this idea of man has become normative, self-evident, and is supposed to be universal'. Resistance on the terrain of human rights thus still risked furthering hegemonic processes. This, however, did 'not mean that we have to get rid of human rights or freedom, but that we can't say that freedom or human rights has to be limited at certain frontiers' (in R. Martin 1988, 15). Genuinely emancipatory human rights claims must be 'unrestricted' in order to escape appropriation (Foucault [1979] 2000, 453). This was greatly facilitated by the fact that formal law by itself had no power to govern society, and was, fortuitously, empty and indeterminate enough to be permanently open to subversion. Foucault (1977b, 151-2) was explicitly Nietzschean on this point:

> rules are empty in themselves, violent and unfinalized; they are impersonal and can be bent to any purpose. The successes of history belong to those who are capable of seizing these rules, to replace those who had used them, to disguise themselves so as to pervert them, invert their meaning, and redirect them against those who had initially imposed them.

More generally, indeed, recalcitrant societies and resistant selves mean that even the most totalitarian of social orders can never hope to contain its 'outside' (Foucault 1980a). Even it leaves silences and gaps to be exploited. In this sense 'resistance comes first' (Foucault [1982] 1988, 14, in Golder and Fitzpatrick 2009, 75). Crucially, however, in the long run, resistance can be understood as constitutive of power and integral to the constant re-making of social orders that Young and Williams associate with the 'liberal project'. Resistance resides at 'the very heart of the power relationship … constantly provoking it' (Foucault [1982] 2000, 342, in Golder and Fitzpatrick 2009,

75). It justifies the perpetual expansion of the disciplinary apparatus (see Rajagopal 2003, 191). 'Mobile and transitory points of resistance' come to 'inscribe [themselves] in [power relations] as an irreducible opposite' (Foucault 1979a, 96, in Golder and Fitzpatrick 2009, 75).

Human rights critics inspired by Derrida have sought to build an ethos out of this highly ambiguous celebration of the limits of such processes (cf. Derrida 2001, 11-23). Although wary of the appropriation of resistance by power, they ultimately value how human rights enable a contentious politics favouring 'bottom-up' pressures towards social inclusion (compare Reus-Smit 2011). For Costas Douzinas (2007, chapter 9), for instance, human rights *laws* do not govern the international order. Instead, they enable imperial projects like the 'war against terror' that ceaselessly re-make it (see also Anghie 2006). But this tendency to justify imperialism, Douzinas (2000, 122, 371) argues, could be reduced if human rights became simply a name for subaltern resistant aspirations; a messianic, Derridan 'cosmopolitanism to come'. For him, critics must remain alert to how such strategies continually risk appropriation, 'every exercise of right, every rearrangement of social hierarchy, opens in turn a new vista, which, if petrified, becomes itself an external limitation that must be again overcome' (Douzinas 2007, 13). Other Derridans have seen similar value in 'Foucault's law' (Golder and Fitzpatrick 2009). For Foucault (1977a, 179) it was the inherent indeterminacy of *the norm* ('humanity') which allows disciplinary agencies to *normalise* 'the whole indefinite range of the non-conforming'; a strong parallel with how activists and bureaucrats use general human rights to initiate specific 'norm spirals'[58]. But this same indeterminacy - which the legal celebration of 'human' rights has transformed into the 'social bond of modernity' - Derridans see as empowering in 'its iterative ability to combine a present determinacy with an incorporative orientation to a beyond' (Golder and Fitzpatrick 2009, 85).

Human rights, however, do not only re-shape subjectivities, but also concrete political orders. The 'unrestricted' human rights Foucault hoped for have now, indeed, expanded beyond the domains of behaviour, subjectivity, inclusion, and relations to 'the Other'. In these areas 'norm spirals' cannot be derived from rights, and normalisation processes cannot be derived from the (indeterminate) norm of humanity. In 1981 Foucault himself co-authored a statement delivered at the UN in Geneva, and which can be read as making precisely this point. Developments in the human rights world meant that resistance was no longer limited to prescriptive claims about human nature, which could be endlessly appropriated by transformative governmental projects. It could extend into inherently political domains: 'Amnesty International, Terre des Hommes, and Medecins

du Monde are initiatives that have created this new right - that of private individuals to effectively intervene in the sphere of international policy and strategy' (Foucault et. al [1981] 2000, 475). It is the consequences of *this* new right - more recently extended downwards into national spheres - which I investigate in this study. As Foucault (1980b, 17, in Ivinson 1998, 142) stated elsewhere, in a comment on Hobbes, in the context of 'the permanence of war in society', the role of a '*singular right'* to resistance 'is not one … above the fray … [or] … to found a reconciliatory order'. As I shall argue throughout, moreover, constructivism is mistaken in claiming that *these* uses of rights can *ever* be reconciled with norms for 'rule-governed behaviour'. Human rights are not always rules, even in this sense.

Chapter 6: Explaining New Rights Beliefs

1. Supranational human rights courts

(a) Interpretive explanation

(i) Introduction

In this chapter I explain the transformation of rights beliefs necessary for the creation and use of new supranational litigation fora, such as that used to judicialise the politics of land in Zimbabwe. The first of these transformations related to beliefs about the appropriate role for human rights courts. The SADC Tribunal which adjudicated *Campbell v. Republic of Zimbabwe* was created as part of what Karen Alter (2012, 135) has described as a 'global spread of European-style international courts'. In these 'new-style' fora international courts possess compulsory jurisdiction and private actors (rather than states, commissions and prosecutors) can initiate litigation (whether directly or via referral from national courts) (Alter 2014, 84). In 1976 only the European Court of Justice (ECJ) possessed such features. Today there are at least twenty such courts, half of which are in Africa (Alter 2014, 82-4; see also chapter 9). For institutionalist scholars this development represents a new and important feature of global politics: 'supranational jurisdiction' (Helfer and Slaughter 1997, 277).

This is indeed a surprising and recent development. Before the 1950s, and 'the creation of the European Court of Justice and the European Court of Human Rights, international courts were primarily designed to adjudicate disputes between states when both parties desired it'. 'Despite their revolutionary designs', moreover, 'in the 1950s and 1960s both of Europe's supranational courts were barely used' (Alter 2012, 137). The ECtHR only delivered 10 judgements in its first decade of operation, and 'for a period in the 1960s', its part-time judges 'met about once a year and only because the rules required them to do so' (Madsen 2011a, 73). In this period powerful European states jealously protected their sovereignty. ECtHR and ECJ judges were prevented from applying, let alone 'developing' the law. Despite its cautious, procedural approach to political disputes, even the ECJ risked sanction at various times from member states and their courts (e.g. Alter 2001,

chapter 5; Rasmussen 2012, 388-394). Stuart Scheingold's (1965, 284) classic contemporary study of the Luxembourg Court concluded that 'pristine adherence to traditional standards is likely to thwart the Community's legal experiment. Only by understanding the forces which buffet the Court, and by continuing to bend before them at appropriate times, can the judges live a reasonably legal life in relatively uncongenial surroundings'. The ECtHR, similarly, from 1950 until 1975 - before its transformation 'from Cold War instrument to supreme European court' - consistently 'deployed a tacit understanding of the relationship between law and diplomacy, using the latter when confronted with high-political questions' (Madsen 2007, 138).

This would only change dramatically in the later 1970s. The ECJ now became 'more willing to make substantive rulings affecting important state interests' (Alter 2008, 211). By the mid-1970s, the ECtHR, for its part, had only decided a mere 17 cases. Within a decade, however, as Moyn (2010, 80) describes, 'the number of petitions received - and even more startlingly - the number approved for court consideration skyrocketed'. States now began tolerating drastically increased levels of 'interference' in sovereign policy-making across an almost unlimited range of policy areas. The paragraphs that follow seek to explain the emergence of *this* ECtHR; the institution that later diffused and became recognisable as a template for supranational human rights courts worldwide (see chapter 9). Such dramatic shifts require explanation; something interpretive explanations maintain can only be provided by reference to the beliefs of actors.

(ii) Positivist and functionalist explanations

Positivist explanations for the new supranational courts forge ahistorical generalisations from observations of powerful states' 'control mechanisms'. On this view, for example, the ECJ has merely functioned as an 'agent' of the 'principals' (states) who have delegated authority to it, its decisions catering for their interests (Garrett and Weingast 1993). This conclusion, however, has not held up to serious scrutiny, and has been moderated by even its adherents (Garrett, Kelemen and Schultz 1998; Alter 2008, 215). Levels of 'activism', moreover, as Madsen (2007, 138) describes, have varied considerably across time. Moravscik (2000, 244) similarly, has observed how liberal states in the early Cold War founded the ECtHR as a bulwark against communism, thus ''locking in'

the domestic political status quo against their nondemocratic opponents'. And from this observation he draws support for the hypothesis that states are 'self-interested and rational in their pursuit of (varying) underlying national interests' (Moravscik 2000, 226). But he cannot account for how states later delegated actual, and not merely formal oversight of their policies to the ECtHR; which is what he purports to explain. As Ed Bates (2010) has illustrated at length, states had not actually originally intended that the Convention would function as a text to which they would be held accountable in the court. In 1950, 'nothing', in Stephanie Hennette-Vauchez's words (2013, 118), 'allowed the thought that the ECtHR's future would be anything close to the one it has proved to be'.

Bourdeiuian scholars provide an alternative explanation for the ECtHR's 'autonomy' that highlights the pragmatism of its pioneers (cf. Madsen 2004; 2007; Vauchez 2013, 7; Hennette-Vauchez 2013). This draws on a wider set of theoretical arguments. Law, on this view, only acquires its autonomy when key actors 'invest' in legal fields, using social capital that they have acquired elsewhere (Dezalay and Garth 1996, chapters 2-3). This dependence on other fields, paradoxically, later helps them appear self-sufficient (cf. Dezalay and Garth eds. 2011; for legal 'autonomy' Bourdieu 1986, 823-6, 844-6). The key to the ECtHR's success, therefore, was the 'multipositionality' of the first generation of 'entrepreneurial' figures that 'populated the ECHR institutional site'; diplomats, civil servants, legal advisors to governments and so on (Vauchez 2013, 7; Hennette-Vauchez 2013, 121). Their social capital helped in the effort to promote a view of human rights as 'scientific'. This view perhaps exaggerates the human rights field's claims to apoliticism (see chapter 5). And like all such approaches, moreover, it typically downplays or merely pauses to register broad social and international shifts; rendering them (implausibly) as simply social capital created by domestic political conflicts (cf. Bourdieu and Wacquant, May 2000). Madsen (2011b, 59, n.58) thus points to the significance of the 'rights culture developed in the late 1960s and early 1970s', but excludes such considerations from his explanatory framework. Broadly speaking, therefore, such approaches describe the consequences and not the causes of change.

Functionalist explanations, finally, explain the spread of 'adversarial legalism' in Europe as

a consequence of functional pressures created by economic liberalisation and the EU's fragmented institutional landscape (Kelemen 2011, chapter 2). But as outlined in the previous chapter, and like positivist political science more generally, such explanations lack a theory of legitimation. They may note how, from the 1980s, 'advocates of deeper European integration saw EU rights as a means to enhance the EU's legitimacy and to expand its authority to new policy areas', and even how the 'legitimating power' of rights played a 'crucial role' in promoting disability rights (Kelemen 2011, 197, 214). But the sources of this new power go unexamined. As the next three sections will illustrate, legitimation imperatives explain European states' initial acquiescence to the new institutions around 1950, and it is the emergence of new rights beliefs in the 1970s that explains how these legitimation requirements subsequently changed. In the following section this account will be defended against two possible objections: the first relating to the supposed impermeability of legal families to external influence, and the second derived from 'realist' critiques of interpretivism.

(iii) Dual crisis

The primary sources of these new beliefs were the dilemmas posed by the collapse of socialist utopias outlined in the previous chapter. For socialists, broadly speaking, human rights ceased to be associated with Western imperialism. For conservatives, meanwhile, anti-communism - crucial to the early legitimation of the ECtHR - lost its domestic political salience (see below). Human rights could now be used to legitimate politics without significant accusations of partisanship (Moyn 2010, chapter 4). Bill Davies (2012, 420), for instance, notes how the European Community turned to rights in the late 1970s 'as part of a broader strategy to address some of the perceived shortcomings of the integration process' and 'win back some much needed legitimacy among the increasingly sceptical national publics'. But such legitimation strategies, he concedes, had only become attractive due to the 'obvious saliency of human rights as an international issue at the time'.

As Madsen (2011b, 58) notes, however, 'these new geopolitics of human rights do not completely account for the changes in the course of the ECtHR'. These international legitimation

strategies must obviously be connected to parallel developments internal to European politics. They could not have been adopted without new ideas about law and rights which challenged orthodox beliefs about the importance of sovereignty. I argue that these developments have a separate genesis. Madsen identifies this second source of change in 'new social policy and new citizens' rights in an increasingly united Europe'. He claims these new social policies 'legitimized' the use of human rights 'as a tool for social emancipation in a more permissive society' (Madsen 2011b, 58). I argue below, by contrast, that a dual crisis of socialist utopias *and modernist government* in the 1970s, was of more significance than social liberalisation. In the 1960s new liberal social policies could be achieved by modernist means and did not require enforcement by courts. And when European courts did eventually enter the policy process, the scope of their jurisprudence soon expanded far beyond questions of subjectivity, individual freedoms and social change.

(iv) The first crisis: Cold War legitimation and socialist dilemmas

The creation of the ECHR (European Convention of Human Rights) was primarily a symbolic act. It was not intended to fulfil the role that positivist analyses ascribe to it. Its years of dormancy thus cease to be a puzzle. European states envisaged it as an anti-communist totem and 'Cold War weapon' (Moyn 2010, 78; Hennette-Vauchez 2013, 118). Its precise genesis was in fact even more conservative. A European human rights court with supranational jurisdiction was first proposed by *La Fédération*, a group of French right-wing intellectuals with some links to the Vichy administration (Duranti 2013). They envisaged it as a means, no less, of protecting Europe's medieval Christian inheritance from parliamentary democracy; an extreme variant of the 'personalist' ideas that had become popular in Catholic political circles following Pius XI's condemnation of totalitarianism in 1937-8 (Moyn 2011, 97-8).

In 1947-8, after communists came to power in Czechoslovakia, politicians began reaching for similar ideas to legitimate the new politics of the Cold War. Despite opposition from the Left of his party, British Labour Foreign Secretary Ernest Bevin now declared his support for 'spiritual union' (Duranti 2012). 'The time', he told the Commons, was 'ripe for a consolidation of Western Europe' (Simpson 2001, 575; compare Mazower 2011, 41). In France and Britain particularly,

however, there was almost no sense that any proposed new court would ever be used against the government (Madsen 2004). It had two champions in British politics. The first was Churchill, who during World War II had already talked of the need to save 'ancient Europe' from 'Russian barbarism' (Simpson 2001, 223-6; Moyn 2010, 78). The second was David Maxwell Fyfe; a prominent member of the conservative wing of the Conservative party, a former prosecutor at Nuremburg, a rapporteur on the committee which drafted the 1950 Convention, and, perhaps most strikingly, the man who later became famous for declaring that he would not be 'going down in history as the man who made sodomy legal' (Kynaston 2010, 370). (Some of Maxwell-Fyfe's personalist colleagues hoped the Convention would defend the 'autonomy' of 'organic communities' [Simpson 2001, 653].)

At this time, indeed, Maxwell-Fyfe was one of the select few European politicians pressing for rights of individual petition and real enforcement mechanisms. He was among the eminent jurists and federalists in the European movement - Madsen's (2011a, 67) 'lawyers-statesmen' - who skilfully outmanoeuvred attempts led by Britain and Greece to obtain a more toothless, declaratory regime akin to the Universal Declaration of Human rights (UDHR) (Simpson 2001, chapter 14). Bevin provided crucial support for the court, which was strongly opposed in Cabinet (Simpson 2001, 683, 727-730). The Foreign and Commonwealth Office (FCO), as a whole, opposed both individual petition and the institution of a court. A negotiating brief apparently drafted by its legal advisor, Sir Eric Beckett, recorded that 'to set up now a court to which governments might be arraigned by individuals […] would be to invite Communists, crooks and cranks of every kind to bring actions which would be at best frivolous and at worst designed merely to embarrass governments' (Simpson 2001, 663). But as Quentin Skinner and some constructivists have observed, prior legitimation strategies create 'self-entrapment' (see chapter 5). When asked by a colleague for an argument 'against the establishment of a Court *at any time*' Beckett was unable to come up with one, constrained as he was by the FCO's at least rhetorical support for human rights as a bulwark against encroaching tyranny (Simpson 2001, 666). The FCO's public opposition was, crucially, restricted to what constructivists label 'tactical concessions'; highlighting procedural difficulties, problems with imprecise drafting, and so forth (Simpson 2001, chapter 14; Risse and Sikkink 1999, 22-28).

Historians have ascribed considerable significance to specific intellectual traditions as explanations for the positions adopted by key players in these negotiations. Of those 'lawyer-statesmen' who pushed for an effective court, they have stressed the 'personalism' and left-wing Catholicism of Pierre-Henri Teitgen (the French Minister of Justice who chaired the Juridical Committee which produced the first draft of the European Convention), and the legal 'formalist' preference for individual rights of Hersch Lauterpracht (the British international lawyer who provided intellectual inspiration for these efforts) and René Cassin (a Nobel Prize winner for 'fathering' the UDHR, a founding ECHR judge, and a figure of some limited importance for the court's creation). Eric Beckett's 'British conception of human rights', meanwhile, which was derived from 'the Blackstonian and Dicyean' traditions' hostility towards formal rights and constitutions, has been held to explain his own early opposition (Compte 1998, 93-4; Mazower 2004, 397; Simpson 2001, 43, 46, 215-6, 306, 345, 615, 651-2; Moyn 2011, 101; Sluga 2011, 110-111; Madsen 2011a, 68-9).

Historians have also, however, noted how these traditions seemingly failed to constrain these 'lawyers-statesmen' when they navigated 'the cross-currents of social and political change' (Sluga 2011, 109). Beckett, for example, soon became the *bête noire* of the Colonial Office, when he supported some of the very same rights of petition in the colonies which he had opposed in Europe (Simpson 2001, 308-312). By the late 1960s, meanwhile, the supposedly convinced 'formalist' René Cassin had embraced the 'inevitability of national and civilizational differences' (Sluga 2011, 122). Such apparent contradictions are not simply an 'irony' of history or proof of the 'fluidity' of human rights (Sluga 2011, 109, 115). Instead, they illustrate the kinds of irrational belief formation implicit in 'the liberal project' (see chapter 5). In many cases, of course, new legal policies were adopted for consciously strategic reasons, and not because of irrationally acquired beliefs. In most liberal diplomatic and legal circles, for instance, the need to replace the League of Nations' minority rights regime was not argued on 'formalist' legal grounds. These people perceived it, simply, as having failed to protect minorities (Mazower 2004; Simpson 2001, 210, 212, 326-6)[59]. Moreover, such figures were not always above argument bordering on the straightforwardly duplicitous (Madsen 2004, 73, for example, describes Cassin's arguments during later French debates over

accession as 'cynical'.) But as Cassin himself described during his 1968 Nobel Prize Speech, if his beliefs were at times strategically acquired they could nonetheless become sincerely held. 'After the turning point of 1948', Cassin announced, referring to the new strategic environment of the Cold War, 'I, a determined universalist, was able to conclude that certain means of implementation are more readily accepted if they are organized among neighbouring nations of similar culture. Communities of law and custom are not invented arbitrarily' (Sluga 2011, 122)[60].

Politically speaking, however, it was only with the more promising circumstances of the later 1970s that those working in and around European institutions acquired more room to pursue such projects. For the most powerful states legitimation in terms of human rights was no longer restricted to mere anti-Communist symbolism. In 1977 the EU Parliament, Council and Commission declared they would respect the decisions of the ECtHR, and in 1979 the ECJ decided to use them as guidelines in its own jurisprudence. Later that same year, in a sign of the times, 'a cross-party grouping of Socialists and Liberals within the European Parliament' sought to persuade the EU institutions to accede to the Strasbourg Court. This move was most enthusiastically pursued by EU Commissioner Roy Jenkins: a long-term campaigner for Labour re-alignment with liberalism in the UK (Davies 2012; 418-420, 433; for Jenkins Bogdanor 2013). As British Home Secretary from 1974-6 Roy Jenkins had promoted a British Bill of Rights based on the European Convention, and legislated to ban even indirect discrimination on the grounds of sex and race (Erdos 2009, 807; Bogdanor 2013). By the 1980s rights and civil liberties had become a central means for the Labour party to legitimate its opposition to Thatcherite dominance (Madsen 2004, 21-2; Erdos 2009, 805).

In France the 1974 elections saw the first victory of Giscard d'Estaing's 'third force'; a pro-European liberalism briefly opposed by an unlikely alliance of Gaullists and Communists (Leigh 1977, 74; see generally Nora 1992). These elections were accompanied by a successful campaign for accession to the ECHR, and a dramatic set of new political orientations towards rights. The opposition Socialists decided that the new international salience of human rights and anti-totalitarianism presented them with an opportunity to distinguish themselves from the perceived totalitarianism of the Communist Party, on the one hand, and the ascendant liberalism of Giscard d'Estaing on the other. The Communists responded by proclaiming similarly redoubled

commitments (Agrikoliansky 2005, 329-331)[61]. Once again, in short, as Moyn (2010, 80) summarises, the 'Cold War 'genesis' of the European Convention explains little about its eventual uses. It was to be far more a cultural and ideological victory in a later era that determined their legal availability and plausibility even in the European zone'.

(v) The Second Crisis: Government to Governance

Socialist dilemmas, and the reduced salience of anti-communism associated with them, thus explain the attractiveness of new legitimation strategies. They cannot, however, account for why powerful states accepted the obvious and dramatic implications of these strategies for their hitherto jealously guarded legal sovereignty. To do so we must attend to the dilemmas posed by the modernist crisis already outlined in the previous chapter. These ultimately saw theories of law as a technology for sovereign state intervention eclipsed by new 'managerialist' alternatives. Such developments had a long genesis. World War One greatly undermined the developmental-historicist beliefs of European elites in the idea of a unique *national* genius, whilst World War Two was ultimately decisive for notions of *Western* cultural superiority (Fussell 1975; Mazower 2006; Manela 2007, chapter 9). The modernist ideas which largely replaced them deployed economistic rather than civilizational concepts of rationality, complemented with new emphases on modernist modes of government; French technocracy, Scandinavian welfarism, German corporatism and its Dutch consociational variant, and so on (Bevir 2010a, 19; Kelemen 2011, 15). By 1945 these modernist beliefs had begun to penetrate even French and British colonial administrations (e.g. F. Cooper 2005, 37, 187; Alexander 2006, chapter 2; Mann 2009, 349-352).

On these views forward-looking 'development' was to be delivered to an undifferentiated 'people', on an equal basis, and under the guidance of tutelary authorities. Although some influential thinkers used concepts of 'social rights' to formulate this new egalitarianism, these 'rights' were intended as legislative and regulatory objectives rather than judicially-enforceable entitlements, and were targeted at individuals rather than groups (Whelan and Donnelly 2007, 923-7; 932-6; Moyn 2010, 73). In T.H. Marshall's ([1950] 1964, 72) famous phrase, they bestowed 'the right to live the life of a civilised being according to the standards prevailing in the society'. This

shift was reflected across a whole range of policy arenas. States now sought, for instance, to eliminate the 'deserving' recipient from welfare provision, complete the long replacement of industrial paternalism with national schemes, and centralise service delivery to unprecedented levels (Briggs [1961] 2011, 15, 17; Hatzfeld 1971; Debouzy Ed. 1988; Conrad 1991, 177)[62].

Modernist legal elites criticised orthodoxies that posed obstacles to these new kinds of interventions. In post-war France a rejection of the institutional models of the Third Republic, now referred disparagingly as the 'Republic of Jurists', was symbolised by the establishment in 1946 of the *Ecole Normale d'Aministration* to train elite civil servants (Madsen 2004, 7). The new field of political science - or *science de l'état* - was established by a post-war generation of constitutionalist thinkers eager to dispense with antiquated legal 'metaphysics' (Vauchez 2006, 500). In Britain, meanwhile, modernist theories challenged constitutional beliefs that had shaped administration since A.V. Dicey in the 1880s: the 'Westminster Model' (see Griffith 1950; Ewing 2004, 735-740; Bevir 2008; 566-7). Most vulnerable of all were traditional notions of fundamental freedoms guaranteed by common law, and the doctrine of parliamentary sovereignty. Both of these struggled to account for how, under modernist government, the bulk of law was produced by bureaucratic and administrative agencies, and not derived from primary legalisation or hallowed precedent (for famous judicial critique of these developments Hewart 1929; Denning 1949, chapters 3-4)[63].

Throughout almost all of Europe's 'thirty glorious years' (1945-75) the growth-model on which this modernist programme depended proved remarkably durable, insulating it from attack. The success of modernist productivism pushed even the 'social-democratic' parties of Europe's centre-Left in a socially conservative direction, leading them to abandon 'traditional socialist commitments' to reforming the state and the family. Their 'attention was entirely concentrated on the main short-term aims: full employment for all male workers and the provision of welfare services to meet needs not provided for through the market' (Sassoon 1995, 197). In the late 1960s and early 1970s, furthermore, when these parties finally reacted to socially liberalising trends, they legislated without providing judicially enforceable rights. In his first spell as Home Secretary (1965-7), for example, and in contrast to the rights-based strategies anti-racist and anti-sexist strategies he would deploy a decade later, Roy Jenkins legislated to legalise abortion, de-criminalise

homosexuality, relax divorce laws and abolish theatre censorship (Bogdanador 2013). In France Giscard d'Estaing's own liberalisation programme - conceived as early as 1967 - was implemented by similar means (Leigh 1977, 74). This programme dominated politics in 1975-6, led to the legalisation of abortion and divorce by mutual consent (e.g. Shenton 1976). (The architect of divorce reforms, Jean Carbonnier - the first and only legal sociologist to exert significant influence on the French legal profession - was a staunch critic of the ECHR and the proliferation of subjective rights [Glendon 1976, 202; Carbonnier 1996, 55-6; de Béchillon 2007].) In short, Madsen's (2011b, 59) 'social emancipation in a more permissive society' did not therefore require judicial enforcement of human rights.

The financial and energy crises of the 1970s soon, however, posed significant dilemmas to modernist orthodoxies. Confidence in the productivist orientation and discretionary power of the tutelary state was drastically undermined by the global recession of the decade. In constitutional thought the over-burdened formal legal system began to be seen as unfitted for governing economy and society (see Zumbansen 2008, 787). Advocates of development law started to radically doubt its efficacy (Trubek and Galanter 1974; Burg 1977). One influential 'neo-liberal' argument had long seen purposive legislation in general as an illegitimate intrusion into spontaneous, self-regulating social orders (Hayek 1960, chapters 11-13; Hayek 1973, chapters 5-6). And a much larger number of neo-liberals now compared 'informal justice' favourably with imposed bureaucracy (for a critical overview Abel ed. 1982)[64]. Early experiments with marketisation that followed attacks on the tutelary state soon, however, generated new pragmatic concerns about how to co-ordinate fragmented (even globalised) policy-making processes (Bevir 2010a, 75-81). Theories inspired by New Public Management were now produced in response to these difficulties (see comments on 'from marketisation to governance' in Rhodes 2002). These began to identify law as a 'thin' frame for co-ordinating dialogue between increasingly autonomous social spheres that produced their own norms, regulations and codes of conduct (cf. Teubner 1983). Whilst courts' policy-making competence expanded dramatically, their involvement in day-to-day administration reduced by the same measure (for criminal law Farrall 2002; for critique Merry and Milner eds. 1993; for South Africa compare Zenker 2013). These new theories, therefore, saw law not as 'autonomous' from politics, but rather as 'responsive' to it: 'the logic of legal judgement becomes closely congruent

with the logic of moral and practical judgement' (Nonet and Selznick 1978, 89; see also Atiyah 1978).

These theories, and the reforms they inspired, thus identified courts as mechanisms for policing complex contractual relationships with significant distributional components; a task for which bureaucracies were now believed unfitted. From a functionalist perspective this process has been labelled as 'deregulation and judicial reregulation' (Kelemen 2011, 8). The functional pressures caused by marketisation are not, however, themselves sufficient to explain the new scope of legal oversight. The creation of the Single Market created a number of pressures on the EU to find ways to replace national regulatory systems with alternatives that did not require the bureaucratic capacity it lacked (Kelemen 2011). Decentralised enforcement by private actors in courts was thought functional to this need (but cf. van Harten 2005). As the functionalist Kelemen (2011, 12, 197, 212-4) himself concedes, however, functional requirements to replace regulatory regimes cannot account for the expansion of court activity into those new constitutional areas, most notably human rights, that are often studied by scholars of judicialisation.

This new managerialist orthodoxy, which Bevir (2008, 573) thus 'encourages the government to treat judges and the courts as part of the policy-making process'. Modernist crises also, moreover, albeit in distinctive ways, explain mobilisation around the new opportunity structures which these courts created. The 'erosion of the religion of progress and of tutelary doctrines of public action', led to the 'entry on stage of social groups competing for new stakes, detached from productivist religion' (Jobert 2010, 131 (author's translation)). These groups increasingly regarded bureaucratic agencies and corporatist bodies - trade unions, professional associations and so forth - as no longer sufficiently representative to mediate social and political conflict. On the New Left, notably, in the late 1960s and early 1970s, a number of environmentalist, feminist and gay liberation movements aimed at thorough-going social transformation, via revolution, self-organisation, mass conscientisation or (on occasion) state intervention. The crises of these ideas and the 'victory' of rights-based alternatives bequeathed these new rights 'maximalist' scope (Moyn 2010, chapter 4, 223-6). Many such groups now began to constitute themselves as NGOs, and, especially in Britain, to use European as well as national legal fora to advance their

claims (Dolidze 2011).

European institutions, in turn, sought to encourage these emerging trends. By 'giving civil society a voice and place in international human rights regimes' the ECtHR has helped, since the early 1980s, to 'expand the boundaries of human rights' (Cichowski 2011, 79). The ECtHR and EU have sought to encourage 'bottom-up' pressures of this sort, 'pressur[ing] laggards to strengthen their legal aid systems', and, in 1979, requiring governments to provide legal aid in civil cases when necessary for effective access to justice (Kelemen 2011, 65). New beliefs thus account for the creation of those 'support structures' - donors, public interest groups and parts of the legal profession - which some political scientists have identified as the keys to sustaining legal mobilisation (Kessler 1990; Lawrence 1990; Epp 1998, 197).

These beliefs' utopian origins, finally, help account for the expansion of rights jurisprudence into the new arenas described in the first part of this study. Their popularity amongst the judiciary reflects what Hirschl (2008, 98) has described as 'the demise of what constitutional theorists call the 'political question' doctrine'. Even sensitive policy areas such as national security are no longer constitutionally allocated solely to governmental discretion. As Christoffersen and Madsen (2011, 3) describe, the ECtHR, 'in its second phase, beginning in the mid to late 1970s against the backdrop of a series of geopolitical and social changes ... embarked on the development of a more progressive jurisprudence, evoking notions such as 'living instrument', 'margin of appreciation', and 'practical and effective'. This shift was brought into dramatic relief by a number of dissenting judgements handed down by Sir Gerald Fitzmaurice (an ECtHR judge during the crucial 1974 to 1980 phase). At the British Foreign Office in the 1950s he had been one of the few lawyers determined to extend individual rights to colonial subjects (Simpson 2001, 308-312). Now, however, he turned his face against their 'maximalist' incarnation, maintaining, in the words of one commentator, that they should be restricted to 'those basic issues with which the natural law tradition behind the Convention has always been concerned', and thus excluded from 'transient questions of social and political policy' (Merrills 1982, 161)[65]. The 'natural law tradition', however, provided no means to effect any such restriction. The transformation of rights could not be prevented from judicialising politics.

(b) Anticipating objections: the permeability of legal families and priority of 'interests'

These analyses gloss over some important methodological challenges that positivists generally occlude. These scholars resist any emphasis on rights 'ideology'. Ginsburg (2008, 90), for example, alleges that such approaches are unable to account for the precise timing and variation of reforms. He contrasts them in this respect with those pioneered by himself and Hirschl (2004; see also Ramseyer 1994; Ginsburg 2003; Helmke 2005). Whilst this study has endorsed Hirschl's primary descriptive contention, it rejects the mode of explanation that he and Ginsburg favour. Constructivists like Sikkink ascribe importance to the bearers of rights ideology, even if they do not explain their emergence. Positivists do not even do this. They simply assume the role of NGOs and others groups to be insignificant, and therefore ignore them. The beliefs of judges, meanwhile, are also largely neglected. They are either assumed to act as 'principals' of powerful 'agents', or to be, in all places and at all times, naturally conservative and likely to rule in accordance with 'hegemonic ideological and cultural propensies' (Hirschl 2000, 138). In all these accounts by far the most attention is paid to political elites. It is *their* changing configurations of self-interest which are held to explain the timing of, and variation in, reforms. In Bevir's (2010, xxxvii) words, however, such analyses lack any theory of how 'pressures lead people to change their beliefs and actions'. Ginsburg and Hirschl do not provide empirical illustrations of specific instances of insincerity and self-deception (compare Spaeth and Segal 1994, 10-12). Nor do they outline any more general theory of false-consciousness to compensate for this shortcoming (see chapter 5). As a result, their notions of relevant interests are so under-specified that they cannot be plausibly understood as generative of political behaviour and new rhetorical commitments. They are able only to identify double standards.

There are of course some good reasons to be sceptical of claims that particular beliefs have specific legal qualities. The modern legal profession has almost always justified its activity as the development of an autonomous and self-standing body of knowledge free from social and political influence (Cotterrell 1995, 54-5). And accepting this self-presentation certainly blinds the analyst to the multiple ways in which law integrates external ideological concerns (Silverstein 1996; Novkov

2008). Yet this is not sufficient to establish systematic self-deception or insincerity. For decades sociologists of law have sought a *via media* between the wholesale acceptance and wholesale rejection of law's claim to self-sufficiency. At the very least, these discussions have largely established, specifically legal beliefs and legal traditions will typically determine the depth and speed with which law is penetrated by external influences (e.g. Dezalay and Garth 1996, 98; for overviews Cotterrell 1995, chapter 5; Novkov 2008, 628-9). Over the short term, at least, they may exercise significant influence.

