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PUBLIC INTERNATIONAL LAW

ARTICLE

GENOCIDE: THE NAMIBIAN CASE AGAINST GERMANY

Lynn Berat†

INTRODUCTION

When Namibia became independent in 1990, after more than a century of colonial rule¹ - first by Germany and then by South Africa - it joined the wave of democratizations sweeping the globe.² While the new government urged a spirit of reconciliation upon the populace³ especially with regard to the country's South African neighbors, many Namibians could not forget the suffering inflicted upon them and their ancestors by the former colonizers. This brought to the fore the question, shared by many in new democracies, of how to treat human rights viola-

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1. The process leading to Namibian independence is described in Lynn Berat and Yossi Shain, *Provisional Governments in Democratization: The 'International Interim Government' Model and the Case of Namibia*, 29 COEXISTENCE 19 (1992); LYNN BERAT, WALVIS BAY: DECOLONIZATION AND INTERNATIONAL LAW (1990).

2. Democratic regime change is discussed in Lynn Berat and Yossi Shian, *supra* note 1; Lynn Berat and Yossi Shain, *Interim Governments in Democratic Transition: Lessons from Namibia, Hope for South Africa?*, 11 CONFLICT 17 (1991); SAMUEL HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991).

3. See, e.g., AFRICA WATCH, ACCOUNTABILITY IN NAMIBIA: HUMAN RIGHTS AND THE TRANSITION TO DEMOCRACY (1992).

tions committed by members of predecessor regimes.⁴ Although, in practice, new regimes often choose not to prosecute for reasons of political expedience, there is substantial authority that new democracies have a duty under international law to bring the guilty to justice.⁵ If the Namibian government decides to abide by that duty, it will, no doubt, proceed against Germany, under whose rule thousands perished through policies eerily redolent of those used by Germany during World War II.

This article establishes that Namibia has a claim of genocide against Germany. Part I examines the details of German colonial rule. Part II resolves questions of standing and state succession which must be overcome if Namibia is to proceed. Part III establishes a cause of action for genocide and addresses the problem of retroactivity. Part IV suggests that the proper measure of redress is reparations, achieved preferably via an agreement between the two states.

I. THE COLONIAL LEGACY

A. *The Struggle for South West Africa*

Little archaeological work has been done in southwestern Africa. Nevertheless, archaeologists have found evidence of human occupation in various parts of what is today Namibia dating to more than ten thousand years ago.⁶ Portuguese mariners began to put an end to the isolation of the region from the rest of the world in the fifteenth century. Prince Henry the Navigator sent a series of expeditions down the western coast of Africa, and after Henry's death in 1460, Joao II continued his uncle's policy of exploration. In 1483, Diego Cao reached the

4. For a discussion of this issue in the South African context, see Lynn Berat, *Prosecuting Human Rights Violators from a Predecessor Regime: Guidelines for a Transformed South Africa*, B.C. THIRD WORLD L.J. (1993) (forthcoming). A related question for the Namibians is what should be done about those now in government who committed atrocities in SWAPO refugee camps when the group was in exile. The government has shown no zeal for investigating allegations of misconduct including torture and disappearances.

5. That duty is described in Berat, *supra* note 4.

6. Among the archaeological studies are Beatrice Sandelowsky, *Mirabib—An Archaeological Study in the Namib*, 10(4) MADOQUA 221 (1977); John Kinahan and Vogel, *Recent Copper-working Sites in Khuseb Drainage Area, Namibia*, 37 S. AFR. ARCH. BULL. 44 (1982); JOHN KINAHAN, PASTORAL NOMADS OF THE NAMIB (1992).

mouth of the Zaire River. Two years later, Cao erected a cross to commemorate his landing at what is still known as Cape Cross. Outward bound on his epic voyage twelve years later, Bartholomeu Dias landed at Angra Pequena (now Luderitz); then, standing far out to sea in a storm, he managed to round the southern end of the continent and make a landfall near Mossel Bay. On his return journey, Dias sighted what he called the Cape of Storms⁷, and on December 8, 1487, he entered Walvis Bay in his ship Sao Cristoforo and named it Golfo de Santa Maria de Conceicao. Eleven years later, Vasco da Gama followed Dias's route around the Cape and then sailed along the East African coast as far as Malindi, near Mombasa, where he engaged an Arab pilot to steer him across the Indian Ocean to Calicut.⁸ European trade with the East increasingly linked the Cape route after the Portuguese had opened it up to European shipping, but not until after the Dutch took possession of the Cape in the mid-seventeenth century did the modern history of Namibia begin.

In 1652, the Dutch East India Company established a refreshment station at the Cape for vessels travelling to and from the Far East. In due course, the company sent exploratory expeditions from the Cape up the West Coast to ascertain who inhabited the region and whether the Dutch could establish trading relations with them. Commanders of the vessels gave unfavorable reports of fighting between their men and the local inhabitants, whom they called Hottentots.⁹

Perhaps as a result of these accounts, the Dutch showed no further interest in the West Coast for more than a century. Whalers from other countries were not deterred, however. By the end of the eighteenth century, American, British, and French seamen were all engaged in whaling operations along the

7. Subsequently named the Cape of Good Hope.

8. Now Kozhikode, a seaport in southwest India.

9. Sydow, *Contributions to the History and Protohistory of the Topnaar Straddler Settlement at the Kuiseb river Mouth near Walvis Bay*, 28 S. AFR. ARCH. BULL. 73 (1973). The term Hottentots, which has taken on a derogatory connotation, referred to indigenous pastoral peoples. In modern scholarship, the term Khoikhoi is used instead. The term Bushmen referred to indigenous hunter-gatherers. In modern scholarship the term San has replaced it. Both groups are often referred to in the literature as Khoisan.

coast. Once there, they encountered the indigenous inhabitants of its shores.¹⁰

By that time, rumors were proliferating of vast herds of game and cattle as well as of huge copper deposits, in the area north of the Orange River. The British had already sent expeditions to explore the West Coast in 1784 and 1786. Fearing that Britain might claim the West Coast, including Walvis Bay, the Dutch sent the *Meermin* under Captain Francois Duminy to the West Coast. On February 24, 1793, Duminy arrived at Walvis Bay where the local Nama-speaking people were exploiting the marine life, herding cattle, and using the "!'nara"¹¹ melon. Without consulting any of the local inhabitants, Duminy took symbolic possession of Walvis Bay.¹² This marked the first time a European power attempted to annex part of what is now Namibia. However, according to the international law of the period, this symbolic act was insufficient to effect a valid annexation.¹³

Even nominal Dutch authority over the Bay was short-lived. In 1795, France invaded Holland. Believing that France might gain control of the sea route to India, the British government sent a naval force to the Cape. The Dutch capitulated and the British took control of the Cape. The following year, the Cape government sent Captain Alexander in the frigate *Star* up the West Coast to inspect its bays, including Walvis Bay, and to take possession of them for Britain.

Alexander also made a symbolic annexation which, like that by the Dutch before, failed to comply with prevailing standards of international law and was thus ineffective.¹⁴ Nevertheless, the

10. See, e.g., Cecille, *Bericht über die Fahrt der Korvette L'Heroine*, 31 MITTEILUNGEN AUS DEN DEUTSCHEN SCHUTZGEBIETEN: DIE ALTESTEN REISEBERICHTE DEUTSCH-SUDWEST AFRIKAS (1918); J. ALEXANDER, AN EXPEDITION OF DISCOVERY INTO THE INTERIOR OF AFRICA (1838).

11. Nama is one of several click languages, so-called because of the distinctive pronunciation of some of their consonant sounds. The "!" is used to indicate one of the clicks.

12. *English Translation of Parts of Sebastian Valentyn van Reenen's Journal of the Expedition to Walfish Bay, 1793*, in DUMINY-DAGBOEKE 304 (J. Franken ed. 1938); Sebastian van Reenen, *Report*, 28 MITTEILUNGEN AUS DEN DEUTSCHEN SCHUTZGEBIETEN (1915).

13. The requirements for a valid annexation are discussed in detail in BERAT, *supra* note 1, at 109-22.

14. BERAT, *supra* note 1, at 110.

British claimed that the whaling and sealing grounds off the coast were under their exclusive domain and commissioned a cruiser to protect those industries from exploitation by foreign nationals. By early in the nineteenth century, European and American explorers, traders, and missionaries, as well as naval vessels, began to arrive in the Walvis Bay area. Their written accounts gave often ethnocentric and unflattering descriptions of the local inhabitants, whom they called Topnaar and whose numbers they estimated in the hundreds. Whereas earlier visitors reported that the Topnaar did not know hunger, by the end of the century, observers indicated that they had become impoverished and that they formed the base of the labor force used to load and unload boats that put into the Bay.¹⁵ The Topnaar were in this condition because of decades of social upheavals that led to the eventual British annexation of Walvis Bay and the German annexation of the rest of what is now Namibia.

It is not known when the first Nama-speaking people arrived in what is today Namibia. The historian Richard Elphick suggests, however, and anthropological linguists support the proposition, that they originated somewhere in present-day Botswana and gradually moved south and west.¹⁶ The Nama were hunter-gatherers; some also became pastoralists at about the time of Christ.

Apart from the little archaeological data available and information furnished by ethnocentric missionaries, travelers, and traders, little is known about the life of the Nama-speakers of southern and central Namibia before their first contact with Europeans. Various ethnographic works written after World War

15. Compare Cecille and ALEXANDER, *supra* note 10 with WILLIAM PALGRAVE, REPORT OF THE SPECIAL COMMISSIONER TO THE TRIBES NORTH OF THE ORANGE RIVER OF HIS MISSION TO DAMARLAND AND GREAT NAMAQUALAND IN 1876, at 6 (1877); THE JOURNAL OF JOSEPH TINDALL 70 (B. Tindall ed. 1950).

16. R. ELPHICK, KRAAL AND CASTLE: KHOIKHOI AND THE FOUNDING OF WHITE SOUTH AFRICA (1977); Anita Pfouts, *Economy and Society in Pre-Colonial Namibia: A Linguistic Approach (c. 1500-1800 A.D.)*, Paper for African Studies Conference, Boston (Dec. 6-10, 1983), and reproduced as Paper No. 30, *International Conference on Namibia*, City University, London (Sept. 10-13, 1984); Christopher Ehret, *Patterns of Bantu and Central Sudanic Settlement in Central and Southern Africa (c. 1000 B.C.-500 A.D.)*, 3 TRANSAFRICAN J. HIST. 64 (1973); Christopher Ehret, *The Spread of Food Production in Southern Africa*, in THE ARCHAEOLOGICAL AND LINGUISTIC RECONSTRUCTION OF AFRICAN HISTORY 158-81 (Christopher Ehret & M. Posnansky eds. 1982). The Nama languages belong to the northern and central branches of the Khoisan families.

I about the peoples of Namibia claim to reveal information on precontact social structure, but their conclusions are unreliable. Written from a structural-functionalist perspective, which regarded ethnic groups as discrete entities for analytical purposes, these studies are ahistorical.¹⁷ In addition, they accept oral information gathered in this century as sufficiently accurate evidence for the reconstruction of social and political formations that flourished more than a century earlier, even though the destruction of the old order was complete long before any of these ethnographic materials were collected.

What is certain, however, is that at the turn of the century, Nama-speaking groups shared structures of sociopolitical and economic organization, language, myths, and rites. They also had a consciousness of being related to one another that they expressed in genealogical terms, real or fictitious. They did not live in rigidly defined territorial groupings. Although they all had their own water holes, these were not limited to a specific territory but were widely dispersed.¹⁸ In the context of settlement patterns, people were not separated into strictly defined territories but lived in an intermixed or checkerboard fashion.

Precontact Nama social organization was based on kinship ties and the acquisition of cattle and clients to enhance one's status rather than on capitalist means of gaining wealth, such as commodity exchange. Decision-making processes, distribution of cattle posts, and distribution of power were determined by kinship relations. Each group appears to have been ruled by a chief who controlled a system of reciprocity, surplus extraction, and accumulation that was characteristic of many precapitalist African societies. This encouraged followers to become dependent upon their chiefs and buttressed chiefly power.¹⁹ This seems to have been the system that prevailed throughout Namibia south of the Swakop River, in the vast area inhabited by these Nama-speaking people that came to be known to Europeans as Nama-

17. See, e.g., R. Hoernle, *The Social Organisation of the Nama Hottentots of South West Africa*, AM. ANTHROPOLOGIST 6 (1925); ISAAC SCHAPER, *THE KHOISAN PEOPLES OF SOUTH AFRICA* (1930).

18. R. Hoernle, *supra* note 17, at 72.

19. Wesleyan Missionary Notices (1821), Shaw, Account, 120 (Cory Library, Grahamstown, South Africa) [hereinafter WMN].

land or Great Namaqualand.²⁰

North of the Swakop boundary line was Damaraland, also called Hereroland—roughly the area north of Windhoek up to Otavi, though during the 1870s it also included Windhoek.²¹ From the mid-eighteenth century on, this area was populated mainly by diverse and largely unconnected groups of pastoral nomads who spoke the Herero language.²² Like Great Namaqualand, the area was ultimately incorporated into a larger system of economic and social relationships dominated by merchant capital that destroyed the old order. The first agents of this profound change were the Orlam.

By the end of the eighteenth century, people who became known as Orlam were moving across the Orange River.²³ A com-

20. Transactions of the London Missionary Society, III, 212 (Cape Archives Bureau, hereinafter KAB) [hereinafter TLMS]; London Missionary Society Letters [hereinafter LMS], A. Albrecht, *Observations*, n.d. (KAB).

It is not clear when the term Great Namaqualand came into use. As early as 1805, missionaries of the London Missionary Society wrote of the people residing on the northern side of the Orange River as Great Namaquas. LMS Journals, Albrecht, August 30, 1905 (KAB). As early as 1796 these people were referred to as Great Nimaquas. K. Budack, *Die Traditionelle politische Struktur der KhoeKhoen in SudwestAfrika* 22, Ph.D. Dissertation, University of Pretoria (1972). By that time it was also known that north of the Great Namaquas lived the Tamaras, or Damaras. After groups of people known as Orlam moved from Little Namaqualand, the area just across the Cape Colony's Orange River northern boundary, and the Cape Colony into Namaland at the end of the eighteenth and the beginning of the nineteenth centuries and the Afrikaner Orlam established themselves under Jonker Afrikaner at what is now Windhoek, a rough borderline was drawn in the north along the Swakop River. Thus, Great Namaqualand, which included what is today the Walvis Bay territory, became a fairly well-defined area, bounded by the Atlantic in the west, the Kalahari Desert in the east, the Swakop River in the north, and the Orange River in the south.

21. In the far north was Ovamboland, populated by people speaking the Ovambo language. With nearly 700,000 people, the Ovambo comprise almost fifty-five percent of modern Namibia's population of 1,252,500. U.N. Institute for Namibia 1970 census figures quoted in SWAPO, *TO BE BORN A NATION* 3 (1981) (670,000 Ovambo constitute fifty-three and one-half percent of the population.). See generally Richard Moorsom and Clarence Smith, *Underdevelopment and Class Formation in Ovamboland*, in *THE ROOTS OF RURAL POVERTY* (Robin Palmer & Neil Parsons eds. 1977).

22. Pfouts, *supra* note 16 at 5. The Herero language falls into the Bantu sub-branch of the Benue-Congo branch of the Niger-Congo family. As a result of the paucity of archaeological evidence, it is not clear when the first Herero-speakers entered Namibia. One theory is that they arrived from the east in the mid-sixteenth century and began to push south in the second half of the eighteenth century. See T. SUNDERMEIER, *DIE MBANDERU* 11-17 (1977). In 1876, Palgrave estimated their population to be 85,000. Sandelowsky, *supra* note 6 at 83.

23. The origin of the word Orlam is disputed. One scholar argues that it came from

bination of Nama-speaking hunters, gatherers, and pastoral peoples whose societies had been destroyed by expanding merchant capitalism at the Cape, people of mixed descent, and fugitive slaves, the Orlam were westernized dependents of white farmers, traders, and hunters. They knew how to use guns, wore western clothing, were Christian, and had a knowledge of Dutch.²⁴ They depended for survival upon European trade goods, and because their knowledge of pastoral techniques had decayed or long since disappeared, they procured cattle to pay for desired commodities by raiding the stock of Nama- and Herero-speakers. They carried out their raiding through the institution of the commando.²⁵ As Orlam groups moved across the Orange River, they established dominance first over Nama- and then over Herero-speakers. Their success was a result of the commando's superiority, which was largely due to the use of guns and horses. The fact that the Nama- and Herero-speakers possessed large herds may also have made them easy victims, because the herds could not be moved readily and easily. Their decline was hastened by a brutal and lengthy war instigated by the white missionaries and traders who had moved into the area.²⁶ Thereafter, their fate was sealed by the struggles of the colonial powers for dominance in Africa.

Thus, by the 1870s, the Cape Colony had been granted responsible government and Prime Minister Sir John Molteno and his government took an interest in what is now Namibia. Curiosity about the area was high because rumors of great mineral

the phrase "over land." Kienetz, *The Key Role of the Orlam Migrations in the Early Europeanisation of South West Africa (Namibia)*, 10 INT'L J. AFR. HIST. STUD. 554 (1977).

24. Martin Legassick, *The Northern Frontier to 1820: The Emergence of the Griqua People*, in *THE SHAPING OF SOUTH AFRICAN SOCIETY, 1652-1820* (Richard Elphick & Hermann Giliomee eds. 1979); J. Du Bruyn, *The Orlam Afrikaners: From Dependence to Dominance, c. 1760-1823*, at 6, University of South Africa (1981) (unpublished paper); Emma Bradlow, *The Significance of Arms and Ammunition on the Cape Frontier at the Turn of the Eighteenth Century*, 26(1) HISTORIA (1981).

25. See generally Brigitte Lau, *The Emergence of Kommando Politics in Namaland, Southern Namibia, 1800-1870*, at 84-103 (1982) (M.A. thesis, University of Cape Town) [hereinafter B. Lau, M.A. thesis]; Brigitte Lau, *The Kommando in Southern Namibia, 1800-1870*, in *NAMIBIA: PAST AND PRESENT* (Christopher Saunders ed., University of Cape Town, Centre for African Studies, Occasional Papers No. 4, 1983).

26. The war of the missionaries and traders is described in BERAT, *supra* note 1, at 27-29.

wealth abounded.²⁷ The possibility of acquiring the area also intrigued Molteno because control of it meant control over trade, especially in guns and gunpowder, with the interior.²⁸ Meanwhile, the British government itself feared the presence of the Portuguese²⁹ in the area as well as the creation of an Afrikaner republic³⁰ in the region. After considerable political confusion, Britain decided to exercise jurisdiction over Walvis Bay.³¹ Thus, in 1878, Richard Cossantine Dyer, the commander of *HMS Industry*, issued a proclamation annexing Walvis Bay to Her Majesty's dominions.³² That same year, the British government approved of Dyer's annexation.³³ Six years, however, were to elapse before the territory was formally annexed to the Cape.³⁴ That event occurred only in the face of rising German interest in the area.

As early as 1868 groups had formed in Germany to promote German colonization. German trade with Africa and Asia, although only a fraction of the country's total trade, grew steadily in the 1870s.³⁵ As long as there was free trade in the colonial world, Germany was content with access to the markets. In the 1880s, however, there were signs that free trade was ending as the colonial powers began to favor their own nationals through the use of differential tariffs and other restrictive legislation.³⁶ Hence, Bismarck felt a need for German colonization.

In May 1883, an agent of F.A.E. Luderitz, a Bremen

27. Gold and silver had been discovered in Damaraland. The belief arose that Great Namaqualand was also laden with minerals.

28. In 1871, the Cape government had endeavored to restrict the trade in guns and gunpowder by forbidding their shipment to any area beyond the Cape Colony's boundary without special permission. *CAPE ARGUS*, March 7, 1874.

29. *BERAT*, *supra* note 1, at 31.

30. *Id.*

31. It did so based on the assumption that the power controlling the Bay would also control the hinterland because the Bay was the territory's only harbor and contained the only supply of fresh water in the vicinity. *BERAT*, *supra* note 1, at 36-37, 47-48.

32. A.14-'81 at 20-25; C.2144 at 8, Enclosure No. 5; 69 *BRITISH AND FOREIGN STATE PAPERS* 1177.

33. 70 *BRITISH AND FOREIGN STATE PAPERS* 495-96.

34. 75 *BRITISH AND FOREIGN STATE PAPERS* 407.

35. Henry Turner, *Bismarck's Imperialist Venture: Anti-British in Origin?*, in *BRITAIN AND GERMANY IN AFRICA* 47, 50-51 (Prosser Gifford and William Roger Louis eds. 1967).

36. *Id.*

merchant, purchased Angra Pequena harbor and the land surrounding it in a five-mile radius from Captain Josef Frederiks, leader of the Bethanie people.³⁷ Three months later Frederiks, in a treaty signed with an "X", purportedly sold Luderitz the entire coast from the Orange River to the twenty-sixth degree of southern latitude, including all the harbors and bays as well as the hinterland to a distance of twenty miles.³⁸ Once more, Luderitz called for German protection.

On April 24, Bismarck cabled the German consul at Cape Town with instructions to declare officially that Luderitz and his establishment were under German protection. In light of this development, the Cape Colony annexed Walvis Bay. On July 24, 1884, the Cape Colonial Parliament passed the Walfish Bay and St. John's River Annexation Act (No. 35 of 1884),³⁹ and on August 7, the governor issued a formal Proclamation of Annexation (No. 184).⁴⁰ With the exception of the Cape's annexation of the Bay, it was too late for British designs on Damaraland and Namaland. Germany had decided to act. On August 7, the same day that the governor's proclamation of annexation of Walvis Bay appeared, Captain Schering, commandant of a German warship, complying with orders from the government, put the territory Luderitz had acquired under German protection and hoisted the German flag. That territory extended from the north bank of the Orange River to the twenty-sixth degree of south latitude, twenty miles inland; it also included all the islands belonging thereto by the law of nations,⁴¹ namely, those within gunshot distance of the coast. On August 16, 1884, Schering issued a proclamation announcing the establishment of a German protectorate over Namaland and Damaraland.⁴² The day before,

37. G.H. 3½ at 330, Despatches Sent, No. 230, Aug. 13, 1833; No. 235, Aug. 20, 1833, at 333 (KAB).

38. I. GOLDBLATT, HISTORY OF SOUTH WEST AFRICA FROM THE BEGINNING OF THE NINETEENTH CENTURY 81 (1971).

39. Walfish Bay & St. John's River Territories Annexation Act No. 35 (1884).

40. Proc. No. 184 (1884), CAPE OF GOOD HOPE GOVERNMENT GAZETTE, Aug. 8, 1884, at 408.

41. The "cannon shot" rule was recorded by Bynkershoek, a Dutch jurist, in the early nineteenth century. It is traditionally regarded as the basis of the doctrine of the three-mile limit of territorial waters. LOUIS HENKIN ET AL, INTERNATIONAL LAW 1297 (2d ed. 1987).