The reactions of European legal elites to the ECtHR's transformation illustrate these assertions. Unlike their British counterparts, for example, in the early 1970s West German judges and politicians believed that the EU's basic rights protections were too weak (Stone Sweet 2000, 170-178; Kelemen 2011, 214; Davies 2012). They were less enthusiastic, however, about the ECtHR's gradual mutation into a policy-making organ. A 'central pillar' of civil-law traditions is the (Kantian) notion of 'subjective rights'. On this view legal 'science' distributes individual rights and responsibilities which can then be asserted in court. Group rights and group interests (as in class action lawsuits) cannot be so neatly distributed (Gidi 2003, 344-347). To redress collective injuries, therefore, 'a civil-law system would more likely turn to legislative and governmental administrative actions' (Brake and Katzenstein 2013, 739). In 1983, after pressure in particular from British lawyerly NGOs, the ECtHR modified Rules of Procedure to allow *amicus curiae* submissions from 'public interest' groups. Such notions of group representation were initially anathema to civil-lawyers, whatever their political sympathies. For the first decade of the new Rules the majority of submissions came from organisations based in Britain, who drew on common-law familiarity with such practices (Dolidze 2011). The civil law, however, could not long remain immune to the post-modernist de-legitimisation of legislative and administrative discretion. Despite widespread expectations that it would remain impermeable to class-action lawsuits, these have now become a common feature of civil law systems across the globe (Brake and Katzenstein 2013, 739-740). The specificities of Europe's legal systems have not served to 'block' the development of U.S.-style 'adversarial legalism'. At the most they have served to 'channel' and 'moderate' them (Kelemen 2011, 9).

Hirschl's analysis of British attitudes towards human rights in the 1950s provides a further

case in point. During decolonisation British elites began to promote the inclusion of ECHR-style human rights standards in post-independence constitutions. As Hirschl (2004, 97) points out, this had more than a whiff of hypocrisy about it (but see Smith 1961b, 217-220). The Colonial Office was simultaneously arguing that colonial subjects should continue to be deprived of Convention rights in order to prevent 'subversives' from using legal technicalities to further decolonisation. Moyn (2010, 78) is not entirely correct, therefore, when he states that rights were 'domestically uncontroversial' by the post-war period. He is also perhaps misleading, although not inaccurate, when arguing that anti-colonialism constitutes a 'distinctive tradition' within the human rights canon; one which placed 'collective liberation' before human rights (Moyn 2010, 86; Moyn 2012). Anti-colonialists did in fact, despite his claims, frequently argue for 'individual rights canonized in international law' (Moyn 2010, 85). But as Christian Reus-Smit (2013a, 175-7) argues, this was more a tactical move than a matter of sincere conviction - designed to de-legitimate imperial rule by exposing its claims to (universal) 'civilization' as hypocritical (for Southern African specificities Irwin 2012, chapter 4).

Such double standards, however, taken by themselves, prove neither pure insincerity nor self-interest. Hirschl (2004, 45-8, 215-221) does not even consider the possibility that sincere anti-communism, rather than covert elite desires to protect property, explain the ECtHR's creation. There are numerous difficulties, meanwhile, with his claim that post-colonial property rights were 'constitutionalised' as part of colonialists' efforts to 'protect the interests of their principal constituencies - white settlers, urban intelligentsia, and foreign investors' (Hirschl 2004, 97). It is very unclear, firstly, why this (already highly disparate) set of groups should naturally constitute post-colonial 'constituencies'. This cannot account, for example, for the well-known contrast between the keenness with which Britain and France sought to maintain such links, particularity with political elites (e.g. Golan 1981; Keese 2007; Chafer and Cumming 2010, 55). It can also not explain, secondly, why formal constitutional means were chosen to protect these 'interests' - as opposed to, say, the more informal relationships which have characterised *Françafrique* (Ginsburg 2008, 92-3 implicitly concedes this point). Post-colonial constitutionalisation is much more plausibly understood, in fact, as an attempt to resolve dilemmas produced by partition in India, and the failure of 'unwritten constitutions' to promote the kind of social order Britain wished to promote

in post-independence countries (for insider perspectives Smith 1961a, 93, 98; 1961b, 215; OSPA Research Project 2011; contrast Jennings 1961, 12)

None of this, of course, is to deny the importance of pragmatic calculations in politics. A range of these will typically supervene on deliberations motivated by even the most sincerely-held beliefs or consistent legitimations. The British state, for example, continued to derogate from a number of ECtHR provisions relevant to its conduct in Northern Ireland until the early 2000s, and has since found fresh justification for these derogations in the so-called 'War on Terror' (Campbell 2005, 335). This does not mean, however, that it has refused to legitimate its activities in terms of the new beliefs which had emerged in the 1970s. In *Ireland v United Kingdom* (1978), for example - one of the series of 'remarkable' cases from the late 1970s during which 'the course of European human rights took a new direction' - the British government accepted a ruling that neither a 'margin of appreciation' nor derogations on the ground of national emergencies could justify inhuman or degrading treatment (Madsen 2011b, 53-4)[66]. In Madsen's (2011b, 54) words, the 1957-1961 *Lawless* case, where Ireland had been allowed to detain Irish Republican Army members without trial, now 'suddenly seemed to belong to a distant past'. For states pragmatic calculations now supervened on new beliefs about law and politics.

2. Universal civil jurisdiction and the litigation of historical injustices by groups
(a) Explaining reparations litigation

In this section I argue that the emergence of new reparations practices can be explained by the same 1970s transformation of human rights ideas that explains the new uses of the ECtHR on the other side of the Atlantic. In 2001, as we saw in chapter 4, the Herero People's Reparation Corporation brought their lawsuit against the German government and German business in the District of Columbia, seeking to use the provisions of the Alien Torts Claims Act (ATCA). This rather extraordinary piece of legislation dates back to a statute contained within the Judiciary Act of 1789 which allowed courts in the United States to hear civil cases brought against foreign national for breaches of treaties and the law of 'nations' (see Burley 1989, 465-488). In 1978 two Paraguayans, Joel and Dolly Filártiga, accused General Peña Americo Norberto Peña-Irala of kidnapping, tortur-

ing, and killing their seventeen-year-old son as punishment for opposing Paraguay's President General Alfredo Stroessner. Two years later an Amnesty International (AI) staff member learnt that Peña-Irala was facing deportation proceedings in New York. Amnesty International contacted the Center for Constitutional Rights, whose lawyers discovered the two-hundred year old ATCA, and argued that it granted the federal courts jurisdiction over the Filártigas' claims (Davis 2006, 62).

1978, the year of the Filártigas' accusations, also saw the launch of a campaign for redress for Japanese Americans interned during World War II (Torpey 2006, chapter 3). This signalled the emergence of new reparation litigation practices such as that later used by the Herero. It also represented the first of a series of claims in Western jurisdictions for compensation for atrocities committed during World War II. As Torpey (2001, 335-6) enumerates, these included:

> claims arising from state-sponsored mass killing, forced labor, and sexual exploitation on the part of the Axis powers (Germany and Japan, but also Austria), as well as from the unjust wartime incarceration of those of Japanese descent in Allied countries (the United States and Canada) and from economic or other kinds of collaboration in Nazi crimes by putatively neutral countries (Switzerland, France, the Netherlands).

Unlike claims made against West Germany in the 1950s and 1960s, these claims involved payments to groups, and not to states or representative organisations attached to them. This was a novel feature of reparations practice. Both 'corporate' groups (such as indigenous peoples) and mere 'collectives' (with no 'legal personality' beyond the issue in question, like plaintiffs in class-action lawsuits) now became eligible to receive payments (see P. Jones 1999).

In its explanations of such phenomena this study rejects the *episteme,* and makes only cautious use of such amorphous entities as 'Western' and 'liberal' traditions, which it treats as conditions not as causes of change. It thus rejects accounts of reparations, such as Elazar Barkan's *The Guilt of Nations* (2000), which see reparations as in some sense inherent to the West. For Barkan 'extending sympathy to the weak and feeling guilty for not doing enough is a fundamental Judeo-Christian principle that was formulated in part by Aristotle, adopted by religion, secularized

by the Enlightenment, celebrated by Smith, and decried by Nietzsche', which has been subsequently focused by a 'Neo-Enlightenment turn in the postmodern and post-Cold War world' which supplemented 'classical liberal notions of the individual' with 'sociological insights about the place of the community and specific identity in the life of people' (Barkan 2000, 308, 315-6). Unlike Barkan, John Torpey (2009) seeks to explain these new 'sociological insights'. Theorists (historians, theologians, legal academics, therapists and 'educators'), he claims, have lent scientific credentials to the new beliefs promoted by rights activists and members of ethnic organisations:

> human rights activists concerned with building a better future … theologians who see history in redemptory terms … therapists who specialize in dealing with the 'traumas' of the past … attorneys …who see the past as a series of potentially justiciable events … historians who have frequently come to play an important role as consultants and expert witnesses in political and legal events to come to terms with the past … educators … who see history as redolent with 'lessons' for the present … [and those] associated with ethnic organizations and who seek to gain recognition or compensation for those of their kind who have suffered injustices in the past (Torpey 2009, 31-2).

Like Moyn (2010), Torpey explains the emergence in these beliefs in terms of 'the collapse of the future' associated with the bankruptcy of socialist utopias. But he also highlights the (normative and empirical) modernist crisis I outlined earlier:

> the spread of reparations politics is [...] a response to a post-utopian context that differs from the period that preceded it […] the idea of well-being for the undifferentiated 'masses' has been replaced by the goal of satisfying the wants, often defined in cultural terms, of minutely nuanced population segments. Mass utopia, whether capitalist of socialist in coloration, is thus out; group self-expression and group self-esteem is in […] in the process, 'one-nation' ideologies and the corresponding idea of assimilation have become increasingly suspected of being a form only of 'ethnic cleansing', not of potential inclusion (Torpey 2006, 7, 28, 71).

As described in the previous chapter, new human rights ideas also emerged from this 'post-

utopian context'. These ideas transformed previous existing practices, just as they had transformed feminism, environmentalism, and other alternatives to productivist and socialist orthodoxies. As Torpey (2006, 43) notes, the most visible consequence of this was that 'reparations' no longer generally referred to those sums of money paid by defeated parties to war victors, or to those payable for seizures of property (for Eastern European 'restitution' Herman 1951; Kozminski 1997). Even the most recognisably contemporary reparations claims in this previous period, as with demands for human rights more generally, were made on behalf of 'peoples' and not groups or specific individuals. In 1952, for instance, West Germany agreed a (controversial) $845 million compensation package with Israel, payable over a 14-year period. The bulk of this money was used for the purchase of crude oil and industrial products needed for modernisation (Honig 1954, 569-571; Lewan 1975, 42-3, 48, 55-6). Only just over $100 million was earmarked for distribution to individuals by the Conference on Jewish Material Claims against Germany: an organisation based in New York representing the Jewish diaspora, but founded at Israel's instigation (for details Zweig 1987).

Between 1959-1961 a number of other formerly-occupied European countries concluded 'global agreements' with the Federal Republic of Germany. These allowed governments to receive funds intended for distribution to individual claimants; a very similar arrangement to that which the government of Namibia has more recently tried and failed to obtain (Schwerin 1972, 510-1; chapter 3). Under Willy Brandt's chancellorship (1969-1974), meanwhile, West Germany 'avoided formal recognition' of claims from Eastern Europe. It provided 'indirect restitution' to the Polish and Yugoslavian states in the form of economic aid and low-interest credits. Public opinion, which became favourable to more direct forms of compensation in the late 1970s, only 'became truly marked in the course of the 1980s' (Goschler 2009, 104). Like Allied and neutral countries, West Germany now began to contemplate compensating groups for harms suffered. The decade saw fierce public debate over the proposed amendment of legislation to allow for legal claims to be launched by groups representing 'forgotten victims': 'forced labourers, Sinti and Roma (Gypsies), victims of forced sterilization, communists, homosexuals, draft resisters, and deserters' (Pross 1998, vii)[67]. Goschler (2009, 105) explains these German developments in terms of 'the shift from universalistic ideologies - embodied in the role of the 'fighter' - to the discourse of identity -

embodied in the role of the 'victim'"; thus highlighting Torpey's 'collapse of the future'.

(b) Modernist crisis and new views of colonialism

Human rights ideas have thus transformed the practice of paying reparations after war. They have also significantly transformed African advocacy for 'reparations' from former colonial powers. The developments which Torpey uses to explain the crisis of modernist ideas in the mid-1970s - the oil crisis of 1973 and the collapse of the Bretton Woods monetary system - were significant once again. These economic shocks, famously, hit African states particularly hard (e.g. Ravenhill 1986; Callaghy 1987). Domestically, although with some exceptions, where modernist-bureaucratic orthodoxies had retained their influence they were abandoned (contrast Allen 1995, 305-7). A number of African rulers began to experiment with new (more or less formalised) legitimation strategies, including personalist 'African' alternatives to modernism, such as Mobutu Sese Seko's *authenticité* in Zaïre (Jackson and Rosburg 1982; C. Young 2004, 33-35).

Internationally, meanwhile, African states did not yet respond to these dilemmas with legitimation through the still marginal ideology of human rights. They turned instead to Pan-Africanist intellectuals, highlighting once again how new beliefs emerge from wider worlds of ideas, and not merely from 'norm entrepreneurs' (contrast Sikkink 2011, 11). These intellectuals sought to replace confident modernist ideas with Marxian 'dependency' critiques of Africa's vulnerability in the global economy (e.g. Arrighi 1970; Amin 1972; Rodney 1973). Re-distributive demands were now justified by persistent reference to 'past exploitation under colonialism and neocolonialism' (Looney 1999). This marked a new phase in the rhetorical treatment of the colonial past by African states, which had previously, by and large, emphasised long 'traditions' of virile statehood and anti-colonialism (see chapter 9).

Ideas associated with these theories informed the turn by a number of African states towards the international system (for this paragraph Arnold 1980; 297-300; Looney 1999; see generally Bhagwati ed. 1977). From 1973 they became important actors in UN advocacy by the Non-Aligned Movement for a 'New International Economic Order' (NIEO). This was intended to replace the

Bretton Woods monetary system that had underpinned modernist development over the last three decades, and was inspired by the now evident international economic influence attained by the Organization of the Petroleum Exporting Countries. In 1974 the UN General Assembly adopted a Declaration and Program of Action of the New International Economic Order and approved a complimentary Charter of Economic Rights and Duties of States (for associated controversies Weston 1981). These documents made various demands for changes to the international system, including 'indexation' of raw material prices, targets for development aid, and improved technology transfer. Between 1975 and 1976, diplomatic action along these lines obtained minor, but still substantive changes to the international aid regime.

Like other political programmes, however, the NIEO soon began to be legitimated through the new medium of human rights. Unlike the other case studies presented here, therefore, and in a departure from the norm spiral model, incipient transnational movements were *not* the first to propagate new beliefs. Instead, as illustrated in the next chapter, an important political response by African states to the emergence of the human rights revolution was to re-cast demands to combat 'underdevelopment' as a 'right to development'. The Senegalese 'lawyer-statesman' Keba M'Baye had been using this phrase since 1972, but it was only debated at the United Nations for the first time in 1977 (Bunn 1999-2000, 1426, n.2; Normand and Zaidi 2008, 437, n.1). In 1978 M'Baye 'formally launched the idea' with a paper to the UNESCO Meeting of Experts of Human Rights entitled 'Emergence of the 'Right to Development' as a human right in the context of a New International Economic Order' (Normand and Zaidi 2008, 437, n.1). He was himself clear that some notion of rights was required to resolve the dilemmas posed by modernist crisis. He expressed this, as Rubner (2011, 249) puts it, 'in most apt Robespierrian terms':

within the framework of development law, the traditional balance "freedom-social order" is upset because the need for order overrides the need to grant liberties. This is where… government [sic]…invoke …: "you can't make an omelette without breaking a few eggs". Unfortunately, it often happens that eggs are broken without producing an omelette at all….The idea would be to discover what is the required correlation between development and respect for human rights.

But M'Baye also carefully legitimated these new ideas in terms of African states' new political ambitions (see Rubner 2011, 176-8, 249). The new right, like many other such rights, was controversial with liberal theorists who hoped that to maintain conceptual order in the face of new 'maximalist' tendencies. They pointed out, for instance, that the precise nature of the duties it created were incapable of specification (see Donnelly 1985). But here, as elsewhere in this study, there was no conceivable conceptual resolution to the question of how and whether the validity of new rights should be adjudicated. They could only be opposed through bureaucratic 'gatekeeping' (Bob 2009).

In political terms, however, at least the kind of legal duties that African states sought to create were clear enough: obligation for payments from Western states. New reparations beliefs emerging elsewhere were identified as a means of expressing these demands in their new form. But African states especially sought to *apply* these beliefs to situations they had not previously been designed for (see Q. Skinner 2002, chapter 8; for how institutionalisation enables 'resistance' see chapter 9). Payments would be made from (ex-colonial) states to (Third World and especially African) states, as Germany had in the 1950s and 1960s. They would not be made to groups. This strategy, along with its shortcomings, is neatly illustrated by a 1979 UN Secretary General's report on the international dimensions of the right to development (United Nations Secretary General, 2nd January 1979, paragraphs 52-54). This summarises debates in the UN Human Rights Commission. During these debates the view was apparently expressed 'by a number of speakers that underdevelopment was basically the sequel of colonial domination and that, even after political independence, developing countries too often remained subjected to neo-colonialist exploitation of their natural resources', and 'a moral duty of reparation has been inferred from these views'. Cautiously, however, the report then went on to note that acceptance of this duty 'to make up for past exploitation by the colonial powers' is 'by no means universal' and would therefore not be pursed in earnest.

The looming debt crisis soon radically reduced African states' leverage in the international economic arena (Looney 1999). Their attention therefore shifted to other areas, such as UNESCO's

regulation of communications (for political controversies this provoked Sussman 1982, 177). Soon even African leaders who had been genuinely influenced by new dependency and Marxian ideas - such as Thomas Sankara in Burkina Faso - began to draw new implications from it (see Otayek 1989, 19-20). If an unequal economic world system could not be profoundly reformed African states would have to practice 'self-reliance'. As the Organisation of African Unity (OAU) declared in 1979, 'the time has come when close attention should be paid to the problems of socio-economic transformation of Member States … in the present circumstances of world economic system [sic]' (Organisation of African Unity, 17th-20th July 1979). The NIEO's 'old' reparations ideas, which still emphasised transfers between states representing 'peoples', thus temporarily faded from the international stage. As described in chapters 7 and 9, however, they would soon return in the changed circumstances of the post-1989 world.

(c) Explaining litigation fora

The early 1990s, finally, would also see new life breathed into the ATCA. After Republican attacks on the Act from the late 1980s, the Clinton administration reclaimed it, to use Anne-Marie Slaughter's term, as a 'badge of honour' to legitimate its new foreign policy orientations (Burley 1989; Slaughter and Bosco 2000). Such bipartisan struggles have been a recurring pattern in United States politics (even if the Obama administration has recently helped restrict its scope Ku and Yoo 2012, 179-185)[68]. Foreign policy legitimation also helps explain the Act's initial re-discovery, and the availability of new fora for reparations claims. As Moyn (2010, 151-160) has described, Jimmy Carter's 1977 Presidential election victory was instrumental in moving human rights from the margins to the centre-stage of Democratic Party politics. It certainly appeared to have some short-term political advantages. The Republican Gerald Ford had famously struggled to articulate a clear line on *détente* and new levels of superpower parity in the Cold War (Mieczkowski 2005, 275, 280-3). But, as with the European Union (described above), this legitimation strategy was only attractive because of the new international salience of these ideas.

The immediately preceding period had seen the formation of a number of new groups mobilised around the issue. Among the most significant of these, in an American context, were

Amnesty International and the Ford Foundation. As a number of analysts have described, in the 1970s these organisations turned to Latin America. They capitalised on new beliefs emerging in the region after the crisis of 'revisionist' socialism - triggered by the overthrow of Salvador Allende in Chile in 1973 (Y. Dezalay and Garth 2006, 237-242; Moyn 2010, 140-141; S. Dezalay 2011, 11; for the Latin American Left in this period Carr and Ellner eds. 1993). In Chile, notably, a number of ex-members of, and former sympathisers with, the Allende administration became influential local partners in the forging of a new, rights-based opposition to the regime of General Pinochet. These 'networks' then played an important role in persuading the new Carter government to integrate human rights into its foreign policy (Sikkink 2004). By now a number of other lawyerly NGOs - such as the Lawyers' Committee for International Human Rights in New York and the International Human Rights Law Group in Washington D.C - had also committed themselves to holding the Carter administration to its new rhetorical commitments. They instigated test cases and produced *amicus curiae* to achieve this objective (Lillich 1980, 21). Pressure groups such as these have represented ATCA plaintiffs in 42 percent of cases since 1980, whilst defendants have not had such representation (Davis 2006, 67). And it was they, in partnership with Amnesty International USA, who ultimately rediscovered the 1789 Act. As elsewhere, in short, new legitimation strategies were parasitic on the emergence of new beliefs. The mobilisation of actors constituted by these new beliefs could then help trigger 'self-entrapment' and political change.

(3) Indigenous rights advocacy

(a) Intepretive explanation and 'framing'

As Moyn (2010, 223) argues, 'rights' to 'culture, indigeneity and environment' are prime examples of the triumph of human rights over other alternatives to modernism which emerged in the late 1960s. One recent symptom of this, described in chapter 4, was Judge Unity Dow's ruling in *Sesana* that 'the Applicants belong to a class of peoples that have now come to be recognized as 'indigenous peoples'. This recognition is a recent event. Until recently, as Torpey (2006, 71) describes, the dominance of ''one-nation' ideologies and the corresponding idea of assimilation' would have prevented it. Constructivists, however, do not even seek to explain the emergence of these new beliefs. They are content to simply note that the indigenous rights movement has been

'growing' over the 'past two decades', or, even more vaguely, that 'indigenous resistance to the threats of states, markets and modernity that shaped the movement's trio of core demands: self-determination, land rights and cultural survival' (Brysk 2000, 59; Sarfaty 2005, 1811, n.85). Some more sophisticated analyses do point out these demands cannot easily be fitted within those traditions 'associated with liberalism and the West' that Sikkink (2011, 255) claims constitute conditions for rights. As Niezen (2010, 222) puts it, 'international agencies are responsible for a multiplication of laws, but also for a hankering for a world without them, in which the spiritual knowledge of enlightened ancestors has been restored' (contrast Thomas et al. 1987; Elliott 2007). Indeed, when it comes to indigeneity, at least, even Sikkink and Keck (1999, 100) are willing to allow that rights are 'constantly changing' and 'renegotiated' for strategic reasons (contrast Brysk 2000, 29-32; 35). They do not simply 'resonate across cultures and societies' (Sikkink 2011, 255).

Once again, however, this adoption was not 'strategic' in the narrow sense of being functional to 'interests'. Activists' core concern was with the local effects of development projects. Indigenous rights provided an effective legitimating 'frame' for this advocacy in the early 1980s. After an 'explosion of environmentalist attention to the Amazon', however, rights were soon jettisoned in favour of environmentalist language and symbolism that 'resonated' more effectively with global networks (Sikkink and Keck 1999, 95; Hochstetler and Keck 2007, 162). Analyses such as these, however, cannot account for why particular languages come to 'resonate' or bestow legitimacy on political action. These points are helpfully clarified by Fiona Adamson's concept of discursive 'opportunity structures' (2005, 554-6). For her, the myriad 'contradictions and inconsistencies' of international discourse offer a 'normative toolbox' to be exploited strategically, just like international institutions. She argues that Marxism-Leninism's collapse has recently left liberalism as the dominant international discourse, triggering the re-framing of local political demands. In the nineteenth-century, by contrast, other ''structures of meaning' such as nationalism, anarchism, and socialism competed with liberal internationalism as tenable political world views'. To this I would add only that an analysis of ideological *competition* between these views, such as that attempted by Moyn (2010), can help explain which 'frames' become rational to adopt as legitimation strategies at particular times.

(b) The revolt against productivist civilization

It is probably true, as Mbembe (2001, 4) argues, that Africa in general has long been understood in Western culture as an 'empty continent'; easily imaginable as the pristine Lost Eden which Isaiah Berlin (2003, 24) saw as 'a central strand in the whole of Western thought' (both in Gallagher 2009a, 439). But is nevertheless also the case that, before 1945 at least, European colonial powers routinely distinguished between different levels of 'primitivity' amongst their subject populations. Pygmies, 'Bushmen', and Karamoja pastoralists, for instance - like some defeated Amerindian populations, were allocated 'reserves' on the grounds that they needed protection from 'civilization' (for the Karamojong Barber 1962, 111, 118-9; for Botswana Ramsay 1998, 76; for pygmies Ballard 2006). After 1945, however, in the Bechuanaland Protectorate and elsewhere, official attitudes shifted (see chapter 4). The spread of modernist ideas amongst even colonial administrations ensured that *all* colonial subjects were now at least rhetorically identified as potential targets for 'development' (see above). And these ideas were almost universally endorsed, again if sometimes only rhetorically, by new Third World elites (see T. Young 2003, 1; Young and Williams 2008; compare R. Jackson 1990, 91-94).

Reus-Smit (2013a, 166-177) faults Moyn (2010) for implying that human rights only become politically significant with the emergence of social movements sincerely committed to them; the classic historians' error of over-estimating the significance of source material. He points out that human rights, although rarely endorsed with any sincerity between 1950 and 1970, were nevertheless important tools in the struggles for decolonisation that dominated international institutions during this period. Unlike these individual rights, however, indigenous rights did not even have an institutional presence in international politics. The only relevant international instrument of the time, for instance - the ILO Indigenous and Tribal Populations Convention of 1957, C107 - identified modernist problems in its preamble: 'there exist in various independent countries indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community and whose social, economic or cultural situation hinders them from benefiting fully from the rights and advantages enjoyed by other elements of the population' (International Labour Organisation, 26th June 1957; see also Minde 1996, 231). Other important

instruments from the 1960s - the UN Convention on the granting of Independence to Colonial Countries and Peoples (1965), the International Covenant on Civil and Political Rights (1966) and International Covenant on Economic Social and Cultural Rights (1966) - mention the right of 'peoples' to self-determination in their first paragraph or article, but were never interpreted as applying to entities other than states. The 1965 Convention on the Elimination of All Forms of Racial Discrimination, for its part, did allow for group rights at sub-state level, but only as temporary measures for promoting individual equality (for these instruments Havemann 2009, 267). The later 1960s, finally, saw some attention paid towards indigenous issues by Latin American members of the UN Sub-Commission for Human Rights. This was initiated by the Secretariat but carried-out in the name Special Rapporteurs; an effort to avoid hostility from states. But even the culmination of this work - a few paragraphs in Hernán Santa Cruz's *Study on Racial Discrimination in the Political, Economic Social and Cultural Spheres* (1970) - remained focused around 'individual and equal rights', 'populations' not 'peoples', and continued to recommend integration (Minde 2008, 53-4).

In this period anthropologists were, indeed, almost alone in endorsing limited versions of what would now be recognisable indigenous rights beliefs. The profession had, of course, long been a lone voice of Western opposition to post-war modernism; an attitude famously encapsulated by the American Anthropological Association's (now renounced) opposition to the 1948 UN Declaration of Human Rights (see Goodale 2006). Yet even their criticisms had to be carefully measured (see Tilley 2007). The imperatives of legitimating anthropological work in the eyes of modernist (post-)colonial governments ensured that research - especially in the 'applied anthropology' tradition - focused around easing brutal 'transitions' to modern ways of life and recording 'data' from 'disappearing' tribal societies (Wright 1988, 371). The collapse of modernist orthodoxies, however, radicalised anti-modernist beliefs and greatly eased legitimation demands. 'The new indigenous movement' in the Americas, like the International Work Group for Indigenous Affairs (IWGIA), were born out of 'trends within anthropology that started in 1968' (Brysk 2000, 64; Dahl 2009, 20). Cultural Survival (CS), today the most prominent organisation of this kind in the United States, was founded at exactly the same time by the distinguished Harvard anthropologist David Maybury-Lewis (L.K. Hart 2009). Even Survival International (SI) itself,

founded in 1969, initially sought out links with anthropologists, and had such eminent names as Claude Lévi-Strauss and Edmund Leach as sponsors and on its board (Houtman 1985, 4).

In retrospect, there are at least three distinctive features of indigenous rights advocacy in the late 1960s and early 1970s. The first was its narrow geographic focus: on the planned destruction of indigenous societies in Latin America, and in Amazonia most particularly. In Western culture this part of the world was the most potent symbol of modernist crisis and the worst effects of post-1945 industrial growth - although not yet understood as a specifically environmentalist issue (Chernela 2005). The second distinctive feature was the narrow scope of its advocacy. This centred around genocide as defined by the UN Declaration of 1948, rather than any specific notion of indigenous rights (for the IWGIA Dahl 2009, 10, 25; for CS Maybury-Lewis 1997, 1-6; for SI Houtman 1985, 3; Survival International, 25th April 2013). The third distinctive feature of this period, finally, was the relative distance of these groups from the (still small) broader human rights movement. The IWGIA produced publications only for a 'politically aware public', whilst SI's distance was signalled by its original name: the Primitive People's Fund (1969-1971). Whilst SI's old name was chosen 'on the analogy of the World Wildlife Fund', its new name consciously echoed Amnesty International; by far the most significant human rights organisation of the 1960s, deeply rooted in British Quaker and Northern European liberal Protestant circles (Dahl 2009, 26, 29; Houtman 1985, 3; Hopgood 2006, 52-72).

(c) Indigenous movements and new legitimation strategies

An indigenous rights movement was also slow to emerge in the wider world of politics. For most of the 1970s the idea of a specific class of human rights for indigenous peoples existed as only a comparatively minor player in the intense ideological competition opened-up by modernist and socialist collapse. In Latin America the popularity of 'conscientisation' had inspired a turn by some anthropologists towards indigenous intellectuals and 'Indianness' - paralleling the Black Consciousness ideas that thrived in South Africa in the same period (Wright 1988, 373-4; Magaziner 2010, 125-137). In Northern America, by contrast, indigenous groups sought instead, typically, to appropriate the self-determination ideals which the international system applied only to states (Cornell

1986; for Australia Foley, Schaap and Howell 2014; for an overview of this 'era' McHugh 2005, chapter 6). Such strategies could hope to attract significant international sympathy until Western beliefs in self-determination largely collapsed under pressure from human rights in the late 1970s (Moyn 2012). (In the social sciences these developments were reflected by the eclipse of 'internal colonialism' theories, which began to be abandoned on the grounds that they neglected various forms of intra-group discrimination [Hind 1984, 553; Chavez 2011, 786].)

Perhaps the most internationally significant of the groups active this period, the American Indian Movement (AIM), exemplifies these shifts (unless otherwise indicated see Cornell 1986, 113-4, 126-8; Minde 1996, 232-3). It was founded in 1968, inspired by the black nationalist outgrowth of the civil rights movement. It argued against the extension of civil liberties to tribal courts and for Indian sovereignty; a return to relationships with federal government governed on the basis of treaty. Over the next five years it occupied strategic locales including Alcatraz Island and the Bureau of Indian Affairs headquarters in Washington, D.C. In 1973, however, after a 71-day standoff with federal forces, it had to call-off an occupation of the historically-significant South Dakota town of Wounded Knee. This failure precipitated a new more transnational strategy (see also the conclusion to Hau de no sau nee (Iroquois Confederacy), 1978). But the new International Indian Treaty Council (IITC), set-up by the AIM, mobilised with Marxist not rights-based 'frames' (see also Wright 1988, 377). As late as 1977 it continued to take a 'class-based approach to indigenous issues', and seek political support from Non-Aligned states (then advocating New International Economic Order) (Dahl 2009, 42). Unlike the World Council of Indigenous Peoples (WCIP), which represented the new indigenous rights movement, it rejected government funding and any representative structure within the UN, installing itself, symbolically, in the World Council Churches (WCC) building opposite the UN headquarters (Minde 2008, 61-2).

The names given to the first indigenous rights-holders bore the traces of these conflicts. In 1974 the Canadian Indian leader George Manuel wrote a manifesto for an international politics of the 'Fourth World', a concept more recently de-emphasised because of its ostensibly socialist overtones (Minde 2008, 81). Distancing itself from demands for self-determination, such as those endorsed by the IITC, Manuel's manifesto for this movement declared that 'the Aboriginal world is al-

most wholly dependent upon the good faith and morality of the nations of East and West' (Manuel and Posluns 1974, 6, in Minde 2008, 59). This represented a new legitimation strategy appealing to transformations in human rights ideas, or, in Minde's (2008, 55) words, 'the winds of favourable change that indigenous questions were experiencing in Western countries' (see also Minde 1996, 242). It led directly to the formation of the WCIP in the following year, and immediately attracted support from the Human Rights group in the Norwegian Foreign Ministry (Dahl 2009, 28; Minde 1996, 240; Minde 2008, 66). Norwegian advocacy, in turn, soon helped displace a diversity of approaches with which Western countries had previously adopted *vis-à-vis* their 'Fourth World' populations. In post-war Scandinavia, for example, welfarist ideas had mitigated strongly against group rights, whilst the civil right movement's push for legal equality had similar effects in North America (Minde 1984; C. Taylor 1992, 56-61). Sami groups, however, now seized successfully upon Scandinavian international advocacy to demand special rights in the domestic sphere. And in Canada the crises of Pierre Trudeau's civil rights liberalism - which had proved catastrophic in the late 1960s and early 1970s - led to the development of multiculturalist orthodoxies far more favourable to emerging notions of indigenous rights (Cairns 2000, chapter 2; Kymlicka 2007, 16-18)[69].

The institutional consequences of these normative shifts were immediate. The 1977 International NGO Conference on Discrimination against Indigenous Populations in the Americas, supported by the Carter Administration as part of its new human rights policy, was followed by a range of similar events over the years that followed (Minde 2008, 69-74; Dahl 2009, 46). Representative organisations proliferated, and in 1982 the UN Working Group on Indigenous Populations (WGIP) was established to revise ILO Convention 109 and establish a post-modernist consensus on the relationship between indigenous peoples and nation-states (Saugestad 2001, 47; Dahl 2009, 33). Indigenous rights had defeated their competitors to become the most attractive frame with which social movement demands could be legitimated.

4. Conclusion

This chapter has described how a dual crisis of modernism and socialist utopia transformed rights beliefs in the 1970s, explaining both new kinds of legal mobilisation and the availability of

new litigation fora. In Western Europe crises of socialist utopias meant that powerful states could no longer use the ECHR simply as a symbolic justification of anti-communism, whilst modernist crisis and new mangerialist ideas led administrative elites to welcome courts into the policy process. By 1980 advocacy for judicially-enforced rights was no longer limited to a small group of liberal lawyer-statesmen focused on individuals, but had become the preserve of a wide range of organisations with 'maximalist' demands including group rights. In sub-Saharan Africa, meanwhile, modernist crisis after 1973 led states to downplay virile statehood and demand redress for colonial exploitation. The human rights revolution that followed the crisis of socialist utopias then led these states to re-frame these demands in terms of legal rights for reparation. In the United States new legal fora were becoming available to litigate such demands. This was largely a consequence of Jimmy Carter's famous decision to legitimate his foreign policy in terms of human rights. In Latin America, finally, the new legitimating power of rights saw indigenous groups re-frame their opposition to modernisation. They could now count on support from new Western NGOs. These organisations were typically created by anthropologists and were created following broader crises of the modernist ideas that they had long opposed.

Chapter 7: Transnational networks.

1. Introduction

This chapter has three objectives. The first is to explain the formation and transformation of social networks in terms of the new beliefs analysed in the previous chapter. This represents an analytical advance over constructivist approaches, which view networks as simply conditions for norm emergence (e.g. Sikkink 2011, 231). Its second objective is to give symbols, culture and 'Durkheimian' insights their proper due (see chapter 5). New beliefs are not by themselves adequate for explaining how and why transnational networks acquire mass appeal. Nor are appeals to broad Western or universal ideals of bodily integrity sufficient (compare L. Hunt 2007, 27-29; Sikkink 2011, 255, 261). Theorists of collective action framing have long stressed the 'cultural resonance' of campaign symbolism (see the overview in Benford and Snow 2000, 622). I use this approach to identify three moments in which actors holding new beliefs successfully tailored communications for culturally-specific, local audiences, in ways that generated increased support for litigants. Thus, in Germany the 2004 centenary of the Herero and Nama genocide saw the issue effectively linked with ongoing political debates about how to deal with the Holocaust and its legacies. In Britain and America, after 2001, indigenous rights in Botswana were effectively linked with the question of 'conflict diamonds'. Whilst in Britain, finally, violence towards white farmers after 2000 was framed as a rights issue for the first time. And this was done in ways that resonated with Western cultural habits of identifying more closely with white than black Africans (for 'habits' Weber [1925] 1964, II, 2, i).

This attention to specific aspects of Western cultures is, of course, not meant to deny the existence of a broader, more universal global human rights symbolism. For the anthropologist Sally Falk Moore (2006, 284) the manipulation of such 'common, diffuse, value-laden symbolic content' is in fact key to 'political struggles in legal arenas'. Whilst for John Torpey (2006, 8-9), more specifically - whose work was discussed in the previous chapter - the Holocaust has become the 'central metaphor' of 'our contemporary historical context'. This fact is certainly reflected in the mobilisation strategies of all three social movements examined here. Such comparisons are, of course,

hardly surprising in the case of the Herero and Nama genocide. The possibility of genuine connections between the two episodes is now a matter of serious scholarly debate (see below). More intriguing are the numerous parallels that Ben Freeth and his legal team have sought to establish between Nazi Germany and the racial discrimination of FTLR - suggesting, notably, that President Mugabe has behaved like Adolf Hitler (e.g. Gauntlett 2009, 13; remarks by Jeffrey Jowell in *Mugabe and the White African*, 2009; *JAG Open Letter Forum,* 27th April 2009; Munyoro, 5th February 2010; Freeth 2011, 126; 2013, 47). It is especially striking that Survival International - despite criticism reported by the BBC - has attempted to describe CKGR relocations as 'cultural genocide', even if no deaths have been directly linked to the government's decision (Levene, 10th October 2002; Kenyon, 6th November 2005). In an African context, of course, apartheid frequently occupies a similar position to the Holocaust. It symbolises a great evil in relation to which all political movements must signal their ''post'-ness', in Torpey's (2006, 8) terms. Here it is notable that Archbishop Desmond Tutu - *the* symbol of anti-apartheid human rights, alongside Nelson Mandela - has produced written and video messages in support of both Ben Freeth and the CKGR litigants (*Mmegi,* 7th November 2006; Setsiba, 8th November 2006; Freeth 2011, foreword; SADC Tribunal Rights Watch, 14th August 2012).

This omnipresence of Hitler and Tutu in human-rights framing also illustrates the importance of what Willems (2005, 100) refers to as 'personalisation'. As she writes, citing Galtung and Ruge (1965, 65), 'the more the event can be seen in personal terms, as due to the action of specific individuals, the more probable that it will become a news item'. (Anthropologists have often noted how David and Goliath tales - illustrated below - resonate particularly strongly with broad Western publics [e.g. Jeffrey 2006, 235; Allen 2009, 165].) Just as 'the imagined community of millions seems more real as a team of eleven named people' - to borrow Eric Hobsbawm's (1990, 143) comment on football and nationalism - identifying constituencies with particular faces thus intensifies the mobilising power of their cause.

Thirdly, and finally, this chapter will situate its analysis between two explanatory poles found in the literature dealing with the emergence of African social movements and NGOs. Whilst the norm spiral model posits that 'norm entrepreneurs' are initially motivated by 'empathy' and 'al-

truism', others have suggested that in Africa, especially, NGOs are typically founded in order to 'establish an instrumentally profitable position' for accumulating patronage resources (compare Finnemore and Sikkink 1998, 898, with Chabal and Daloz 1999, 22; see also Bayart 2000; Hearn 2007). This chapter does not deny that insincerity and even cynicism may exist. But it maintains that many components of its Zimbabwean and Namibian case studies are much better understood as falling into a third category. Here international languages are 'read' and 'appropriated' according to African actors' local political needs; a neither purely cynical nor purely altruistic endeavour (Dorman 2001; Pommerolle 2005, 12-13; 2006; contrast Hearn 2006, 653).

One corollary of the litigant with convictions is that strategic framing becomes a contentious process. Lawyers and activists have sometimes had to work to prevent some more idiosyncratic beliefs from being voiced publicly. Conflicts have emerged over the use of frames clashing with either global human rights symbolisms, or more local cultural content that movements seek to mobilise (for how 'inconsistent' framing can disable mobilisation compare Zuo and Benford 1995 with Johnson 1997). Where contentious framing has been successful it has allowed rights claims to become 'vehicles for other projects', and enabled litigants to 'resist, transform and thwart elite agendas' (T. Young 1998, 33; Bevir 2010, xli; chapter 5).

2. Commercial farmers and indigeneity

In the case of the commercial farmers' campaign issue framing was not the only means of attracting transnational support. Even the choice of litigation team was designed to maximise symbolic impact. The first man approached was Sir Sydney Kentridge, who had defended Nelson Mandela and Stephen Biko in perhaps the most famous cases in apartheid South Africa's history. He had also led the appeal to the Privy Council in *Stella Madzimbamuto v Lardner-Burke*, the most famous case in Rhodesian history, which saw the new rebel state's constitution ruled illegal (H. H. Marshall 1968; Freeth 2011, 152). Kentridge, now aged 83, was no longer taking on cases abroad, but passed on relevant case law (Ben Freeth, interview, 5th April 2012). In a potentially explosive move, Freeth then approached Cherie Booth QC; a human rights lawyer but, most importantly, wife of British Prime Minister Tony Blair - the man whom President Mugabe famously detested like no other

(Chan 2003; 2012, 124; Freeth 2011, 152). Booth, however, would have asked £5,000 for a legal opinion (anonymous interview, April 2012; Ben Freeth, interview, 5th April 2012). Next on the list was Johann Kriegler, an 'old friend' of Mike Campbell's and a retired judge on post-apartheid South Africa's Constitutional Court (Freeth 2011, 152-3; Ben Freeth, interview, 5th April 2012). Kriegler put them in touch with Jeremy Gauntlett, one of the best-known Advocates in South Africa, who has chaired the General Council of the Bar in South Africa as acted as the Vice-President of the Bar for the International Criminal Court (Freeth 2011, 152-3).

Gauntlett's case was not, however, his alone (see Freeth 2011, 154-8). In his own words, 'I wouldn't want you to think I'm Florence Nightingale alone in an unlit ward' (in Pampalone, 23rd December 2009). The argument against the Government of Zimbabwe's ouster clause was produced with the assistance of Professor Sir Jeffrey Jowell QC, one of Britain's leading public lawyers and the son-in-law of Helen Suzman, long South Africa's sole anti-apartheid parliamentarian (Freeth 2011, 151; for Suzman see Strangwayes-Booth 1976). Given his lawyers' credentials Freeth was concerned about funds. As in the other cases analysed in this study, donors and politically well-connected NGOs - agents of the 'liberal project' in Africa - were unwilling to assist in such a fundamental challenge to the new order. Money was therefore found from other sources (Freeth, 2011; 153). Crucially, the legal team was often content to work for free. Since 2011 they have been working entirely *pro bono* (Ben Freeth, interview, 5th April 2012). The first part of this section seeks to explain how Freeth's case came to acquire such importance for these legal constituencies. In some respects the account parallels explanations for new beliefs about law and politics presented in the previous chapter, but it highlights particularities peculiar to apartheid South Africa and Britain's 'Westminster Model' of government.

(a) The transformation of a transnational movement

Apartheid was ushered in by the National Party's electoral victory in 1948. This victory coincided with 'mounting support within a range of bureaucratic circles' for 'the growing global enthusiasm for a more centrally unified and assertively interventionist state' (Posel 2001, 99). In the 1950s liberal judges were steadily replaced with the 'executive-minded'. New 'purist' theories of

law became dominant, popularised notably by Lucas Steyn (Chief Justice from 1959 until 1971, and author of the first legal textbook in Afrikaans). These theories attempted to cleanse South African law of corrupting British influence. They were intended to justify new levels of discretion for the racialist and modernist state, and sought to discover legislative intentions, freeing the executive from the constraints of common law precedent (Cameron 1982, 40, 59; Dugard 1979, 37-42)[70]. Perhaps the most notorious application of these doctrines was *Lockhat v Minister of the Interior* (1960). Here an Indian resident of Durban charged that the planned division of the city into 'group areas' would have an unreasonably discriminatory effect not justified by the terms of the Group Areas Act 77 of 1957. The Court held, however, that whilst such discrimination was indeed not permitted by the Act, it was 'clearly implied' by the fact that 'the Group Areas Act represents a colossal social experiment and a long-term social policy' (Dyzenhaus 2010, 71)[71].

Liberal jurists sought to oppose these developments by holding to the tenets of the British 'Westminster Model'. This had been classically formulated by Albert Venn Dicey's *Introduction to the Study of the Law of the Constitution* (1885). As Bevir (2008, 563-4) argues, until the 1970s it formed the broad template for how British liberal legal and political elites thought about constitutional affairs. And as Chanock (2001, chapter 18) describes, the Model had also dominated constitutional thought in South Africa until 1945. For South African purposes, the Model was comprised of two core beliefs[72]. Parliamentary sovereignty, firstly, allowed parliament to make or unmake any law it chose. The rule of law, secondly, countered any despotic temptations thus produced by emphasising the importance of 'known rules, equality, and respect for precedent' (see Bevir 2008, 562). The upshot of this was that jurists knew that 'in the Diceyan world they did not settle substantive political issues, and that the judges' role was only to keep the executive within the powers defined by the legislature' (Chanock 2001, 517). By focusing on 'known rules, equality, and respect for precedent', and focusing on apartheid's violations of its own precepts, liberal opponents of 'grand apartheid' in the 1960s and 1970s sought to avoid the damaging charge of political partisanship often levelled at human rights in this period[73]. In the words of the 'leading (and representative) text of the period', by Tony Mathews:

the identification of the human rights or of a particular philosophy … with the Rule of Law is here rejected as unscientific […] theories are inevitably contentious and unstable; and to identify the Rule of Law with any one of them is to make it … a weapon in the war of political and moral ideas (Mathews 1971, 1-2, in Chanock 1999, 378).

The most-discussed liberal critique of the Model in this period - John Dugard's 1971 inaugural lecture at the University of the Witwatersrand - was grounded in natural law, not human rights. Revealingly, it garnered few adherents (see Sachs 1973, 260; Albertyn and Dennis 2010).

The human rights revolution of the late 1970s saw increased international funding for human rights causes. Dugard, notably, became Director of the Centre for Applied Legal Studies at the University of the Witwatersrand: a new academic home for human rights founded in 1978 with grants from the Ford Foundation, Rockefeller Fund and Carnegie Foundation (S. Dezalay 2011, 16-17)[74]. In the 1980s Western funds for legal advice centres, education projects, and defence funds 'grew exponentially' (Abel 1995, 20-1; Broun 2000, 99, 101). The time was now 'ripe', Dugard (1978, 47) declared, 'for South African civil libertarians positively to assert their demands for a Bill of Rights and, negatively to measure their losses by the new standards of liberty of the world community, rather than by the limited, largely procedural standards of Dicey'. From the very outset of his career, however, Jeremy Gauntlett defended South Africa's older 'Cape liberal' legal traditions against these new ideas. A much-discussed (and very impressive) student essay of his - deploying Mathews against Dugard - defended 'the firm empirical tradition in the sphere of the law' against more freewheeling 'higher law' arguments (Gauntlett 1972, 213-7). And he continued to occupy such positions until the last days of apartheid. This was illustrated in 1988 by his fulsome praise for the 'balance between detachment and commitment to liberal values' struck by James Rose-Innes, the greatest Chief Justice in the 'Cape liberal' tradition (1914-1927) (Gauntlett 1988, 13).

In the post-apartheid era, however, Gauntlett has found new opponents. His brand of legal liberalism now identifies itself as defending the Rule of Law, not against 'purism' and Afrikaner statism, but against 'transformative jurisprudence' (see Klare 1998). Very broadly speaking, this new philosophy has two dimensions. The first is a claim that the 'activist' nature of South Africa's

new constitution entails a style of judicial interpretation more focused on just outcomes than on 'formalistic' technicalities and the letter of the law (compare Moseneke 2002 with Lewis 2009, 441-4). Gauntlett (2011) has publicly criticised exponents of this, like Albie Sachs, who would like 'judicial reasoning to embrace fluid concepts of hybridity and permeability' claiming that 'language like that ... is inexact because the reasoning is not rigorous'. (For a response attacking Gauntlett's own 'exceedingly formalistic' approach see de Vos 3rd February 2011.)

A second dimension of transformative jurisprudence Gauntlett has opposed is affirmative action in the legal profession, and specifically the 'transformation of the judiciary' (e.g. Gauntlett 2010a, 13; Rabkin 12th November 2012)[75]. The Judicial Services Commission (JSC) has, controversially, rejected his applications for both the Constitutional Court (CC) and Western Cape bench (where he was one of four candidates for three vacancies) (Buthelezi, 14th November 2012; *Constitutional Crossroads*, November 21st 2012; Tolsi, 12th April 2013). The immediate background to the latter is most relevant for our purposes. In 2008-9 the JSC dismissed allegations that John Hlophe, the Judge President of the Western Cape High Court, had attempted to improperly influence two CC judges sitting on a case involving corruption allegations against Presidential hopeful Jacob Zuma. A newly-founded NGO, Freedom Under Law (FUL), then decided to take the JSC itself to the CC (Malan 2012, 280-288). FUL was chaired by Johann Kriegler (an outspoken critic of Hlope and judicial transformation) (Kriegler, 7th October 2007; 6th September 2009). Its Board of Directors includes Gauntlett, the Namibian advocate Elize Angula (who helped argue *Campbell*), and the Botswanan attorney and ex-Chief Magistrate Abdul Rahim Khan (part of the original *Sesana* legal team). Its International Advisory Board includes Desmond Tutu and Jeffrey Jowell[76].

Jowell and Gauntlett not only have similar political projects but promote similar jurisprudential beliefs. In debates surrounding *Campbell*, as well as in their academic work, both have become advocates of a shift from a governmental 'culture of authority' to 'culture of justification' (Jowell 2009; Rabkin, 19th May 2011). They borrow this phrase from Etienne Mureinik (1994, 32) - a South African liberal jurist (sadly) famous for committing suicide whilst controversially opposing the selection of William Malegapuru Makgoba as the University of Witwatersrand's first black Deputy Vice-Chancellor (compare Trewhela, 23rd July 1996 with Mamdani 1997). Mureinik's formulation

was intended, partially, to preserve constitutional respect for parliamentary sovereignty after the collapse of the Westminster Model (see Mureinik 1988, 63-4; Haysom and Plasket 1988; Corder and Davis 1988). It relates closely to the 'managerialist' theories of administration whose genesis is described in the previous chapter. The judiciary, on this view, should not interfere in the details of administration, but should nonetheless demand that government justify its decisions as reasonable and proportionate. In post-apartheid South Africa it has proved particularly attractive to legal liberals, like Gauntlett, who fear excessive governmental discretion but have been constrained in arguing for legal 'formalism' because of dilemmas posed by the advent of a new 'activist' constitution (see Lewis 2009, 442-3; for this constitution's genesis Brett 2014).

In British public law circles, meanwhile, the culture of justification has thrived as Dicey's influence has waned. In post-war Britain the very notion of 'administrative law' was a heterodox one. Lord Alfred Denning, who became Master of the Rolls in 1962, was almost a lone advocate for this cause. He became known as the closest British equivalent to the American 'crusading judge' (see Jowell and McAuslan eds. 1984). As he explained in his 1949 Hamlyn lectures *Freedom Under Law* - from which FUL took its name - 'the Jack-in-office never realises that he is being a little tyrant'. Parliamentary sovereignty alone was an insufficient remedy against this tyranny, so when power is 'exercised in a way that is plainly unreasonable, then the court will infer that it was not a genuine exercise of that power' (Denning 1949, 110, 127). In the 1970s the Westminster Model collapsed, unable to cope with dilemmas posed by the simultaneous crises of its core beliefs (for simultaneous crises d'Avray 2010, 13, 77). Accession to the European Union challenged parliamentary sovereignty, new 'horizontal' regulatory regimes challenged old rule of law ideas, and new behaviourist orthodoxies undermined 'constitutional morality' (Bevir 2008, 564). These changes disabled Dicyean and modernist opposition to Denning's project[77]. As explained by Jowell (2006), moreover, new managerialist orthodoxies have allowed some judges to further the simultaneous growth and expansion of human rights. After reviewing, and welcoming, 'the rapidly expanding standards established through the process of judicial review of administration over the past 40 years', he concluded that:

although the courts based many of those standards upon such broad notions as "fairness" or "reasonableness", the result has been, in fact, that the courts were … consciously or unconsciously .. chipping away at the rock of parliamentary supremacy by making it increasingly difficult for Parliament to authorise the infringement of the rule of law and ... fundamental rights (Jowell 2006, 575).

A key agent in this process has been Lord Tom Bingham, who recently occupied Britain's most senior judicial roles in succession: as Master of the Rolls (1992-1996), Lord Chief Justice (1996-2000), and Senior Law Lord (2000-2008). He argued, amongst other things, for the incorporation into British law of the European Convention of Human Rights, (via the Human Rights Act of 1998), and for the stronger institutional and symbolic separation of the judicial and legislative branches of government (via the Constitutional Reform Act of 2005); the two key milestones in Bevir's (2008, 570-2) 'juridification' of the British constitution (Beloff 2007, 311-3; Clayton and Tomlinson 2009, 61-2). For Bingham's admirers this was 'the transformation of the law' (Andenas and Fairgrieve eds. 2009). Ben Freeth, Jeremy Gauntlett and their supporters have certainly been keen to associate their movement with Bingham's name - commending his Orwell Prize-winning book on the *Rule of Law* (2010) to various audiences, including myself (Gauntlett 2010a, 9-10; 2011; Ben Freeth, interview; 5th April 2012; see also Dale Doré, interview, 13th April 2012; Doré 2012-3a; Sentamu 2012).

This enthusiasm for British models reflects, in part, conscious efforts by Jowell and others to build a transnational network dedicated to promoting these ideas in Southern Africa. Jowell's own activities in this area - now pursued as inaugural Director of the Bingham Centre on the Rule of Law - significantly pre-date Judge Hlophe and FTLR. He assisted with the post-apartheid's constitution's administrative law statute and organised workshops on the topic for the South African Law Commission in the following years (South African Law Commission, August 1999, paragraph 5.4)[78]. He was recently praised by the Constitutional Court's first Chief Justice for his advocacy of the right to lawful administrative action; a right he has advocated for other jurisdictions (Chaskalson 2012; Jowell, 19th November 2012). In Zimbabwe he has not only argued against the ouster clause

of Amendment 17 - the antithesis of a 'culture of justification' - but has also helped in drafting the Law Society's model constitution (Law Society of Zimbabwe, October 2010, foreword).

This Zimbabwean work, especially, excited the interest of his colleagues in the Middle Temple (an Inn of Court, one of Britain's elite institutions for training barristers). In 2011 Jeremy Gauntlett was admitted to the institution as a 'bencher', and began publicising the SADC Tribunal case (Burnton 2010, 5; Jowell and Gauntlett 2011, 7-8). In 2010, meanwhile, the Temple organised a conference in Cape Town on The Rule of Law. An all-star cast of speakers included Gauntlett, Jowell, South Africa's Deputy Chief Justice, one current and two former judges of the Constitutional Court, one current and two former judges from the UK Supreme Court, one judge from the Irish Supreme Court, and Britain's Director of Public Prosecutions (for an overview Meiring and Pelser 2010; for a contribution discussing *Campbell* Cameron 2010, 27-8). In a section of an article for *The Middle Templar* entitled 'Why South Africa?'*,* The Rt Hon Lord Justice Stanley Burnton - the institution's senior figure (or 'Master Treasurer') - explained why it had decided to invest in the campaign:

> my belief that South Africa is at a cross-roads. [...] My impression was that the Rule of Law is not entirely secure in South Africa. Her northern neighbour, Zimbabwe, is a terrible example of what may happen to a once-prosperous country when the Rule of Law is abolished. I felt that sending a strong delegation of judges and lawyers from Middle Temple to a conference on the Rule of Law would be a demonstration of support for the independent judiciary and legal profession there (Burnton 2010, 5).

The aim of this section has been to show how new (post-Dicyean) beliefs help explain the creation and transformation of (liberal legal) transnational networks. We do not have to refer simply to 'altruism' or 'unique background conditions' to account for their emergence. The goal of the next is to explain the new mobilising power of Burton's allusions to FTLR.

(b) Framing

There can be no doubt that ZANU-PF rule in Zimbabwe has been frequently coercive and often brutal. This has been highlighted by scholarly work on, amongst other topics, the *Gukurahundi* massacres, military control of prisons, torture and imprisonment of political opponents, coercive control of informal diamond mines, the intimidation and eventual displacement of around 100,000 farm workers, and Operation *Murambatsvina* - the demolition of hundreds of thousands of homes as part of politically-motivated 'slum clearances' (e.g. Alexander, McGregor; and Ranger 2000, part II; Sachikonye 2003; 2011, 89-93; Vambe Ed. 2008; Nyamunda and Mukwambo 2012; Alexander 2013). The British media, however, has focused almost entirely on violence directed towards white commercial farmers during FTLR, as well as on how, in Burton's words, the latter's threat to the 'Rule of Law' has ruined a 'once-prosperous country'. This is not to deny that real brutality was involved. Eleven farmers were killed between 2000 and 2004, and a much larger number suffered threats, intimidation and assault (Pilossof 2012, 227, 229-236). But in the wider landscape of repressive politics in Zimbabwe the (British) media focus on these events was wildly disproportionate. For Rory Pilossof (2012, 147, n.78), who helped document violence against farmers, this group 'received an embarrassing avalanche of attention'[79].

Wendy Willems (2005) has recorded the background to this avalanche. In 2001 Liz McGregor, *The Guardian*'s Deputy Comment Editor, noted how:

> with countries with a large white population like Zimbabwe and South Africa there is a lot more interest and I think this is largely because the [British] newspapers are white-run and owned and they are trying to identify with people who look like them [...] one of the reasons why there is not a lot of interest in the DRC is that there is not a big white party involved (in Willems 2005, 93).

Other (anonymous) *Guardian* and *Daily Telegraph* journalists who Willems interviewed noted that 'if one white farmer was killed, that created far more news input than if thirty blacks were killed', and how one editor said 'look, put white and black in your lead paper, and you know, you are on the

wire'. As another concluded, 'people like to read about themselves' (Willems 2005, 95-6).

At one level, of course, this collective self about which people like to read about is simply comprised of racial prejudice. As correctly observed by Gérard Prunier, a prominent observer of conflict in the Great Lakes, 'white corpses are heavier than black corpses' (in Keane, 13th January 2005; compare Achebe 2012, 218-220). As theorists of 'communitarian international relations' insist, however, a whole range of other domestic political identities are also (often implausibly) projected into the international sphere (Walker 1993, chapter 3; Adler 2005; compare 'projection' in Gallagher 2009b). In short, the self and its others - 'us' and 'them' - are subjects of heightened international moral concern. In the previous chapter, for example, I outlined the genesis of the new human rights ideas in the 1970s. Unsurprisingly, however, these were not uniformly applied. Durkheimian and communitarian concerns supervened on ideational dynamics. As Jack Donnelly (1988) described in detail, the human rights records of Chile, Israel and apartheid South Africa were subject to a level of concern and scrutiny at the United Nations that the objective brutality of these regimes cannot plausibly account for.

In part, as also described in the previous chapter, this 'bias' resulted from attempts by the Third World bloc to use international law and regimes to discredit their ideological opponents (cf. Irwin 2012, chapter 4). These attempts could only attract Western sympathy, however, because of the ways these regimes symbolised what Western states identified against: colonialism, racism, and fascist dictatorship. As Young (1987, 425) outlined at the time, apparently far worse atrocities in Burundi, East Timor, and Northern Nigeria went simultaneously unnoticed because Westerners could not understand them in such terms. 'By what strange calculus', he asked:

are the lives of Burundians or Timorese worth less, or at least less attention, than those of black South Africans? […] What is special about South Africa is that it is whites killing blacks, or at least whites ordering the killing of blacks. […] For the white people of the world, or at least its thinking part, South Africa represents a peculiarly painful guilt, a reminder of their historical awfulness, of slavery and racism, of the failure of Western civilisation to live up to the ideals of freedom and liberty in its relations with non-European peoples. […] The

parents see in their offspring the image of their own inadequacies (T. Young 1987, 425-6).

In Britain, today, conversely, as Paul Gilroy (2005, 105) has written, such feelings of pain and guilt mean that images of white Zimbabweans are not only 'deployed to contest and seize the position of victim', but also to symbolise 'the severe problems that arise once colonial order has been withdrawn or sacrificed' (for more on British-Zimbabwean relations Gallagher 2011). When these framings are successful they enable white farmers, like supporters of apartheid, to become subject to heightened levels of Western moral concern - even if this concern is of a diametrically opposed kind. The key point here, *pace* the 'norm spiral' model, is that political culture ensures that some transnational movements are more likely to get off the ground than others.

An important feature of attempts to build such familial and communitarian identification is 'personalisation' (see above). In 2000 the death of David Stevens attracted significant media attention. *Hello!* magazine even devoted five-pages to an interview with his wife Maria *(Hello!,* 23rd May 2000, in Willems 2005, 95). More recently, however, Ben Freeth himself has become the face of commercial farming. He has been featured on the *BBC News* website 14 times, with a photo of his face accompanying the headline on 7 occasions[80]. This identification was promoted, most significantly, by an award-winning documentary entitled, revealingly, *Mugabe and the White African* (2009)[81]. Focusing almost entirely on Freeth, Mike Campbell and their family, the film, in Desmond Tutu's words, narrates the SADC Tribunal case as a 'David and Goliath' battle between Freeth and President Mugabe (Freeth 2011, foreword). A subsequent book by Ben Freeth, with the same title, goes even further down this path. According to Mike Thomson, the *BBC Today* programme's foreign affairs correspondent, it 'lays bare … 'a Clockwork Orange' state where racism, greed and violence are ultimately humbled by almost unimaginable courage' (Freeth 2011, cover). It opens with an account (excerpted on the back-cover) of a (an otherwise) unremarkable meeting between Freeth and Mugabe in the 1990s. Freeth describes a 'clammy … lifeless' handshake with the President, whom he characterises as 'a reptile and not a warm-blooded human being' (Freeth 2011, 16-7).

Framing FTLR in these terms mobilised effectively in Britain, and helped, indirectly, to

generate support for liberal jurists' campaigns to save the SADC Tribunal. In 2010 Freeth received an MBE, curiously, 'for services to the farming community in Zimbabwe' (*Daily Telegraph* 12th June 2010). His 2011 book came with forewords from Desmond Tutu and John Sentamu, the Archbishop of York who famously destroyed his dog collar on BBC television to protest at Mugabe's actions (BBC News, 9th December 2007; Freeth 2011, foreword). Freeth's charity, the Mike Campbell Foundation, has held events at the Royal Geographical Society hosted by Kate Hoey, MP, Chair of the all-Parliamentary Committee on Zimbabwe. Hoey (5th November 2013) has encouraged Peter Hain - a former Labour minister and anti-apartheid campaigner - to meet with Freeth, 'a brave Zimbabwean standing up for the rule of law'. As revealed during a House of Commons debate replete with (somewhat nostalgic) references to Zimbabwe's former status as the 'bread basket of Africa' - her Committee had even arranged for a special screening of *Mugabe and the White African* at Westminster in 2009. Paying 'special tribute' to Freeth and his (undeniable) courage, Hoey concluded - mistakenly, as it turned out - that 'ZANU-PF's intransigent and dishonest response to the tribunal [sic] helped leaders of SADC Governments to recognise the true nature of what they are up against with the old guard in Zimbabwe' *(Commons Hansard*, 27th April 2011, column 73WH).

(c) Resistance

Writing in *The Guardian* Blessings-Miles Tendi (5th February, 2010) criticised *Mugabe and the White African*. He pointed out that Zimbabwe's history of land alienation, and colonial and white minority rule was simply absent from the film. Farm-workers, for their part, were literally consigned to the background (for farmers' story-telling more generally see Pilossof 2012, chapter 5). In his conclusion, meanwhile, Tendi noted how, in

> a separate documentary by Hopewell Chinono called 'A Violent Response' ... Michael Campbell comments on the Mount Carmel Farm violence by saying ... [']I do not believe that any of them are capable of ruling themselves. Democracy is a joke' [...] Were [the directors Lucy] Bailey and [Andrew] Thompson so gullible to fall for Michael's 'I am a white African' pretensions or did they conveniently choose to omit the unpalatable reality that colonial

attitudes endured in independent Zimbabwe?

If Bailey and Thompson framed their material by screening-out 'unpalatable' and illiberal beliefs, Ben Freeth himself has been consistently up-front about them. As Freeth informed me, his legal team have often been 'a hard task-master', telling him 'down-boy' when he risks going overboard (interview, 5th April 2012). As one of them informed me, for example, contacting Cherie Booth was like releasing 'a bull in a china shop' (anonymous interview, April 2012). In his solely authored publications, however, Freeth has been free from such constraints. He expresses views clearly at odds with the contemporary liberal ones some theorists equate with human rights. Capitalism, Freeth maintains, is a product of a unique Anglo-Saxon and Protestant genius. 'America', notably, 'was good because it understood the truth'; a truth revealed by the Old Testament, the prosperity of Sumeria, Magna Carta, John Wyclif's vernacular bibles, and 'the Christian-inspired enlightenment that drove the Glorious Revolution' (Freeth 2013, 55, 121-2, 130, 157, 164; 7th March 2013). Now this legacy is threatened by a 'Marxist totalitarian' and 'godless' ideology of Communism in Southern Africa (Freeth 2013, 55, 101). The 'genocides' inflicted by Lenin, Stalin and Mao will inevitably result (Freeth 2002). Authors cited to prove this point include Ayn Rand and Rousas Rushdoony (who elsewhere advocated the death penalty for homosexuality, apostasy, sabbath-breaking, failing to restore bail and other crimes) (Freeth 2013, 51-2; Longman III 1998, 115). Africa, meanwhile, has only been exposed to these truths by Anglo-Saxon settlement and colonisation. Prior to this it had no wheels, no calendars, no civilization without slavery, and 'each day simply merged into the next' (Freeth 2013, 139). On a trek in northern Kenya he had observed how 'enveloped by a universe of tyranny, the Omotic tribes were suspended in a world of their own' (Freeth 2011, 38). Rhodesia in the 1970s may therefore have appeared 'idyllic', but 'like a crocodile lurking below the water, conflict was close at hand' (Freeth 2011, 22). The crocodile - 'often used as a picture of evil' in the Bible, and which has 'remained virtually unchanged since the age of the dinosaurs' - is the 'clan totem' of President Mugabe (Freeth 2011, 89-90).

3. Reparations for Africa

(a) The transformation of transnational movement

As described in the previous chapter, the same 1970s dilemmas which helped displace the Westminster Model generated new beliefs and legitimation strategies for African states. While these states had begun arguing for reparations during the Cold War, the impetus for a genuinely transnational movement only came from Nigeria in 1990. The politically-influential businessman and philanthropist M.K.O. Abiola had become well-acquainted with the latest developments in this area thanks to contacts with Congressional Black Caucus and Jewish groups in the United States. He now organised a series of high-profile conferences on the subject, receiving support from a number of states. In 1992, the OAU swore-in a twelve-member Group of Eminent Persons (GEP) charged with information gathering in pursuit of reparations for slavery and possibly other historical wrongs done to Africa (for this paragraph Howard-Hassmann 2008, 26-7; Gifford 2012, 77-82).

The GEP clearly represented an effort to re-legitimate the international politics of the 1970s and 1980s. It included key African advocates for the NIEO, notably Samir Amin (a prominent dependency theorist), Amadou-Mahtar M'Bow (UNESCO Director during its controversial advocacy for a New World Information and Communication Order), and East African intellectual Ali Mazrui (Howard-Hassmann 2008, 32, 72)[82]. None of its members, however, despite disagreements over specific issues, ever departed from the position that states not groups should receive reparations. Nor did they jettison 'dependency' theorists' arguments about the debilitating effects of Africa's enmeshment in the global economy (see chapter 6; see also Howard 1978).

As Rhoda Howard-Hassmann (2008, 48-9) has argued, however, drawing on Snow and Benford (1988), these framings were not conducive to mobilisation. Unlike Holocaust reparations campaigns, the GEP's 'symbolic politics' failed to 'personalise' the issue (see above). And it could not identify with precision 'who is the perpetrator of a wrong, who is the victim, what exactly is to be compensated, and what are the desired reparations' (Howard-Hassmann 2008, 48). Practical problems emerged immediately, and included the notorious difficulties involved in tracing victims

of slavery, disputes with Black Caucus members and others over whether African-Americans and/or Africans should receive reparations, and opposition to efforts at symbolically excluding perpetrators amongst African *comprador* elites (Makanjuola, February 4-10th 1991). The campaign established no convincing 'causal chain between initial actions and later damage' (Howard-Hassmann 2008, 49).

As a result, the social movement that coalesced around the GEP was limited to two small activist networks. Transafrica Forum, based in Washington DC, published some material on the movement alongside much more significant engagement in demands for reparations for African-Americans (Torpey 2004, 176-8; Howard-Hassmann 2008, 54). The London-based African Reparations Movement (ARM) drew on older Anglo-Caribbean political networks created in the late 1970s and early 1980s (Howard-Hassmann 2008, 29, 54; Gifford 2012, 77-82). This advocacy reflected a multiculturalist turn on the metropolitan British Left that was provoked by socialist and anti-racist dilemmas (cf. Bernie Grant, the ARM's founder, in Gilroy 1990; Shukra 1998, 68; C. Jones 2014). More recently, following the failure of African states' campaigns, these Anglo-Caribbean networks have embraced similar reparations (for slavery) by Caribbean states[83]. These states are being advised on this by the same specialist law firm (Leigh Day) that is responsible, *inter alia*, for the Mau-Mau veterans lawsuit (for details R. Sanders 2013; Associated Press in Miami, 26th July 2013). Thanks to new histories, moreover, they have been able to draw much more plausible causal connections between 'initial actions and later damage'. Most notably, careful work by a group of historians working with Catherine Hall - a London-based historian of the Caribbean on the new Left in the 1970s - has been instrumental in identifying past and present beneficiaries of £20 million (an enormous £11.6 billion in today's money) paid in 1833 by the British government to slave-owners in compensation for abolition (Draper 2009; C. Hall 2013; Matthews 2013, 22). This work has formed a central plank in the Caribbean states' case (R. Sanders 2013; C. Jones 2014)[84].