42. C.4262 at 12-13.

the German consul at Cape Town had informed the governor of these actions. On September 5, he told Robinson that Germany had now also annexed the coast from Cape Frio to Walvis Bay and from Walvis Bay to the twenty-sixth degree of south latitude. The British government received official confirmation on October 15 that the area was a German protectorate.⁴³ With the proclamation of the protectorate, known as the South West Africa protectorate, the drawing of the boundaries of what would become Namibia was complete. On July 1, 1890, Britain and Germany concluded an agreement regarding Africa and Heligoland that recognized British authority over Walvis Bay and German supremacy over the South West Africa protectorate.⁴⁴

B. *German Rule*

German rule proved to be extremely brutal with especially disastrous consequences for the Nama/Orlam and the Herero. In October 1890, the Germans occupied Windhoek, and three years later they established an official German colonial administration there. In 1894, Theodore Leutwein became the first Colonial Governor of German South West Africa. His appointment came after various German military defeats against the people of South West Africa, most notably, a campaign against the Nama/Orlam Witboois, many of whom perished.⁴⁵ Leutwein had mercenary views about the nature of colonialism. Thus, he wrote,

[s]tripped of all idealistic and humanitarian impediments, the final objective of all colonization is to make money. The colonizing race has no intention of bringing happiness to the aboriginal people, the kind of happiness that the latter perhaps expects. In the first instance, the conquerors seek their own advantage. Such objectives correspond to human egotism, and therefore accord with nature. Colonial policy must therefore be determined by the expected profits.⁴⁶

With such views, Leutwein opposed any marriages between Ger-

43. E. HERTSLETT, 2 *MAP OF AFRICA BY TREATY* 693 (1909).

44. Agreement, reprinted in M. HURST, 2 *KEY TREATIES FOR GREAT POWERS* 873 (1972).

45. HORST DRECHSLER, *LET US DIE FIGHTING* 7-9, 74-75 (1980).

46. LOUIS GANN & PETER DUIGNAN, *THE RULERS OF GERMAN AFRICA 1884-1914*, at 44 (1977).

man settlers and the territory's native inhabitants on the grounds that those from mixed marriages might eventually demand self-rule from Germany and the protectorate and its economic assets would be lost.⁴⁷ Indeed, under Leutwein, the registry offices adopted a policy of not registering mixed marriages.⁴⁸ Also, the German authorities endeavored to subdue the local populace by entering into agreements with their chiefs; those who accepted the German offers received as much as two thousand German marks a year.⁴⁹ At the same time, the Germans established reserves where the country's indigenous inhabitants were forced to live.⁵⁰

However, not all local leaders accepted collaboration. Most famous of these was Hendrik Witbooi of the Nama/Orlam who opposed the German policy and warned his peers against such behavior. As early as 1892, he wrote to Josef Frederiks of Bethanie who had sold the coast of the country to Luderitz,

[t]hey [the Germans] are the big nation trying to enter our lands with power. I can already see them governing us with their might. I can see them passing laws that forbid us to do things we are accustomed to do. I therefore cannot agree to your giving away land which would permit these Germans to live and work here. . . . I cannot see any peace coming out of this arrival of the Germans. Incidentally, they praise their own deeds and strength far too much.⁵¹

Accordingly, Witbooi adamantly opposed entering into a protec-

47. *Id.* at 227.

48. In 1907, the High Court in Windhoek even insisted that all such marriages that occurred before 1905 were null and void. The decision affected thirty marriages but mixed relationships continued so that in 1908 there were five hundred mixed births recorded. HELMUT BLEY, *SOUTH-WEST AFRICA UNDER GERMAN RULE 1894-1914*, at 212-19 (1971).

49. *Id.*

50. WADE PENDLETON, *KATATURA: A PLACE WHERE WE DO NOT STAY* 24 (1974); Henning Melber, *Socio-Economic Interaction and Establishment of Colonial-Capitalist Relations in Namibia Before And During German Rule*, in *ALLIES IN APARTHEID: WESTERN CAPITALISM IN OCCUPIED NAMIBIA* 21-22 (Allan Cooper ed. 1988). In 1891, there were three hundred Germans in South West Africa. By 1903, there were 4,640 whites of whom some three thousand were German. HELMUTH STOECKER, *GERMAN IMPERIALISM IN AFRICA* (1986).

51. *NAMA/NAMIBIA: DIARY AND LETTERS OF NAMA CHIEF HENDRIK WITBOOI, 1884-1894*, at 73 (1984). Witbooi's writings are also found in *THE HENDRIK WITBOOI PAPERS* (Annemarie Heywood and Eben Maasdorp eds., Brigitte Lau annotator 1989).

tion treaty with Germany.⁵² The Germans met this resistance with force and so, in October 1894, the Witboois began a three-year guerrilla struggle against the Germans during which the Witboois suffered serious economic and human losses.⁵³

By the time the struggle of the Witboois subsided, tragedy also struck the Herero. In 1897, rinderpest⁵⁴ killed most of their cattle.⁵⁵ The loss of their main means of sustenance forced many Herero to sell their land to the Germans or enter the wage labor market. Some of the Herero, however, resisted submission to German rule. For example, Herero leader Samuel Maherero, the Supreme Chief, who himself had collaborated with the Germans from 1894 to 1903,⁵⁶ planned a revolt.⁵⁷ In a January 11, 1904, letter to Hendrik Witbooi, in which he sought the latter's support, Maherero expressed his views of the cruelty of German rule and wrote, "All our obedience and patience with the Germans is of little avail, for each day they shoot someone dead for no reason at all. . . Let us die fighting rather than die as a result of maltreatment, imprisonment or some other calamity."⁵⁸ The message never reached Witbooi and the Herero commenced their war against the Germans alone on January 12, 1904. Initially, they were victorious. They recaptured most of the land they had lost and seized most of the Germans' livestock, killing more than one hundred Germans in the process.

Almost as soon as the Herero began their uprising, voices came from German officials demanding that the Herero be completely vanquished. Two days after the revolt commenced, the German Colonial League's Executive Committee released a pamphlet accusing Leutwein of letting the Herero behave as they did.⁵⁹ The pamphlet maintained that

[a]nyone familiar with the life of Africa and other less-civilized

52. Protection treaties are discussed in BERAT, *supra* note 1, at 111-13.

53. WOODRUFF SMITH, *THE GERMAN COLONIAL EMPIRE* 127 (1978).

54. An acute, contagious virus disease, chiefly of cattle, characterized by ulceration of the intestinal tract.

55. *Id.*

56. DRECHSLER, *supra* note 45, at 143.

57. This rebellion is described at length in JON BRIDGMAN, *THE REVOLT OF THE HEREROS* (1982).

58. DRECHSLER, *supra* note 45, at 143. The rinderpest is described in SMITH, *supra* note 53, at 63.

59. *Id.*

non-white peoples knows that Europeans can assert themselves only by maintaining the supremacy of their race at all costs. Moreover, anyone familiar with the situation knows that the swifter and harsher the reprisals taken against rebels, the better the chances of restoring authority.⁶⁰

Shortly thereafter, the Commandant of Swakopmund sent a telegram to the German Foreign Office demanding that “[t]he Herero must be disarmed, mercilessly punished and rounded up to perform forced labor for the railway.”⁶¹ In the same vein, a Colonial Department official responsible for South West African affairs wrote, “All here in the colony agree that this rebellion must be put down with severity and that all those responsible must receive their just desserts.”⁶² The Commander of the Imperial Naval Vessel *Habicht* informed the Imperial Naval Office that “[t]he most severe punishment needs to be inflicted on the enemy. . . . The only way to restore calm and confidence among the whites is to disarm the rebels completely and to confiscate all their land and cattle.”⁶³ A missionary from the Rhenish Missionary Society wrote that

[t]he Germans are consumed with inexpiable hatred and a terrible thirst for revenge, one might even say they are thirsting for the blood of the Herero. All you hear these days is ‘make a clean sweep, hang them, shoot them to the last man, give no quarter.’ I shudder to think what may happen in the months ahead. The Germans will doubtless exact a grim vengeance.⁶⁴

In their battles with the Herero, German forces appeared to adhere to a policy like that which the advocates of severity had demanded. Their behavior became known in Germany itself; in March 1904, the leader of the Social Democratic Party brought the issue of the Herero before the Reichstag and objected to the brutal methods being used by German troops.⁶⁵

Leutwein himself admitted to the Director of the Colonial Department that no Herero prisoners had been captured by May

60. *Id.*

61. *Id.* at 144-45.

62. *Id.* at 145.

63. *Id.*

64. *Id.*

65. *Id.* at 151.

1904.⁶⁶ While he insisted that no orders not to take prisoners had been given, he also indicated that no orders to be lenient had been delivered either. He noted, “[i]t is only natural, however, that after all that has happened our soldiers do not show excessive leniency.”⁶⁷ Nevertheless, despite the widespread sentiment in favor of continued German bellicosity, Leutwein began negotiations with Maharero to the dismay of the government in Berlin, which insisted that Leutwein demand unconditional surrender.⁶⁸ Leutwein defended his actions and, primarily on economic grounds, argued against those who envisioned obliterating the Herero. He wrote,

The insurgents must know that there is an alternative to death. . . After all, the natives have nothing to lose now but their lives - and they are doomed anyway. . . As regards the future terms for subjugation, . . . after all the outrages the Herero have committed nothing short of unconditional surrender will have to be enforced. On the other hand, I do not concur with those fanatics who want to see the Herero destroyed altogether. Apart from the fact that a people of 60,000 or 70,000 is not so easy to annihilate, I would consider such a move a grave mistake from an economic point of view. We need the Herero as cattle breeders, though on a small scale, and especially as laborers. It will be quite sufficient if they are politically dead. If this is practicable, they should be denied any form of tribal government and confined to reserves adequate for their needs. . .⁶⁹

In the face of continued German losses, the authorities in Berlin did not find Leutwein’s arguments persuasive. Accordingly, in April 1904, Wilhelm II appointed Lieutenant-General Lothar von Trotha Commander-in-Chief of the German forces in South West Africa. Von Trotha had acquired a reputation for ruthlessness in dealing with indigenous peoples elsewhere in the world. He had been responsible for brutally suppressing the Wahehe rebellion in East Africa in 1896 and the Boxer Rebellion in China in 1900-01.⁷⁰

The General arrived in South West Africa on June 11, 1904.

66. *Id.*

67. *Id.*

68. *Id.* at 148.

69. *Id.*

70. *Id.*

He told Leutwein,

I know enough tribes in Africa. They all have the same mentality insofar as they yield only to force. It was and remains my policy to apply this force by unmitigated terrorism and even cruelty. I shall destroy the rebellious tribes by shedding rivers of blood and money.⁷¹

He later wrote to Leutwein,

I did not receive any instructions or directives on being appointed Commander-in-Chief in South West Africa. His Majesty the Emperor only said that he expected me to crush the rebellion by fair means or foul and to inform him later of the causes that had provoked the uprising.⁷²

Leutwein recommended offering the Herero clemency if they surrendered but von Trotha rejected the idea.⁷³ In August 1904, German forces engaged the Herero in the vicinity of Waterburg. The Herero were defeated and Von Trotha then placed his forces in such a way so to ensure that the only escape route available to the Herero was through the arid Omaheke desert. The German General Staff extolled this tactic in an official report indicating that

[i]f, however, the Herero were to break through, such an outcome of the battle could only be more desirable in the eyes of the German command because the enemy would then seal his own fate, being doomed to die of thirst in the arid sandveld. . . This bold enterprise shows up in the most brilliant light the ruthless energy of the German command in pursuing their beaten enemy. No pains, no sacrifices were spared in eliminating the last remnants of enemy resistance. Like a wounded beast the enemy was tracked down from the water-hole to the next, until finally he became the victim of his own environment. The arid Omaheke was to complete what the German Army had begun: the extermination of the Herero nation.⁷⁴

71. *Id.*

72. *Id.* at 153-54.

73. *Id.* at 149, 153-54.

74. *Id.* at 155-56; BLEY, *supra* note 48, at 162. A guide for the Germans later stated under oath that "[a]fter the battle [at Hamakiri near Waterberg] all men, women and children who fell into German hands, wounded or otherwise, were mercilessly put to death. Then the Germans set off in pursuit of the rest, and all those found by the way-side and in the sandveld were shot down or bayoneted to death. The mass of the Herero

Subsequently, it appears, von Trotha became even more ruthless. On October 2, 1904, he issued an extermination order which stipulated,

The Herero people will have to leave the country. Otherwise, I shall force them to do so by means of guns. Within the German boundaries, every Herero, whether found armed or unarmed, with or without cattle, will be shot. I shall not accept any more women and children. I shall drive them back to their people—otherwise I shall order shots to be fired at them. These are my words to the Herero people.⁷⁵

Two days later, von Trotha sent an official report to the Chief of the Army General Staff in which he remained vehemently opposed to negotiations. He wrote,

As I see it, the nation must be destroyed as such and, should this prove impossible to achieve by tactical moves, they will have to be forced out of the country through a long-term strategy. . . . Since I neither can nor will come to terms with these people without express orders from His Majesty the Emperor and King, it is essential that all sections of the nation be subjected to rather stern treatment. I have begun to administer such treatment on my own initiative and, barring orders to the contrary, will con-

men were unarmed and thus unable to offer resistance. They were just trying to get away with their cattle." DRECHSLER, *supra* note 45, at 157. However, the Namibian historian Brigitte Lau insists that the German forces required two weeks to recover from the engagement and that the subsequent pursuit was generally unsuccessful. Brigitte Lau, *Uncertain Certainties: The Herero-German War of 1904*, MIBAGUS No. 2 (Windhoek, April 1989) [hereinafter MIBAGUS]; Brigitte Lau, *Letter to the Editor*, Southern African Review of Books (June/July 1990) [hereinafter cited as *Letter*]. It is irrelevant whether the actual physical pursuit was successful because the Germans knew that the desert route was so inhospitable that many Herero were sure to perish. Moreover, the guide's account of atrocities was mirrored by many others in the employ of the Germans. For examples, see DRECHSLER, *supra* note 45, at 158.

75. DRECHSLER, *supra* note 45, at 157. No German record of the order exists and Lau, who disputes the notion that genocide occurred, maintains that the authority for it is not reliable. Lau, MIBAGUS, *supra* note 74; Lau, *Letter*, *supra* note 74. However, it is arguable that the veracity of the order can be confirmed by subsequent references to it in German colonial documents. On a slightly more humane level, the order seems to have been accompanied by an instruction to the army that "the firing of shots at women and children means firing over their heads to drive them away. I am in no doubt that as a result of this order no more male prisoners will be taken, but neither will it give rise to atrocities committed on women and children. These will surely run away after two rounds of shot have been fired over their heads." DRECHSLER, *supra* note 45, at 157; BLEY, *supra* note 48, at 164. Von Trotha and his troops disregarded the instruction. See *infra* notes 91, 94, 97 and accompanying text.

tinue to do so as long as I am in command here. . . Before my departure yesterday I ordered the warriors captured recently to be court-martialled and hanged and all women and children who sought shelter here to be driven back into the sandveld. . . To accept women and children who are for the most part sick, poses a grave risk to the force, and to feed them is out of the question. For this reason, I deem it wiser for the entire nation to perish than to infect our soldiers into the bargain and to make inroads into our water and food supplies. Over and above this, any gesture of leniency on my part would only be regarded as a sign of weakness by the Herero.⁷⁶

But more than three weeks later, on October 27, von Trotha wrote to Leutwein indicating that

[t]hroughout my period of duty here, the eastern border of the colony will remain sealed off and terrorism will be employed against any Herero showing up. That nation must vanish from the face of the earth. Having failed to destroy them with guns, I will have to achieve my end in that way.⁷⁷

This communication began a dispute between Leutwein and von Trotha. Leutwein asked the Foreign Office in Berlin to allow him to give an order permitting the surrender of the Herero. The Foreign Office, however, sided with von Trotha and recalled Leutwein to Germany by granting him home leave.⁷⁸ Von Trotha then became Governor of South West Africa from November 1904.⁷⁹

At that time, criticism of von Trotha's behavior arose from certain missionaries, some civilian groups, and even the Colonial Department.⁸⁰ For example, the Chief of the Army General Staff informed the Imperial Chancellor that von Trotha's "plans to wipe out the entire nation or to drive them out of the country are meeting with our approval."⁸¹ He continued,

[t]he racial struggle that has erupted can be brought to an end only by destroying one side or reducing it to serfdom. The latter

76. DRECHSLER, *supra* note 45, at 160-61. In the letter, Von Trotha wrote three times that the Herero had to be destroyed. BLEY, *supra* note 48, at 164.

77. DRECHSLER, *supra* note 45, at 161.

78. *Id.* at 161-62.

79. BLEY, *supra* note 48, at 159.

80. *Id.* at 164-65.

81. DRECHSLER, *supra* note 45, at 163.

proposition is an unrealistic one, given the views that are prevalent. So while General von Trotha's intentions are commendable, he is powerless to carry them out. . . We will have no choice, therefore, but to try to induce the Herero to surrender. This is complicated by General von Trotha's order to shoot each and every Herero.⁸²

In response, the Chancellor lobbied Kaiser Wilhelm to rescind von Trotha's order and accept the surrender of the Herero. The Chancellor argued on economic, humanitarian, and strategic grounds. He noted that "if the rebellious natives were annihilated or expelled, this would seriously undermine the colony's potential for development."⁸³ Moreover, the policy of shooting all the men and forcing the women and children into the desert to perish was "contradictory to all Christian and human principles."⁸⁴ In addition, the proclamation was "demeaning to our standing among the civilized nations of the world."⁸⁵ The Kaiser eventually accepted these views.

On December 8, he rescinded von Trotha's order and indicated that he "would exercise clemency" with regard to those Herero who voluntarily surrendered as long as they had not been responsible for decision-making or killings.⁸⁶ The General Staff construed the order narrowly for von Trotha, informing him that, "His Majesty has not forbidden you to fire on the Herero. On the contrary. . . [b]ut the possibility of showing mercy, ruled out by the proclamation of 2 October, is. . . to be restored again."⁸⁷ Von Trotha met his new orders with consternation and lobbied in favor of his approach until he left for Germany in November 1905.⁸⁸ Shortly before that, he received a medal of honor from the Kaiser.⁸⁹

Von Trotha was succeeded as Governor by Friedrich von Lindequist whose policies were more akin to those of Leutwein. On December 1, he issued a proclamation indicating that he had

82. *Id.* at 163-64; BLEY, *supra* note 48, at 165-66.

83. DRECHSLER, *supra* note 45, at 164.

84. *Id.* at 162-63; BLEY, *supra* note 48, at 163, 166.

85. DRECHSLER, *supra* note 45, at 164.

86. BLEY, *supra* note 48, at 167.

87. DRECHSLER, *supra* note 45, at 164.

88. BLEY, *supra* note 48, at 167.

89. *Id.* at 165, 169.

instructed two missionaries to open reception camps for those Herero still at large and that, as of December 20, military operations in Hereroland and German raiding of Herero camps would cease. Those who surrendered at the centers were almost immediately forced to labor for the Germans under extremely harsh conditions with the result that many perished.⁹⁰ As time went on, the condition of the Herero - both in the camps and at large - grew ever more parlous. By mid-1906, von Lindequist wrote to the Colonial Department that "[t]he northern and central parts of the country, in particular Hereroland proper, are virtually devoid of Herero. . . . The Herero have lost the will to fight arms in hand and to put up resistance. Those still roaming about will consider themselves lucky if they come to no harm."⁹¹ However, because the German settlers claimed to fear that the concentration of large numbers of Herero in the two locales would lead to another uprising, von Lindequist closed the camps and distributed the Herero among the settlers as laborers.⁹² He also rescinded his December 1905 proclamation and ordered that military action against the Herero be resumed. Meanwhile, under the terms of the Imperial Decree of 26 December Pertaining to the Sequestration of Property of Natives in the Protectorate of South West Africa,⁹³ von Lindequist had declared that all of Hereroland belonged to Germany.

In the end, the Herero were vanquished. Although it is impossible to arrive at an exact figure, it is certain that large numbers of Herero perished. The most frequently cited statistics come from the historians Helmut Bley and Horst Drechsler. Bley estimated that seventy-five to eighty percent of the Herero died by the end of 1905. This meant that the population declined from between sixty thousand and eighty thousand to about sixteen thousand, of whom fourteen thousand were in con-

90. DRECHSLER, *supra* note 45, at 207-08.

91. *Id.* at 208.

92. *Id.* at 208. Large numbers of Herero also perished in the concentration camps. According to the Imperial Colonial Office's *Report on the Mortality in Prisoner-of-War Camps in German South West Africa*, dispatches from October 1904 to March 1907 revealed that 7,682 of the approximately fifteen thousand Herero and two thousand Nama, 45.2% of the total, perished. *Id.* at 214.

93. *Id.* at 208.

centration camps.⁹⁴ According to Drechsler, who relied on 1911 census results as recorded in a 1918 British *Report on the Natives of South West Africa and their Treatment by Germany*, "in 1911 there were a mere 15,130 Herero left out of an original eighty thousand. . . No fewer than eighty percent of the Herero had thus fallen victim to German colonial rule."⁹⁵ The fate of the Herero was shared by the Nama/Orlam.

In August 1904, under the leadership of Jakob Morengo, some of the Nama/Orlam had taken up arms against the Germans. On October 4, Hendrik Witbooi led most of the remaining Nama/Orlam groups into the guerrilla struggle. Like the Herero, the Nama/Orlam were initially victorious in their engagements with the Germans. This irked von Trotha who, in the spring of 1905, went to the southern part of the territory where he took personal control of the operations against the Nama/Orlam. On April 22, he issued a proclamation in which he threatened his opponents with annihilation and insisted that they surrender unconditionally.⁹⁶ The proclamation became widely known not only in Germany but also in Britain⁹⁷ but had no effect on the Nama/Orlam who continued their fight. As criticism of von Trotha's failure to win the war grew among the Germans in the territory, von Trotha forbade officers returning to Germany from divulging to the press information about the political and military situation.⁹⁸ The Nama/Orlam persisted with their guerrilla tactics and, on October 29, 1905, Hendrik Witbooi, von Trotha's main Nama/Orlam nemesis, died from a

94. BLEY, *supra* note 48, at 151. Bley claimed that of the fifteen thousand Herero in prisoner-of-war camps, some forty-five percent died.

95. DRECHSLER, *supra* note 45, at 214. Lau disputes the veracity of both the Bley and Drechsler figures. She maintains that "[n]o comprehensive statistics of Herero and Nama population figures or death rates during or after the war exist. To report the contradictory guesswork of the colonizers with confidence is already mystifying. The missionaries questioned their predecessors' Herero population estimates of the 1870's (circa eighty thousand) among themselves, and as to survivors, there are contradictory counts by the German General Staff in Windhoek, individual officers, the Colonial Office in Berlin, the Rhenish Mission Society and individual missionaries. . . There is no such thing as 'the real figure' of POW mortality or survivors." Lau, *Letter, supra* note 74; *see also* Lau, MIBAGUS, *supra* note 74. However, the precise number of those who perished is unnecessary to make out a case for genocide.

96. DRECHSLER, *supra* note 45, at 188.

97. *Id.* at 187.

98. *Id.* at 188.

wound sustained in an attack on a German convoy. Von Trotha rejoiced at the news which, he apparently believed, furnished him with a pretense for making an exit from the country.⁹⁹

With von Trotha gone, von Lindequist insisted that the Nama/Orlam surrender unconditionally.¹⁰⁰ The Witboois, demoralized by Hendrik's death, surrendered on February 3, 1906. Their capitulation was made possible by the fact that Samuel Isaak, their new leader, was by then acting openly on behalf of the Germans.¹⁰¹ With the Witboois subdued, the Germans turned their attention to the remaining Nama/Orlam leaders, most notably Cornelius and Morengo. On March 3, 1906, Cornelius surrendered.¹⁰² The Germans were determined to capture Morengo at all costs. One German who was later imprisoned for five years for speaking out, reported that

[n]ot far from Hartbeestmund our troops captured fifty women and thirty-eight children, but failed to extract from them any information about Morengo's whereabouts. I am not sure whether it was for this reason alone or partly because of the difficulties involved in transporting the prisoners that they were all shot. Maybe both considerations were playing a part. At any rate I feel ashamed of being a German.¹⁰³

Still, Morengo survived. Then, following repeated battles with the Germans, he fled into the Cape Colony where he surrendered to the British on May 7, 1906, after his band was destroyed by a German detachment which had pursued them across the border.

The British held Morengo for more than a year. After his release, he remained in the Cape Colony but the Germans were determined to see him and his band dead. The Kaiser himself ordered von Lindequist to "put a price of 20,000 Marks on

99. *Id.* at 190.

100. *Id.* at 191. Von Lindequist wrote, "I do not want them [the Witboois] to be given any assurances that they will remain at liberty, rather they should be treated as prisoners of war for a certain period of time. If leniency is shown towards these unrepentant sinners now, this may have disastrous consequences for the entire native issue at some later stage. . . Rash action and excessive leniency are out of place here especially with regard to the Hottentots [Nama/Orlam]." *Id.* at 192.