The difficulties encountered by African reparations contrast starkly with the more successful mobilisation around 'limited claims' by Mau-Mau veterans and descendants of survivors of the Herero and Nama genocide (for limited claims Howard-Hassmann 2008, 56-9). Despite complica-

tions often associated with the contemporary representation of victims, in such cases wrongs and their perpetrators can typically be identified with precision. Not only to do states have legal personalities - a significant practical advantage over claims for the slave trade - but atrocities can be more easily personalised. British and German Documentaries, exhibitions and press articles in the press have all focused significantly on Terence Gavaghan, the Officer-in-Charge of Rehabilitation in the Mwea Camps for Mau-Mau detainees, and, of course, Lothar von Trotha - the general who issued the infamous extermination order of 1994 (e.g. *Kenya: White Terror* 2002; *BBC News*, 14th August 2004; *Namibia Genocide and the Second Reich* 2005; McGreal, 13th October 2006; Sears, 10th April 2011).

The groups mobilised around the Herero and Nama genocide reflect these global transformations. A key factor in mobilising German support for reparations claims has been framing in terms of Holocaust legacies. Such practices have a pre-history, beginning with the controversies surrounding 'incorporation' of South-West Africa after 1945 (see chapter 3). Using the languages and ideas of the Nuremburg trials, activists sought to connect earlier German 'crimes against humanity' with South African failures to honour its mandate. The key figure then was radical Anglican priest Michael Scott, around whom the most important figures in the small world of post-1945 human rights activism coalesced. (Scott received assistance from the Indian UN delegation, Natal's Council for Human Rights, Eleanor Roosevelt, the International League for the Rights of Man, MPs Frank Byers and Tom Driburg, and the Anti-Slavery and Aborigines Protection Society (which had previously represented Namibian groups at the League of Nations, and now represented the pre-history of the rights movement) [for these organisations' support and (unusual) activities Yates and Chester 2006, 83, 90, 103-5; Dedering 2009; Moyn 2010, 125; Irwin 2011, 15-18; McMahon 2013, 186-7].) In a groundbreaking institutional development, Scott was granted special permission to petition the United Nations in 1949. He summarised his demands in an article of the same year, focusing directly on the figure of von Trotha and continuities with the Holocaust:

> then came the German colonists, hungry for land; and finally von Trotha, a general whom
> Hitler would have been delighted to honour … the Germans had not gas chambers then, but

killed babies with their own hands, or burned sick old women in their huts (in Gewald 2004, 68).

Cold War politics, however, soon checked the emergence of international criminal law, and put an end to such forms of mobilisation. Genocide in South-West Africa became associated with South Africa not Germany, and was publicised by African and Namibian anti-colonial nationalists, not human rights activists (see Irwin 2012, chapter 4; compare Moyn 2010, chapter 3). This became especially pronounced after the Sharpeville massacre, when international attention began to focus on South Africa's human rights record (Klotz 1995, 463; Black 1999, 82-6). SWAPO and SWANU made allegations of genocide in South-West Africa at the UN. A 1962 fact-finding mission sent by the Special Committee for the country, however, rejected the allegations, and its (controversial) 'Carpio-Verwoerd' communiqué found no breach of the mandate (du Pisani 1986, 138-9). Even radical international sympathisers such as Michael Scott and Ruth First sought to frame advocacy in more moderate terms, and accused nationalists of over-politicising the genocide concept (Yates and Chester 2006, 193, 239). As First wrote to SWANU President Jariretundu Kozonguizi:

do you not feel this is hard to substantiate in the light of the definition of genocide in the 1948 convention? The result of land and labour policies and neglect of the social and health conditions of the people is undoubtedly great ... but is this genocide? ... Perhaps I'm too sensitive to a certain proneness to exaggerate a very good case and, by slightly over-doing it, to render it shaky (Ruth First, letter of July 14th 1962 [Ruth First Papers]).

West German groups mobilised around Southern Africa in this period were, however, largely unconcerned with such niceties - or even rights issues more generally. Unlike in Britain and the United States for instance, where anti-apartheid was influenced by liberal and religious ideas and enjoyed broad generational appeal, here 'solidarity' with Southern Africa was firmly nested within radical student movements activism (compare Skinner 2010, chapter 7 with Schilling 2014, 135-142). During the 1960s West Germany had only recently emerged from Allied tutelage. The generational shift of this period led to widespread critique of the complicity of state elites in Nazi, rather than colonial crimes. In 1967, most famously, radical students at the University of Hamburg

attacked statues of former German colonial 'heroes' in the belief that:

> by attacking this 'embodiment of the Aryan master race' in direct action, they could unmask the West German establishment as heirs to Nazism and contribute to a 'change in consciousness' that would lead to solidarity with the struggle of liberation movements in the Third World and a revolution against a perceived deeply ingrained deference to authority at home (Cornils 2011, 197).

After 1968 the new popularity of Maoist and Third-Worldist ideas saw a number of student groups raise funds for the revolutionary and guerilla activities of political organisations identifying with their brand of socialist thought (Kössler and Melber 2002, 110, 114).

After the human rights revolution, by contrast, Daniel Cohn-Bendit, the Franco-German student leader of 1968, would ask whether West German solidarity should have been shown towards the (Vietnamese) victims of imperialist genocide, instead of towards the anti-imperialist resistance which claimed to represent them (Melber and Kössler 2002, 118). In the 1980s West German solidarity movements joined the international human-rights-against-apartheid mainstream (Kössler and Melber 2002, 122; Köhler 2002, 150-151). Only in the early to mid-2000s - after years of public disinterest in African affairs, and in a parallel with Britain's Mau-Mau Justice Network - would members of the old anti-imperialist West German Left throw themselves behind the Herero and Nama reparations campaign (for previous disinterest Hofmeier 2002)[85]. In what follows I describe how this accompanied framings in terms of Holocaust legacies.

(b) Framing

The emergence of new beliefs animating those mobilised around these issues is well explained by Torpey (2001, 334). He describes

> the emergence of a broader "consciousness of catastrophe" that is rooted in but goes well beyond Holocaust awareness. This novel sensibility derives fundamentally from the dominant in-

terpretations of the history of the twentieth century, which stress its catastrophic qualities rather than the humanitarian possibilities to which its disasters have given momentum.

These 'catastrophic' interpretations are, of course, themselves to be understood as reactions to the crises of socialist utopias (for critique Badiou 2005). As many commentators pointed out, for example, debates about German colonialism in 2004 strongly paralleled the famous 'historians wars' of the 1980s (Fitzpatrick 2008; Gerwarth and Malinowski 2009). These 'wars' were primarily about whether Soviet atrocities should be commemorated like Nazi ones (see Eley 1988). Whilst it is true that some scholars, ever since Hannah Arendt (1951, part II), have postulated discursive and structural similarities between colonial atrocity and the Holocaust, these ideas had only become objects of widespread academic discussion with the beginnings of organised comparative research into genocide in the 1990s. Paralleling wider efforts to de-link the study of human rights from an exclusive grounding in the history of the West, scholars such as those associated with the *Journal of Genocide Research* (founded 1999) have attempted to challenge the 'trope of uniqueness' that has surrounded the Holocaust (Moses 2002; Fitzpatrick 2008, 483; Stone Ed. 2008; Gerwarth and Malinowski 2009, 280). These efforts dramatically altered the scholarly consensus among historians of German colonialism in the 10 years after 1995 (Lennox 2010, lvi-lvii).

Nevertheless, despite these shifts Foreign Minister Joschka Fischer could still declare in 2003 that the Herero lawsuit precluded official apology. Germans, he announced, were not 'hostages to their history'; an allusion to longstanding debates over whether a 'final stroke' was required to finally reconcile the country with its traumatic past (Diebold, Engelhardt and Iskenius 2004, 55; Kössler 2006, 58). Throughout the 2004 centenary of the genocide a small number of activists organised events designed to contest this perspective, comprised largely of 'scholarly conferences, adult education initiatives and information venues, television features and exhibitions of various shapes and sizes' (Kössler 2006, 58). Zeller (2005, in Melber 2014, 163) enumerates six distinct exhibitions and more than twenty seminars, panel debates, public lecture series and conferences from mid-2003 to mid-2005; many more than were held in Namibia. Contemporary Pan-Africanist NGOs in the 'No Amnesty for Genocide' alliance now obtained significant exposure for the first time (for contemporary Pan-Africanism see H. Campbell 2009; contrast Cheikh Anta Diop in Mazrui 2005,

58). AfricAvenir - one of the most important of these, founded in Berlin in 2000 before the Durban conference - has since 2005 organised more events (mostly in Germany) every year than in the whole of its previous existence[86]. But all of these events have remained 'directed mainly towards a limited and committed audience' (Kössler 2006, 58).

Of perhaps wider import, however, was *Herero*, a highly-publicised 2003 novel by anarchist and 1968 student activist Gerhard Seyfried[87]. This revived Arendt's thesis but was sometimes criticised by academic experts (e.g. Eckert 2007, 276). Largely told from the point of view of German protagonists - who act as 'focalizers representing colonial thinking' - *Herero* places key dates, particular perpetrators, and guilty institutions in the spotlight (Göttsche 2013, 90). Also significant was a prime time television series and accompanying 2005 book produced by Horst Gründer, 'one of the grand old men of German colonial historiography' (Kössler 2008, 326). Gründer had long opposed expanding the scope of the genocide concept, and in a 2005 public debate about the Maji Maji war claimed it was time to shed 'whininess, larmoyency and the penitential robe', since all modernisation had proved socially destructive (Steinmetz and Hell 2006, 157; Kössler 2008, 326). Nevertheless, even critics that praised his book asserted that 'continuities between colonialism and Nazism … seem too comfortably resolved' (Eley 2010, 65). Comparative scholars of genocide were more openly critical. Jürgen Zimmerer, perhaps the leading proponent of these new perspectives in the Namibian debate, and then editor of the *Journal of Genocide Research*, was rebuked by Gründer for alleging that he had 'reintegrate[d] colonialism as a positively valued epoch of national history' (Kössler 2008, 326; see also Zimmerer 2005).

(c) Resistance

Despite their comparatively limited impact, the new reparations advocacy of Pan-Africanist organisations nevertheless helps showcase the 'appropriation' of rights for local political struggles. AfricAvenir, for example, was founded in Douala in the 1980s by the Cameroonian intellectual and Germanist Prince Kum'a Ndumbe III[88]. Ndumbe's father was a member of the Union des Populations du Cameroun (UPC): the country's largest anti-colonial rebel movement which was excluded from power at decolonisation thanks to a compromise between the French government and less rad-

ical political forces (Ndumbe III, April-May 2010; Joseph 1977 remains the classic account of the UPC). For the last thirty years Ndumbe, like other UPC sympathisers, has turned towards human rights activism as a means of internationalising domestic struggles for recognition. Like the group associated with Kuaima Riruako, contemporary UPC activists have sought to receive justice for colonial repression by directly addressing the former colonial power, bypassing inhospitable bilateral relations (*Libération*, 17th September 2008; for the internationalisation of current UPC rights strategies Pommerolle 2005, 72-3, 241-2; 2006, 79-81).

Kuaima Riruako's own 'sustained campaigning, including court action in the USA' has been central to 'the dynamism which the whole issue … [has] gained since the mid-1990s' (Kössler 2008, 326). And he too has also been willing to frame his cause in terms of pan-Africanism and new reparations beliefs. In 2006, for example, in a speech delivered at the Global Pan Afrikan Reparations and Repatriation Conference in Accra, he described how:

> the world is full of victims: victims of war and genocide for land, oil, gold, diamonds and people to enslave […] It is instructive to hear African people, Continental and Diaspora, whose growth and development have been interrupted by colonialism, slavery, and genocide, tell their story. Each thinks that their experience was the worst, that their colonizer or slaver was the most brutal, most evil, and that their experience was the longest and most devastating. I would say that each of us speaks our truth. It was the worst, for us (Riruako 2012, 119-120).

Elsewhere, meanwhile, he has sought to frame his demands in terms of the more specific Holocaust parallels which have recently given the campaign momentum in Germany: 'the Herero Genocide in 1904 was the inaugural holocaust, succeeded by the Jewish Holocaust in the 1940s and enacted by the same sovereign power' (Sarkin 2010, vi).

To perhaps an even greater extent than Kum'a Ndumbe III, however, Riruako - who himself has a degree in political science - has appropriated reparations ideas within a web of internationally unorthodox beliefs. In the 1980s, after his (contested) selection as Herero Paramount, he participated in South Africa's controversial efforts at internal settlement (see du Pisani 1986, 416; Soggot

1986, 271-3). Genocide commemorations became symbols of 'peace between black and white' and 'South African-sponsored Opposition to SWAPO' (Gewald 2004, 296; Förster 2007, 253-5). Riruako began also blending neo-traditionalist ideas with a Cold War brand of Christian conservatism (compare Gatsha Buthelezi in Southall 1981). These ideas identified the apartheid government as a bulwark against 'materialistic communism […] the most dangerous ideology ever known to man'. Communism's 'diabolical anti-Christ plan' violated 'the belief in a Supreme Being (Mukuru, Modimo) by the African'. And it also undermined 'the communal system' of 'African society'. In this system, although 'land really belongs to the people, including the chief … no man can take or nationalise another man's property' and 'tribal society is composed of the rich, the middle class and the poor' (see Riruako 1984, 9-10). These statements were not, however, purely for external consumption. Riruako openly encouraged the death penalty in tribal courts, for example - not a position destined to secure international legitimacy (Riruako 1984, 22; see also Soggot 1986, 278). More strikingly for our purposes, furthermore, he continues to espouse similar positions today - well after they have lost their political utility. As he explained to me, the campaign was launched on behalf of 'my tribe or nation whom I love', and was inspired by Biblical models of leadership including Jesus Christ and John the Baptist. Unlike some of his more radical supporters he hoped that reparations payments would not be used for land reform until it was possible to 'educate people of this country until land becomes one of those things' (interview, 27th August 2011).

As with Ben Freeth in Zimbabwe, internationally unorthodox beliefs such as these have thus required strategic framing to mobilise most widely. Riruako's attempts to do so have dovetailed with the more orthodox objectives of his advisors and legal team. Esther Muinjangue, for example - the Ovaherero Genocide Committee Chair - would prefer that the campaign be understood as 'community mobilisation' rather than simply about Riruako's leadership, even if 'we give him the acknowledgement that he started the whole issue and so on and so on' (interview, 23rd August 2011). Jeremy Sarkin, similarly, who has volunteered his services *pro bono* as legal advisor, has certainly not hoped solely to promote Riruako's leadership claims. He has also sought to challenge 'patriotic history' in Namibia and to pluralise its nationalist narrative; 'the current case for reparations is about more than restitution; it is about the preservation of ethnic memory and identity for a group that has been denied official recognition and land by its post-independent [sic] government' (Sarkin

2008, 184). He hopes that the case will help publicise the victimhood of not only anti-SWAPO political forces (such as Riruako and NUDO), but also ex-SWAPO members (such as the dissidents detained and tortured at Lubango in Angola the 1980s) (interview, 12th August 2011; for details Groth 1996; Southall 2013, 62-3). Having worked himself for South Africa's Truth and Reconciliation Commission, he hopes, like some others in Windhoek civil society, that the reparations campaign will help promote a similar process for Namibia[89].

4. Indigenous rights in Bostwana

(a) The transformation of a transnational movement

The early 2000s also saw new framing techniques used by the transnational campaign opposing relocations in the CKGR. As before, moreover, these techniques were deployed by activists holding new beliefs which had emerged in the 1970s. Western interest in the CKGR, however, long predated this period. As described in the previous chapter, Western publics have traditionally displayed 'double vision' towards modernisation projects in Africa (see Robins 2001). In Botswana this was evident as early as the inter-war period. As outlined in chapter 4, nineteenth-century missionaries had pressured the government to abolish San 'slavery'. As the colonial administration began to move in this direction, however, the most vocal British critics of Tswanadom suddenly became its staunchest defenders. In 1930 Tshekedi Khama, the Regent of Bangwato, had travelled to the country to raise support for his campaign against unprecedented levels of metropolitan interference in the judicial and constitutional affairs of the Protectorate. Khama succeeded in rallying a number of key constituencies to his cause 'the missionaries, the humanitarians, liberal politicians or those who just needed a stick with which to beat the government of the day, and finally, most important of all, the press' (Crowder 1985, 212). (Intriguingly, given Survival International's later tactics, Khama had done so by framing his cause in terms of the damaging consequences of plans for mining; 'if towns such as Johannesburg spring up we have lost the whole of the country', he told Sidney Webb (by then Lord Passfield) (Crowder 1985, 204). In 1935 he and others were able to mobilise these same constituencies against the colonial government's new abolitionism (compare Solway 2009, 337, n.17). He wrote the first part of a London Missionary Society (1935) report on the issue. 'African tribal life', this concluded, 'is a

complicated and intimate social structure which it is most undesirable to break down forcibly or hastily without fully understanding the system and its sanctions and having a well thought out policy of reconstruction ready to apply'. San interests would be best protected by maintaining their incorporation under improved conditions, and not by 'turn[ing] them back to the desert where they would revert to the hunting stage of life' (in Russell 1976, 184).

The depth of the post-war modernist shift, however, provoked a traditionalist reaction eager to defend 'reversions' to the 'hunting stage of life'. In North America and Britain, especially, this traditionalism was catalysed by the extraordinary success of Laurens van der Post, whose films helped pressure the British government to create the CKGR (see chapter 4; Wilmsen 1995). As analysed in the previous chapter, however, efforts to effect such changes via litigation would only come later, with the emergence of indigenous rights NGOs such as Survival International. The organisation's activities in Botswana provide some evidence for this shift. These began in 1975-6, and focused around health and education (Resnick 2009, 62; Survival International, N.d.a, 3). As Barbara Bentley (1976, 352) wrote, the 'common thread' running through all SI's new projects at the time was that they were 'designed to provide specific groups of aboriginal peoples with the opportunity or "breathing space" in which to gather themselves together to protect their rights against the encroachment of the modern world'. Focusing on 'ethnocide' and conscientisation they were informed by the narrow rights agenda and post-1968 utopianism typical of the period (see chapter 6). Although land rights could perhaps be secured by 'if necessary buying the land and giving it to the aboriginal peoples concerned', the 'problems of aboriginal peoples' were, ultimately, 'part of a larger problem of global proportions' (Bentley 1976, 352). Fundamentally, as Jaulin (1970, 422) wrote, 'the solution of ethnocide will only be found within the framework of a modification of the attitude of the West to the universe' (in Bentley 1976, 352).

Ultimately, however, Africa would only become a focus of indigenous rights activism following the end of the Cold War (as described in chapter 9). In the 1980s there was little trace of the explicit land rights programmes that were already being developed for other continents. SI's first *Urgent Action Bulletin* on the CKGR dates from 1989, and was issued amid allegations by government officials that SI was assisting apartheid 'destabalisation' (R. Hitchcock 1999, 109;

2002, 806; see also chapter 4). Such accusations worked powerfully to disable transnational mobilisation. They could even claim some *a priori* plausibility, moreover, thanks to the (albeit rather academic) controversy which had surrounded Jamie Uys' very successful 1980 film *The Gods Must be Crazy*. This film begins, famously, with a Coca Cola bottle falling out of the sky from a plane. The arrival of the mysterious object leads the San protagonist to have a series of comedic encounters with incompetent and malevolent black African politicians and Cuban revolutionaries. The film, financed by the South African government, was roundly denounced by academics for its essentialist depictions of San life and 'thinly disguised … propaganda' (Lee 1986, 91; see also Hunter 1985; Volkman 1985; Parsons 2006, 38). For the anthropologist Robert Gordon (1992, 1) it was proof that 'some films can kill'. Some anti-apartheid groups even held protests against it (Parsons 2006, 38). At the time even Laurens van der Post - who famously visited the Kalahari with Prince Charles in 1987 - did not criticise planned relocations[90]. A rare 1988 article in the *Washington Post* criticising relocations, and drawing a hostile response from the government, was clearly at pains to avoid advocating 'separate development' (Harden, 27th March 1988; R. Hitchcock 1999, 108-9). It stressed that life in the CKGR was 'no longer the stuff of romantic movies', and pointedly cited revisionist anthropologists, such as Edwin Wilmsen, who understood San-Batswana relationships in terms of economic inequalities rather than cultural incompatibilities (Harden, 27th March 1988; for 'revisionism' see chapter 8).

(b) Framing

As described in chapter 4, a transnational movement centered around indigenous rights and opposition to the CKGR relocations began to emerge in the early 1990s. Its framing tactics, however, remained largely similar. Like its predecessors it sought to appeal to the symbolism of Western anti-modernist nostalgia. The Marshall family, for instance - who made a series of famous ethnographic films about the San in the 1950s - have now been shown to have 'deliberately excluded any signs of acculturation amongst the Ju/Wasi, such as the use of modern implements (pots, pans, Western clothing, tyres, water drums, and so on)' (van Vuuren 2009, 562, discussing Tomaselli and Homiak 1999, 160-1). By 1980 John Marshall was seeking to challenge essentialism, and even shot 'footage of the filming of The Gods Must Be Crazy' to show 'the racist and patronising attitudes of

the South African filmmakers'. But in 1991, post-apartheid, he was once again happy to use his films from the 1950s to promote San land claims in Namibia (van Vuuren 2009, 567, 572).

First People of the Kalahari (FPK), for its part, was also, initially, keen to mobilise old imagery in the new geo-political context of the 1990s. In 1996 van der Post - who described relocations as 'unforgiveable' - arranged for Roy Sesana and John Hardbattle to meet with Prince Charles at his home in Balmoral (Block, 26th May 1996; R. Hitchcock 1999, 115; Booker, 26th October 2013). The publicity they helped create generated support, notably, from the House of Lords and the American Senate (Block, 26th May 1996; R. Hitchcock 1999, 115). But it was also criticised by a variety of diplomats and human rights organisations. The Swedish ambassador defended the government's intentions (Block, 26th May 1996). Linda Chalker, the British Minister for Overseas Development, made similar arguments in response to criticism in the House of Lords (*Lords Hansard*, 16th May 1996). Whilst for the American ambassador the real question, apparently, was 'how does a hunter-gatherer culture fit into modern life in an age of telecommunications and travel to Mars?' (Matloff, September 3rd 1997). San activist Louis Liebenberg, finally, claimed that 'people like Laurens van der Post have done much to focus attention on the Bushmen but have also done a lot of damage by creating a romantic, mythical image of Bushman life' (Block, 26th May 1996).

These constituencies, unsurprisingly, are still appealed to. In 2014 FPK activist Jumanda Kakelebone presented a letter to Prince Charles stating that 'we know that you walked with Laurens van der Post and the bushmen a long time ago. You know who we are. We are begging you to talk to president Khama and ask him to stop persecuting us' (Vidal, 18th April 2014). Now, however, such framings co-exist with more contemporary ones. In the early 2000s SI decided, for the first time, to also frame the issue in terms of 'conflict diamonds' - alleging, more specifically, that intentions to mine in the Reserve had motivated relocations. This new frame had been created for Western publics by NGOs, notably Global Witness, who had reported on wars in Angola, Liberia, Sierra Leone and the DRC in the 1990s (I. Taylor and Mokhawa 2003, 266-8). It was particularly embarrassing for the Bostwanan government since its own response to these tactics had been to legitimate itself internationally as the sole example of an African administration not to fall into the 'conflict diamond' trap. In 2001, just before SI's change of tactics, it had launched a 'Diamonds for Development' campaign to make just this point for the West (cf. I. Taylor and Mokhawa 2003, 271-3). The

NGO now held protests outside embassies, official occasions, and the opening of flagship De Beers stores in London and New York (*Mail and Guardian*, 22nd June 2005; Resnick 2009, 63). (President Mogae had earlier, unwisely, described this company as Botswana's 'Siamese twin' (Good 2004, 17, n.2).) In 2005 SI protested outside the National Museum of History in London, which had refused to alter an exhibit about diamond mining in Southern Africa in ways highlighting its costs in the CKGR (U.S. Embassy Gaborone, 14th July 2005). These activities led supermodels Iman, Erin O'Connor and Lily Cole to distance themselves from De Beers. The actress Julie Christie and feminist icon Gloria Steinem joined protests against it (*Ottawa Citizen*, 20th September 2006; Survival International, N.d.a, 4-5).

Late 2006 and early 2007, meanwhile, saw the release of the film *Blood Diamond*, featuring Leonardo DiCaprio. SI tried to use this to attract younger and perhaps less traditionalist supporters to its campaign. A full-page advertisement in the magazine *Variety*, paid for by SI and FPK, informed DiCaprio that 'we hope you will use your film The Blood Diamond to let people know that we too are victims of diamonds, and we just want to go home' (Survival International, N.d.a, 6; see also Solway 2009, 323). After the film's release SI and FPK then

> appealed to our black brothers and sisters in the hip hop industry - to Russell Simmons, Snoop Dogg, Ludacris, and all the other musicians that are household names to help us. We know you love our diamonds. . . . at least help us pressure our government to let us go home. Please don't let us perish for your 'bling' (Solway 2009, 323).

(c) Resistance

These new framings had a considerable impact. In 2008 De Beers decided to sell its prospecting licenses held in the Reserve, citing the campaign and 'particular sensitivities regarding the status of communities in the CKGR subsequent to their court victory' (*Reuters,* 6th December 2005; Survival International, 29th October 2008; De Beers, N.d.). As Resnick (2009, 67) has shown, moreover, an explosion of references to the CKGR controversy in the international news media can clearly be linked to this new choice of frame (see figure 4).
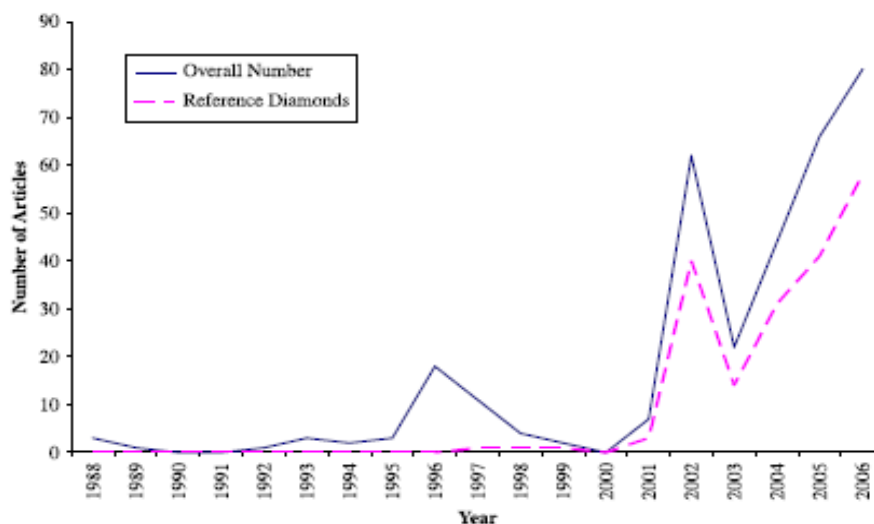
Figure 4: References to the CKGR controversy in magazines, newspapers and international press agency material (via LexisNexis). From Resnick (2009, 67).

SI's tactics did, however, alienate the litigation campaign from most of its Botswanan support base - a sad development described in chapter 4[91]. Even Judge Dow, the judge seemingly most sympathetic to its cause, was scathing in her criticism:

> while diamond mining as a reason for the CKGR relocations might be an emotive rallying point, evoking as it does images of big, greedy multinationals snatching land from, and thus trampling the rights of small indigenous minorities, the case before this Court does not fit that bill. It would be completely dishonest of anyone to pretend that that is the case before this court. Those looking for such a case will have to look somewhere else (*Sesana v The Attorney General* 2006, judgement of Dow, paragraph 107).

FPK and Roy Sesana were, indeed, almost alone in following SI's lead. As a consequence, and as in Zimbabwe, the applicants' legal team tried to avoid the diamond issue, and frame their cause in terms more acceptable to the court and wider society. Judge Dibotelo described tensions on

this point between Sesana and his lawyer, Gordon Bennett:

> the allegation that the First Applicant was running articles in the press during the trial to the effect that the mining of diamonds in the CKGR was one of the reasons why the government was relocating the residents of the CKGR is true and was in fact not denied by the First Applicant, who also strangely even stated that he did not have confidence in the manner the Court was handling this case, which statement resulted in his apology to the Court through his Counsel. I must also state that Counsel for the Applicants has told the Court that it is not part of the Applicants' case that they were relocated from the CKGR by the Government in order to give way to the mining of diamonds in the Reserve (*Sesana v The Attorney General* 2006, judgement of Dibotelo, paragraph 9).

Apparently fearing such confrontations with the court, both legal teams, strikingly, refused to call Sesana (the lead applicant) to testify. This led Dibotelo to label Sesana's allegations as 'disingenuous' (*Sesana v The Attorney General* 2006, judgement of Dibotelo, paragraph 11). Dow, for her part, noted how Gordon Bennett had failed to 'rein … in' Sesana after he had made a series of 'ridiculous' statements to the press. At one point Bennett even promised 'to file a letter of undertaking by Mr. Sesana that he would stop the presentation of the distorted version of his case to the public' (*Sesana v The Attorney General* 2006, judgement of Dow, paragraph 21).

Unlike in the cases of Ben Freeth and Kuiama Riruako, however, these tensions within the litigation team do not appear to have resulted from human rights ideas being 'read' or 'appropriated' according to politically unorthodox webs of belief. Roy Sesana's 'resistance' can, instead, be understood according to the most thoroughly 'strategic' accounts of collective action framing (cf. Valocchi 1996). *Wikileaks* records, indeed, that Sesana had even informed the U.S. Embassy that 'he did not agree necessarily with … [SI's] strategies nor with its campaign to boycott Botswana diamonds. He thought it only hardened attitudes on both sides [...] [T]he alliance was a last resort' (U.S. Embassy, Gaborone, 18th March 2005). Commenting on Sesana's rhetorical flexibility, Saugestad (2011, 48) has claimed, in culturalist fashion, that 'in playing out these different roles Sesana took on a striking resemblance to the classical trickster, one of the heroes in San mythology and belief [...] The trickster is perfectly at home in this changing world, in tune with its spirits of disorder and

flux'. Dow concluded, however - in a more rationalist spirit - that 'the only conclusion one can reach, and it is an adverse one, is that this was a case of 'he who pays the piper, calls the tune', that is, Mr Sesana chose to sing the tune dictated by those or some of those who paid for his fees. Unfortunate' (*Sesana v The Attorney General* 2006, judgement of Dow, paragraph 21).

5. Conclusion

Human rights resistance, therefore, need not be a matter of expanding liberalism's disciplinary apparatus by seeking to provoke it and transgress its limits (see chapter 5). In some cases - as in the case of Roy Sesana - rights may be invoked for straightforwardly tactical reasons. In other cases - as with Ben Freeth and Kuaima Riruako - they may be 'read' according to transgressive, but nonetheless profoundly political conservative beliefs. In all cases, the expansion of rights into new domains has seen them become vehicles for non-liberal projects. This expansion, itself analysed in the previous chapter, has here been used to explain the emergence and transformation of the transnational movements which have supported these litigants. (In the next chapter similar historical dynamics will be used to explain particular dilemmas confronting historians and anthropologists who have provided this support.) New beliefs alone, however, cannot explain the mobilisation of political energies. In this chapter I have sought to correct for the potential rationalist biases of my Davidsonian approach by integrating it with Durkheimian insights about the roles of imagery and symbolism provided by theorists of collective action 'framing' (for this theoretical integration see chapter 5; d'Avray 2010, 91). Actors in transnational movements have framed campaigns in terms of potent local symbolisms; conflict diamonds, Holocaust legacies, and moral concern for the collective (racial) self.

Chapter 8: Information gathering

1. Introduction

The first phase of the norm spiral model begins with 'information-gathering' by transnational networks (Risse and Sikkink 1999, 20). The last two chapters have illustrated how this model assumes rather than explains the emergence of these movements. This chapter, like the previous one, shows how focusing on the ideational context for this emergence - which is absent from the model's early stages - helps us to understand the model's failure to explain normative dysfunction and indeterminacy. It argues that those 1970s dilemmas which produced new transnational rights networks were responsible for a very different set of beliefs amongst historians and anthropologists; the 'information-gatherers' in my Namibian and Botswanan case studies. It is only by understanding the distinctive attempts of these disciplines to resolve these dilemmas that we can account for their failures to behave as the norm-spiral model anticipates. In short, prevailing historical and anthropological orthodoxies have posed obstacles to efforts at mobilising the expertise necessary for successful legal claims. Academics of all stripes, of course, have long bemoaned the inevitable tensions between their professional commitments and the roles they are asked to play in legal arenas and as expert witnesses (for stimulating discussions see R. Evans 2002; Stacey 2004). The tensions examined here, however, are of a new and distinctive kind - explicable by the dual crisis of the 1970s. More importantly, finally, and as illustrated below, anthropologists and historians had begun mobilising around the Kalahari San and Herero and Nama genocide long before such disputes reached the courtroom. Such groups have played an integral part in the mobilisation and transformation of transnational movements described in the previous chapter.

These dilemmas have, by contrast, been of considerably less significance for the brands of human rights activism focused on by the norm spiral model's first stage. The 'ultimate goal' of such activists' information-gathering is not 'to challenge the 'truth' of something', but is rather to 'challenge whether it is good, appropriate, and deserving of praise'. This process is 'not necessarily or entirely in the realm of reason, though facts and information may be marshalled to support claims. Affect, empathy, and principled or moral beliefs may also be deeply involved' (Finnemore

and Sikkink 1998, 900). Allies in the media are central to this. In order to 'put a norm-violating state on the international agenda', however, norm spirals also depend upon the moral authority of human rights organisations, researchers, and fact-finding missions (Risse and Sikkink 1999, 20; for 'moral authority' Hopgood 2006, 106-7). These roles are typically performed by Amnesty International, the International Committee of the Red Cross, and the International Commission of Jurists (e.g. Schmitz 1999, 42; Jetschke 1999, 140).

There is considerable debate about how to interpret the reports these organisations produce. Kathryn Sikkink's former student Hun Joon Kim (2014, 69, 79), for example, has recently stressed how such researchers, by focusing on facts, can attain 'objectivity' and reveal 'the reality of … events'. But such claims to 'unflinching realism' have been attacked by critics such as Richard Wilson (1997, 149), who equates this stripping-away of context with an elicit 'suppression of authorial voice' (but cf. Hopgood 2006, 205-7). Critiques such as Wilson's are lent credibility by Kim's (2014, 70) own observation of how reporters use events 'as a subject and not as an object in the sentence, suggesting it is not reporters but the facts of the … events themselves that reveal the truth'. Stephen Hopgood (2006, 74), likewise, records Amnesty International staffers' intentional avoidance of 'emotive sentences' or even 'adjectives and abverbs'. Indeed, even some advocates of the norm-spiral model are willing to see the primary role of human rights organisations as providing an 'interpretive framework' for new information (Schmitz 1999, 54). These organisations are adept, notably, at portraying political violence in terms of violations of physical integrity rights and 'violent bodily harm'; issues which are thought to resonate particularly well with global publics (Sikkink 2011, 255). As with the media, therefore, the key political question here is whether rights activists have access (directly or indirectly) to researchers and organisations who are able to frame their predicament in these apparently objective terms.