101. DRECHSLER, *supra* note 45, at 192.

102. *Id.*

103. *Id.* at 193.

Morengo's head and to wipe out the whole bunch without mercy."¹⁰⁴ There ensued considerable Anglo-German intrigue which resulted in Morengo and his men being killed by Cape police on September 20, 1907.¹⁰⁵ Meanwhile, von Lindequist did not apply the Imperial decree of December 1905 regarding the sequestration of land to the Nama as he had to the Herero.¹⁰⁶ With Morengo's death, however, on May 8, 1907, Oskar Hintrager, the Deputy Governor, issued an order appropriating Namaland.¹⁰⁷ Thus, the Germans also subdued the Nama/Orlam.¹⁰⁸ Like the Herero, their losses seem to have been great.

According to Bley, thirty-five to fifty percent of the Nama died, thus reducing the population from fifteen thousand to twenty thousand in 1892 to ninety-eight hundred by 1911.¹⁰⁹ Drechsler reports that "in 1911 there were 9,781 Nama out of an original twenty thousand. No fewer than . . . fifty percent of the Nama had thus fallen victim to German colonial rule."¹¹⁰ The

104. *Id.* at 201.

105. *Id.* at 202.

106. *Id.* at 216. See *infra* note 45 and accompanying text. Von Lindequist refrained from sequestering the land because, as he revealed in an April 25, 1906, message to the Colonial Department, "[t]he seizure of land might, in fact, have some impact on those among the Nama who have not yet laid down their arms. The realization that they would have to make a living through work in the absence of any tribal property would have diminished their readiness to surrender in the near future." DRECHSLER, *supra* note 45, at 216.

107. *Id.* at 216.

108. Although a small number of Nama/Orlam continued to fight on under Simon Kopper, who fled with his followers into neighboring British Bechuanaland (modern Botswana), the Germans eventually induced Kopper to accept an annual stipend in exchange for not attacking South West Africa. Kopper died in Bechuanaland in January 1913. DRECHSLER, *supra* note 45, at 205-07.

109. BLEY, *supra* note 48, at 151.

110. DRECHSLER, *supra* note 45, at 214. Of those who died, many suffered in captivity. See text accompanying note 114 *infra*. In the case of the Herero, the German authorities transported those captured to Swakopmund where they labored under extremely onerous conditions building a railway line to Otavi. Any who escaped were put to death if caught. DRECHSLER, *supra* note 45, at 208.

The Germans viewed the Nama differently from the Herero. In the scientific-racist mode of the day, they considered the Nama to be lazy good-for-nothings. Hence, they devised a deportation scheme aimed at the eventual extinction of the Nama. In the view of the Imperial Colonial Office, "[O]nce the rebellion is over, the Hottentots, or rather what will have remained of them, ought to be shipped to Togo or some other German colony where they will do not harm, but rather vanish from the scene in the not too distant future." *Id.* at 210. As the authorities deemed the cost of deporting the Nama to other German colonies to be prohibitive, the Witboois and Bethnaie people eventually

final blow to the autonomy of the Herero and Nama/Orlam came on August 18, 1907, when the German authorities issued three directives which barred the indigenous inhabitants of South West Africa from owning land or raising cattle, required all black people over the age of seven to carry passes, and provided for the prosecution on vagrancy charges of anyone who could not prove what the source of his livelihood was.¹¹¹

The directives ensured that, thereafter, the remaining Herero and Nama/Orlam would be forced into the wage labor market but, despite the directive, in the short term, there was a dearth of manpower occasioned by the German policies in the conduct of the campaign against the two groups,¹¹² a shortage much lamented by the German authorities.¹¹³ Dr. Otto Bongard who visited the territory with State Secretary Dernburg on a fact-finding tour to the territory in 1908, reported that

the Herero have been largely wiped out by the war. A high percentage of those who survived are in a deplorable state of health due to the hardships they endured during the war, the terrible ordeal they went through in the sandveld where thousands died of hunger and thirst, and the venereal disease they contracted in prisoner-of-war camps where infections spread with alarming speed. To cap it all, their cattle herds were destroyed by the war. . . . Although it can be assumed that those who survived the war are the most robust of all, the majority of them are beset by disease to such an extent that they cannot be expected to produce healthy offspring. . . . Consequently, there is little hope in the foreseeable future that the labor reservoir required for the development of the country might be swelled from among the ranks of the Herero and the Hottentots [Nama/Orlam] (whose situation is much the same) . . .¹¹⁴

were placed on Shark Island off the South West African coast. The death rate was very high. For example, in December 1906, 276 died. *Id.* at 211.

Ultimately, from September 1906 to April 1907, 1,032 of 1,795 Shark Island prisoners perished. *Id.* at 211-212. In contrast, of the estimated 20,867 men deployed by the Germans, 13,029 either died (mostly from disease) or were returned to Germany because of illness. LAU, *supra* note 75 at 5, 8.

111. DRECHSLER, *supra* note 45, at 231.

112. *Id.* at 233.

113. *Id.* at 232.

114. Oskar Bongard, *Dernburgs Studienreise nach Britisch- und Deutsch-Sudafrika*, 25 DEUTSCHE KOLONIALZEITUNG 704 (1908).

Those who did work toiled under harsh conditions¹¹⁵ which would not improve once Germany lost its colonial empire.

C. *South Africa Takes Charge*

In 1915, forces from the Union of South Africa, of which the Cape Colony had become a part in 1910,¹¹⁶ fighting in World War I on the side of the Allied and Associated Powers occupied German South West Africa. After the War, the Union administered what had been the German protectorate on behalf of Britain as a League of Nations C mandate.¹¹⁷ It also effected the legislative unity of South West Africa and the Walvis Bay territory.¹¹⁸ South Africa proceeded to treat the mandate as a veiled annexation and instituted a harsh system of rule.¹¹⁹

After World War II, the United Nations replaced the League of Nations. All mandated territories¹²⁰ were to come under the United Nations trusteeship system which envisioned eventual independence. South Africa refused to submit the South West Africa mandate to trusteeship and one of the most protracted international legal disputes of the century ensued.¹²¹ More than four decades elapsed before superpower cooperation and the declining fortunes of South Africa brought Namibia to independence in 1990 via United Nations-supervised elections.¹²² The country's democratic constitution enshrines myriad human rights guarantees.¹²³ However, despite the good intentions of those in the new government, Namibia inherited considerable structural and socio-economic defects. For example, the Namibian government's inability to attract foreign investment, despite considerable efforts including the passage of liberal laws,

115. DRECHSLER, *supra* note 45, at 231-44.

116. The Union came into being via the South Africa Act, 1909, 9 Edw. 7, ch. 9. The Union was a white, self-governing British dominion. On the events leading to the creation of the Union, see LEONARD THOMPSON, *THE UNIFICATION OF SOUTH AFRICA 1902-1910* (1960). After the formation of the Union of which the Cape became a part, Walvis Bay passed from the Cape to the Union. BERAT, *supra* note 1, at 13.

117. BERAT, *supra* note 1, at 122-37.

118. The legal process by which this occurred is described at length in *id.* at 47-67.

119. *Id.* at 47-89.

120. The mandates system is discussed in BERAT, *supra* note 1, at 126-131.

121. *Id.* at 2-12.

122. The independence process is described in Berat and Shain, *supra* note 1.

123. See Republic of Namibia, Constitution, GOVERNMENT GAZETTE, G.N. 1 (1990).

is largely the result of a sordid colonial legacy.¹²⁴ The colonial boundaries Namibia inherited mean that it is largely desert with a sparse population.¹²⁵ Consequently, it does not have a domestic market of a size appealing to foreign multinational companies and also has an unenviable position between economically and infrastructurally more advanced South Africa and the declining nations of sub-Saharan Africa. While geography might be surmountable if the population were highly skilled, the complete lack of regard for African education by Namibia's erstwhile German and then South African overlords has created a population that is barely literate and numerate.¹²⁶ The inability to expand the private sector has meant that the government has bloated the bureaucracy—with disastrous effects on efficiency—in an effort to create jobs. Indeed, it is estimated that fifty-five percent of all employment is in the public sector.¹²⁷ With such a dismal inheritance, the desire of the Namibian government to seek remuneration for past injustices from Germany is understandable. However, questions of standing and state succession must be resolved before such a claim can be lodged.

II. STANDING AND SUCCESSION OF STATES

A. *Standing*

With the exception of post-World War II developments according rights to the individual under international law,¹²⁸ jurists have long deemed states to be the sole actors in international affairs. Historically, as long as acts of domestic repression

124. *Cabinet Looks at Ways of Reactivating Economy*, NAMIBIAN, August 1, 1991, at 3.

125. See generally Fiona Adams, Wolfgang Werner, and Peter Vale, *The Land Issue in Namibia: An Inquiry* (Namibia Institute for Social and Economic Research 1990).

126. Marja-Liisa Kiljunen, *The White Man's Burden: Africans Under Apartheid*, in NAMIBIA: THE LAST COLONY 105-09 (Reginald Green, Maria-Liisa Kiljunen, & Kimmo Kiljunen eds. 1981).

127. Robert Rotberg, *Namibia: An African Success Story - So Far*, CHRISTIAN SCIENCE MONITOR, July 29, 1992. Indeed, there should have been an aid package tailored to the country's needs from the appropriate U.N. development agencies as the reward for playing by the rules of the international transition game. Ideally, the receipt of that aid package would have been contingent upon the new government's continued adherence both to internationally-accepted standards of human rights and particularly, those human rights guarantees enshrined in the country's new democratic constitution.

128. These developments are described in Berat, *supra* note 4.

did not interfere with international relations, the issue of evening the score by aggrieved individuals or groups was, by and large, not a subject that concerned the international community. The issue was settled domestically with acts of retribution by competing contestants for power who vied for personal loyalty. It was only with the eradication of state absolutism as expressed in Louis XIV's statement "L'etat, c'est moi,"¹²⁹ and the emergence of the impersonal modern state that governments and citizens began to become accountable to universal legal codes. Even then, however, the concept of state sovereignty, long at the center of traditional international law, continued to elevate state dominion over people and territory. Such a dispensation left little recourse to aggrieved individuals or groups either inside or outside the state.¹³⁰

Instead, in the international sphere, the sole international responsibility for state activity acknowledged by this traditional international law was state responsibility for the breach of one state's rights—contractual, territorial, or delictual—by another state. Indeed, beginning in the eighteenth century, international law dealt only with the laws governing sovereign states.¹³¹ Rejecting natural law concepts whereby human beings were at the center of international law, this unenlightened international jurisprudence flew in the face of contemporaneous Enlightenment notions and practices of individualism that began to find expression primarily in England, the United States, and France. International law was, therefore, unable to deal with the many vexing questions resulting from state actions against individuals and groups including state-sanctioned torture against individuals—what are now termed crimes against humanity—and a host of other evils such as arbitrary arrest, detention without trial, and disappearances.

It was only after the Nazi and Japanese excesses of World War II that international human rights law arose in response to state persecution of individuals and groups. While proving of lit-

129. DULAURE, *HISTORY OF PARIS*, 387 (1863).

130. Jurist M.N. Shaw has written, "[t]he principal subjects of international law are nation-states, not individual citizens." M.N. SHAW, *INT'L L.* 1 (2d ed. 1986).

131. According to jurist Ian Brownlie, "[t]he sovereignty and equality of states represent the basic constitutional doctrine of the law of nations. . . . IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 287 (3d ed. 1979).

tle utility to those still under repressive systems, once those systems are finally dismantled, appeals to such universal human rights norms and international institutions offer those who have been wronged some hope of vindication and compensation should they decide to proceed against their former oppressors. Even then, the potential for optimal results deriving from such an appeal is minimized by the fact that the dominant actors in the world community continue to be nation-states which jealously guard their sovereignty and territorial integrity and abhor interference in their perceived domestic jurisdiction. Under this "traditional" international law, therefore, it is uncontroverted that the Namibian government has standing to bring suit against Germany in international fora such as the International Court of Justice, or to take up the case of its citizens in arenas such as the United Nations or via bilateral negotiations.¹³² However, with regard to the question of liability for acts committed against the Namibian people, the historical nature of such a claim, however, raises substantial problems of state succession that demand resolution before the Namibian government can proceed to seek redress.

B. *The Succession of States*

1. *General Principles*

The problem of succession of states is "the legal consequences of a change of sovereignty over territory."¹³³ Such a change may occur through cession, annexation, the formation of a union or federation, or the attainment of independence. In all instances, one sovereign is replaced by another with regard to the territory in question. Accordingly, state succession influences rights and obligations regarding treaties, private rights, and public administration.¹³⁴ In order to determine whether state succession has occurred, the interested party must understand, as jurist J.H.W. Verzijl put it, the "fundamental difference between

132. In this regard, see also HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 194-96 (1966).

133. MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 157 (1982).

134. The history of the law of state succession is found in J.H.W. VERZIJL, *VII INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* (1974).

cases in which one or more new states really succeed to an old one, and those in which a state only appears to be new, but despite the modifications in size, its system of government, or its constitutional or social structure, is in actual fact identical in the eyes of international law with its former self."¹³⁵ In the latter instance, there is legal continuity for purposes of international law and no state succession has occurred.

Whether state succession has occurred is a crucial issue because it is generally accepted that successor states inherit no responsibility for international delicts or crimes committed by the predecessor state.¹³⁶ The only two exceptions are if the successor state benefits from the acts of the predecessor state or if it acts in concert with the predecessor in committing the delict.¹³⁷ These principles were articulated in two seminal cases. In the *Robert R. Brown Claim*,¹³⁸ Robert Brown, a United States citizen had, in 1895, made substantial preparations for the projected opening of a public gold digging at Witfontein in the South African Republic.¹³⁹ He had placed many agents on the land and arranged for the transmission to them by heliograph of notice of the actual grant of licenses. Until that notice from the responsible clerk arrived, claims could not be staked.

As Brown's methods were unorthodox, the relevant authorities initially refused to grant the licenses and then rescinded the proclamation opening the field. Brown brought an action in the Republic's courts and was granted twelve hundred licenses.

135. *Id.* at 16.

136. *The International Law Commission's Draft Articles on State Responsibility of 1978*, 1978 2 INT'L L. COMM. Y.B. 78, provides that a breach of an international obligation is an "internationally wrongful act" (art. 19(1)) entailing the international responsibility of the breaching state (art. 1). An internationally wrongful act can be either an international delict or an international crime. An international delict is "any internationally wrongful act which is not an international crime." *Id.* at art. 19(4). An international crime is a breach of an international obligation "so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole." *Id.* at art. 19(2).

137. D.P. O'CONNELL, *STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW* 480-83 (1967).

138. (1923) 6 R.I.A.A. 120.

139. The South African Republic was an Afrikaner republic that eventually became incorporated into the Union of South Africa. Its history and legislation are described in Lynn Berat, *Constitutionalism and Mineral Law in the Struggle for a New South Africa: The South African War Revisited*, 15 SUFFOLK TRANSNT'L L.J. 61 (1991).

However, the executive and the judiciary became embroiled in a power struggle and, after the Chief Justice was dismissed, the judgment in Brown's favor was dismissed. Consequently, Brown petitioned Queen Victoria as sovereign of the Republic for intercession, but he was directed to take up his claim with the United States government.

In 1901, Great Britain annexed the Republic and Brown petitioned the British Governor of the Transvaal, as the Republic had become known, for redress. It was only in 1923 that the Anglo-American Arbitral Tribunal considered the case.¹⁴⁰ The Tribunal dismissed the claim because it could not support the principle that the "doctrine [that] a State acquiring a territory by conquest without any undertaking to assume such liabilities is bound to take affirmative steps to right the wrongs done by the former State."¹⁴¹ Two years after *Brown*, the same Anglo-American Arbitral Tribunal heard the Hawaiian Claims.¹⁴² In that case, Britain presented claims against the United States regarding wrongful imprisonment, detention in prison, and forced departures from the country, and other indignities which were inflicted upon British subjects by Hawaiian authorities when Hawaii was a republic and not yet annexed by the United States. The Tribunal held that the claims had to be rejected because the annexation extinguished the legal unit responsible for the wrongs in question and legal liability was extinguished with it.

Following the logic of these two cases, the fact that Germany lost part of its territory following World War I—in this case that colonial part in which the acts complained of occurred—should not extinguish a claim against Germany if no state succession occurred in Germany itself.

140. The Tribunal was established under a Special Agreement of August 18, 1919 (211 C.T.S. 408).

141. (1923) 6 R.I.A.A. 120. The Tribunal also noted that the authority Britain had enjoyed over the Republic as sovereign "fell far short of what would be required to make [Great Britain] responsible for the wrong." *Id.*

142. (1925) 6 R.I.A.A. 157.

2. Germany

In 1871, the North-German Federation and the South German States joined to form the German Reich¹⁴³ which gave way to the Weimar Republic in 1918. The Republic was a weak state plagued by hyperinflation and high unemployment. Indeed, the dire economic conditions were, at least, partly responsible for the rise of Adolf Hitler's Third Reich in 1934. However, unlike the 1871 creation of the Reich which was a state succession, the later developments were examples of regime change.¹⁴⁴

The defeat of the Third Reich in World War II, the Allied Occupation, and the subsequent creation of two Germanys—the Federal Republic of Germany (F.R.G.) in the west and the German Democratic Republic (G.D.R.) in the east—complicates matters. If it is determined that the German Reich incurred liability for the acts it committed in Namibia, it must be decided whether the F.R.G., G.D.R., or both were successor states.

The position in the F.R.G. was that it was “not the successor of, but rather identical with, the still existing organless German Reich.”¹⁴⁵ This theory was derived from F.R.G. Basic Law¹⁴⁶ and supported by court decisions to the effect that although the German state existed after 1945, it had no capacity to act. Accordingly, the F.R.G. accepted no liability for debts incurred by the Reich.¹⁴⁷ Moreover, as the F.R.G. merely coexisted

143. WILLIAM HARBUTT DAWSON, *THE GERMAN EMPIRE 1867-1914 AND THE UNITY MOVEMENT* (1966). In the literature, the Reich is also referred to as the Second Reich or the German Empire.

144. The best discussion of the succession question for this period is found in VERZIJL, *supra* note 134.

145. Geck, *Germany and Contemporary International Law*, 9 *TEX. INT'L L.J.* 263, 265-66 (1974).

146. FRG Basic Law, Preamble, arts. 16, 23, 116, 146.

147. This argument is discussed in greater detail in VERZIJL, *supra* note 134, at 267-68. The 1951 ruling by the Federal Supreme Court in the *Collision of the Baltic* stopped short of determining whether the F.R.G. was liable for a claim brought against the Reich. I.L.R. 1951, Case No. 15 (Oct. 30, 1951). Instead, the case, which involved a claim of set-off by the owner of a neutral ship against a claim by the F.R.G. for collision with a German ship during the war. The Court found that “the German Reich is to be regarded as a legal entity even after the establishment of the Federal Republic” although the F.R.G. owned all assets of the Reich situated in the Western occupation zone. *Id.* at 41. The court went on to acknowledge “the doctrine of identity, which stresses the identity of the German Reich and the [Federal Republic as if] there has been no change in the entities in whom the claims are vested.” *Id.* at 42. With regard to set-offs, the Court

with the German state, it was not a successor state. The courts of other western states also accepted the F.R.G. view that it was not the Reich's successor state. For example, to the Swiss, the creation of the F.R.G. and G.D.R. did not mean that the Reich's international obligations were terminated. Hence, in 1952, the Court determined that a 1905 treaty between Switzerland and Germany continued to exist between Switzerland and the F.R.G.¹⁴⁸ Six years later, the Supreme Court of the Netherlands found that the F.R.G. was "the continuation under international law of the former German Reich."¹⁴⁹

Complicating the question of state succession was a 1972 treaty between the two Germanies in which they recognized each other as sovereign states.¹⁵⁰ However, in 1973, the F.R.G.'s Federal Constitutional Court, responding to a challenge to the validity of the treaty, insisted that the two Germanys shared the same roof formed by the still existing Reich.¹⁵¹ Hence, the two were not foreign states and neither East nor West could represent all of Germany. The Court went on to uphold the treaty which it viewed as merely giving de facto recognition to the G.D.R. and which explicitly reserved the national question. The views of the F.R.G. and its supporters contrasted markedly with the G.D.R. position that the old German state met its end with the 1945 termination of hostilities and that it as a successor state was not responsible for any acts of the Reich. That view apparently became discredited in 1990. Indeed, it seems that the

continued, "it would be contrary to good faith if a creditor of the Reich who, before [the War's end] was entitled to claim a right of set-off, were to be deprived of that right by reason of the collapse of the Reich, while the latter would be in no way precluded from asserting its claims against its debtors." *Id.*

148. I.L.R. 1952, No. 14.

149. 26 I.L.R. 477 (1958-II). The opinion was contrary to a 1949 lower court decision to the effect that a state succession had taken place because the Reich no longer existed and had been replaced by two distinct sovereign entities. *Flesche Case*, A.D. 1949, No. 87 at 267-68. Both Verzijl and the jurist Hans Kelsen supported this view. VERZIJL, *supra* note 134, at 277; HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 386 (1966). In the United States, the Second Circuit agreed with the view that the Reich and the F.R.G. were not the same and that the F.R.G. was a successor state. *Kunststammungen zu Weimar v. Elicofon*, 536 F.Supp. 829, 853-55 (E.D.N.Y. 1981), *aff'd* 678 F.2d 1150 (2d Cir. 1982).

150. Federal Republic of Germany-Germany Democratic Republic Recognition Treaty, 1972.

151. F.R.G. Constitutional Court.

notion of "reunification" ascribed to the process by which the two Germanys came together lends credence to the West German idea that, although divided, the German state continued to exist in the post-World War II years with two governments exercising jurisdiction over different parts of the country. This means that there has been no German state succession since 1871. By this logic, the reunification merely represented the restoration of the complete sovereignty of the continuously existing German state. While Germany, therefore, can be held liable for the acts committed early in this century, it may be that South Africa and Namibia also can be held accountable.

3. *South Africa*

Following the reasoning regarding state succession articulated above, South Africa, which administered the mandate on behalf of the British Empire, would not be liable. The territory did not, under international law, ever become part of South Africa although a serious argument can be made that South Africa can be held liable on other grounds, namely the imposition of apartheid, a crime against humanity.¹⁵² Germany could, of course, argue that South Africa's behavior in Namibia amounted to a de facto state succession and that South Africa was enriched by German behavior because South Africa had fewer unruly Africans to subdue; therefore, the cost of administering the area was less, so South Africa gained an economic benefit entirely keeping with its apartheid policies.¹⁵³ By this logic, South

152. See *infra* text accompanying note 155.

153. It is extremely unlikely that Germany would make the latter claim in an international forum. In 1964, the case of *Pittacos v. Belgium*, 45 I.L.R. 24 (1964), came before the Belgian Court of Appeals. Pittacos had owned a plantation in the Belgian Congo which had become infested with a contagious plant disease. The Belgian colonial authorities in the Belgian Congo had ordered that the plantation be destroyed to prevent the spread of the contagion. The colonial courts found the official policy to be improper and unnecessary. Once the Congo became independent Zaire, Pittacos brought suit against Belgium in the Belgian courts. Pittacos argued that quasi-delictual debts incurred before a state is dismembered continue to be the responsibility of the dismembered state, namely Belgium. The Court of Appeals agreed that Pittacos had accurately stated the governing equitable principle but, based on the facts of the case, it rejected his argument. Moreover, the Court found that the general policy of destroying diseased property benefitted the colony even if the actions were improper in the Pittacos case. As the whole colony had been benefitted by the policy and the actions had been for a proper motive, liability could not be made to lie with Belgium. Following the logic of Pittacos, in the

Africa would be liable because it benefited from Germany's conduct.¹⁵⁴ However, it is unlikely that perverse benefits which fly in the face of international norms would shift liability to South Africa.¹⁵⁵ Thus, South Africa cannot be held responsible for acts committed under German rule. This does not necessarily mean that the new Namibian government is not liable. Although the standing issue is resolved in Namibia's favor,¹⁵⁶ the question of Namibian responsibility remains to be answered.