2. Framing human rights violations in Zimbabwe

Our Zimbabwean case study, unlike its Namibian and Botswanan counterparts, is reasonably well captured by this account. Perhaps the most significant difference was that new information communication technology - including digital and mobile phone cameras - allowed farmers'

organisations to present violations 'objectively' without the aid of major NGOs and human rights organisations (cf. Laurie 2012). Chapter 2 described information-gathering by JAG (Justice for Agriculture) and GAPWUZ (The General Agricultural and Plantation Workers Union of Zimbabwe). These efforts relied on farmers' already well-established organisational and communication structures, and were eventually published with the assistance of researchers from the Research and Advocacy Unit (RAU), a small Harare-based NGO (Pilossof 2012, 1, 45). Whilst documenting losses to property, these reports' main 'focus … [was] on violations of physical integrity and political freedoms' - particularly intimidation, assault, detention, rape, disappearance and torture (including that of pets) (JAG and GAPWUZ 2009, 24-28; GAPWUZ, RAU and JAG 2010, 3). Their findings were illustrated with 'unflinching realism' and long factual narrative accounts of violence (JAG and GAPWUZ 2008; GAPWUZ, RAU and JAG 2010; see also Zimbabwe Human Rights NGO Forum 2007). As described in chapter 2, this information gathering has been central to the litigation of abuses in South Africa and attracting attention to the farmers' and farm workers' cause.

The availability of such information has not, however, been sufficient to place Zimbabwe 'on the international agenda'. Unusually for an African country, until the early 2000s major British newspapers, especially, almost all had foreign correspondents based in Harare (Willems 2005, 92). But the most revelatory of all the country's human rights reports - a well-known 1997 investigation by the Catholic Commission for Justice and Peace and the Legal Resources Foundation into the *Gukurahundi* massacres of the early 1980s - attracted very little international media attention (CCRJ and LRF 1997; Willems 2005, 94-5). As described in the previous chapter, violence towards white farmers (not black farm workers) has mobilised effectively in the West. The badly beaten faces of Ben Freeth and his family formed the centrepieces to his 2011 book, were the key exhibits in the courtroom footage included in *Mugabe and the White African* (2009), and accompanied almost all journalistic coverage of the story (e.g. *Daily Telegraph* 30th June 2008; Banya, 1st July 2008; *BBC News*, 1st July 2008; Freeth 2011). Local actors could thus benefit from Zimbabwe's privileged position of the racial hierarchy of moral concern. During interviews with CFU and JAG representatives in 2003, one of Willem's (2005, 99) informants described how successful these organisations had been in passing on the information they had already 'framed' and collected:

we usually get contacted before they arrive in the country and the first stop is here. At the same time, there are still quite a lot of journalists who might be here for two weeks and it's only the last couple of days that they hear about us and get in contact with us. Very sad and they end up doing a lot more work in those two days than they have done in the previous twelve days. So yah, my advice to those journalists out there is that we're here, make contact with us. If you are not prepared to come into the country, we do have this database with statistics and a lot of footage, a lot of the camera work has been done and is ready.

The focus in this chapter, however, will not be on physical integrity rights or on the Zimbabwean case study. Instead I want to illustrate how rights' expansion into the definition of groups has necessitated new alliances for litigants: not the press and human rights organisations but historians and anthropologists. These people are required to act as expert witnesses and to add scientific credibility to allegations of violations. Their particular disciplinary histories, however - bound up with those same historical shifts which led to the 1970s expansion of rights in the first place - have typically left them unwilling to provide the 'information' that litigants require. The defining of groups is often simply too contentious. Even at this first stage of the 'norm spiral', therefore, we can begin to observe how the ideational background to new generations of rights is key to understanding their dysfunction.

3. Reparations histories and the 'judicalisation of the past'

These historical shifts are particularly evident in the case of historians writing in support of African reparations. This had begun before groups such as the Herero and Nama began claiming reparations on their own behalf. As indicated in the previous chapter, in the 1990s an incipient global social movement had sought, unsuccessfully, to justify reparations for African *states* with the aid of 'dependency histories'. These histories contrasted with an older modernist historiography of colonialism. A key category in this had been 'primary resistance', which interpreted initial confrontation and non-compliance with colonial powers as connected, in some sense, with much later demands for decolonisation (for an overview Walvaren and Abbink 2003; for leading

historians' perspectives on this period Rathbone 2000, preface; Lonsdale 2005, 390; Ranger 2013, 83). In these new 'dependency' histories, however, popular on the Marxian Left, 'glorious historical pasts for … the new political organisations that would lead African countries in to the New Era' were de-emphasised (T. Young 2003, 1). In the more extreme formulations, African elites at the coming of colonialism were portrayed not as icons of resistance but as mere 'conveyor belts' for global economic imperatives (Amin 1972, 518). A corresponding emphasis was placed on how the capitalist world system, and particularly the slave trade, had allowed Europe to industrialise whilst leaving Africa 'underdeveloped' - a process only intensified by formal colonial rule (cf. Rodney 1973).

In the 1970s this clearly could serve to justify political demands for a New International Economic Order more favourable to African industrialisation. But following the demise of the NIEO, it was now unclear how any particular reparations figure could ever be justified. As early as 1979 the UN Secretary General, referencing Rodney (1975), had noted that 'dependency' histories could only support the existence of a right to development in 'ethical', not in legal terms (UN Secretary General, 2nd January 1979, paragraph 54, n.25). The GEP itself, strikingly, refused to even provide an estimate of the reparations it demanded. The Jamaican Pan-Africanist Dudley Thompson claimed this was 'impossible' and would 'trivialise' the issue - an argument more usually made by critics of 'compensation cultures' (Howard-Hassmann 2008, 28). Subsequent attempts have often been crude. These range from a figure of $100 trillion (reached by assuming that slavery alone accounts for the respective population sizes of Africa and Asia), to a wholly unjustified estimate of $777 trillion (62 times the then gross domestic product of the United States) (the first estimate is academic, the second produced by activists; Osabu-Kle 2000; Howard-Hassmann 2008, 28).

Now, however, effective 'information-gathering' for reparations campaigns not only had to help mobilise but had to be guaranteed by forms of historical expertise recognisable by legal procedure. As shown below, the 1990s saw the rapid development of new historiographical trends favouring precisely such uses. These trends can themselves be located within wider debates triggered by the ideological crises of the previous decades. These surrounded, in particular, the possibility of connections between mass violence and universalising ideologies; the latter being

thought inherently prone to 'othering' those excluded from their visions of true humanity (cf. Furet 1978; Martin 2008, 88; for analysis Torpey 2001 342-3; Burbank and Cooper 2004, 457). These new theories have come to de-emphasise structural explanations in favour of the discursive logics behind atrocities, focusing historians' attention on those responsible for such acts (recently, for example, Gott 2011). For Henri Rousso (2000, 73-80), the leading French student of these developments, they have enabled a 'judicialisation of the past'[92].

'Black books' and 'white books' had, of course, long been produced by parties to international conflicts and disputes. These were typically intended to provide seemingly objective documentary foundations for partisan positions. In post-war Eastern and Central Europe a number of these were produced for traditional purposes, publicising enemy atrocities, de-legitimising occupations, or justifying reparations from defeated parties (e.g. Republic of Poland 1940; Jewish Anti-Fascist Committee [1946] 1981). Although the Nuremburg Trials ostensibly placed a great premium on 'impartial' information gathering, Cold War politics soon re-established the value of more obviously partisan documentation (compare *The Avalon Project* [1946] 2008, 658, 665-6, 691, with Moscow Press Group of Soviet Journalists 1968; Littell Ed. 1969; but cf. Hirsch 2013). This, however, had begun to change by the early 1990s. Older documentation practices now began to co-exist alongside 'black books' produced by third-parties, and intended to directly influence transitional justice and international criminal-legal institutions (compare, for example, Reporters Sans Frontières 1993, with Estonian State Commission on Examination of the Policies of Repression 2005).

It was, however, the *Black Book of Communism* (Courtois et al. 1999) and the *Black Book of Colonialism* (Ferro ed. 2003) which marked the (contentious) arrival of this 'information gathering' style in the mainstream of professional historiography. The latter was clearly produced, at least in part, to bolster the reparations demands made at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban in September 2001 (Ferro 2003, 10; Vuckovic 2003; see also critical comments by Jean Fremigacci in Chrétien et al. 2003). In line with the demands made at Durban against Western powers, no effort was made to distinguish between historical periods, slavers and abolitionists, colonialists and anti-colonialists, or any other

sub-category of the 'West'. The *Black Book* simply recorded crimes against humanity; appealing to a 'new human rights ideology' which had emerged thanks to 'a change in mentality linked to the dramas of the previous century' [author's translation] (Ferro 2003, 11). Like the *Black Book of Communism*, it was characterised by the wholesale adaption of analytical categories from the Nuremburg trials (for Left critique Badiou 2005, 11). Most significantly, however, it did not constitute a polemical response to its predecessor, as with traditional 'black books'. As Burbank and Cooper (2004, 456) argue, this fact reflected 'fundamental reconfigurations of intellectual thought in the 1990s [...] there is no comparison of evils, no setting of colonialism and communism against each other, no ritual of choice between two systems, no way out toward a different future. Instead the focus is relentlessly on the murderous violence of the past'.

Subsequent years have seen similar such works and debates produced in conjunction with 'limited' reparation claims (see chapter 7). Perhaps the best-known of these in academic circles are the controversies surrounding 'information gathering' for the reparations lodged claim by Kenyan Mau-Mau veterans in the British High Court. Mau-Mau memories have proved particularly divisive since a number of 'loyalist' Kenyans died aiding the British counterinsurgency. Consequently, the first President Jomo Kenyatta sought to neutralise these divisions and render them consensual: 'we all fought for *uhuru* [independence]' (Lonsdale and Odhiambo 2003, 4). Under second President Daniel Arap Moi, meanwhile, some of the state's most radical critics laid claim to the Mau-Mau inheritance (Clough 2003, 258-261; Pommerolle 2006, 78). After 2002, however, the Mau-Mau legacy was wholeheartedly endorsed by the new democratic government of Mwai Kibaki (e.g. Branch 2009, xii). In this it received support, notably, from some former radical critics at the Kenyan Human Rights Commission. This was the most influential local NGO, and it now began to prepare the veterans' lawsuit (Pommerolle 2005, 168, 193, n.3; Anderson 2011). These developments created a highly politicised context for the twin publication in 2005, on the same day, of two new academic works on the counter-insurgency: David Anderson's *Histories of the Hanged* (2005) and Caroline Elkins' *Imperial Reckoning* (2005) - published in Britain, significantly for our purposes, as *Britain's Gulag*. Of these Elkins' Pulitzer-Prize-winning effort has proved the most controversial, claiming as it does that the British detention and torture of civilians may have constituted an 'incipient genocide' claiming the lives of 'perhaps hundreds of thousands' of

Kenyans (Elkins 2005, xvi, 49). These atrocities, Elkins claims, in strikingly contemporary fashion, were a logical corollary of Britain's self-ascribed 'civilising mission' in the colony (Elkins 2003, 193; 2005, xv).

Other historians of the period, however, have been notably critical of *Imperial Reckoning*. They have accused Elkins, *inter alia*, of uncritically using oral testimony by members of veterans' associations pursuing reparations, inflating statistics, stripping-away context with 'prosecutorial zeal', downplaying Mau-Mau atrocities (discussed by Anderson at length), and of allowing her work to be used as an 'intellectual prop' by the notoriously corrupt Kibaki regime (Vice-President Moody Awori spoke at the book's Kenyan launch) (e.g. Ogot 2005 493, 502; Blacker 2007; Berman 2007, 534-5; Branch 2009, xv). Often implicit in these criticisms, moreover, has been an allegation made by Pascal Imperato (2005, 147): *Imperial Reckoning* seeks 'not so much to present truth supported by incontrovertible evidence' as to 'demands reparations' for 'Mau-Mau adherents'; something Imperato believed was confirmed by Elkins' participation as the first historian advising the legal firm representing Mau-Mau claimants. (Elkins, it should be noted, rejects these accusations. She claims that the absence of 'loyalists' from *Imperial Reckoning* can largely be explained by the book's temporal and geographical scope, and that although 'rumours abounded about possible reparations for years' this had no direct effect on her work [Elkins 2011, 735-6].)

In Namibia, meanwhile, German colonial atrocities were portrayed by nationalists as crimes against the nation they hoped to build. It was only in the 1970s that the word genocide was attached to the death of Herero and Nama, as opposed to Namibians (McCullers 2011, 43, n.1). But SWAPO propaganda in exile continued to understand the genocide as a crime against the latter. Its 1981 *To Be Born a Nation* drew heavily on classic Marxian accounts from the 1960s. Written, in part, as pleas for decolonisation, these works - especially Dreschler ([1966] 1981) - explained the genocide, at least in part, in terms of Germany's distinctive authoritarian-capitalist path, dictated by the imperatives of late-imperial 'catch-up' (see also the more contemporary-style argument in Bley [1968] 1996; and commentary in Gewald 2003, 294). The 'uprisings' preceding von Trotha's infamous order, meanwhile, were understood, in line with contemporary modernist orthodoxies, as 'primary resistance' to the colonial economic project. The still classic work from the 1980s - *A*

History of Resistance in Namibia, written by SWAPO's London spokesman Peter Katjavivi - described the events in largely uncontroversial terms, and in no great detail. In then situated them, however, within a now contentious anti-colonial context; 'a widespread war of resistance to German rule by the Nama and Herero people, from 1904 to 1907' (Katjavivi 1988, 8; for commentary Gewald 2004, 70).

As elsewhere, more recent approaches to the genocide have foregrounded specific atrocities by stressing the murderous discursive 'logic' of the new imperialist ideologies which Lothar von Trotha brought to South-West Africa. This is a view once specific to Hannah Arendt (1951, 196), who saw imperialism as a 'laboratory test' for pan-Germanism. The genocide, on this account, cannot be understood as a simple consequence of colonial economic imperatives. The highly contested rise of ideas of racial superiority within German politics takes centre-stage (for these domestic debates Madley 2005, 432, 439-440; van der Heyden 2007). It was only with the dismissal of former governor Theodor Leutwein that these radical notions - promoted by patriotic societies since 1890 and largely shared by Kaiser Wilhelm and Bernhard von Bülow (Chancellor from 1900) - began to supplant previously dominant utilitarian beliefs. Leutwein had endorsed widely-held Social Darwinist ideas, saw Namibians as a labour force for economic development, and sought to establish a kind of rural utopia for Germans in South West Africa - which some Conservatives had identified as a haven from modernisation (Wallace 2011, 194; for the importance of Leutwein's replacement Dedering 1999). But Leutwein never understood 'race war' as an end in itself. This new ideology, found in all European colonialisms and not specific to a German 'special way' (*Sonderweg*), placed the colonised 'outside humankind' (e.g. Zimmerrer 2005, 55). It thus helped pave a road 'from Windhoek to Auschwitz', and broke the 'ultimate taboo' surrounding the bureaucratised massacre of whole populations (Zimmerrer 2005, 56; 2007, 59; contrast Kundrus 2005). (Recently, Caspar Erichsen and David Olusoga *The Kaiser's Holocaust: Germany's Forgotten Genocide and the Colonial Roots of Nazism* (2010) - along with Olusoga's *Namibia Genocide and the Second Reich* (2005), shown by the BBC and Channel 4 - has sought to bring this narrative to a broader audience, modelling itself notably on Adam Hochschild's famous *King Leopold's Ghost* (1998)[93].)

By seeking to explain what made specific atrocities possible, such historiographical trends thus favour the production of empirical work useful for litigation. Erichsen's own careful studies, for example, have done much to document and trace the hitherto little understood episode of scientific experimentation on Herero and Nama skulls on Shark Island (Erichsen 2005; 2007). More dramatically, furthermore, in 2003 Jeremy Sylvester and Jan-Bart Gewald produced a scholarly edition of the 1918 *Blue Book*, used by the British to persuade the League of Nations of German 'crimes of humanity' committed against Herero and others. This international legal category was created by Allies in an effort to justify the dismantlement of Ottoman and German empires for international audiences[94]. On the 4th January 1918, accordingly, a telegram was despatched to British authorities in Australia, New Zealand and British South Africa asking for 'evidence of anxiety of natives of (German New Guinea) (Samoa) (South-West Africa) to live under British rule' (Gewald and Sylvester 2003, xv). One of the results was the Blue Book, or *The Report on the Natives of South-West Africa and their Treatment by Germany* (1918) (Gewald 2004, 64). Alongside an exhaustive catalogue of abuses, and eyewitness accounts, it mobilises much of the 'bare life' pathos Agamben (1998) associates with human rights practice. A section entitled 'The Outbreak of the Herero Rising and the Humanity of the Herero' includes the following passage:

> there is something deeply pathetic in this picture of the desperate Herero warrior with his ancient rifle and half-a-dozen cartridges deciding to rise and defend his liberties against the might of the German Empire … Can anyone allege that these poor mild-mannered creatures who had born the German yoke for over 14 years had no justification for the step they took? Is there anyone in the civilised world who can assert that Germany was justified when she allowed von Trotha and his soldiers mercilessly to butcher and drive to their death 60,000 or more of these unfortunate people and to destroy every asset in the way of cattle, sheep, goats and other possessions? (Sylvester and Gewald 2003, 103).

(The political background to this publication is clear from Zephania Kameeta's foreword, even if the editors argue cogently for its value as a historical source [Sylvester and Gewald 2003, xix-xxix; contrast Twomey 2011].) In 2010, meanwhile, Jeremy Sarkin himself - Kuiama Riruako's legal advisor - published a very detailed historical account of the genocide (Sarkin 2010). This was

prefaced by his client and produced a number of facts which clearly help establish the legal responsibility of the Kaiser and German state for the genocide. As with such trends generally, some in the historical profession have reacted strongly against such works. Reinhardt Kössler (2012, 234), for example, has sought to criticise Sarkin on the grounds that he 'dons the role of attorney out to persuade the jury'.

Jan-Bart Gewald (1996), whose pathbreaking research is the most detailed yet produced on the genocide, has been subject to another kind of critique. He began by noting how media and academic coverage of the reparations campaign has focused attention on 'Germany's role in Namibia' to the exclusion of 'the role of the Herero in determining their own history'; portraying them misleadingly 'as a people who were and are only capable of reacting to and in copy of external influences' (Gewald 1996, 1). This stress on 'African agency', widespread in African studies, represented, like the focus on the violent 'logics' of ideology, a response to crisis of dependency theory and dilemmas on the Marxian Left (most famously Bayart [1989] 2009; see also Lindsay 2014; for critique T. Young 1999, 150-3; Hearn 2007). Although Gewald has come to argue that the politicisation of memories may diminish the benefits of symbolic recognition, his work has formed an important part of the reparations case (Gewald 2003, 279; 2005). International law, notably, has dictated that the Herero lawsuit produce expert knowledge which presents the plaintiffs as a 'people' who both understand themselves as such, and whose boundaries have remained largely fixed over time:

> the Hereros had a reasonably well-developed sense of orderly international relations and they regulated their affairs with other tribes on the basis of treaties [citing Bridgman 1981, 20] … The Herero tribe was and is a tribe of racial social, cultural and political distinctiveness, and as such was and is entitled to the protection of international law (*The Herero People's Reparation Corporation et al. v Deutsche Bank AG et al.,* paragraphs 25, 28).

Here the lawsuit could ground itself in the 1999 version of Jan-Bart Gewald's thesis, *Herero Heroes*. This argues that an encompassing 'Herero' identity, and not merely Otjiherero-speaking language group, had acquired real salience by the end of the nineteenth-century (cf. *The Herero*

People's Reparation Corporation et al. v Deutsche Bank AG et al., paragraphs 14-17). Whilst this particular point has rarely been contested, other scholars have alleged that *Herero Heroes* naturalises it nevertheless. Marion Wallace (2001), for example, has written that 'while other historians of Namibia are moving towards an approach that treats ethnicity as neither fixed nor inevitable, Gewald hardly pauses to discuss what he means by the term 'Herero''. These requirements of judicialised politics have indeed often created dilemmas for scholars who endorse contemporary liberal theories of identity's fluidity, but must for practical reasons present groups as facts. Whilst some have been happy to sacrifice academic commitments for the political - Gaytari Spivak's (1988) 'strategic essentialism' - the longterm prospects of such strategies are uncertain at the very least (see also Lynch 2012).

4. Anthropologists and violations of indigenous rights

The framing of indigenous issues in terms of 'genocide' has long been unpopular with anthropologists. In the early 1970s, when they were still a key constituency for the early indigenous rights movement, SI's director, Stephen Corry, devoted considerable effort to defending the use of terms such as 'ethnocide' in academic fora (Corry 1975; Mair 1975). Then, as now, however, the profession as a whole has been largely unwilling to openly condemn states where they conduct their fieldwork (Houtman 1985, 4; Dahl 2009, 30). There may obviously be self-interested reasons for this. But in states such as Botswana, nevertheless - which are both jealous of their sovereignty and sensitive to external criticism - a much wider range of voices has argued that confrontation ultimately proves counter-productive (Solway 2009; Saugestad 2011).

Dahl (2009, 31) describes the strategic dilemmas these failed collaborations created, and suggests that SI 'chose a different path' than IWGIA in 'reaction' to them. Whilst IWGIA turned towards capacity-building, the London-based organisation began to focus 'primarily on the media and the public in order to reach as many people as possible and raise public awareness'; tactics it continues to favour today. The organisation preferred not 'to remain forever philosophising about first principles' (Bentley 1976, 352). As this section will illustrate, however, it could not sever all links with the anthropological profession. In legal settings the indigenous rights it promotes can

only be applied with the aid of anthropological expertise.

In the final pleadings of *Sesana*, the plaintiff's case focused on the CKGR inhabitants' 'freedom to choose'; a freedom which Judge Dow ruled as conferred by their international legal status as indigenous peoples (*Sesana v The Attorney General* 2006, judgement of Dow, paragraphs 117-119). The plaintiff's anthropological witness was George Silberbaeur, the colonial official upon whose recommendation the CKGR was created in 1961 (see chapter 4). Silberbauer testified that the San had chosen freely to move into the CKGR 'many centuries' ago. They had not been forced into this by the movement of 'Bantu' groups. The San constituted a distinctive people characterised by egalitarian social organisation and non-dominance by other groups (Tutwane, 14th July 2004; Zips-Mairitsch 2013, 349).

In order to contest these points the government at one stage planned to call Japanese 'Kyoto School' anthropologist Masazuka Osaki to the witness stand (Tutwane, 14th July 2004). This, had it happened, would have exposed to the courtroom to some seemingly intractable theoretical disputes between Japanese and Western schools of anthropology (Silberbauer 1982: 803; Izumi 2006; Barnard 2007, 62-64, 118). In the event, however, respondents' counsel (Sidney Pilane) focused on two issues which have proved extremely controversial within Western branches of the discipline: the extent to which San can be defined as a distinctive group, and the nature of this difference. He aired these issues in order to establish that the anthropology Silberbaeur practised was not 'a science' which used 'empirical evidence' as its 'tool' (Sapignoli 2009, 260). His strategy drew attention to the ways in which anthropological 'information-gathering' is in fact shaped by interpretive disputes locatable within the dilemmas described in chapter 6. Indeed, there is no reason to believe that these disputes can continue to be publicly downplayed, over the long-term, in ways protecting anthropology's political value for indigenous rights activism.

Perhaps most embarrassing for Silberbauer was Pilane's questioning of his original justifications for the creation of the Reserve. A central plank of the applicants' case was that the CKGR had been *intended* as neither a game reserve nor as a place for 'conserving' so-called 'primitive peoples'. It had been meant, rather, as a protected space allowing its population to choose its way of

life. As Pilane pointed out, however, this was far from evident from contemporary documents. Silberbauer had, in fact, argued at the time for the reserve to be a 'retreat for hunters and gatherers' who were 'in danger of extinction' (Sapignoli 2009, 258; Zips-Mairisch 2013, 293). In response to this questioning, the anthropologist was obliged to explain that at the time such policies simply had to be legitimated in terms of then dominant modernist beliefs (see chapter 4).

The late 1960s collapse of modernist consensus relieved anthropologists of these legitimation requirements, and allowed them to write in ways which subsequently proved more useful for indigenous rights advocacy. The consequences of this shift were immediately visible in San studies. In 1966, most famously, the young Canadian anthropologist Richard Lee co-organised the 'Man the Hunter' conference in Chicago; 'one of the most important ... in the history of the discipline' and instrumental in challenging 'the traditional Hobbesian view of hunter gatherers as having a difficult struggle for existence' (Barnard 2007, 67). Lee's co-authored introduction to the 1968 conference volume made clear the normative background to the enterprise: 'we cannot avoid the suspicion that many of us were led to live and work among the hunters because of a feeling that the human condition was likely to be more clearly drawn here than among other kinds of societies' (Lee and DeVore eds. 1968, preface). In the same year, Marshall Sahlins' seminal essay on the 'the original affluent society' - originally published, co-incidentally, in Paris - drew on Lee to suggest that poverty was 'an invention of civilization' (Sahlins [1968] 2006). Hunter-gatherers, on Sahlins' account, simply had no desire to accumulate wealth. This view resonated so strongly with new anti-productivist beliefs, Barnard (2007, 69) argues, that 'it would be an exaggeration to say that our modern anthropological image of the bushman is a result of the events of 1968, but it would not be outright nonsense'. As Irven deVore later put it, 'we were being a bit romantic … but that was probably inevitable given the social and intellectual context within which we were working' (in Lewin 1988).

A corollary of insisting upon hunter-gatherer 'affluence' was an assumption of autonomy. New anthropological studies of the San by Lee and others painted pictures dramatically removed from the early twentieth-century ones described in the previous chapter. Economic independence and self-determination took the place of 'slavery' and dominance by neighbouring groups. By the 1980s, however, the collapse of the political utopias which had informed these views opened up

considerable space for critique. The result was the so-called Kalahari Debate between 'revisionists' and 'traditionalists'. Paralleling political science debates about the economic 'rationality' of peasants in the Third World, 'revisionists' pointed to archaeological evidence that demonstrated San historic integration in global capital circuits *and therefore* political interdependence (cf. Denbow and Wilmsen 1986; Wilmsen 1989; compare Popkin 1979; R. Bates 1981). These have seen San not as autonomous but as an 'underclass' (e.g. Wilmsen 2002, 834-835, 839). Lee, now working with Jacqueline Solway, adjusted his viewpoint. Whilst conceding many of the revisionists' empirical findings, Solway and Lee (1990, 109) accused their opponents of mistakenly 'assuming that evidence of trade implies the surrender of autonomy' (compare attached responses by James Denbow, Edwin Wilmsen, Robert Gordon and Carmel Schrire; Lee and Guenther 1991). The revisionist viewpoint was politically useful for the government in *Sesana*. It seemed to suggest both that the San should not be understood as an indigenous people endowed with effective 'freedom to choose', but also (perhaps more contentiously) that they constituted a suitable object for welfarist government intervention. Sidney Pilane, certainly, made reference to such revisionist 'knowledge' in order to assert that Botwsanan San were simply a poor class of the population (Sapignoli 2009, 265).

But perhaps even more awkward than this was Pilane's identification of the problems involved in defining a population whose autonomy and distinctiveness could not uncontroversially be assessed. Several days of courtroom time, indeed, 'were taken to try and define in an objective and scientific way who can be considered 'bushman' and 'indigenous'' (Sapignoli 2009, 257). (These terms were legally significant because under the Botswanan Constitution (Article 14, section 3.c) freedom of movement is only qualified in the case of only 'bushmen, indigenous at the Reserve' [sic].) The plaintiffs, of course, required a definition that established continuity between themselves and those peoples which the CKGR was originally created to protect. Silberbauer's testimony provided evidence of this. He claimed that San 'populations have been stable for a considerable period many hundreds of years [sic]', and this evidence proved central to Judge Phumaphi's conclusion that 'Bushmen are indigenous to the CKGR' (*Sesana v The Attorney General* 2006, judgement of Phumaphi, paragraph 65; also Zips-Mairisch 2013, 331). This continuity, however, was incorporated in, rather than established by, Silberbauer's definitions of 'bushmen'. Speaking from memory he defined 'bushmen' simply as 'descendants of hunters and gatherers who spoke languages con-

taining a predominance of click consonants and by implication are indigenous to Southern Africa and her children' (in Sapignoli 2009, 257, n.26)[95]. This definition focused on changing practices rather than on seemingly immutable group traits or characteristics. As Sidney Pilane pointed out, it thus contrasted explicitly with the definition based on race that Silberbauer had earlier provided to justify the creation of the Reserve: 'the Bushmen are the oldest race of Bechuanaland's population having inhabited all of Southern Africa for 12 or 15000 years' (in Sapignoli 2009, 260).

Silberbauer's difficulties illustrate the anthropologists' dilemmas highlighted in James Clifford's classic works from the 1980s (cf. Marcus and Clifford eds. 1986). In *The Predicament of Culture* (1988, chapter 12) Clifford described an episode from 1976 when two anthropologists testified on behalf of Mashpee Indians suing for the return of lands in Cape Cod. Eager to avoid the 'reifying' of 'tribes', these expert witnesses highlighted the fluidity of Mashpee identity in recent centuries. As a result their claims appeared 'fuzzy and opportunist' and the claim was lost. The demands of courtroom politics had now begun to conflict with disciplinary beliefs. Clifford's work certainly resonated among anthropologists in the ways that help explain current their unease with accepting tasks like Silberbauer's. It spoke to a widespread and decreasing confidence in the discipline about the authority attached to their representation of cultural 'others'. This authority was now seen as derived, above all, from positions of increasingly contested social privilege. As Clifford (2012) recently speculated in a 25-year retrospective on *Writing Culture* (1986), this resonance may have been partially due to the rise of post-structuralism - noticeable all across the humanities and social sciences - but it also probably reflected existing efforts to resolve dilemmas posed by anthropology's past in a postcolonial world (cf. Asad 1973). He reported a conversation to this effect from the early 1970s with Raymond Firth, the renowned ethnographer of the Tikopia: 'not so long ago we were radicals. We thought of ourselves as gadflies and reformers, advocates for the value of indigenous cultures, defenders of our people. Now, all of a sudden, we're handmaidens of empire!' (Clifford 2012, 419).

In Southern Africa, as with historians, anthropologists' wariness of naturalising group identities has been greatly accentuated by the political demands of opposition to apartheid. Adam Kuper (2005, 203-5), most famously, argues not only that support for indigenous rights represents a 're-

turn' to anthropology's invention of 'primitive' peoples, but that it dovetails neatly with the nativist rhetoric of Afrikaner ethnonationalism and the far Right (see also Kuper 1999). Among Survival International's critics, James Suzman draws identical parallels, whilst Jacqueline Solway follows Kuper in identifying links between Survival International and the Countryside Alliance, a British pro-hunting lobby group (Suzman 2002, 6; Kuper 2005, 218; Solway 2009, 323, n.5). These politically-charged moves may help explain the edge to SI's responses. Its director Stephen Corry, for example, has replied to Suzman in the following terms:

> there are a tiny number of British and US anthropologists who, like Suzman, are trying to promulgate this idea [that indigenous rights promote ethnic inequality] within the profession. Although this may sound cranky, governments have often followed bizarre anthropological theories when devising schemes to cope with minorities who did not fit their own view of the world. Perhaps the best-known example of this is the Nazi fabrication of a 'master race' - well supported by German social scientists (Corry 2003, 2).

A sceptical report of the consequences of *Sesana* by young anthropologist Julie Taylor, meanwhile, received the following retort:

> effectively challenging vested interests ... is met with well-funded hostility. The allegations made here that Survival made things worse originate with Ditshwanelo, an organization that has represented Botswana at the UN. The author cites Suzman and Solway with approval. However, Suzman does not believe indigenous rights have a place in Africa, an idea also embraced by his former employer, De Beers. Solway does not believe the Gana and Gwi have a right to live in the reserve. The organization Kuru is cited, but not the fact that its principal funder is De Beers and its patron is minister of mines (J. Taylor 2007, 5).

Their tone and immediate political context notwithstanding, such exchanges reflect deep conflicts between indigenous rights activism and the anthropology it depends upon to guarantee its legal tools. SI has not been able to distance itself from the discipline entirely in order to focus on media mobilisation. It has had, rather, to frame sincere interpretive disagreements over indigeneity as the

products of vested interests or wilfully perverse adherence to outmoded racial doctrines; supposed deviations, in both cases, from the 'scientific' norms that guarantee legal respectability.

No anthropological attempts to maintain politically productive relationships with indigenous rights in the face of these dilemmas are sustainable in the long-term. Some supporters have argued, reasonably enough, that parallels with Afrikaner nationalism and the far Right are misleading. San populations are simply in no position to impose 'blood and soil' ideologies on others (e.g. Plaice 2003, 397; Dahre 2008, 147; Minde 2008, 58). This critique fits with recent anthropological re-definitions of the concept of indigeneity in terms of differential power; definitions referring to systematic patterns of marginalisation and exclusion from national society rather than aboriginality or cultural traits (see Saugestad 2001, 55-58; Kenrick and Lewis 2004; Kenrick 2006; Zips 2006). Such arguments, however, neither deny the political value of 'essentialist' images nor suggest that their use should be opposed. In this respect they are fully compatible with currently orthodox resolutions of these dilemmas. As Lee (2006, 472) writes 'a theme common to many of these recent studies is an acknowledgement of the beauty and utility of *strategic essentialism* as a tool in the arsenal of indigenous peoples' struggles'. Essentialism should be endorsed politically, that is, even if intellectually indefensible (cf. Barnard 2006)[96]. Lee himself, a veteran of earlier utopian worlds, is now almost alone in suggesting that the notion 'indigenous peoples' is not only a 'powerful tool for good', in political terms, but is also an intellectually-meaningful term with real-world referents (Lee 2006, 458). In a passage referencing Marshall Sahlins, he makes it clear that for him, still, the 'main story' is not (post)-colonial exclusion and differential power, but:

> how indigenous people are connected to the land, how indigenous people are living in cultures that are profoundly non-capitalist, and how their ongoing existence bears witness that even in this hard-bitten age of real-politik and globalization, other ways of being, other ways of living in the world are possible (Lee 2006, 472).

5. Conclusion

For Lee, indigenous rights activism thus represents 'an essential component of the coalition of progressive forces fighting globalization' and a weapon for the 'Party of Humanity in its historic struggle against the Party of Order' (Lee 2006, 473). This is a wonderfully robust defence of an increasingly dissident stance. But the Party of Order's arguments have merits even from its opponent's perspective. As the next chapter will illustrate, anthropologists' (and historians') resistance to precise definition, and even to the enterprise of definition itself, has facilitated effective resistance to the very parts of the international legal order upon which indigenous rights activism depends.