Namibia case, the equitable principle that delictual liability remains with the dismembered state would make Germany rather than the successor states of South Africa or Namibia liable. Since it would be perverse for Germany to argue that the policy of genocide benefitted the colony, that it was engaged in for a proper motive, and that, therefore, the benefitted successor state should be liable, the liability should remain with Germany.

154. In the Lighthouse Arbitration (*France v. Greece*), (1934) P.C.I.J., Ser. A/B, No. 62, the parties had, by special agreement, referred the question whether a concession for the maintenance of lighthouses agreed between the Ottoman Government and the French firm of Collas and Michel in April 1913 was "operative as regards the Greek Government in so far as concerns lighthouses situated in territories assigned to it after the Balkan Wars or subsequently." The P.C.I.J. held that because negotiations for the concessions had begun before the war, it was evident that there had been no intention of excluding the territories which were by 1913 occupied by Turkey's adversaries. In the Lighthouses in Crete and Samos Case, (*France v. Greece*) (1937) P.C.I.J., Ser. A/B, No. 71, the Court dealt with the applicability of its judgment to lighthouses in Crete and Samos which were autonomous areas in 1913. It found that Turkish sovereignty continued over Samos and Crete until it was formally renounced in treaties after the end of World War I. In 1956, a French-Greek arbitral tribunal held that the issue of succession to delict must be decided by reference to all the facts and that no general principle existed. According to the tribunal, Greece, the successor state, was liable for acts by Crete, the predecessor state, which violated the rights of the French company. This was so because a Greek company was responsible for the violation in question and its actions occurred with the full knowledge of the Greek government which, after becoming successor to the Cretan government, maintained the wrongful situation. O'CONNELL, *supra* note 138, at 483. However, that same year, in the *Aghios Nicolaos* Case, the same tribunal found that the Greek government was not liable when it was not involved in the complicated relationship among the government of Crete, the Ottoman government, and the same French company. The tribunal queried the logic of permitting both parts of a dismembered state to escape international obligations to provide compensation which would have lain with the predecessor state responsible for the wrongful act. *Id.*

155. Namibia, of course, could proceed against South Africa for having practiced apartheid and racial discrimination in the country. Such behavior contravenes the *jus cogens* and is punishable under international law. On this subject, see BERAT, *supra* note 1, at 146-54. This issue, however, is beyond the scope of this article.

156. See *supra* note 132 and accompanying text.

4. *Namibia*

As indicated above, once Germany lost World War I, German South West Africa became a Class C mandate under the League of Nations system and the Union of South Africa, now the Republic of South Africa, administered the mandated territory on behalf of the British Empire.¹⁵⁷ Although this transfer of power ended German sovereignty over the area, it did not mean that sovereignty was vested in the League of Nations. The League was an international organization with certain international rights and duties. Its nature was, however, *sui generis* in the international law of the day. It possessed none of the attributes of statehood, namely a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.¹⁵⁸ Accordingly, sovereignty over Namibia did not vest in the League which, instead, had supervisory power over mandates.

Sovereignty over South West Africa also did not vest in South Africa despite the expressed intention of South Africa to the contrary. From the start, South Africa treated the mandate as a veiled annexation. It continually took actions that asserted South African sovereignty over the territory. The Permanent Mandates Commission repeatedly rejected any act or suggestion that a mandatory had sovereignty over a mandated territory. For example, when the preamble to a 1926 Portuguese-South African treaty delimiting the boundary between South West Africa and Angola provided that "the Government of the Union of South Africa, subject to the terms of the said mandate, possesses sovereignty over the territory of South West Africa lately under the sovereignty of Germany,"¹⁵⁹ the Commission objected. In a report to the League Council it indicated that

[u]nder the circumstances, the Commission doubts whether such

157. See *infra* note 162 and accompanying text.

158. The generally accepted criteria for statehood appear in article 1 of the Montevideo Convention on the Rights and Duties of States of 1933. It provided that "the state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states." Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.S. No. 881, 164 L.N.T.S. 19.

159. T.S. No. 29; 123 BRITISH AND FOREIGN STATE PAPERS 590.

an expression as 'possesses sovereignty,' used in the preamble to the above-mentioned Agreement, even when limited by such a phrase as that used in the above-quoted passage, can be held to define correctly, having regard to the terms of the Covenant, the relations existing between the mandatory power and the territory placed under its mandate.¹⁶⁰

Subsequently, in 1927 and 1930, the Council passed resolutions stipulating that mandatory powers did not have sovereignty over their mandates.

It would seem, then, that by default, sovereignty over South West Africa vested in the people themselves. This was not the case. In international practice, League of Nations mandates and later, in the early post-World War II years, trust territories under the United Nations, were dependent territories and in terms of succession of states, they received the same treatment as colonies. Accordingly, they had no sovereignty before independence. Sovereignty over South West Africa, therefore, remained in suspension. This view was expressed by Lord McNair in his separate opinion in the International Court of Justice's 1950 advisory opinion on the legal status of the territory.¹⁶¹ He wrote that "sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the territory obtain recognition as an independent state, as has already happened in the case of some of the Mandates, sovereignty will revive and vest in the new state."¹⁶² Following this view, it would appear that, in 1990, the new Namibia, which came into being via the U.N.-controlled elections process, began its life as a new state, a *tabula rasa* in international relations. Although the new state's government has legitimate internationally-recognized authority to represent the Namibian people,¹⁶³ Namibia cannot be held liable

160. Permanent Mandates Commission, Minutes of the Permanent Mandates Commission 182 (1926), Doc. C. 632 M. 248.

161. International Status of South West Africa, 1950 I.C.J. 150.

162. *Id.* at 150.

163. However, it is more appropriate to argue that because of its peculiar international legal status prior to independence, the Council for Namibia must be deemed to be the predecessor state for some purposes, namely membership in certain international organizations. This proposition and the issues of the obligations of the new government with regard to treaties and private rights are elaborated upon in Lynn Berat, *Namibia: The Road to Independence and the Problem of Succession of States*, 18 J. POL. SCI. 33, 48-55 (1990).

for atrocities committed during the days of German rule.

In light of the foregoing, it is apparent that because the present German state may be seen as a direct legal continuation of the old Germany instead of the creation of a new sovereign entity, it, rather than South Africa and Namibia, should be accountable for acts which took place in Namibia earlier in this century. This being the case,¹⁶⁴ the most likely complaint is for genocide. However, if the Namibian government alleges genocide, the problem of retroactivity then arises because there is a question as to whether the acts committed at that time, which are now violative of international law, were also illegal then.

III. GENOCIDE: A CAUSE OF ACTION AND THE QUESTION OF RETROACTIVITY

A. *Genocide*

In pursuing its claim, the Namibian government must first decide upon the grounds on which it can proceed against Germany. Based on the historical evidence, it seems that a case can be made that the Germans engaged in genocide, a term first used by the scholar Lemkin in 1944.¹⁶⁵ The relevant international instrument is the Convention on the Prevention and Punishment of Genocide, which was adopted by the U.N. General Assembly in December 1948 and entered into force just over two years later in January 1951.¹⁶⁶ According to article 2,

genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.¹⁶⁷

Article 1 provides that genocide, "whether committed in time of

164. However, the argument can also be made that, regardless of whether modern Germany is the same state as the Reich or a new one, there are no sound juridical reasons as to why it should escape liability for the acts of its predecessor.

165. LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* (1944).

166. 78 U.N.T.S. 277.

167. *Id.* at art. 2.

peace or in time of war, is a crime under international law which [the contracting parties] undertake to prevent and punish."¹⁶⁸ Article 6 establishes that genocide can be prosecuted in "a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction. . ."¹⁶⁹ Moreover, the contracting parties are obliged to enact legislation making genocide a crime within their territories and to provide "effective penalties for persons guilty of genocide" or of associated acts,¹⁷⁰ such acts include conspiracy, direct and public incitement, attempt and complicity.¹⁷¹ Those punishable for genocide and associated acts include "constitutionally responsible rulers, public officials or private individuals."¹⁷² The Convention also declares that the commission of genocide violates the *jus cogens*.¹⁷³ Certainly, the available evidence on German treatment of the Herero and Nama/Orlam fulfills the criteria for genocide. There was intent to destroy the groups by killing, causing serious bodily or mental harm, and inflicting conditions calculated to bring about its physical destruction.¹⁷⁴

The Genocide Convention, of course, did not exist at the time of German rule of South West Africa. However, the mere existence of the Convention does not mean that before its passage genocide was not a crime under international customary law.

The exact parameters of customary international law, namely those practices widely adhered to by the international community, are still subject to scholarly debate. Jurist Louis Henkin has suggested that it is

widely accepted that it is now a violation of international law for any state to practice or condone genocide, slavery or slave trade, killing or causing the disappearance of persons, torture, prolonged arbitrary detention, comprehensive and systematic racial discrimination, and perhaps other consistent patterns of gross violations

168. *Id.* at art. 1.

169. *Id.* at art. 6.

170. *Id.* at art. 5.

171. *Id.* at art. 3.

172. *Id.* at art. 4.

173. Peremptory norms. On the *jus cogens*, see *infra* text accompanying note 175.

174. See *supra* notes 61 and 62 and accompanying text.

of internationally recognized rights.¹⁷⁵

According to the Restatement (Third) of the Foreign Relations Law of the United States, a state violates international law if, as a matter of state policy, it practices, encourages, or condones genocide.¹⁷⁶ Moreover, the commission of genocide would not only leave Namibia with a cause of action but also give rise to universal jurisdiction.

Universal jurisdiction permits any state to prosecute offenders for certain crimes even though the prosecuting nation lacks a traditional nexus with either the crime, the alleged offender, or the victim. Courts developed this doctrine centuries ago to deal with piracy then menacing international trade and justified its application by deeming the pirate *hostis humani generis*, the enemy of all people.¹⁷⁷ Later, the doctrine expanded to enable all states to prosecute slave traders and war criminals. Today, drawing on multinational conventions that outlaw specific crimes, such as the Genocide Convention, and on fundamental norms that have developed in international criminal law, legal scholar Kenneth Randall maintains that universal jurisdiction has expanded further to allow any state to prosecute those charged with hijacking, terrorism, torture, apartheid, genocide, and other offenses that the international community widely condemns.¹⁷⁸ As these offenses endanger values to which the global community is committed, the legal force of any state's challenge to the prosecution by another state of universal crimes is thus diminished.¹⁷⁹ Although in the current international climate presumably no other state would be willing to bring an action against Germany, there is some indication that the whole question of genocide may be obviated by the recognition, in 1990, by

175. LOUIS HENKIN, *THE AGE OF RIGHTS*, 21 (1990).

176. Restatement (Third) of the Foreign Relations Law of the United States (1987), sec. 702 (customary international law of human rights), reprinted in FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS* 332 (1990). The Restatement also deems violative of international law: slavery or slave trade; the murder or causing the disappearance of individuals; torture or cruel, inhuman, or degrading treatment or punishment; systematic social discrimination; and a consistent pattern of gross violations of internationally recognized human rights. *Id.*

177. Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 *TEX. L. REV.* 783, 788-792 (1988).

178. *Id.* at 785.

179. *Id.*

three German political parties - the Christian Democratic Union, the Social Democratic Party, and the Green Party - that genocide in fact occurred.¹⁸⁰

B. *The Problem of Retroactivity*

While the commission of genocide is today clearly an international crime, the question remains whether customary international law proscribed genocide even at the beginning of this century, thus making Germany's conduct actionable or whether the prohibition was a post-World War II development. In order to make a claim of genocide, the Namibian government must first resolve this problem of retroactivity, namely whether the acts committed constituted breaches of customary international law at the time they occurred. Indeed, the retroactivity issue was widely debated during and in the years immediately after the Nuremberg trials.

The Nuremberg Tribunal came into existence via an August 1945 agreement among the victors of World War II.¹⁸¹ The Agreement provided for the establishment "after consultation with the control council for Germany, [of] an international military tribunal for the trial of war criminals whose offenses have no particular geographical location."¹⁸² The Charter of the Tribunal, which was annexed to the Agreement, gave a definition of crimes against humanity as

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecution on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of any domestic laws of the country where perpetrated.¹⁸³

The Tribunal's jurisdiction was based on German violation of various treaties, particularly the Kellogg-Briand Pact.¹⁸⁴ The

180. NAMIBIAN, November 5, 1990. Presumably, before Namibia could get satisfaction for its claim, the opinion of these political parties would have to become the dominant view within the German government.

181. United States, United Kingdom, France and the Soviet Union.

182. 82 U.N.T.S. 279.

183. Charter of the Military Tribunal at Nuremberg, art. 6C.

184. General Treaty for the Renunciation of War, 1928, 94 L.N.T.S. 57; 22 A.J.I.L.

Tribunal construed its own jurisdiction narrowly and thus insisted that its power did not extend to "crimes against humanity" unless such crimes occurred "in execution of, or in connection with" war.¹⁸⁵ Although Count Three of the Nuremberg indictment charged the defendants with war crimes and Count Four charged them with the commission of crimes against humanity, the Tribunal, in line with its narrow interpretation of its authority, refused to convict the defendants for such crimes committed prior to the beginning of World War II.¹⁸⁶ It did, however, find them guilty of crimes committed during the war over the objection of the defendants who argued that their behavior was not criminal under any law at the time they acted. Thus, although the Tribunal refused, for narrow jurisdictional reasons, to make the crimes in question retroactive for the period before the War, it did permit retroactivity for the War years. According to the Tribunal, "so far from it being unjust to punish. . . , it would be unjust if . . . wrongs were allowed to go unpunished."¹⁸⁷ The mere fact that the Tribunal Charter acknowledged crimes against humanity and that individuals were convicted despite the absence of any international agreement to which Germany had been party, gives further credence to the idea that the prohibition on the proscribed conduct derived from natural law rather than positive law.

The Nuremberg notion that retroactivity was essential for justice to be served was not new. As the common law developed in England, heinous acts such as murder were retroactively made into crimes. Indeed, such behavior had been punished for centuries and an accused could not seek exoneration on the grounds that when he committed the act, no statute or other law made them illegal.¹⁸⁸ It was this logic that the Nuremberg Tri-

Suppl. 109, 114.

185. Trial of the Major German War Criminals (Cmd. 6964); The Charter and Judgment of the Nuremberg Tribunal: History and Analysis, U.N. Doc. 1949 Vol. 7.

186. In response to this narrow constructionism, in 1948, the United Nations General Assembly unanimously adopted the Convention on Genocide. See *supra* notes 166-175 and accompanying text.

187. International Military Tribunal Secretariat, Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, November 14, 1945 - October 1, 1946, 42 vols. (1947-49), quoted in A. D'ENTREVES, NATURAL LAW 110 (1951). The judgment is also discussed in CHERIF BASSIOUNI, 1 INTERNATIONAL LAW 276 (1980).

188. BASSIOUNI, *supra* note 186.

bunal adhered to in delivering its judgment. It was this same logic that the Israeli Supreme Court applied in its 1962 condemnation of Nazi leader Adolf Eichmann.¹⁸⁹ In that case, the Court relied upon Blackstone's *Commentaries* and distinguished between *ex post facto* laws and retroactive laws. It followed Blackstone's notion that

ex post facto laws are objectionable when, after an action indifferent in itself is committed, the legislator then, for the first time, declares it to have been a crime and inflicts a punishment upon the person who has committed it. . . . Here it is impossible that the party could foresee that an action, innocent when it was done would afterwards be convicted to guilt by subsequent law. He had, therefore, no cause to abstain from it and all punishment for not abstaining must, in consequence, be cruel and unjust.¹⁹⁰

The Court distinguished such *ex post facto* treatment from retroactivity in which case no new crime was created. Thus, the Court held that

[t]he crimes created by the Law and of which the appellant was convicted must be deemed today to have always borne the stamp of international crimes, banned by international law and entailing individual criminal liability.¹⁹¹

Moreover, the Court continued,

[A]s is well known, the rules of the law of nations are not derived solely from international treaties and organized international usage. In the absence of a supreme legislative authority and international codes, the process of its evolution resembles that of the common law; . . . its rules are established from case to case, by analogy with the rules embodied in treaties and in international custom, on the bases of the 'general principles of law recognized by civilized nations,' and in the light of the vital international needs that impel an immediate solution. A principle which constitutes a common denominator for the judicial systems of numerous countries must clearly be regarded as a 'general [principle] of

189. *Atty. Gen. v. Eichmann*, 36 Int'l L. Rep. 277 (Sup. Ct. Israel 1962).

190. *Id.*

191. The court deemed these crimes to have such opprobrium that they gave rise to universal jurisdiction. According to the Court, "It is the particular universal character of these crimes that vest in each State the power to try and punish any who assisted in their commission." *Atty. Gen. v. Eichmann*, 36 Int'l L. Rep. 277 (Sup. Ct. of Israel 1962). On universal jurisdiction, see *supra* note 177 and accompanying text.

law recognized by civilized nations. . .¹⁹²

According to the logic of the Israeli court, genocide always constituted an international crime. Indeed, this seems to have been recognized by the Germans themselves as when the Chancellor lobbied the Kaiser to rescind von Trotha's order on the grounds that it violated "all Christian and human principles" and demeaned Germany's "standing among the civilized nations of the world."¹⁹³ Thus, the German actions against the Herero and Nama/Orlam would be examples of international crimes.

IV. REPARATIONS: THE APPROPRIATE REMEDY

Having established that Germany can indeed be held liable for genocide, the nature of that liability must then be determined. Unlike at Nuremberg or in the Eichmann trial, those responsible for atrocities in Namibia are no longer alive. Thus, individual liability is impossible. Instead, reparations are the appropriate means of making amends for past wrongs. In 1928, in the *Chorzow Factory Case* between Germany and Poland involving German factories taken over by the Polish Government, the Permanent Court of International Justice¹⁹⁴ established that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."¹⁹⁵ Such reparation

192. *Eichmann*, 36 Int'l L. Rep. 277.

193. See *supra* note 76 and accompanying text.

194. The Permanent Court of International Justice was the first World Court. It was established pursuant to article 14 of the Covenant of the League of Nations. The Covenant was Part I of the Treaty of Versailles with Germany of June 28, 1919 (225 C.T.S. 188) and of the Peace Treaty of St. Germain-en-Laye of September 10, 1919 with Austria (226 C.T.S. 8) and the Treaty of Neuilly of November 27, 1919 with Bulgaria (226 C.T.S. 332). A committee of jurists appointed by the League Council drafted a statute approved by the League Assembly on December 13, 1920. League of Nations, Records of the First Assembly, Plenary Meeting 500; P.C.I.J. (ser. D) Ann. 3, at 3. The Court, which was the predecessor of the International Court of Justice, first convened on February 15, 1922 and ceased to exist when the judges resigned on January 31, 1946. The accomplishments of the Permanent Court are described in HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942* (1943).

195. 1928 P.C.I.J. (ser. A) No. 17. The Court held by a nine to three margin that Poland had an obligation to pay as reparation to the German government, not only the value of the undertakings expropriated at the time of the acquisition, but also a compensation equivalent to the damage sustained by the owners. The compensation was to be in the form of a lump sum payment; its calculation was to be made by experts appointed by

must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.¹⁹⁶

The reparation is governed by the rules of international, rather than domestic, law. "The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State."¹⁹⁷

At the end of World War II, the statute of the newly-established International Court of Justice acknowledged three kinds of reparations.¹⁹⁸ These are restitution, indemnity, and satisfaction. Theoretically, restitution or *restitutio in integrum*¹⁹⁹ is the primary form of reparation; it supercedes indemnity, pecuniary reparation for determinable damage including consequential damages, and satisfaction, compensation for non-material or moral injury to the dignity of the state generally taking the form of prosecution of guilty parties or symbolic moves like official apologies. In practice, however, *restitutio* is rarely used as aggrieved individuals and their governments generally favor mone-

the President of the Court. Experts were so appointed, P.C.I.J. (ser. C) No. 16, at 11, but, after a settlement of the dispute by agreement of the parties, another Presidential order terminated the investigation and an Order of the Court ended the proceedings. P.C.I.J. (ser. A) Nos. 18/19.

196. 1928 P.C.I.J. (ser. A) No. 17, at 47.

197. *Id.* at 28. Moreover, because at the level of international law, reparation is made to the state and not to the individual whose claim it espouses, the recipient state has total control of any sum it receives and can dispose of it as it sees fit. Administrative Decision No. V (1924) 7 R.I.A.A. 119.

198. Article 7 of the U.N. Charter established the International Court of Justice as one of the principal U.N. organs and article 92 made it the main judicial organ. Article 92 also provided that the Court is to function in accordance with its statute which is annexed to the Charter and indicates that it is based on the Statute of the Permanent Court of International Justice and forms an integral part of the Charter.

199. The return of property unlawfully taken, the revocation of an illegal act, or the prospective abstention from a repetition of such conduct.

tary compensation.²⁰⁰

Perhaps the most well-known instance of a claim for reparations, and the one which furnished the most valuable precedent for Namibia, involved the post-World War II claims brought by Israel against Germany for atrocities committed by the Nazis against European Jews. Israel demanded the return of all confiscated property that had been owned by Jews; indemnification for survivors who had suffered damage and injury; and reparations for the rehabilitation of the displaced.²⁰¹ The West German government began discussion with Israeli representatives at the Hague in March 1952. At that time, based on an estimated current cost, not the cost that would have been incurred at wartime prices, of U.S. \$3,000 per person to resettle five hundred thousand Jewish immigrants to Israel, the Israeli government sought U.S. \$1,500,000,000.²⁰² On September 10, 1952, the two sides agreed upon \$715 million in services, commodities, and machinery to assist the Israelis in their resettlement task from 1953 to 1966.²⁰³ The agreement came into force on March 27, 1953,²⁰⁴ and, because the reparations were really to the community as a whole and not just to the survivors, it extended long beyond the actual period necessary for resettlement. Following German conduct in the Israeli reparations case, it would seem that Namibia's best hope is to seek to extract a similar agreement with regard to the Nama and Herero. The best course of conduct would be to pursue the claim via diplomatic channels. If negotiations fail, then the Namibian government might pursue its claim in international fora such as the United Nations. Such behavior would enable Namibia to mobilize support in the international community which could be brought to bear on Germany. Namibia also could ask the International Court of Justice for an advisory opinion or bring a claim against Germany in that forum. However, either action involving the I.C.J. might take years to resolve.²⁰⁵ The Namibian government, faced as it is with

200. On this subject, see VERZIJL, *supra* note 134, at VI 742-45 (1973).

201. R. HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 1155 (1985).

202. F. Honig, *The Reparations Agreement Between Israel and the Federal Republic of Germany*, 43 *AM. J. INT'L. L.* 564, 565 (1954).

203. *Id.* at 566.

204. *Id.*

205. There are many jurisdictional hurdles that Namibia would have to overcome if

daunting social and economic problems, should endeavor to settle this matter favorably as soon as possible so that the suffering of its people can be ameliorated.

CONCLUSION

When Namibia became independent in 1990, the country's successful transition to democracy marked the end of decades of foreign domination. Few of the Namibian people, however, could forget the colonial experience whose legacies continue to plague them. Indeed, a particularly sordid part of the Namibian past was the country's late nineteenth century and early twentieth century rule by Germany. During that time, thousands perished through the German overlords' policies. Today, a strong case can be made that under international law Germany is liable for genocide committed in Namibia against the Herero and Nama/Orlam. The appropriate measure of redress is reparation for the injuries suffered. The best way of pursuing such a claim is through diplomatic channels and, if that approach fails, in international fora. Of course, reparations can never adequately serve as compensation for the atrocities which took place.²⁰⁶ Nevertheless, if used prudently by the Namibian government, such reparations would at least help restore Namibia's social and economic fabric which was so tragically torn nearly a century ago.

a case on the merits were to be heard by the I.C.J. Some of these hurdles, which are beyond the scope of this article, are discussed in *BERAT*, *supra* note 1, at 183-84 (discussing compulsory jurisdiction).

206. When Israel began negotiating its reparations agreement with West Germany, both parties understood that, from Israel's point of view, no reparation would ever be adequate compensation for the actions of the Nazis. Honig, *supra* note 202, at 565.