Chapter 9: Institutionalisation

1. Introduction

After transnational movements have emerged, and they have gathered information about violations, the second and third stages of the norm spiral model see activists attempt to persuade states to accept new norms for interpreting the information they have gathered. States initially oppose rights with 'allegedly more valid norms', such as national sovereignty (the second stage). They then make tactical 'concessions', accepting their general validity and opposing only their application to specific national contexts (the third stage) (Risse and Sikkink 1999, 22-28). This persuasion became easier after 1989. As Sikkink (2011, 11-12, 83, 247) argues, if the human rights revolution dates from the 1970s, its globalisation dates from the 1990s. Geopolitical shifts allowed for the global spread and institutionalisation of new human rights beliefs. 'In most cases' these institutions became crucial to facilitating persuasion and (later) diffusion. Institutions do this by 'clarifying what, exactly, the norm is' and by 'spelling out specific procedures by which norm leaders coordinate disapproval and sanctions for norm breaking' (Finnemore and Sikkink 1998, 900). This means that states' tactical concessions can impose reputational clear costs on other states (particularly those in the same region) that refuse to follow suit (Risse and Sikkink 1999, 22-25; Sikkink 2011, 94, 248). As a result, ratification is mimicked and diffuses rapidly. A 'norm cascade ensues' (the spiral model's fourth stage) and domestic activists can use clarified norms to socialise states into 'rule-consistent behaviour' (the spiral model's fifth stage) (cf. Risse and Ropp 2013, 8-11)[97].

There is one central difficulty with applying such approaches to understanding the evolution of human rights beliefs. Their institutionalisation, typically, cannot in fact clarify their content. In the case of individual rights this has long been the case to some extent. The boundaries of the individual 'human' can, of course, never be stabilised (e.g. Singer 1975, chapter 1; Bobbio 1996, 86). In the 1950s African states could use human rights institutions to assert their humanity and thus de-legitimise imperial rule (for the United Nations see Reus-Smit 2013a, chapter 5; for Leopold

Senghor and the ECHR see Simpson 2001, 739). But the human rights revolution of the 1970s dramatically increased the scope for such resistance. The ideological context in which new beliefs emerged now ascribed them a 'maximalist' character, and stretched their potential area of application beyond individual rights and into the definition of groups and collectivities. As John Dunn remarked in the 1980s, it became hard 'to see how any authentically presented claim of a right offered on behalf of a determinate human grouping can be discounted' (J. Dunn [1988] 1990, 53)[98]. The Zimbabwean case, which involves (in political terms) dangerously determinate individual rights claims, provides an exception to these rules.

The expansion of rights, therefore, must be understood in the context of changing webs of beliefs, as well as in terms of globalisation and an increasingly diverse international society (for latter cf. Hopgood 2006, chapter 5). Moreover, whilst 1989 and the end of geopolitical stasis may have granted international institutions much greater formal oversight over domestic human rights questions, it only began a process of contestation over how, and *to whom*, new norms were to be applied. African states have sought here to appropriate existing discourses and institutional sites, whilst contesting similar moves by their domestic opponents. These legal challenges, finally, have been greatly enabled by new 'interlegal' forms of diffusion across international and transnational legal regimes. Through an analysis of the changing beliefs of key agents in this diffusion, this chapter will seek to provide an interpretive complement to existing explanations for such processes.

2. Reparations for colonial injustice

(a) Institutionalisation

In chapter 6 I described the emergence of new reparations practices in the 1970s. These involved compensating entities other than states for historical injustices. After 1989 these practices have globalised and extended to colonial injustice. Parties to such cases may be 'collectives', such as survivors of the British repression of the Mau-Mau rebellion in Kenya (see chapter 8). Alternatively, lawsuits may be brought on behalf of 'corporate groups', such as those represented by the Herero People's Reparations Corporation (see chapter 6; for this distinction P. Jones 1999).

One key development has greatly facilitated, if not explained, the globalisation of such claims. This is the gradual expansion, in international law, of the phenomena comprehended by 'gross' human rights violations and 'crimes against humanity'. The significance of these classifications is that they typically override two legal objections to the litigation of colonial injustice: that such cases may involve the illegitimate retroactive application of law, and that they may - although again not always - be brought so long after the events in question as to be subject to statutes of limitations (or periods of prescription, in civil law systems)[99].

International law has, of course, at least in theory, treated acts such as the Herero and Nama genocide as 'crimes against humanity' for over six decades - ever since the first legal application of this concept at the Nuremburg and Tokyo trials, and the subsequent definition of the international crime of genocide in 1948 (Schiff 2008, 24-5). Contemporary arguments for retroactivity merely repeat those made at that time. The Nuremburg Tribunal grounded its decisions in 'general principles of law', such as those embedded in humanitarian law and the 1907 Hague Regulations (Dana 2009, 884). Supporters of the Herero and Nama claims have done likewise, identifying general principles they believe criminalised German conduct in the Hague Regulations of 1899 (Harring 2002, 406-8; R. Anderson 2005; Sarkin 2008, chapter 2)[100]. Nuremburg's retroactivity, however, proved fiercely controversial even amongst the most liberal of commentators (compare, famously H. Hart 1958, 593, 615-621 with Fuller 1958, 648-657 and Shklar 1964, 144-181). Cold War politics, moreover, soon ensured that even international duties to prosecute genocide were largely neglected (see Pendas 2011).

The failures of these post-1945 norms to permeate domestic politics in this period were dramatically illustrated during debates at the General Assembly in 1968 over the Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity. The preparation of the Convention had been triggered by a decision by the West German Bundestag to proscribe the prosecution of serious offences after 1969, including crimes against humanity and war crimes under international humanitarian law. The retroactive provisions in Nuremburg had never been integrated into West German domestic law, and even its accession to the Genocide Convention

had been qualified to avoid them (R.H. Miller 1971, 479). The socialist states of Eastern Europe seized on this opportunity to publicise West German tolerance of Nazi Criminals. The debates which followed took place at the height of Cold War division within human rights institutions, and saw more dissenting votes than to any previously adopted UN human rights instrument (R.H. Miller 1971, 478, n.7; more generally Moyn 2010, 126-7). Western states argued especially, and unsuccessfully, against retroactivity. And they sought to counter definitions of crimes against humanity which referred only to the practices of the enemies of the Eastern bloc; South African apartheid, Israeli occupation and alleged West German indifference to Nazi crimes. They did this by proposing more limited (but still vague) reference to 'grave' violations (R.H. Miller 1971 487-8, 490, n. 79, 498-501).

The most interesting features of these debates, for our purposes, are the positions of African states. These illustrate Moyn's (2010, chapter 3) argument that, prior to the late 1970s, anti-colonialists deployed human rights only to further demands for decolonisation. Arab states thus sought to aid Palestine by adding 'eviction by armed attack or occupation' to the definition of crimes against humanity in Article I (Miller 1971, 490). African states, meanwhile, sought to publicise the iniquities of apartheid, and *not* colonialism or the slave trade (see explanations of votes by Tanzania and Dahomey (Benin) in Third Committee of the General Assembly, 11-13th December 1967, paragraphs 68-9). The Democratic Republic of the Congo - for obvious reasons, linked to the Katanganese succession - did propose to insert 'and from the exercise of mercenary activities' after 'apartheid' (Third Committee to the General Assembly [Report], 15th December 1967, paragraph 26). But it, too, failed to mention colonialism as a possible crime against humanity. African states' silence on this issue strikingly illustrates the dominance of confident, forward-looking theories of African history (see chapters 6, 8). Such theories paralleled the modernist beliefs to which some states (such as Tanzania) were sincerely committed, and to which others used to legitimate their rule (e.g. T. Young 2005, 159). Somalia did insist that apartheid *and* colonialism were 'equally as serious crimes as nazism' (in R.H. Miller 1971, 491). But this exception merely proves the rule. Somalia was the only independent African state under majority rule that continued to insist on the illegitimacy of colonial borders (see Kornprobst 2002, 376, 381).

The contrast between these debates and those of more recent decades is a marked one. The rapid globalisation of international criminal justice has created new incentives for expanding the category of 'gross' violations - thus reducing the scope for prescription, and enabling retroactivity. Such arguments could be made with special force in new transitional justice domains, where successor states risked inheriting legal systems of dubious status from their predecessors (Teitel 1997, 2022-2026). And such arguments can be extended to colonial situations where citizens had no effective recourse to the law (Sarkin 2008, chapter 2). Between 1997-8 negotiations around the creation of the International Criminal Court saw statutes of limitations excluded from the final Statute (Article 29). A number of Western and liberal states also argued for broad definitions of 'crimes of humanity' which would allow for a progressive development of international law (Arsanjani 1999, 36). A number of liberalising states, although none from Western Europe or North America, even ratified the Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity; the preserve, before 1989, of non-aligned and Soviet-allied states[101]. The United States was now almost alone among such states in fearing that such provisions might endanger its foreign policy; an imperial outlier (see generally Ikenberry 2011).

The institutionalisation of this new consensus, however, did nothing to clarify new norms. In the United States, as we have already noted, the Alien Tort Claims Act has established some degree of effective universal civil jurisdiction over cases like these, without any formal international institutionalisation process (for similar legislation elsewhere Stephens 2002)[102]. At the United Nations, however, efforts to institutionalise new reparations beliefs began as soon as the Cold War ended (van Boven 2010, 1). These made almost no progress towards defining rights-holders. Particularly intractable debates centered around the legal identification of 'groups' and 'victims'. The reports of distinguished UN legal experts appointed to deal with this question provided only vague guidance. In addition to direct victims, their immediate families and dependants, those 'connected with', 'closely connected with', or 'beneficiaries' of victims (both individuals and collectivities) were, at various stages, proposed as entitled to reparation (United Nations Commission on Human Rights, 24th May 1996, 3; 22nd December 1997, 11; 8th February

1999, 13). Whilst the first of these reports warned, finally, that definitions should not be stretched 'so far that no generally applicable conclusions in terms of rights and responsibilities could be drawn', it failed to provide any conceptual tools by which such stretching might be prevented; a problem which the subsequent documents did nothing to resolve (United Nations Commission on Human Rights, 2nd July 1993, 7).

This lack of clarity was singled out for criticism by a number of states during consultations. But there was little consensus about what might replace it. Sweden and Japan argued that only individuals could be victims, Germany wanted the category to extend to immediate families, France favoured the inclusion of institutions and organisations, Canada and Portugal criticised broad definitions of 'collectivities', and the UK and Spain asked for an 'objective test' to be included in the document (United Nations Commission on Human Rights, 27th December 2002, paragraphs 65-72). States from the old Third World, meanwhile, demanded more emphasis on collectivities. Ecuador wanted a greater focus on ethnic cleansing, whilst Cuba and Egypt continued to stress apartheid and Israeli occupation (United Nations Commission on Human Rights, 27th December 2002, paragraphs 73-74). The legal experts ignored these latter moves but nonetheless defended references to 'collectivities' against Western objections. In doing so, however, they conceded that domestic legal provisions for group representation were so varied that international law could not yet effectively regulate this area (United Nations Commission on Human Rights, 27th December 2002, paragraphs 77-78; 10th November 2003, 28). The Basic Principles and Guidelines eventually adopted by the General Assembly were, in one commentator's words, 'less than clear' (Zwanenburg 2006, 663). Their definition included 'groups of persons who are targeted collectively'; an ambiguous formulation that allowed compromise precisely because of its failure to clarify. None of this was surprising 'given the fact that States have not been able to agree on this point for many years in other fora' - notably, I would add, those pertaining to indigenous rights (Zwanenburg 2006, 663).

(b) States' responses

Pace the norm spiral model, as described in chapter 7, intellectuals affiliated with the OAU did not initially use the idea of sovereignty to oppose the payment of reparations to groups. Instead they supported new norms enthusiastically, hoping to exploit their indeterminacy by continuing to apply them to states. During the 1990s African states also made 'offensive' use of new rights (for this term Bob 2014). Their efforts culminated, famously, in the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban in early September 2001. As described by the Brazilian diplomat who formally proposed the event, the Conference was largely intended to demand reparations. For 'the States of the African Group' this meant 'compensation to be effected by inter-state donations, pardon the foreign-debt, or increased economic assistance' (Lindgren Alves 2003, 369). Following their intellectuals' lead African states legitimated these claims, indistinguishable from those once associated with the NIEO, in terms of new reparations practices. The hypocrisy of paying reparations to Jewish groups but not to Africans was identified by both Jakaya Kikwete (future Tanzanian President and then Minister of Foreign Affairs) and Theo-Ben Gurirab (the Namibian Minister of Foreign Affairs) (Melber 2006; Howard-Hassmann 2008, 44). The Zimbabwean Minister for Justice Patrick Chinamasa asked 'a poignant question, why reparations to Jews, American Japanese, and not to African Americans and Africans? Why the double standards' (Howard-Hassmann 2008, 44)[103].

Faced with these criticisms, Western states made a series of 'tactical concessions' (Risse and Sikkink 1999, 24). Like the German government confronted with Namibian demands, they sought to appease critics with gestures falling short of legally-consequential apologies. The Dutch representative at Durban, for example, expressed 'deep remorse about enslavement and the slave trade'. The British Minister for Africa, meanwhile, declared that 'the British Government and the European Union profoundly deplore the human suffering, both individual and collective, caused by slavery and slave trade' (for both positions Howard-Hassmann 2008, 37). As anticipated by the norm spiral model, moreover, these concessions then provided domestic critics with standards by which governments could be held account. Although British Labour Party figures were reportedly

concerned most by the threat of litigation by African states, the Anglo-Caribbean social movement identified in chapter 7 exploited official rhetoric most effectively (e.g. Bright and Jasper, 25th November 2001; *BBC News*, 27th November 2006). Domestic mobilisation around the bicentenary of abolition in 1807, for example, saw Nelson Mandela drop a planned visit to the former slave-port of Bristol from his UK itinerary (Sengupta, 25th March 2007). Prime Minister Tony Blair now apologised for the trade on a visit to slave-holding castles in Ghana (*BBC News* 14th March 2007; 25th March 2007). And this, in turn, facilitated the demands for reparations for slavery from Caribbean states, which had promoted the bicentenary at the United Nations 'in the spirit' of the Durban Conference (*Caribbean Net News*, 14th November 2006; chapter 8).

As with claims relating to colonial atrocity, however, disputes within Caribbean politics now revolve around whether states alone are representative enough to receive and distribute any sums they obtain (e.g. *The Gleaner*, 15th July 2013). As the norm spiral model fails to anticipate, no determinate standards for behaviour (whether legal or socially-constructed) can be produced to help resolve these disputes. Questions of representation are inherently political. It remains unclear which 'collectivities' can represent past victims. *A priori* there is no means of excluding groups like the Herero and Nama, or states like Zimbabwe, from the canon of deserving beneficaries[104]. The upshot, as described by Chief Riruako's legal advisor, is the suggestion that these questions be left to judicial discretion: 'when examining historical reparations cases, it is thus vital to carefully consider the current political, economic, and social conditions of the party claiming them to discern its motivations for and stake in the award of restitution' (Sarkin 2008, 184).

3. Indigenous rights

(a) Institutionalisation

Global indigenous activism, like reparations advocacy, changed in scope after 1989. Previously it had focused on peoples perceived as needing protection from the excesses of productivist civilization. The most obvious candidates for assistance were, therefore, the populations of Western states, most especially European Sami populations and direct descendants of

those peoples who had inhabited settler colonies of the New World before European conquest. There was some interest in those African groups which had previously identified as 'primitive', but lack of resources and the hostility of African states prevented any significant mobilisation. Only those such as the East African Maasai, who had longstanding connections with state structures, were able to benefit (Crawhall 2004, 46; Igoe 2006; Dahl 2009, 66). The end of the Cold War, however, saw a dramatic increase in the financial and institutional opportunities available to NGOs and civil society organisations worldwide, but in Africa in particular (for an overview Igoe and Kelsall eds. 2005). Some of these organisations now sought to apply indigenous rights to African populations. As in the 1950s, the institutionalisation of these rights ensured that shared tacit understandings hostile to such new applications provided only limited resources for those elites seeking to prevent this.

The first of these institutional developments in the post-1989 period was the adoption of ILO Convention 169. In 1988 the Organisation's Meeting of Experts unanimously concluded that 'integrationist language of Convention 107' was 'outdated' and 'destructive in the modern world'. 'In 1956 and 1957' by contrast, it declared, 'it was felt that integration into the dominant national society offered the best chance for these groups to be a part of the development process of the countries in which they live […] In practice it had become a concept which meant the extinction of ways of life which are different from that of the dominant society' (in Zips-Mairitsch 2013, 43). But NGOs and indigenous organisations had little input into this process, and the document says next to nothing about to whom it applied (Dahl 2009, 70-71). To date, despite a number of ratifications by Latin American states, the Central African Republic (in 2010) has been the only African state to do so[105]. The United Nations, by contrast, has been the central focus of indigenous activism (Niezen 2010, 117, 217). In 1993 the Working Group on Indigenous Populations produced a final draft of a proposed UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The drafting process was characterised by greater involvement of indigenous organisations, and the text placed much greater stress on 'self-determination' than on mere 'consultation' and 'participation' (e.g. D. Sanders 1997, 107-8).

Defining indigeneity, however, was to prove elusive. Western democracies like Canada and Australia had long distinguished 'the rights of old homeland minorities from those of new immigrant minorities' (Kymlicka 2008, 8). Whilst each category was internally heterogeneous, and almost infinite potential complexities involved in arbitrating their precise application, their distinctions had been very largely underpinned by a set of tacit cultural understandings shared by Western elites[106]. In Saugestad's (2008, 159) words, 'an emphasis on first come was *natural* in contexts where it was unambiguous who was there first and who arrived later' (emphasis added). UN machineries now effectively replicate these countries' bipartite schema. Their (largely redundant) systems for guaranteeing the rights of 'national minorities' are inherited from the League of Nations' more ambitious schemes for protecting minorities in Eastern Europe (for the older system Mazower 2004). And their concepts of indigeneity were originally derived from the 1970s focus on the 'victims of the 'blue-water' colonialism that began with Columbus in 1492' (Saugestad 2008, 159). Tacit elite understandings from these earlier periods, however, have now been eroded by institutionalisation.

In Africa various groups' self-identifications have posed particular definitional difficulties. An emphasis on aboriginality would appear to allow claims from a variety of groups not imagined in the West as existing outside of productivist civilisation. As Kuper (2005, 203-5) points out, both Afrikaners and even English nationalists in Europe have in fact made precisely such claims. Some pastoralist peoples, meanwhile, who *are* imagined as indigenous in the West, might thereby also be excluded[107]. Anthropologists' 'strategic essentialist' solution to this problem, discussed in the previous chapter, has been well summarised by Barnard (2006, 9):

supposing one's definition of 'indigenous people' accidentally leads one to the conclusion, which Kuper raises, that the English might qualify as 'indigenous people', or that Maasai might not qualify? As a sceptic, Kuper would see this as an argument for getting rid of the concept of 'indigenous people'. The dogmatists in the indigenous peoples' lobby, however, would see it as a problem to be solved by redefinition. Each case becomes a special case, and the refinement of definition becomes endless. The third solution is the recognition that we do

know an 'indigenous people' when we see one; and the English are not one! It is the idea of definition itself that is the problem. [...] The logical solution then, is **...** redefine 'indigeneity' according to local requirements for the achievement of legitimate political goals[108].

Legal and anthropological experts on the UN Working Group have deployed this anthropological 'knowledge'. They too have substituted assessments of politically-relevant goals and aspirations for an emphasis on legally-relevant characteristics. In 1996, for example, Erica Irene-Daes stated that:

attachment to a homeland is ... definitive of the identity and integrity of the [indigenous] group, socially and culturally. This may suggest a very narrow but precise definition of 'indigenous', sufficient to be applied to any situation where the problem is one of distinguishing an indigenous people [from] the larger class of minorities (United Nations Commission on Human Rights, 6th July 1996, paragraph 39).

Yet by 2000, this emphasis of 'precise definition' had disappeared. In a statement co-authored with the chairman of the UN working group, Daes now asserted 'that indigenous peoples and minorities organize themselves separately and tend to assert different objectives, even in those countries where they appear to differ very little in 'objective' characteristics' (United Nations Commission on Human Rights, 19th July 2000, paragraph 41). Whilst minorities were assumed to want to 'integrate themselves freely into national life to the degree they choose', indigenous groups were assumed to 'desire to remain collectively distinct'. This document frankly admitted the political reasons for this shift,

the usefulness of a clearcut distinction between minorities and indigenous peoples is debatable. The Sub-Commission, including the two authors of this paper, have played a major role in separating the two tracks. The time may have come for the Sub-Commission to review the issue again … The distinction is probably much less useful for standard setting concerning group accommodation in Asia and Africa (United Nations Commission on Human Rights, 19th July 2000, paragraph 25).

Conceptually speaking, the problem with this approach is that it forges axioms from highly implausible empirical assertions. As Will Kymlicka (2008, 17) - a pioneer of indigenous rights in Canada - argues, a number of 'national minorities' do in fact also appear to desire to remain 'culturally distinct', and base their arguments on historical vulnerability *vis-à-vis* national majorities. And recent changes, as Kymlicka bemoans, have seen 'any number' of national minorities seek to change their self-definition. No conceivable conceptual innovation could, seemingly, contain this contestation: 'once we start down the road of extending the category of indigenous peoples beyond the core case of New World settler states, there is no obvious stopping point' (Kymlicka 2008, 14). Politically speaking, meanwhile, the late 1990s saw some determined opposition to this conceptual expansion from both African and Asian states and some anthropologists. All these claimed that the concept should be reserved for victims of 'blue-water' colonialism (Béteille 1998; Kingsbury 1998, 416-8).

The most significant confrontation over this issue, however, came from within the UN system itself. In 1999 Alfonso Martinez, the UN Working Group rapporteur, claimed there was a need 'to re-establish a clear cut distinction between indigenous people and national and ethnic minorities' (United Nations Commission on Human Rights, 22nd June 1999, paragraph 68). This would be achieved, in effect, by re-asserting old shared understandings. For Martinez, the efforts of some African groups to appropriate the indigenous label needed to be guarded against, particularly the claim that: 'all Africans on the African continent are 'autochthonous'' (United Nations Commission on Human Rights, 22nd June 1999, paragraph 91). Martinez's, however, was a quixotic attempt. It was rejected by the Working Group for the same reasons that it had been conceived: it threatened to exclude African groups and put an end to incipient indigenous mobilisation of the continent. In one observer's words, 'his report has, on the whole, not been treated as a significant document' (Saugestad 2008, 163).

Over the last decade, therefore, indigenous rights institutions have not generally sought to counter controversial self-definitions by re-defining the concept. Instead, the 'relational' or 'processual' concepts of indigeneity discussed in the previous chapter have been used to justify

taking decisions on a case-by-case basis. This move has in fact threatened to re-anchor the application of indigeneity in new tacit cultural understandings; not those of the Western publics which dominated prior to institutionalisation, but those of the anthropologists, legal experts, and indigenous activists who regularly participate in global political fora - Irène Bellier's (2006, 112) 'new indigenous elite'. As Barnard (2006, 9) puts it, 'we do know an 'indigenous people' when we see one'. Jens Dahl (2009, 153-4), for instance, has described how the IWGIA has used 'processual' concepts to justify drawing distinctions between groups. Dahl's discussion is a revealing one and worthy of extended treatment. He first takes the example of Griqua populations in South Africa, who 'are accepted as being indigenous by most indigenous peoples participating in international meetings and by organisations like IWGIA'. He then compares them with the Rehoboth Basters from Namibia, 'to whom they are historically related', but who are not so recognised. This contrast is 'interesting for IWGIA because IWGIA has supported the Griqua while similar support would never have been given to the Rehoboth Basters. But it is even more interesting because it reveals - and confirms - the need to take a relational view on being indigenous (beyond the self-definitional issue)'. Dahl attaches a brief history of the two groups to this discussion. This is intended to demonstrate how relational (non)-definitions can be used to justify the tacit understandings shared by 'most indigenous peoples participating in international meetings and by organisations like IWGIA'. Dahl's history explains how the two groups were originally one, before the Reheboth Basters crossed the Orange River into modern-day Namibia. Here 'the Rehoboth Basters developed into a settled community with its own identity. During colonial times, they allied themselves first with the Germans and, after World War I, the South Africans'. In South Africa, by contrast, 'the Griqua were dispersed and, during the Apartheid regime, grouped as Coloured peoples. As Coloured, the Griqua were discriminated against and were in general not in opposition to the Black majority'. All this is intended to show how:

> history made it different for those Basters who moved north and those who remained south of the Orange River. The two groups reacted differently to the colonisers and the Black majorities and, without a relational perspective, we are unable to understand why today the Griqua have received a positive response to their indigenous claim while the Rehoboth Basters have not.

For Dahl this approach serves as a model for how indigenous rights organisations can combat the subversion of their agendas:

> groups from all continents have tried to use the indigenous UN platform […] Groups like the Rehoboth Basters may feel that they have no other place to go. These cases always give rise to discussions and considerations but there are few cases in which the indigenous course is abused. It must be borne in mind that, when new groups of indigenous peoples enter the UN, the indigenous movement itself is faced with new challenges, which may cause some tension. […] These are the realities that have moulded IWGIA's way of dealing with the issue of definition and the reason why it often distances itself from the academic debate around the issue of indigenousness. IWGIA's point of departure has been from a social, political and cultural position and not from a theoretical discussion.

As this discussion should by now have made clear, however, read alongside that in chapter 8, NGOs such as IWGIA have in fact operated at anything but a distance from academic discussion. 'History', moreover, does not, of course, simply consist of objective 'processes' awaiting discovery. Many Reheboth Basters, indeed, as well as a number of Namibian historians might strongly contest not only Dahl's facts but also the moral weight he attaches to their interpretations. Alternative histories would point to brutal South African repression of Reheboth Rebellion in the 1920s, which led to their petitioning the League of Nations for decades (Dedering 2009). And these accounts, like some orthodox treatments of Namibian politics today, would understand SWAPO and other 'black majorities' as capable of marginalising populations rather like colonial powers did (e.g. Melber 2009a; 2010). Relational understandings of Dahl's breadth clearly lack anything approaching the forensic qualities traditionally associated with legal concepts (even on 'activist' understandings such as Dworkin 1982, 194-6). Simple references to processes of marginalisation are simply incapable of uncontroversially parsing real-world situations of serious complexity. In Dahl's own words, they are far more likely to merely reflect 'social, political and cultural position[s]'.

As Saugestad (2001, 50) describes, the concept of indigenous peoples is 'perceived by

bureaucrats all over the world as a concept that is inconvenient, diffuse and difficult to handle'. 'Relational' approaches only intensify such difficulties. They provide law and bureaucracy with nothing in the way of predictability; their capacity to help routinise such domains being proportionate only to the sociological density of global indigenous rights milieux, and its corresponding capacity to exclude candidate peoples on the basis of shared understandings. Institutionalisation, in short, has not served to 'clarify' indigenous rights norms, as constructivist approaches would lead us to expect. Instead, it has opened up spaces for resistance by allowing African and other groups to expand the area of application for these rights. Whilst human rights have always had such indeterminate qualities, only an analysis of their 1970s transformation helps us understand how such resistance was able to expand beyond the domain of citizenship and individual rights (contrast Reus-Smit 2013).

(b) States' responses

On 13th November 2007, in a development that surprised many observers, African states abandoned traditional public postures, and voted in favour of adapting the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP - General Assembly Resolution 61/295). Only the CANZUS states - Canada, Australia, New Zealand and the United States - voted against. African states' change of position can be understood as a move from the second to the third stage of contructivists' 'norm spiral' model (Risse and Sikkink 1999, 24-5; Risse and Ropp 2013, 8-11). On this account, as we have seen, after norms emerge states initially deny their universal validity. This accurately characterises the behaviour of African states in the 1990s and until mid-2007. These same states then make 'tactical concessions' to avoid international isolation. Once again, this accurately captures the reasons for African states vote in favour of the Declaration. The failure, however, to clarify norms via institutionalisation meant they could not be made universally valid. Tactical concessions were, inevitably, made to norms with obviously indeterminate implications for state behaviour - a development that would complicate later efforts to seek compliance and 'rule-consistent behaviour' from Botswana (see chapter 4).

One African state has long provided an exception to such rules. After apartheid, President Mandela and the ANC identified South Africa's San population as the least divisive symbol around which to build the post-apartheid nation (see Fauvelle-Aymar 1999). In the 1990s and early 2000s South Africa was effectively the only African state to promote indigenous rights in pan-African fora (Crawhall 2004; Crawhall 2011, 20). The single most important figure in this effort is often identified as Barney Pityana, Chairperson of the South African Human Rights Commission and member of the African Commission on Human and Peoples' Rights (Crawhall 2004, 41; Crawhall 2011, 24). In the 1970s Pityana had been an important and radical figure in Black Consciousness and World Council of Churches circles (Magaziner 2010, 23-36; for conscientisation before indigenous rights see chapter 6). Now, from the IWGIA's perspective at least, he was 'probably the only member of the African Commission interested in indigenous issues' (Dahl 2009, 96). From 1999 he began a slow but ultimately successful attempt to persuade other commissioners to embrace indigenous rights questions.

Other African states, however, were hostile to this language. They consistently argued that all (black) African populations were colonised and none are therefore any more indigenous than any other; a denial of the new norm's universal validity (e.g. Kymlicka 2008, 13, n.22). Important explanations for these attitudes include memories of 'balkanisation', associated in particular with some international support for Katanganese succession in newly independent Congo, and, on the part of Southern African states such as Botswana, memories of 'separate development' under apartheid (e.g. Heraclides 1991, chapter 5; Southall 2013, 5-6; chapter 4). Indeed, Botswana and Namibia, who like South Africa are famous for having significant San populations, led African opposition to UNDRIP (Crawhall 2011, 19-22). This opposition began to mobilise at a late stage in response to mounting pressures from African civil society, co-ordinated by the African Commission on Human and Peoples' Rights (ACHPR) and with support in particular from Danish donor assistance (Crawhall 2011, 24; for the Danish aid Dahl 2009, 100-101). These efforts eventually elicited support from some African states in other regions, 'Congo Republic, Gabon, Cameroon, DR Congo and to some degree Morocco and Algeria' (Crawhall 2011, 20). A compromise text was agreed by the Working Group, and then adopted by the UN Human Rights Council in June 2006.

But at the General Assembly in December 2006, Namibia, operating on the behalf of the African Group, tabled a proposal to postpone consideration of the Declaration (Oldham and Frank 2008, 6). Botswana had become the 'leading actor' in co-coordinating this opposition, catalysed by the unfavourable outcome in the *Sesana* case (Saugestad 2006, 1). In October the President had written to other African states outlining his concerns, and on the very same day that the *Sesana* judgement was read Charles Tiboni, Minister of Minerals, Energy and Water Resources, announced that UNDRIP 'in its current form ... would not see the light of day' (Saugestad 2006, 3; Botswana Press Agency, 13th December 2006). The African Group's 'Draft Aide Mémoire' expressed a number of concerns about sovereignty and balkanisation (African Group, 9th November 2006, paragraphs 5,7 and 8). Significantly for our purposes, moreover, it objected that the 'absence of a definition of indigenous peoples in the text creates legal problems for the implementation of the Declaration', and asked for a 'jurisdictional clause defining the rights holder' to be included in the text (African Group, 9th November 2006, paragraph 2.1). In January, at the African Union, the Botswanan Minister of Foreign Affairs declared that:

> the Declaration, as currently drafted, shows that, far from correcting past wrongs, it instead poses a serious threat not only to our sovereignty and territorial integrity, but to peace and stability of our respective countries and the continent at large ... [and] provides an opportunity for Non-Governmental Organisations to meddle in the internal affairs of sovereign states in the guise of promoting human rights. A number of countries, including my own, are already facing this challenge (in Saugestad 2006, 3).

In May 2007, finally, an African amendment was proposed stipulating that 'every country or region shall have the prerogative to define who constitutes indigenous people in their respective countries or regions taking into account its national or regional peculiarities' (Oldham and Frank 2008, 6-7).

As constructivists would expect, a number of other groups quickly sought to re-assert the universal validity of indigenous rights (e.g. Indigenous Peoples' Caucus, June 2007; Kamel Rezag

Bara of the ACHPR in Assembly of First Nations, May 17th 2007, annex, paragraph 23). In late May 2007, however, the ACHPR produced an Advisory Opinion rejecting the Group's arguments on the grounds of local politics, not universal principles - something constructivists do not expect. The Opinion observed that 'trans-national identification' in Africa posed no danger to 'territorial integrity' and wholly discounted the Group's concerns about legal definitions (ACHPR, May 2007, paragraph 30). It claimed that since 'no single definition can capture the characteristics of indigenous populations' it was 'not necessary or useful' to have one. A 'much more relevant and constructive' approach would seek to bring out their 'main characteristics' (ACHPR, May 2007, paragraph 10). These characteristics were, in turn, then defined according the latest 'relational' anthropological ideas: 'self-identification; a special attachment to and use of their traditional land [... and] a state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model' (ACHPR, May 2007, paragraph 12). 'In Africa', the Commission noted, the

term indigenous populations does not mean 'first inhabitants' in reference to aboriginality as opposed to non-African communities or those having come from elsewhere. This peculiarity distinguishes Africa from the other Continents where native communities have been almost annihilated by non-native populations. Therefore, the ACHPR considers that any African can legitimately consider him/herself as an indigene on the Continent (ACHPR, May 2007, paragraph 13).

Following closed-door negotiations between Namibia and Mexico (representing the co-sponsors of the Declaration), between May and August 2007, the African bloc abandoned its opposition. After the vote the central importance of 'provisions on sovereignty and territorial integrity in providing 'comfort language' were highlighted by 15 mainly developing countries'. But no more substantive tactical concessions were obtained (Oldham and Frank 2008, 6). The final Declaration contained no precise definition of 'indigenous peoples', and did nothing more to assuage the CANZUS states' concerns that provisions concerning land rights and natural resources

might threaten their extractive industries (for these states' subsequent attitudes Smits and Winter 2013). Accounts of these events by NGO participants provide nothing approaching an explanation for this rather extraordinary *volte face* (cf. Oldham and Frank 2008, 7; Crawhall 2011, 29). And the opacity of the relevant diplomatic proceedings prevents us drawing any more than speculative conclusions. The general phenomenon is however assessed by Saugestad (2008, 171), a former employee of the Norwegian development agency in Botswana and one of the closest anthropological observers of indigenous rights politics:

> what exactly is the driving force behind such changes? With the possible exception of South Africa, we can probably not attribute these changes to strong national organisations that have succeeded in persuading their governments. Rather, we can increasingly observe the effect of the indigenous discourse being taken up by actors on a level that controls financial capital (World Bank, IMF) or moral capital (the African Commission). Put even more bluntly, some countries in search of loans may come up with a policy on their indigenous populations, because World Bank directive 4.20 requires it.

African states tactical concessions certainly did not extend to tacit approval of the universality validity of new norms. A number of public statements made by African governments after voting for the Declaration made it clear that they continued to reject both the principles behind it and those behind indigenous rights policies more generally (e.g. Hitchcock, Sapignoli and Babchuk 2011, 63). As outlined above, moreover, African states in fact insisted upon retaining their rhetorical framing of issues ('comfort language'), and made concessions only on political specifics (especially legal implementation); a reversal of the constructivist account. Their opponents' framings were in any case structurally indeterminate. They were promoted as reflecting universally valid principles (the ACHPR letter), but also placed great stress on local 'peculiarities' (the ACHPR advisory opinion). This ambiguity was unavoidable. As their promoters concede, indigenous rights cannot be turned into universally valid norms or determine desirable behaviours with any degree of precision.

(c) 'Interlegal' diffusion

As described in chapter 2, however, even if Botswana was to initiate 'backlash' against the evolving international regime, this would not necessarily insulate it from international law's effects in the long-term. Like judges in ATCA cases, Botswanan judges could make use of new international legal principles governing indigenous rights. They could do so, moreover, without having to ground their decisions in formally agreed international instruments, and without the formal 'embedding' of international law in the Botswanan Constitution (for the latter's significance Alter 2014, 159-60). Of course, laws have never circulated only between national and international systems. The 'horizontal' diffusion of laws between national systems has long been studied by comparative lawyers (famously Watson 1974; Kahn Freund 1978). William Twining (2004, 1-2) remembers teaching the subject in colonial Sudan with the aid of a world map coloured according to national legal 'families'; civil law, common law, Roman-Dutch law and so on. And it was through the common-law family channel - specifically the Australian High Court in *Mabo and Others v The State of Queensland* (1992) - that Judge Phumaphi was able to 'sneak' Aboriginal title into Botswanan law 'through the side door' (Ng'ong'ola 2007; chapter 4). But as Twining (2004, 2) points out, the assumptions behind his Sudanese map were 'dubious even then'. As described in chapter 6, for example, the class-action lawsuit has globalised dramatically in recent decades, despite civil lawyers' predicting its certain incompatibility with their legal systems[109]. For Twining (2005, 239) these 'processes by which legal orders and traditions are influenced by other legal orders and traditions' now constitute 'a pervasive aspect of *interlegality* at all levels of law and legal ordering' (emphasis added).

Judge Dow's judgement in *Sesana* exemplified the shift which Twining describes. Her crucial conclusions that 'the Applicants belong to a class of peoples that have now come to be recognized as 'indigenous peoples'', and have a 'special relationship to their land', were justified by reference to a leading UN expert, and not the laws of Botswana or any international conventions to which it was a party (*Sesana v The Attorney General* 2006, judgement of Dow, paragraph 117). Dow's willingness to do this would have been unsurprising to Botswana jurists. As summarised by

Duma Boko, a Harvard-educated attorney whose firm represented the *Sesana* applicants, she was a judge 'who was willing to listen to arguments that to some conservative judges would seem to be outrageous. In the CKGR case, I think she brought it home in the plainest manner' (in Segwai, 14th November 2008). Dow defended these 'activist' interpretations by citing theories of 'generous construction' and the opinion of the U.S. Supreme Court that 'liberty is a broad and majestic term ... subject to change in a society that is not stagnant' (*Sesana v The Attorney General* 2006, judgement of Dow, paragraphs 118-9).

Dow took both these citations from *Dow v the Attorney General* (1991). This was previously the best-known case in the recent judicial history of Botswana, and one in which Dow herself had been the litigant (see Dow 1995). Although she herself was a Motswana, the 1982 and 1984 amendments to the Citizenship Act effectively denied her children citizenship rights on the grounds that her husband was American. Her lawsuit - which she saw as a 'test case' with crucial implications for 'implementing change' for African women - received support from the Swedish International Development Agency and various Southern African and American NGOs (Pfotenhauer and Dow 1991, 104-5; Dow 1995, preface). It was the first civil action to allege that parliament had violated human rights and exceeded its constitutional powers (Pfotenhauer and Dow 1991, 101). Its success coincided with a comparative explosion in Botswanan constitutional litigation (see Fombad 2011, 18). Although a Bill of Rights had existed since independence, arguments based upon it had been 'largely unheard of' (A.J.G.M. Sanders 1983, 351). The Ghanaian Charles Hayfron-Benjamin, Chief Justice from 1978 to 1981, had briefly sought to use the law of Britain and the United States to bring an 'activist' style to the country's conservative judiciary (A.J.G.M. Sanders 1983). But he was consistently frustrated by the conservativism of a Court of Appeal bench dominated by white liberal judges from South Africa, all appointed on short-term contracts (A.J.G.M. Sanders 1984)[110]. The only politically acceptable means for these men to oppose apartheid was by a strict 'positivist' adherence to the letter of the law (see Forsyth 1985; Chanock 1999, 397-8).

As Brake and Katzenstein (2013, 727, 728, n.14) write, 'interlegal' movements of law 'occur around nodes of power and prestige'. Where once 'at the turn of the last century, states looked to German law for an institutional catalyst to speed development from agrarian to an industrialized society', African judges are now more likely to import concepts from international law or the law of the United States (Brake and Katzenstein 2013, 727; for European law and the transformation of Meiji Japan, Ataturk's Turkey, late nineteenth-century Egypt, and 1960s Ethiopia see Beckstrom 1973; Wilner 1975; Örücü 1992; Hirowatari 2000). 'Neo-functionalist' explanations for diffusion conceal these unequal relationships by referencing global 'communities' or 'networks' of law (see Helfer and Slaughter 1997; for critique Dezalay and Garth 2002; Buxbaum 2004; for functionalism generally see chapter 6). In the Botswanan case conditions for such diffusion have included the globalisation of American-style litigation 'support structures' after 1989, and the existence of agents, such as Unity Dow, who reject the beliefs in parliamentary sovereignty and judicial 'positivism' which had previously dominated liberal jurisprudential thought in the region (for 'support structures' Epp 1998, 197).

In Namibia, notably, there have been no such agents and no such diffusion processes. The appointment of acting judges continues to be necessary for the Supreme Court to attain quorum, and these (politically-dependent) appointments continue to be made from amongst the ranks of those same (largely) liberal-positivist expatriates who once dominated Botswana's Court of Appeal (Hemed Bukurura 2006; Tjombe 2008; 229, 234; Southall 2013, 152)[111]. One result is that Namibia's judges have worked, pragmatically, 'to develop and maintain amicable relations with the executive' whilst not seeking to not compromise their independence (VonDoepp 2009, 149). For Jeremy Sarkin (2008, 174), indeed, they are so 'sympathetic to the ruling party' that he does not consider them likely, in the short-term, to accept the transplantation of international reparations norms into Namibian law. Legal rights can thus diffuse across the boundaries of legal-systems, and in the absence of clarification by institutionalisation. Their adoption is determined not merely by desires for conformity and reputational costs, but also by the beliefs and social positions of local diffusion agents (for social positions Dezalay and Garth eds. 2011).

4. Supranational human rights courts

(a) Institutionalisation

In chapter 2 I described how, in Zimbabwe, the government has sought to prevent 'interlegal' diffusion by replacing judges in the higher courts, and seeking to remove 'international law' from the constitution's interpretive sources. Litigants, however, have still been able to make use of the 'embedding' of international law in the South African constitution, as well as supranational courts associated with regional and continental organisations. Africa, indeed, has more of these 'new-style' courts - with compulsory jurisdiction where non-state actors initiate litigation - than any other continent (Alter 2014, 82-4; chapter 6). In this section, taking the example of the SADC Tribunal, I argue that the norm spiral is incapable of explaining this remarkable institutionalisation process. African states ratified new courts without internalising or even making tactical concessions to new norms. In the SADC case 'backlash' against the Tribunal only began when it was clear that *potentially determinate* rights provisions could be used to undermine 'patriotic-historical' norms embedded in legitimate regional statehood. (This contrast with the two previous cases explains why I have treated it last, departing from my usual practice.)

Before the end of the Cold War sub-Saharan Africa had only one 'new-style' court: the inoperative Court of Justice of the ECCAS (Economic Community of Central African States) (1983). By 2004 it had nine (excluding war crimes courts), including the Court of Justice of the African Economic Community (1991), the Court of Justice of the WAEMU (West African Economic and Monetary Union) (1996), the Common Court of Justice and Arbitration of the OHADA (L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires) (1997), the Court of Justice of the COMESA (Common Market for Eastern and Southern Africa) (1998), the Court of Justice of the CEMAC (La Communauté Economique et Monétaire de l'Afrique Central) (2000), the East African Community Court of Justice (2001), the Court of Justice of the ECOWAS (Economic Community Of West African States) (2001), and the African Court on Human and People's Rights (2004) (Romano, Alter, and Shany 2014, fold-out chart). The SADC Tribunal (2000), for its part, was created as part of SADC's replacement of the Southern African Development Co-ordination Conference (SADCC) in the early 1990s. The 1992 Windhoek Treaty

committed the new organisation, *inter alia*, to 'human rights, democracy and the rule of law', the 'free movement of capital and labour', and the establishment of a supranational tribunal with compulsory jurisdiction (with specific competences to be established via a separate protocol) (SADC, August 1992, articles 4-5, 16). This was a dramatic *volte face.* SADCC institutions had not been devoted to human rights. Although rhetorically committed to 'economic liberation', the organisation had in fact functioned primarily to divert trade from areas affected by South African 'de-stabilisation' during apartheid (cf. Gleave 1992).

This striking lack of interest is not surprising in the context of African political history. As described in chapter 6, during decolonisation African states had largely used rights as tools (see generally Moyn 2010, chapter 3). In the years around 1960, like Irish republicans and Cypriot nationalists at the ECtHR, they had sought to expand the application of *individual* rights to colonial subjects in order to de-legitimise Empire (Simpson 2001, 1053-1102; Reus-Smit 2013). 'The fight against apartheid', in particular, which was rooted in rights discourse, 'gave form to the political project known as the Third World' (Irwin 2012, 5, 104). After independence, however, rights were typically abandoned domestically. They became bourgeois luxuries which developing states could ill-afford. Every African state which had inherited or advocated for a Bill of Rights at independence significantly restricted its scope in the post-independence period (Rubner 2011, 123, 125-147). Only President Nyerere of Tanzania adopted a less obviously instrumental attitude. In his opening address to the Pan-African Freedom Movement of East and Central Africa Conference in September 1959 he asked:

> are we going to turn round to them, tomorrow after we have achieved Independence and say, 'To hell with all this nonsense about human rights; we are only using that as a tactic to harness the sympathy of the naïve? (in Eckert 2011, 298).

And in 1967 he was almost alone in criticising Nigerian conduct during the Biafran War, arguing that 'the OAU is not a trade union of African Heads of State' (Rubner 2011, 117-8)[112]. In Tanzania itself, meanwhile, and again very unusually, Nyerere had opposed British attempts to impose a Bill of Rights at independence. This was on the grounds that Tanzania's poverty meant that the UDHR

'represents our goal rather than something we have already achieved' (in Eckert 2011, 299; see also Moyn 2010, 111; Rubner 2011, 133). Other leaders would only discover this argument after independence.

In the later 1970s, as outlined earlier, African states began to use the 'human rights revolution' to re-legitimise the New International Economic Order. They applied new 'maximalist', indeterminate right ideas to groups and 'collectivities'. The most significant product of this period was the continent's first human rights document: the 1981 African Charter of Human and People's Rights (ACrHPR). Here African states enshrined the 'right to development' and sought to establish idiosyncratic new concepts such as 'peoples' rights' and even *duties* towards the 'national community' and 'the family … the custodian of morals and traditional values recognized by the community' (OAU, 27th June 1981, articles 18, 27, 29; for analysis Rubner 2011, 245-302). Such applications were so novel, and their implications so far reaching, that Theo Van Boven, Director of the United Nations Division of Human Rights, was forced to concede that it was 'a pertinent question ... whether the Universal Declaration is still a valid and pertinent international instrument' (in Rubner 2011, 180). The overall result, in Peter Takirambudde's words, was 'a comparatively weak declaratory regime exacerbated by potential or actual normative incoherence' (Takirambudde 1991, 48, in Widner 2001, 167).

Once more, Nyeyere represented a partial exception to these rules. Hailing the Charter, he welcomed the opportunity to 'attack [human rights abuse] … when it is committed by Black Governments against their own people'. But this was largely a post-hoc justification of his invasion of Uganda and deposition of Idi Amin in 1979 (Widner 2001, 168). Whilst a number of states had begun to condemn Amin, even Nyerere studiously avoided justifying intervention on human rights and humanitarian grounds, and such concerns were of no importance for the creation of the ACrHPR (Wheeler 2001, 118; Rubner, 2011; 257, 259; contrast Welch Jr. 1981, 405-6). President Senghor of Senegal did, it is true, promote the adoption of something more like the UDHR. But for Rubner (2011, 258) 'the evidence, such that it is' suggests only 'that it appealed to his vanity' at a time when he was hoping to win the Nobel Prize in Literature and promote his 'Civilization of the Universal' on the international stage (for more evidence of this see Villey 1983, 16).

In short, during the Cold War few if any African leaders believed in human rights law, let alone courts. Superficially, this only makes their subsequent enthusiasm for them more of a puzzle. Unlike during the drafting of the ACrHPR, moreover, after 1989 they did not even try to contest the scope of the rights these new courts would adjudicate. There was no extended period of international and domestic pressure followed by 'tactical concessions', as constructivists would anticipate. Instead, the end of the Cold War saw large-scale diffusion of ECJ and (especially) ECtHR models, emulating the forms these institutions had adopted by the later 1970s (see chapter 6). The SADC, like so many other organisations of its sort, was clearly modeled on European Union templates (see Börzel and Risse 2012). The SADCC's Consultative Conference in preparation for the Windhoek Treaty simply announced, without justification, that such regional communities required 'mechanisms of mediation and arbitration, to which all agents of integration - governments, business, civil associations and individuals - can seek justice' (in Lenz 2012, 165). Strikingly, therefore, as Lenz (2012, 165) notes, 'when the decision was taken to establish a Tribunal with the Windhoek Treaty, no real discussion on the costs and benefits of different options had taken place at the regional level'. And no such discussions would take place until *Campbell* had come to court. Tanzanian President Kikwete later bemoaned how he and his fellow Heads of State had 'created a monster' (e.g. Hulse 2012). But SADC states had allowed 21 direct and indirect references to human and individual rights to be inserted into the Community's Protocols (Cowell 2013, 155). (As described in chapter 2, Zimbabwe had both defended itself before, and even sent a judge to this Court which it would later claim was illegally constituted.)

Given this, it is difficult to understand how Nathan (2013, 884) can explain the Tribunal's dissolution by referencing 'predominant norms' in the SADC of 'respect for sovereignty … regime solidarity and anti-imperialism'. In the 1990s even Zimbabwean official rhetoric regularly proclaimed alternative standards for state conduct. Following the Liberian crisis of 1990, for example, President Mugabe was so keen to qualify sovereignty that he suggested that the ''domestic affairs' of a country' must be re-defined to 'mean affairs within a peaceful environment' (in Wippman 1993, 182). Some regional leaders have, of course, justified their apparent change of heart on these matters by citing new Western pressures, and some analysts have been tempted to explain it likewise

(e.g. Nathan 2013, 882-4). But despite the Tribunal and other SADC organs being almost wholly dependent on European Union and other donor funding, Lenz's (2012, 163) detailed study in fact 'found little evidence to suggest that active EU diffusion efforts were causal for this decision [to emulate EU models]'. He places much greater stress on SADC leaders' pro-active efforts to seek out European funding by emulating European institutions, as illustrated by the Summit's 1991 observation that 'the existing patterns of net resource flows are likely to, at best, stay the same in real terms, in the face of keen competition for aid and investment from the other parts of the world, notably Eastern Europe' (in Lenz 2012, 165).

Theoretically, I maintain, such findings are instances of what one leading Africanist, Jean-Francois Bayart (2000), calls 'extraversion' (see Brett and Gissel 2013). Dependence, for Bayart, can be a 'form of action', geared towards extracting rents from the international system. It need not be simply equivalent to 'external structural conditions', as maintained by dependency theorists in earlier decades (cf. Bayart 2000, 218). In simple terms, African states reacted to harsh new geopolitical conditions by simulating compliance with new Western demands; Chabal and Daloz's (1999, 117) 'politics of the mirror'. The most radical exponents of this 'technique of self-preservation' were 'various *anciens régimes'* including Zimbabwe (Bayart 2000, 225). After 1989 such techniques replaced the efforts to stretch and re-appropriate human rights ideas which had characterised the previous period[113]. So although African states were still to internalise human rights 'norms', they studiously avoided the kind of contentious 'dialogue' over their content which endanger aid flows and regime stability (contrast Risse and Sikkink 1999, 17; Risse and Ropp 2013, 8). As explained by Judge Ariranga Pillay, who headed the SADC Tribunal when it was dissolved, the court was intended 'to get funds from the European Union and others' by giving-off 'all the right buzz words, you know, 'democracy, rule of law, human rights'' (in Nathan 2013, 883). This extraversion, meanwhile, was reflected in the 'poor drafting' of the SADC Treaty (Matyszak 2011, 3, n.22). And it is betrayed by the vagueness of references to human rights in SADC instruments. In Cowell's (2013, 156) words, these only reflect 'a commitment to what is sometimes termed the 'global script' of human rights among Member States'[114]. They certainly did not result from an institutionalisation process which had helped to clarify the relevant norms.

(b) States' responses

In the aftermath of *Campbell*, however, this lack of clarity was not itself, *per se*, responsible for backlash. Unlike in the Botswanan and Namibian cases examined here, rights had not expanded into the inherently political realms of group definition. The Tribunal's decision to rule on racial discrimination was certainly an 'activist' one. As described by Tazorora Musarurwa (2010, 11), the court's international legal assistant, 'conservative positivists may thus have problems with the approach taken by the Tribunal'. But the Tribunal had merely expanded the scope of application for individual rights, as was commonplace before the human rights revolution of the 1970s (see chapter 6). Nor was regional backlash caused by threats to fundamental political order, even if the *Campbell* judgement clearly posed this risk (see chapter 2). Regional backlash resulted, rather, from the threat these particular individual rights posed to the predominant norms governing legitimate statehood in the region (for legitimate statehood Bull 1977; Wendt 1999; Reus-Smit 1999). These norms were not Nathan's trio (2013, 884) of 'respect for sovereignty … regime solidarity and anti-imperialism'. All of these had been at least rhetorically violated to serve extraversion in the 1990s. They related, instead, to ex-liberation movements' legitimations as overthrowers of settler colonialism. The Tribunal would only violate *these* norms when it ruled on the legality of Fast Track Land Reform in 2008.

As outlined above, the SADCC had been conceived to combat the 'de-stabalisation' and regional designs of the apartheid regime: identified by African states as the last vestige of settler colonial rule on the continent (Price 1984, 14-16; Gibb 2007, 424). The pre-existing areas of co-operation it built upon, moreover - notably the Dar-Es-Salaam Transport Corridor - had been designed to safeguard Zambian trade following the advent white minority rule in Rhodesia (Gleave 1992; Takirambudde 1999, 153). Negotiations to end apartheid (1990-1994), however, meant that such activities could no longer provide the explicit rationale for post Cold-War regionalism. This history remained central, however, to the domestic legitimation of former liberation movements governing ex-settler colonial states. As Southall (2013, 5), citing Johnson (2001), has claimed, the ANC in South Africa, SWAPO in Namibia and ZANU-PF and Zimbabwe all share a 'common theology' of 'national liberation'; 'the just and historically necessary conclusion of the struggle between the peo-

ple and the forces of racism and colonialism'. This theology has three corresponding demands, 'a conception of the colonially oppressed 'people' or 'nation' as one', as exemplified by SWAPO's reaction to Herero and Nama demands for reparations; that 'their leaders be 'imbued with a particular legitimacy' as illustrated by ZANU-PF's reaction to the emergence of the MDC; and 'the construction of 'patriotic history'', which insists that 'the seizure of African land by white settlers was a motivating force driving the armed struggle' (Southall 2013, 6, 231; chapter 2)[115].

These norms also have their 'norm entrepreneurs'. 'Agentic constructivists' have tended to identify human rights activists as the only kind of agents motivated by 'empathy, altruism and ideological commitment' (Finnemore and Sikkink 1998, 898). For these scholars 'counter-discourses', where they exist, are 'regime-based'; centered around the defence of state interests and typically propagated by state agents and ideologues (Risse and Ropp 2013, 15-21; Kim 2014, 64, 99, 136). Following FTLR, however, Southern African activists unconnected with ZANU-PF have, in fact, done much to propagate the 'patriotic history' of land (or 'liberation narrative') in the wider region. By lobbying regional meetings - and the Namibian and South African governments, which are already at least rhetorically committed to these norms - these activists have been able to ensure norms' wider diffusion (Alden and Anseew 2009, 107-8, 140, 143, 173-4; 2010, 265, 273).

A powerful indicator of the growing power of norms relating to land and patriotic history has been regional leaders' increasing unwillingness to publicly express private concerns. Pragmatic concerns about the planning and consequences of any FTLR-like 'process' are, indeed, almost ubiquitous among regional elites. The ANC, for example, although increasingly eager to promote symbolic initiatives, has consistently undermined the efforts of its land reform bureaucracy via under-financing and contradictory policy-making (Zenker 2013). In 2000 President Thabo Mbeki - who, like many urban and once exiled party intellectuals, had never personally engaged much with the land question - initially expressed private concerns about FTLR (Alden and Anseeuw 2010, 276, n.5; for ANC attitudes Klug 2000, 125; Walker 2008, 53). He consistently, however, refused any forthright condemnation of Mugabe's efforts to redress the 'enduring legacies of colonialism' - bemoaning, in 2003, how the land issue had 'disappeared from public view', its place 'taken by the issue of human rights' (Alden and Anseew 2009, 110-112; Nathan 2013, 885). More recently Land

Reform Minister Gugile Nkwinti, to cheers from ANC parliamentarians, has declared it an 'honour' to have his work compared with that of Robert Mugabe - despite the relative pragmatism of his own actual approach (South African Press Association, 31st May 2013; for Nkwinti see Jacobs 2012, 174; Southall 2013, 224). In Namibia, similarly, SWAPO's commitment to land reform has been almost entirely rhetorical (see chapter 3). President Nujoma, however, was personally sympathetic to Mugabe and FTLR, and Zimbabwean developments triggered a wave of domestic mobilisation around the issue in 2004-5 (Melber 2005; Alden and Anseeuw 2009, 139-140, 143). The result, in both cases, has been that:

> Southern states came to ignore the pressure of international actors when it contradicted the sources of regional legitimacy and the regional norm on solidarity. Domestic audience costs of taking a harsh public stance on the Zimbabwe question were deemed by governing authorities in Pretoria and Windhoek too high, given the reverberations it would hold for their own domestic land question. Moreover, the residual impulse of regional solidarity ... came to play a far greater role in situating these transitional states in relation to their self-ascribed identity as independent, post-settler states (Alden and Anseeuw 2009, 178).

Namibia was later particularly forthright in its opposition to the Tribunal's human rights jurisdiction, with its Minister of Justice, Pendukeni Iivula-Ithana, claiming that member states were entitled to 'fine-tune regional bodies' and that the Tribunal existed to 'serve us' (Melber, 17th August 2011; Cowell 2013, 163).

Leaders of many states with differing historical legacies have followed suit. In 2000 President Chissano of Mozambique, like President Mbeki, had privately voiced concerns with FTLR (Alden and Anseeuw 2010, 276, n.5). Subsequently he even 'quietly sought to encourage white Zimbabweans to take up farming in the underutilised agricultural areas of the country's central provinces' (Alden and Anseeuw 2009, 116; see generally Hammar 2010). His FRELIMO government, however - despite officials' private concerns - has consistently 'spoke[n] publicly in support of Mugabe's dilemma, emphasising their shared colonial legacy of land dispossession' (Alden and Anseeuw 2009, 168). In 2004 the Tanzanian President Benjamin Mkapa and Mauritian Prime Min-

ister Paul Berenger praised FTLR at the SADC Summit, even if these countries later justified their stance on the Tribunal's suspension on technical grounds (Alden and Anseeuw 2009, 174; Mike Campbell Foundation, 4th March 2014). Botswanan elites alone have consistently criticised FTLR (e.g. *BBC News*, 11th November 2001; Kahiya, 11st October 2002; for a response typical of ZANU-PF Maodza, 7th August 2013). This would be difficult to understand if 'respect for sovereignty … regime solidarity and anti-imperialism' genuinely constituted norms of legitimate statehood in the region, but becomes less puzzling once that country's historical lack of anti-colonialism and land dispossession is taken into account (see chapter 4; contrast Nathan 2013, 884). Even here, however, 'though forthright in its criticism of the Zimbabwean government internally, by end 2005, the President [Mogae] had changed his tone dramatically at an international level', praising Zimbabwean agriculture (Alden and Anseeuw 2009, 169). The regional salience of the 'patriotic history' of land was hammered home, finally, by the justifications for the Tribunal's suspension offered by SADC Deputy Secretary General, Joao Caholo - an SADCC veteran and former deputy minister in the Angolan government. An interview conducted by the Zimbabwean journalist Edson Gutu (17th March, 2011) began with the following exchange:

> *QUESTION: About the SADC tribunal's alleged suspending after a ruling made in favour of Zimbabwe's aggrieved farmers…*

> Now. Let me first underscore the fact that the land issue is a very sensitive issue. It has to do with ownership, it has to do with the past; It has to do with the process that led to the liberation of Zimbabwe. It has to do with, probably the future of Zimbabwe in particular. But let me also state that the land issue is not only particular to Zimbabwe or Southern Africa. It is probably, or it can probably be applied to all African countries.

And Caholo concluded that,

> the issue of land in Zimbabwe is not legal only, it is also political ... and that is not the mandate of the tribunal to judge [...] Even in the country that I come from - in Angola, the issue

of land has not been addressed properly, and it is political. You cannot disown me, a native of that piece of land in the name of justice; You cannot!.

At the level of individual states a number of country-specific factors must, of course, have exerted some influence. President Kabila of the Democratic Republic of Congo, for example, may have continued to feel obligated towards Nujoma and Mugabe for their 1998 military intervention on behalf of his father's embattled regime (see Prunier 2009, 258). For Merran Hulse (2012) it is unsurprising if 'autocratic' Heads of State such as King Mswati of Swaziland decided to suspend the court. Jeremy Gauntlett (2012, 36), meanwhile, speculates, plausibly, that 'it must have been ex-plained to a country such as Botswana (or perhaps the other shoe dropped) that its manner of treat-ment of the San people ... would be set to be challenged, soon, before the Tribunal'; a view shared by Hulse (2012). And Gauntlett's suggestion that Malawi may have had similar worries about its criminal law 'provisions and discrimination enforced, often brutally, against gay people' was also echoed by various (anonymous) interviewees. Some of these alleged that Mugabe had waited until South African President Zuma absented himself from the 2011 Summit before persuading other at-tendees of this risk.

The political culture of liberation movements may also have come into play. Michelo Hansungele (2013, 138) of the International Commission of Jurists, for instance, has reported that a senior GOZ official declared at an earlier workshop that its nominated judge (Antonina Guvava) was 'too junior to 'overrule' the Supreme Court of Zimbabwe while sitting at the SADC Tribunal', despite her actual seniority in the rational-legal hierarchy. A number of influential culturalist scholars believe that decoding these familial and paternal metaphors is the key to understanding political legitimacy in Africa (Schatzberg 2001; Bayart [1989] 2009, 174; Chabal 2009, 40). Such language is particularly common amongst former liberation movements, who continue to regard each other as 'brothers in war' and now 'fathers of the nation' (e.g. Alao 1994; Melber 2009b, 456-8). At SADC Summits Heads of State thus 'accord President Robert Mugabe with elevated status first as an elder statesman and second as the most educated among them', some even being 'said to queue for advice' from the Zimbabwean leader (Hansungele 2013, 145). For Chabal (2009, 40) this treatment of Mugabe 'speaks to the attributes of the politics of age' in the region. Nonetheless, these

specific cultural inheritances and more local political concerns are clearly themselves insufficient to explain how similar patriotic-historical justifications for suspension were invoked by a wider range of states. To do this we must make reference to intensifying regional norms of legitimate statehood.

5. Conclusion

In every case examined here, therefore, institutionalisation failed to clarify emerging norms and render them more determinate. This runs counter to the constructivist account of 'norm spirals'. In the case of reparations and indigenous rights a condition for this indeterminacy was the 'maximalist' expansion of rights that followed the 'revolution' of the 1970s. When new reparations norms were institutionalised after 1989 states were no longer the only legitimate rights-holders. But nor could they be excluded as such. This has prevented liberal actors from stopping Namibia and other African states contesting and even deriving positive advantages from new reparations ideas. Similarly, in the case of indigenous rights, institutionalisation after 1989 undermined tacit elite assumptions which had previously restricted their scope to cases of 'blue-water' colonialism. This expansion meant that liberal actors were unable to assuage African states' concerns that no determinate definition of rights-holders could be devised. These states' 'tactical concessions' are likely to have been elicited by more straightforward coercive means. By contrast, the failure of institutionalisation to clarify the mandates of new supranational courts owed little to the events of the 1970s. Initially, in fact, Southern African states eagerly promoted these processes when deploying techniques of 'extraversion'. They only sought to contest these norms when the courts they had established began adjudicating individual rights that violated 'patriotic history'; now a key component of legitimate statehood in the region.

Chapter 10: Conclusion.

1. New dysfunction in the liberal project

The editor of a student textbook has recently written that the future of human rights is best learnt about from 'science fiction'. Promoting them is not a matter of adhering to specific beliefs. It involves, instead, 'taking sides' for or against an 'inherently revolutionary' challenge to 'traditional cultures and philosophies' (Goodhart 2009, 2, 4-5). Constructivists, as we have seen, take a similar view. They understand rights activism as the socialisation of political actors into complying with new behavioural norms constructed by 'norm entrepreneurs'. As argued in chapter 5, finally, sophisticated Foucauldian studies of liberalism echo this position. These scholars downplay the significance of proclaimed differences between specific liberal ideas, and highlight their shared political effects. For Young and Williams (1994, 93, n.61), for example, who draw on Ian Shapiro (1986), there is 'much in common' between even utilitarianism and rights-based philosophies. In Christianity, similarly, fierce theological controversies such as those following the Spanish conquest of the Americas ultimately distract the analyst from the fixed core of its civilising mission. Apparently irreconcilable positions shared 'premises of singularity and universality [which] press against ... cultural pluralism ... If innocent, these others must be converted; if hopelessly corrupted they must be conquered or eliminated so that the corruption will not spread' (Connolly 1991, 42-3 in Young and Williams 1994, 100). These positions were united not by overarching *epistème*, but by shared relentless desires to re-shape non-Christian or non- liberal others (see chapter 5; contrast Foucault 1970, 181). Differences can always be 'resolved in practice' (Young and Williams 1994, 96).

In this study, however, I have argued that human rights discourse now has other functions. I have sought to demonstrate ways in which it has expanded beyond the realm of individual subjectivities, and into domains of fundamental political order; a domain it has proved fundamentally incapable of regulating. An explanation for this is that liberalism's adoption of rights language has entailed a new dependence on legal establishments. Liberal ideas have increasingly been applied by lawyers, the 'clergy of liberalism', and not by 'the foot-soldiers of the liberal

project' (chapter 5). This has meant that the inherent indeterminacy of these ideas has become a political problem of greatly increased significance. Traditional liberal concepts (such as autonomy and utility) have long been understood as ultimately 'unadministerable' and lacking the 'relational specification' necessary to help resolve real-world disputes (I. Shapiro 1989, 58, 60). But where such concepts have served to license new kinds of social transformation by the liberal 'foot-soldiers' their 'theoretical implausibility' has not, historically, been of central importance (see Young and Williams 1994, 100). Now, however, lawyers apply indeterminate rights ideas to regulate concrete legal orders where the consequences of the specific decisions could hardly be more far-reaching. Differences between interpretations cannot be simply 'resolved in practice' via socialisation. In the long-term, of course, the 'liberal project' depends on containing opposition to realistic efforts to consolidate legal order. The expansion of rights, in this narrow sense, is dysfunctional for it. Liberals, therefore, have reasons to be sceptical of rights[116]. Opposition to it need not be limited to adherents of 'traditional cultures and philosophies'.

As Duncan Ivison (1998, 144) describes, Michel Foucault himself recognised this problem but steadfastly refused to engage with it:

> something then has to create the conditions for social order, for the possibility of *some* kind of identity. For Hobbes it was a civil peace backed by the power of a Leviathan. For Locke, it an almost self-regulating civil society. For Foucault, perhaps all we can say is that the clamour for Right only ever muffles the sound of war continuing on around us.

Bernard Williams, by contrast, himself a convinced liberal, took a less sanguine view of this muffling. His brand of liberal 'realism' was intended as a corrective to recent 'moralist' theories, such as those of John Rawls or Ronald Dworkin. These assume that the existence of social order can first be established 'at the level of state-of-nature theory', and then rights and responsibilities assigned (Hawthorn 2005, xiv; Williams 2005, 62). For Williams whilst it was 'easy to think of the political in those terms' in 'settled' societies, such views could be damagingly misleading when applied to other contexts (Williams 2005, 62). He thus sought to provide an alternative 'Hobbesian' solution to the question of order's priority. This did not start from the 'state-of-nature', but from the

real-world; it was 'inherent in there being such a thing as politics' (Williams 2005, 5). For Williams, Hobbes had correctly identified 'the first political question': 'the securing of order, protection, safety, trust, and the conditions of co-operation' (Williams 2005, 3, 62). This question was logically 'first' because 'solving it is the condition of solving, indeed posing, any others'. There is simply no point in reflecting upon how to promote 'justice' and human rights if no political order exists to deliver them. It makes no sense to say, in short, as Article 28 of the UDHR does, that 'everyone is *entitled* to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised' (my emphasis). Such an order is simply a condition for their realisation.

For Hobbes, of course, the monopoly of violence had been key to this. For Williams, by contrast - who follows Weber at this point - some element of legitimacy is also essential. Any durable order must fulfil a 'basic legitimation demand' (BLD) (unless, like some slave societies, it is to be experienced as simply coercive by a large number of its inhabitants) (Williams 2005, 4-5). This legitimacy can be secured in a number of ways, including those which do not respect human rights. History, indeed, provides a variety of answers for 'why, when and by whom' basic political arrangements have been 'accepted or rejected' (Williams 2005, 9). In Africa, notably, as we have seen, the process of building new orders in land 'must engage broad citizenries, and ... require consensus building over basic questions of political order and community' (Boone 2007, 586; chapter 1). They cannot merely be imposed by a court or Leviathan. These attempts to resolve basic constitutional conflicts are canonical examples of Williams' 'first' questions. They are 'central to state-formation', 'logically prior to policy choices', and, I would add, morally prior to the guaranteeing of rights (Boone 2007, 586; Lund and Boone 2013, 1). But as Raymond Geuss (2008, 22) has written, drawing on Williams, basic political order is 'always a social achievement, and it is something attained and preserved, and generally achieved only at a certain price'. As my Zimbabwean case illustrates, even a new, broad consensus around these questions may have to be brought at the cost of rights violations and injustice.

The boundaries of basic political order can, therefore, be identified in specific cases, and claim a moral priority over the abstract ascription of rights, freedoms and obligations. Such a task

will always, however, in Foucault's (1977b, 139) words, 'be grey, meticulous, and patiently documentary'. On close examination, for example, the CKGR case in Botswana has turned out to be one that courts might just, at least in theory, have been able to use to help satisfy Williams' BLD; legitimating new entitlements to land and resources by promoting political inclusion of San via the language of rights. (In reality, of course, this has not been the result.) The Zimbabwean commercial land and Namibian reparations cases, by contrast, are not of this kind. They are ferociously complex struggles over fundamental political order. Neither abstract moral reasoning nor the social construction of new norms for conduct can resolve them.

One obvious corollary of this, finally, is that some kinds of rights-based resistance really do present fundamental challenges to liberalism. They do not all expand the boundaries of 'the human' and individual subjectivity, and thus enable new and more powerful forms of discipline (see chapter 5). A 'logic of appropriation' does not always threaten 'to make rights, as positive legislation and disciplinary apparatus, complicit in the 'etatization' of our social lives' (Rajagopal 2003, 191). Louiza Odysseous (2011, 452) may be right to argue, in Foucauldian mode, that in the CKGR, at least to date, 'invoking rights does not resist the processes of 'power that conducts''. This, she claims, is because 'it still animates the art of government's guiding of the conduct of the population ... by leaving the value of development unproblematized'. In Zimbabwe and Namibia, however, resistance to state-formation trends post-FTLR, like resistance to the framework of bilateral relations, cannot be appropriated by power and turned into new norms for conduct. Here power must oppose them in the name of order.

2. Prospects

Geuss (2005, 65) believes that it may be too late for political considerations such as these to generate any backlash against rights in the West: 'settling back into our cosy world of cultivating the tiny garden of our own welfare and our 'human rights' and those of other members of the global village, incoherent as the concept of a 'human rights' is, may well turn out in fact to be the last word for us'. In Southern Africa, however, much of the Left is turning against this language (for Zimbabwe Raftopolous 2013, 973, 984; Ncube 2013, 99; Lewanika 2014; for South Africa

Neocosmos 2006; 2011; Cousins and Hall 2011; contrast Madlingozi 2012; Tissington 2012). Elsewhere some leading promoters of indigenous rights have denounced the 'liberal consensus' that has emerged since the 1970s and the 'rights fetishism' that has accompanied it (respectively Sutton 2009, 11, 19-20; McHugh 2014; see also Lowe 2010, 221). They now endorse more openly paternalist approaches that stress trusteeship and 'capacity-building' (Sutton 2009, 9, 1; Edwards 2010, 23; McHugh 2014; see also Roger Chennels in chapter 4). Even reparations advocates make similar arguments. Reflecting on the 2011 Rawagede case, where payments were made to Indonesian victims of Dutch mass executions, Larissa van der Herik (2012, 704), for example, has argued, like many Namibian analysts, that 'comprehensive political settlements regulated by the legislator may well be preferable over casuistic and individual court cases' (compare chapter 3).

Backlash from states, even liberal ones, is of course also likely. Such efforts, however, operate within as yet under-analysed constraints (compare Helfer 2002). Goodhart (2009, 374) is on to something significant when he writes that 'it is not as if some decision - by scholars, diplomats, lawyers, or government officials - could draw a line or fix a limit to human rights claims and aspirations'. This does not mean that there is nothing states can do about their expansion. By concentrating their attention, and expending significant diplomatic resources, African states, may, for example, perhaps soon be able to limit the powers of the International Criminal Court - rather as they have the SADC Tribunal. At the grandest and most dramatic level, therefore - when dealing those institutions which most obviously restrict state sovereignty, and which are only weakly enmeshed with other legal regimes - backlash may be a possibility in the short-term. We may perhaps see the 'endtimes' for totemic 'Human Rights' institutions such as the ICC (Hopgood 2013).

One of my core concerns in this study, however, has been to illustrate just how far lesser-known international courts and legal regimes have proliferated, and just how enmeshed in them even some Southern African states have become. As described in the previous chapter, Twining (2005, 239) has identified 'a pervasive aspect of interlegality at all levels of law and legal ordering'. To the extent that rights have diffused 'interlegally' they will be difficult to dislodge. To do so would require degrees of co-ordinated thought and concentrated bureaucratic attention that is now

untypical of elites anywhere, let alone in the more dependent states of sub-Saharan Africa (cf. Kelsall 2002). In the words of my Zimbabwean informant, 'as one door closes another one will open' (see chapter 2). Students of the (highly interdependent) European Union have already noted how overlapping, 'pluralist' human rights architectures can assist with the 'construction of postnational authority' and prevent backlash (see Krisch 2008). The significance of this, however, has not always been so obvious to students of other regions.

Courts themselves, moreover, are unlikely over the long-term to be able to organise a sufficiently deft jurisprudential retreat from some of the politically dangerous positions they now occupy. International investment regimes, for example - including the International Convention on the Settlement of Investment Disputes, which arbitrated in *Funnekotter v Republic of Zimbabwe* - are beginning, slowly, to accommodate pressure from states eager to retain their regulatory privileges (Waibel et al. eds. 2010; Alvarez 2011; Wouters, Duquet and Hachez 2012, 20-21; Trakman 2012). But arbitrators' new 'strategies of self-limitation' have been too 'hesistant' and 'ad hoc' to deter states from wanting to intervene further in the system (Schneiderman 2011, 1, 5, 18; compare Roberts 2014). In South Africa, similarly, courts have begun, belatedly, to attempt to reconcile rights to property with social pressures, particularly for housing. In 2008 the Constitutional Court (CC) created a new (quasi-legal) concept of 'meaningful engagement', obliging all parties to squatting and eviction disputes to engage with one other 'in good faith and with a willingness to listen to the concerns of the other' (cf. Muller 2011, 261; for its significance Budlender 2011). In other area of property rights more generally, however, the courts have been unable to prevent government from adopting ever more antagonistic positions (e.g. Chaskalson 2012; Mostert 2014; contrast Jacobs 2012).

Rights theorists may thus be mistaken in believing that courts will be able to restrain themselves so that the liberal project as a whole is not endangered. James Griffin (2010, 355), for example, believes that the law, 'as it often does', will 'restrict its own activity in its service'. The case of the SADC Tribunal also illustrate why such assumptions may be misplaced. Human rights beliefs have acquired some utopian qualities from the ideational dynamics explaining their emergence. There is no guarantee that those applying them will end up assisting liberals performing

their various tightrope acts. None of this is to suggest, as systems theorists sometimes do, that law and lawyers are not cognisant of, or influenced by politics (e.g. Luhmann 1986; for commentary Cotterrell 1995, chapter 6). 'At its own rhythm', the law must indeed, ultimately, reflect 'the forces that at bottom shape social relations' (Dezelay and Garth 1996, 98). These different rhythms, however, have themselves been enough to introduce dysfunction into the liberal project.

3. Explanatory implications

The dysfunction already caused by new rights beliefs is, however, difficult to understand if we seek to understand liberalism by looking only for a historically invariant or 'intensifying' core (for 'intensification' Foucault 1979b, 228; 2007, 229. 231). The views I engage with in this study have sought to derive such a core from some blend of Christian, Western, Renaissance and Enlightenment elements (Meyer, Boli and Thomas 1987; Sikkink 2011, 255, Foucault 2007, chapters 8-10; Young and Williams 1994, 100). In every case these theories downplay the explanatory significance of dilemmas posed by more specific instances of ideological competition, such as the socialist and modernist crises of 1970s (and associated rise of human rights). As described in chapter 5 these theories typically accomplish this by assuming irrational belief formation. On sophisticated Foucauldian views, in particular, new beliefs are only adopted when functional for relentless desires for social transformation. As Donald Davidson's work shows, however, the dominance of such irrationality in the 'matrix of decision' cannot simply be assumed. Rational belief formation helps account for the recent arrival and tenacity of new kinds of beliefs in rights. The beliefs are indeterminate in new and specific ways (relating to the definition of groups), and yet have been clung onto despite the difficulties they pose for wider liberal projects.

International relations constructivists have already established the need to understand norms in relation to other principles governing the international system (e.g. Reus-Smit 2001; Finnemore 2003). In this study, however, I have used the theoretical considerations outlined above to produce a relational account of norm emergence. It is implausible, I have suggested, to ascribe this solely to the creative agency of 'norm entrepreneurs', who extract them from a stable set of cultural sources, each 'nested' within another. It makes more sense to understand normative shifts, and norm

entrepreneurship, as products of new beliefs. These beliefs, in turn, should be understood as mutable products of ideological competition. Norms derived from them continue to bear the traces of their contested origins. The recent history of human rights in Southern Africa bears witness to the dramatic consequences of this fact.

1   John Rawls (1971, 5-6) - an author Williams and (especially) Geuss attack on this score - did, it is true, acknowledge that moralist theories such as his could only apply in 'well-ordered societies' where 'everyone accepts, and knows that everyone else accepts, the very same principles of justice', and where 'basic social institutions satisfy and are generally known to satisfy these principles'. Williams' Weberian, internalist notion of legitimacy, however, helps us see how political order can in fact be established in the radical absence of any such agreement about justice or just institutions - current disputes in the United States between liberals and (extreme) libertarians being a case a point (for discussion of legitimacy in Williams see Hall 2013, 4, 10).

2   Rights advocates may, of course, be sceptical of such arguments, since 'unitary states' tend for obvious reasons to be the most reliable implementers of international legal obligations (Risse and Ropp 2013, 18-19).

3   This is not to adopt a naïve legal pluralism, where (modern) law is wholly absent from (African) customary norms (for critique Chanock 1992; Zips and Weilenmann eds. 2011). Lund and Boone's emphasis on the local effects of national constitutional orders illustrates why this is mistaken. Such observations, however, do not entail that between distinctions between 'negotiated' social orders and those governed by more rational-legal forms legitimacy become impossible to draw in particular cases (see Roberts 2005; 16).

4   For the Namibian case some journalistic sources, public statements, and press releases are now at http://www.africavenir.org/en/project-cooperations/german-genocide-in-namibia/press-clipping-links.html [accessed 5th June 2014].

5   As my interviews revealed, both counterfactuals are still keenly debated.

6   Mugabe has a degree in law and administration from the University of London. An honorary law degree was revoked in 2008 (Svep, 12th July 2008).

7   Acquisitions also continued to violate the amended Land Acquisition Act (Marongwe 2008, 197).

8   This is quoted from the famous 'Utete Report'. For a recent overview of Zimbabwe's complex tenure arrangements see Rukuni (2012-3a).

9   JAG's allegations of a 'Matabeleland faction' echo the CFU's earlier history; a central topic of Selby (2006).

10 For a list of only the decisions reached see http://www.sadc-tribunal.org/?page_id=1872 [accessed 25th May 2014].

11 For a legal opinion by Jeremy Gauntlett, Jeffrey Jowell and Frank Pelser see *Ex Parte: Commercial Farmers Union* (3rd September, 2009). For other legal challenges by the CFU, still with somewhat more limited objectives than those pursued by Freeth and his team, see CFU (September 30th, 2010) and Bell (3rd June 2011). For gradual rapprochement between the two positions see *JAG Open Letter Forum* (7th October 2011).

12 Madagascar, the organisation's fifteenth member, was then suspended.

13 Tembani and Freeth met at the Tribunal in Windhoek (Ben Freeth, interview, 5th April 2012). In 2000 the Agricultural Bank of Zimbabwe had auctioned-off the indebted Tembani's farm without a court order. The execution of sale was upheld by the Supreme Court in Zimbabwe but ruled illegal by the SADC Tribunal in 2009.

14 The details of ratifications are available at: http://www.african-court.org/en/images/documents/Court/Statute%20ACJHR/Statuts%20of%20the%20Ratification%20Process%20of%20the%20Protocol%20Establishing%20the%20African%20Court.pdf [accessed 1st June 2014].

15 GOZ officials have often occupied important roles in the Commission, which has frequently 'stressed the colonial element of the Zimbabwe situation' (Murray 2011, 188).

16   This text is taken from Section 4(3) of the Implementation of the Rome Statute Act 27 of 2002.

17 Summaries of the case and heads of argument are available at: http://www.osisa.org/law/zimbabwe/sa-must-investigate-zimbabwean-officials, http://www.osisa.org/law/blog/applying-universal-jurisdiction-sa-law, and http://www.Southernafricalitigationcentre.org/2000/02/13/salc-and-another-v-ndpp-and-others-3/ [all accessed 3rd June 2014].

18 The court order is available at: http://cfuzim.org/index.php?option=com_content&view=article&id=375:louis-fick-v-government-of-zimbabwe-in-pretoria-high-court-77812009-&catid=44:legal-cases&Itemid=91 [accessed 4th June 2014].

19 Some lawyers and commercial farmers claimed that these valuations were extremely low, and inferior to what could be obtained on the basis of SADC judgements (*JAG Open Letter Forum*, 2nd March 2010; *JAG Open Letter Forum*, 22nd June 2011).

20 See http://www.ecchr.de/index.php/our_work.html [accessed 12th June 2014].

21 See comments by Tomaso Ferando, Jarrod Hepburn, Luke Eric Petersen and Christian Schliemann at http://www.ecchr.de/index.php/worldbank.html [accessed 12th June 2014].

22 For these statistics see http://www.tradingeconomics.com/zimbabwe/current-account [accessed June 12th 2014]. The intervening period has seen deficits increase, but stabilise at around $2000 million (see http://www.worldbank.org/en/publication/global-economic-prospects/data?region=SST [accessed June 12th 2014]).

23   For Zimbabwean GDP http://data.worldbank.org/inrdicator/NY.GDP.MKTP.CD?page=2 [accessed 12th June 2014].

24   Unlike JAG and Freeth, Ben Purcell-Gulpin and Marc Carrie-White of the CFU also believe that some form of 'affirmative action' may in principle have been appropriate for Zimbabwe before FTLR. They do not see property as

'God's Law' (Ben Purcell-Gilpin and Marc Carrie-Wilson, interview, 5th April 2012).

25 ZLHR was now the leading such organisation in Zimbabwe (compare Dorman 2001, 160-162). It enjoyed close links with some MDC figures and international human rights organisations - notably the International Commission of Jurists, of which it was the Zimbabwean affiliate (cf. Tsunga 2009). Amendment 17 linked urban civil society with commercial farmers' campaigns for the first time (for the distance between these constituencies see Pilossof 2012, 204-5). ZLHR appealed against the ouster clause to the UN Special Rapporteur on the Independence of the Judges and Lawyers, and - alongside the SADC Lawyers Association and other groups - launched litigation against it in the African Commission on Human and Peoples Rights (Zimbabwe Lawyers For Human Rights, September 6th 2005; N.d., 4; JAG, 9th September 2005). But it studiously avoided the questions of racial discrimination and future political order raised by the Amendment.

26 In 2005 the party split. Unless otherwise indicated I refer here, post-2005, to the larger of two parties that resulted: the MDC-T, led by Morgan Tsvangirai.

27 For constitutional drafts and commentary http://www.sokwanele.com/zimbabweconstitution/sections/2552 [accessed 15th June 2014].

28 Compared to Zimbabwe, agricultural land in Namibia is generally arid and unproductive. Before independence commercial farming survived largely because of South African subsidies (Werner and Odendaal 2010).

29 In an interview with me on the 27th August 2011 Riruako stated that he had devised the campaign. Morgan (2010, 285) claims that a quotation from one informant (whom I believe to be Mburumba Kerina) shows that the campaign originated in the 1950s. This may be a conflation with efforts at that time to link the genocide with opposition at the United Nations to South Africa's 'incorporation' of South-West Africa (Gewald 2003, 289-291; Yates and Chester 2006, 193).

30 I thank Joachim Zeller for providing me with a copy of his interview with Phil Musolino. For more on the 'political question' doctrine see chapter 6, section 2(c).

31 Hinz's proposal was first presented at a high-profile conference on August 17th. The conference had a telling title: '1904-2004 Decontaminating the Namibian Past'.

32 Riruako had, however, pointedly invited King Kauluma of Ndonga from Northern Namibia - chairperson of the Council of Traditional Leaders - to the 2004 centenary commemorations, illustrating the unusual degree of unity at the time (Zuern 2012, 502).

33 More recently remains of survivors from Shark Island have been buried in a 'rather inclusive' manner as 'martyrs of the liberation struggle' (Förster 2013).

34 For recent shifts in some Nama political circles away from commemorating anti-colonial resistance (see Kössler 2007). In the 1970s the Nama Chiefs' Council, for its part, like the Herero's Chiefs' Council, had deployed resistance narratives to contest SWAPO's anti-apartheid credentials (du Pisani 1986, 255-7).

35 One speculative explanation for this is the better relationship that Riruako enjoyed with President Hifikepunye Pohamba than with his predecessor (Kuiama Riruako, interview, 27th August 2011).

36 Some have suggested that the reparations campaign has radicalised Herero youth to the point that they hope seize land from German-speakers (Esther Muinjangue, interview, August 23rd 2011; also Förster 2013). At Red Flag Day Commemorations in 2011 I certainly observed that radical demands were greeted with more enthusiasm by youth than by political leaders.

37 I side-step controversies surrounding the normative status of institutions' technical capacity to preserve objects.

38 This same source believes that major European museums now co-ordinate their public positions on such matters in order to continue treating claims on a case-by-case basis.

39 For the 'colonisation of Tswana consciousness' see Comaroff and Comaroff (1991, 4).

40 The CKGR's population density was 4,000 times less than Austria's (R. Hitchcock 2002, 804; Zips-Mairitsch 2013, 303).

41 See http://www.ditshwanelo.org.bw/about.html [accessed 10th June 2014].

42 As Russell (1976) argues, seeing the (typically impoverished) Ghanzi settlers as vehicles of apartheid is in fact rather absurd.

43 Unfortunately time constraints meant I could not investigate these.

44 For how the late John Hardbattle could play this role in the early days of FPK see Saugestad (2001, 176-7).

45 Such consent is much harder to achieve amongst class-action litigants in Western societies (for fascinating discussion Rubenstein 1997). For 'bands' in San society see Barnard (2007, 62-64).

46 Not all Kantians, it should be noted, endorse all aspects of human rights (e.g. O'Neill 2005).

47 For the 'countless ways' in which human interests can in fact be classified see Feinberg (1984, 55).

48 For arguments that at least some liberals' beliefs were tenaciously anti-imperialist even in the late nineteenth-century (Claeys 2010). For 'self-interested' liberal anti-imperialism in this period, motivated by desires to protect domestic liberties see A. Fitzmaurice (2012, 138).

49 For how a new managerialist 'vulgate' has 'apparently risen from nowhere' see Bourdieu and Wacquant (May 2000),

and contrast Bevir's (2010a) analysis of its historical origins. Bourdieuan 'fields' may justify themselves in terms of beliefs, but the two are very far from equivalent (for an introduction Bourdieu 1981).

50 Contrast the more functionalist explanation for ideas about bodily integrity in Elias ([1939] 2000).

51 This paragraph draws on Brett (2012).

52 As John Dewey (1935, 3) observed, 'liberalism has meant in practice things so different as to be opposed to one another' (in Bell 2014, 21). Something similar, arguably, has been the case with Christianity (a theme of MacCulloch 2009). Sikkink may have granted causal influence to what 'world polity' sociologists call the 'Western cultural account' thanks to agentic constructivist engagement with their work (Thomas et al. 1987; Finnemore 1996). These scholars see human rights as simply the latest incarnation of the Western 'cult of the individual'. They can only deny their obvious expansion into 'collective and corporate entities' on the grounds that such rights remain a statistical minority (see Elliott 2007, 356, 359).

53 For twentieth-century convergence between rights and humanitarianism see Schiff (2008, 15-20), Sikkink (2011, 106-8) and W. Hitchcock (2012).

54 When asked to help draft the UDHR the great liberal idealist Benedetto Croce could reportedly only pronounce himself 'inept' (Villey 1983, 10-11).

55 Catastrophe avoidance, previously a liberal preserve, has become a Left theme - something reflected by new arguments about the dangerous nature of truth (compare Shklar 1989 with Harcourt 2011; for critique Badiou 1993; 2005). Moyn (2010, 47, 81-3) dates Holocaust awareness to the early human rights revolution. Cohen (2012) dates it somewhat earlier.

56 Geuss (2005, 37, n.18) notes that 'a general characteristic of much of the history of ideas' is that the prominence of particular views can be understood by analysing 'the spectrum of what were thought to be possible alternatives'. He associates this approach, which I endorse, with Weber and Nietzsche.

57 For the significance of the 'particular character' of the 'intellectual strata' propagating religious beliefs see Weber ([1922] 1978, 501).

58 Here I gloss over a distinction between 'normation' and 'normalisation' which Foucault introduced from 1976 (see D. Taylor 2009, 49-52). Briefly put, biopolitical power, unlike disciplinary power, derived the normal not from abstract 'humanity' but from the scientific and technical studies of 'populations' (normation). Normalisation could then proceed according to the variety of normals these studies produced.

59 Lauterpracht and Cassin both had their extended families massacred during the Holocaust. A recurring theme in Simpson (2001) is how British elites failed to understand the importance of this experience for European construction (see also P. Anderson 2009, 18-19).

60 Compare Jean Monnet's 'indifference' but not 'insensibility' towards ideological debates (P. Anderson 2009, 15).

61 Britain had acceded to the Court in 1966, accepting individual petition for a test period. France would only accept it after Mitterand's election in 1981. Madsen (2011a, 72) explains accession in terms of 'safe distance from the war in Algeria'.

62 Whilst pensions, for example, had long been nationally guaranteed for certain classes of the population - such as soldiers, miners and civil servants - these reforms were only extended to all after 1945 (Conrad 1991, 177). For state-led reforms and the New Deal see Skocpol and Amenta (1985).

63 Denning's views on the common law in ex-British colonies also contrasted with those of 'law and development' modernists (Harrington and Manji 2003, 395-7).

64 The Chicago neo-liberals were so disinterested in law at this time that they appear to have attracted Michel Foucault's qualified admiration (Harcourt, Becker and Ewald 2012).

65 Fitzmaurice sought, especially, to identify peremptory norms of international law, or international norms form which no derogation could be allowed, see G. Fitzmaurice (1973, 323).

66 This is not to say, of course, that the judgement was therefore a beacon of humanitarianism (for powerful critique C. Campbell 2005, 336-7).

67 These victims were not, strictly speaking, forgotten. Rather, they were 'deliberately excluded' by the limited but nevertheless striking legislative precedents of the 1950s (Pross 1998, 52; Goschler 2009, 105).

68 Jurisprudential milestones included *Tel Oren v Libyan Arab Republic* (1984), which reached a different conclusion on justiciability from that in *Filártiga. Siderman de Blake v Republic of Argentina* (1992) saw the Court of Appeals overrule district courts, and decided that the Foreign Sovereign Immunities Act also meant ATCA claims were not justiciable. I thank Chandra Lekha Sriram for guidance here.

69 In North America and Australasia there were long histories of courts arbitrating disputes over treaties signed with still 'independent' nations, and sometimes of appeals made to the British Crown by peoples formally under its protection. There was however no standardised international legal approach to such questions (cf. McHugh 2005, chapters 3-5).

70 The 'purism' of J.C. de Wet was one notable exception to this rule (see Fagan 1996, 62-64).

71 Similar, and almost equally notorious was *Rossouw v Sachs* (1964) (see Dyzenhaus 1998, 69).

72 For a discussion of 'constitutional morality', particularly important for British jurists, see Stapleton (1995).

73 Some of the government's more radical political opponents sought to exploit the Afrikaner 'formalistic sense of justice' in similar ways (see remarks by the current Deputy Chief Justice Dikgang Moseneke in Broun 2000, 117).

74 For the genesis of Ford's work in the 1970s collapse of Latin American socialism (Y. Dezalay and Garth 2006, 237-242; Moyn 2010, 140-141; S. Dezalay 2011, 11). For the important Legal Resources Centre see Dubow (2012, 84).

75 Compare comments on judicial 'prejudice' by Minister of Human Settlements Tokyo Sexwale (2013) with those in Gauntlett (1972, 207). For another ANC response to Gauntlett see Radebe (26th June 2012).

76 For FUL's membership see http://www.freedomunderlaw.org/ [accessed 4th April 2014].

77 William Wade and, more recently, Christopher Forsyth - encountered in chapter 4 - have been some of the most significant inheritors of Denning's legacies (e.g. Forsyth 1999; Wade and Forsyth 2000, preface).

78 See also biographical information at http://www.blackstonechambers.com/people/barristers/jeffrey_jowell_qc.html [accessed 4th April 2014].

79 On 22nd March 2008 Pilossof (2012, 147, n.78) performed google searches for "farm workers" AND Zimbabwe, "land reform" AND Zimbabwe, and "white farmers" AND Zimbabwe, receiving 5,700, 21,000, and 827,000 hits respectively.

80 From a search on www.bbc.com/news/ for 'Ben Freeth' conducted on June 1st 2014.

81 Alongside a number of smaller awards, the film was nominated for an Emmy and BAFTA, and shortlisted for an Oscar (see http://www.mugabeandthewhiteafrican.com/news/ and http://www.imdb.com/title/tt1437235/awards?ref_=tt_ql_4 [both accessed 18th June 2014]).

82 But see Mazrui (1977) for disagreements with some aspects of dependency theory.

83 For details see Revitalizing the Reparations Movement, an important conference held in Chicago on April 19th 2014, addressed by Louis Farrakhan and Ralph Gonsalves, chairman of CARICOM (see http://ibw21.org/press-2/revitalizing-the-reparations-movement-a-nationalinternational-forum/ and https://www.youtube.com/watch?v=r2NYDwFlO0k .

84 An older generation of Caribbean scholar-politicians had highlighted the damage caused by slavery in order to legitimate decolonisation rather than to demand reparations (see C.L.R. James 1938; E. Williams 1944.)

85 For the Mau-Mau campaigning of Jeremy Corbyn MP and Liberation (formerly Fenner Brockaway's Movement for Colonial Freedom), which Corbyn chairs, see Olende (5th October 2012) and Shah (2012).

86 See http://www.africavenir.org/about-africavenir/about-berlin/our-activities.html [accessed 4th April 2014]. Berlin Postkolonial is another very important group in the NGO alliance, and advocates notably for changed streetnames (Nicolai Röschert, personal communication, 29th July 2014). It was founded in 2007, and stresses the 120th anniversary of the Berlin Africa Conference as the catalyst for increased mobilisation in 2004 - unlike Melber (2014, 157) who, likes me, stresses the centenary of 1904 (see https://www.betterplace.org/en/organisations/berlin-postkolonial [accessed 4th April 2014]).

87 See http://www.goethe.de/kue/lit/prj/com/cgp/cgse/enindex.htm and
https://www.goethe.de/ins/za/prj/sua/gen/rue/wer/her/enindex.htm [accessed 4th April 2014].

88 See http://www.africavenir.org/about-africavenir/about-berlin.html [accessed 14th April 2014].

89 The launch of the Namibian Coalition for Transitional Justice (NCTJ) was spearheaded by Breaking the Wall of Silence (BWS; a group representing ex-SWAPO detainees), and the Legal Assistance Centre. It was supported by former TRC commissioner Yasmin Sooka who argued that a 'good reparation' policy was essential for entrenching the rule of law and human rights in society. An LRC report published to accompany the launch blamed the Namibian government for a failure to resolve 'issues of accountability, truth-telling, memory and compensation' relating to the genocide of 1904-07 (Sasman, 27th October 2009). BWS spokeswoman, Pauline Dempers, believes that SWAPO fears that 'another chapter will immediately be opened' if reparations are paid (interview, August 30th 2011; for similar speculations see Buford and van der Merwe 2004, 298). In 2001 Namrights, another NGO engaged around these issues, even threatened to sue the Tanzanian and Zambian governments - allegedly complicit in torture of dissidents - if such a reconciliation commission was not created (Namrights, 22nd February 2001). For a comparison of Namrights and BWS' strategies see Höhn (2010).

90 Van der Post (1986, 74) also attacked sanctions against apartheid as 'morally obscene', even if he had long criticised apartheid itself (Wilmsen 1995, 207, n.47). For the 1987 Kalahari visit see Butcher, 30th August 2002.

91 Saugestad (2011, 61, n.73) thus queries Resnick's (2009) claim that 'frame resonance disputes' such as these can be beneficial for transnational movements.

92 This should be distinguished from a linked but separate development: the dramatic increase in the legal responsibility of historian themselves for the content of their work, especially that denying historical crimes (see Le Crom 1998; *Chauvy And Others v. France* 2004).

93 For *King Leopold Ghosts'* role in recent legal battles around Belgian colonial atrocities see Ewans (2003). And for Hoschild's contribution (Buettner 2014).

94 Ultimately, however, this legal category only become accepted after 1945. The strategic calculations of Great

Powers clearly prevented such forms of oversight extending into inter-war colonial administration after Germany's loss of her colonies (compare Schiff 2008, 22). The pressure applied to 'little' Belgium to curb abuses in the Congo constituting the exception proving this rule (see Koskenniemi 2001, 155-165). In 1919 Germany prepared its own 'White Book' documenting British colonial atrocities. And in 1923 after South African independence, the German settler bloc in Windhoek's new all-white legislative assembly forcefully demanded the Blue Book's destruction (Gewald 2004, 65). British and South African officials acquiesced 'in the interests of chessboard politics of imperial consolidation' (Sylvester and Gewald 2003, xxviii).

95 Silberbauer conceded this definition might also apply to non-San groups in the CKGR such as the Bakalagadi

96 But for how gender differences might be obscured see Sylvain (2004; 2006; 2011).

97 This most recent version of the norm spiral model stresses 'bottlenecks' between norm cascades and compliance, notably those caused by low state-capacity. It aligns itself with the Chayes' (1995) managerialism and downplays the importance of rules (Risse and Ropp 2013, 15).

98 It should be noted that he bureaucratic 'gatekeeping' which Bob (2009) shows can efficiently exclude new rights, is not necessarily so less effective at preventing new applications of existing rights.

99 For an argument that neither statutes of limitations nor retroactivity should in fact prevent Namibian reparations see Sarkin (2008, chapter 2). For arguments that limitations should have excluded recent Indonesian reparations claims against the Dutch government see van den Herik (2012, 698, n.23). And for reasons why the British High Court was able to use its discretion to decide otherwise in the Kenyan case Engelhart (2012, 101).

100 Jeremy Sarkin (2008, 64) has also argued that 'the international system of rights protection, even outside of the laws of war, was not only present in the nineteenth century, but developing rapidly'. (The intervening period had, it should be noted, seen significant efforts by international lawyers to connect humanitarian and human rights law 'streams' - as reflected in the 2005 UN principles on reparations (Zwanenburg 2006, 655-660; Schiff 2008, 15-20; Sikkink 2011, 106-8).

101 See http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&lang=en [accessed 14th April 2014].

102 The domestic law of the United States possesses some *de facto* international enforcement capacities - capacities mirrored on a sub-regional scale by the domestic law of South Africa (see chapter 2) - since almost all states have commercial interests of some sort in that country. Space precludes analysis of some new, similar liabilities of corporations.

103 The African leaders who most openly opposed the principles behind these demands were Senegalese President Abdoulaye Wade and Ghanaian President J.A. Kufour. Wade declared that he himself might be liable for the slaves owned by his ancestors, whilst Kufour - a figure whose political opponents frequently accused of inheriting traits from slave-owning forebears - later claimed that African elites involvement in slavery undermined the legitimacy of any reparations payments (Hasty 2002, 66; Hassmann 2008, 86; Asare 2008, 34; see also MacCaskie 2007, 176).).

104 Space precludes extended discussion, but the most common means of denying states' claims is to brand them as 'criminal'. This certainly followed Zimbabwean demands at Durban and Haitian demands for reparations from France in 2003 (Charles, 18th December 2003; compare also Dupuy 2007 with Hallward 2007; Howard-Hassmann 2008, 135-6). As Skinner (2010, 46) argues, however, inherited state obligations such as public debts are necessarily integral to the international system. This means only some states can be ever labelled as unrepresentative at any one time. This informal, negotiated division of the world into 'civilised and barbarous nations' is what Reus-Smit (2013b, 181-4) calls 'Millian sovereignty'.

105 See http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314 [accessed 3rd June 2014].

106 Even in these countries, however, there have always been concerns that legal definitions in terms of 'aboriginality' impose overly demanding and even perverse evidential requirements on potential litigants (e.g. Thuen 2004, 270; Ulbricht 2014). This has served to render self-definitional approaches more attractive. Such approaches in turn, however, have been criticised on the grounds that membership lists - produced, for instance, in order to share casino revenue or allocate scholarships - reflect the vested interests of the indigenous elites who draft them (see Pfefferle 2007; McHugh 2014).

107 Saugestad (2008, 165, n.4), for example, notes how contemporary United Nations definitions of indigeneity retain an emphasis of 'priority of occupation' despite the fact that peoples such as the Maasai may only have occupied their territories 'for about two centuries'

108 The terms 'sceptics' and 'dogmatists' refer to an analogy Barnard draws with a debate in the history of mathematics.

109 'Horizontal' here does not imply uncoercive (see Buxbaum's 2004, 184-5 critique of Slaughter 2003).

110 The last two decades have seen a significant indigenisation of the Botswana judiciary, even if expatriate judges still regularly sit on the Court of Appeal. I thank Rachel Ellett for sharing her database of these judges.

111 Once again I thank Rachel Ellett for sharing her database of expatriate judges' career paths.

112 Gabon, Côte d'Ivoire and Zambia were the only other states to recognise Biafra - which had justified succession in

terms of the risk of genocide. President Kaunda of Zambia often followed his friend Nyerere's lead in foreign affairs, whilst, for a long time at least, the Francophone states were considered to have been acting as French proxies (see Heraclides 1991, 93-98; Saideman 2001, chapter 4).

113 For Bayart (2000) extraversion is not merely a technique but part of African states' 'historicity' and 'grammar of action'. Such claims are advanced from within a Foucauldian theoretical framework ultimately incompatible with that proposed in this study (cf. Bayart [1989] 2009). And despite my indebtedness to Bayart's work, I agree with Young (1999, 151) that such perspectives are, strictly speaking, ahistorical.

114 These scripts, importantly, do not operate automatically - as in Boli, Meyer and Thomas (1987) - but are consequences of extraversion. For the case of ECOWAS see Ebobrah (2010).

115 This 'theology' is largely common also to FRELIMO in Mozambique (Saunders 2013, 163).

116 Liberal theorists have, of course, argued against some of their other features. Some have alleged, for example, that rights are corrosive of social capital and republican virtue, and tend to over-bureaucratise public service delivery (Glendon 1991; Dagger 1997; O'Neill 2005, 425).

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