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# SHADOWS OF THE PAST:

# CHANCES AND PROBLEMS FOR THE HERERO IN CLAIMING REPARATIONS FROM MULTINATIONALS FOR PAST HUMAN RIGHTS VIOLATIONS

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Meinen Eltern und meiner Schwester gewidmet.
Ohne Eure Unterstützung wäre dies nicht möglich gewesen.

Mein Dank gilt auch meinen Freunden in Kapstadt und an der University of the Western Cape. Dank Euch wurde dies ein wertvolles, wundervolles und lehrreiches Jahr in meinem Leben

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Dedicated to my parents and my sister.
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Thank is also due to my friends in Cape Town and at the University of the Western Cape. Because of you this year was valuable and wonderful and full of lessons that I have learned.

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# Abstract

*Shadows of the Past: Chances and Problems for the Herero in Claiming Reparations from Multinationals for past Human Rights Violations*

In this thesis I explore the current situation regarding the accountability of transnational corporations, using the lawsuit of the Herero Community of Namibia against two German corporations that were involved in the German colonial enterprise that killed approximately 80% of the Herero Tribe.

After describing the history of the German occupation I will show, that due to different reasons accountability for the crimes committed almost a hundred years ago will not be found on domestic level in Germany, Namibia or the United States. And since accountability of transnational corporations in international law does not exist either, the Hereros will not find any legal remedy there either. From this case I will then change the focus to the general situation. The lack of legislation is due to the opposition the corporations put up against being limited in any way and due to their ability to shift operations to different shores. The country will lose jobs, tax revenues, etc. This ability of the corporations allows them to pressure countries to maintain favourable legal and economical settings. The dilemma of dependency by countries on the corporations results in their inability to control them.



The above-mentioned reasons for lack of international legislation are also true for the domestic level in most countries. One important exception is the Alien Tort Claims Act, an American domestic law, which has already enabled several victims of company crimes to hold them accountable. Showing the chances, I will also show the problems that limit the access to this tool for victims.

Then, using the results of the work so far, I will argue that the Hereros will have huge difficulties in claiming damages from multinationals. Previous cases like the NS-Slave labour cases only succeeded due to public interest / pressure and in the Herero case there is non in Namibia, America or Germany, i.e. I will show the need for public pressure in cases like this and try to show moves that might be beneficial for the Hereros.

Then the focus will shift towards the international situation again. I believe that the current situation, regardless of the need for an instrument, is not going to change soon, since the mentioned reasons will not change. Thus the only way to improve the protection of human rights against infringement by companies is to optimise the current situation and I will show different possibilities.

# DECLARATION

I declare that *Shadows of the Past: Chances and Problems for the Herero in Claiming Reparations from Multinationals for past Human Rights Violations* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.



JAN GROFE NOVEMBER 2002

Signed: .....

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REMARKS:

- Internet material: Since no enumerated pages exist on the Internet, sources found there will be quoted with the authors name and the year of its publishing only. In the bibliography the source on the world wide web will be given together with the time of the last visit to the website.



- The majority of citations of books and journals referred to in the footnotes follow the conventions prescribed by of the University of the Western Cape, i.e. author – year of publishing – page/para, e.g. Drechsler.1984: 51

- Some footnotes, namely the ones dealing with US-American cases, documents from the United Nations and international cases do not follow the UWC conventions of citation, because they are, as the author feels, not compatible. Thus in order not to falsify the footnotes, they follow their own recognised style, e.g. General Assembly Resolution 96 (I), U.N. Doc. A/64/Add.1, at 188-89 (1946) and *Adra v. Clift*, 195 F. Supp. 865 (D.Md. 1961).

# ABBREVIATIONS

| | |
|---|---|
| ATCA | Alien Tort Claims Act |
| CIHT | Cruel, Inhuman or Humiliating Treatment |
| Convention (II) 1899 | Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899. |
| Convention (IV) 1907 | Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. |
| DAL | Deutsche Afrika Linien |
| DM | Deutsche Mark |
| DTA | Deutsche Turnhallen Allianz |
| Forced Labour Convention | Convention Concerning Forced or Compulsory Labour, 28 June 1930 |
| FSIA | Foreign Sovereign Immunity Act |
| Genocide Convention | Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948. |
| GDP | Gross Domestic Product |
| ICC | International Criminal Court |
| ILO | International Labour Organisation |
| MNC | Multinational Corporation |

| | |
|---|---|
| NGO | Non-Governmental Organisation |
| NSDAP | Nationalsozialistische Deutsche Arbeiter Partei |
| OECD | Organization for Economic Cooperation and Development |
| PLAN | Peoples Liberation Army of Namibia |
| RGbl | Reichsgesetzblatt |
| SADF | South African Defence Force |
| Slavery Convention | Slavery Convention, 25 September 1926 |
| Statutory Limitations Convention | Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968 |
| SWA | South-West Africa |
| SWAPO | South West African People's Organisation |
| SWAPOL | South West African Police |
| TNC | Transnational Corporation |
| UN | United Nations |
| UNTS | United Nations Treaty Series |
| Vienna Convention | Vienna Convention on the Law of Treaties 1969 |
| WIR | World Investment Report |

# INTRODUCTION

During the 18th and 19th century, the European Powers started a race for colonisation of Africa, with each power trying to secure regions looking promising economically and agriculturally. The regions occupied were numerous times larger than the original mother country. In the late 19th century the vast continent of Africa was completely divided between the European Powers.

This time of occupation and foreign rule was also a time of violence and human rights abuses for the occupied people. The Europeans considered themselves superior and treated the Africans accordingly. No matter if it was the Italians in Ethiopia, the French in Algeria, the British in Zimbabwe, the Portuguese in Mozambique, the Belgians in Congo, the indigenous population was mostly without any rights, thus human rights violations occurred often and mainly unaccounted for. The Europeans exploited the occupied territories.



Until today the people of those territories suffer from the abuses. They suffer as individuals and as a society. Victims of the human rights abuses tell nightmare tales, but as important, the impact the exploitation and rule had on societies and on the economy. Many problems of nowadays are due to faults of the African rulers of the past decades, but still also many deficits can be traced back to the rotten roots in the time of colonisation. The past is not long ago, but present in everyday life. People are reminded of what happened and the past is alive; the crimes still stirring in the collective memory of the people living in poverty, struggling to enhance their situation.

One of those territories was the country we now know as Namibia, formerly German South-West Africa. The Germans in a joint action of Imperial Germany and some of its economical powerhouses occupied this spot of Africa, at that time not cared for by the other Europeans, in the late 19th century. Soon they established their rule over this large region. It was not a just rule, but a rule of mainly force and fraud. Steadily the influx of German settlers and the economical plans of the Empire closed in on the indigenous population ever more, thus making it more and more impossible to live according to their old ways of pastoralism.

It culminated in a desperate attempt to break free, leading to the first genocide of this century, called by some the Century of Genocides. During the battles that left behind a battered and subjugated Herero nation, thousands died, were uprooted and forced into camps. The horrors of war were followed by the nightmare of total German rule, using the Hereros as workers in mines and for railway constructions. The major beneficiaries were German corporations, having minimum costs for work force, no worries about labour rights and always replacements available. And thousands of replacements they needed.

This story was long forgotten and not cared about, but now the ghosts of old haunt the perpetrators: the Herero instituted a lawsuits in America suing the German Government, the Deutsche Bank and Deutsche Afrika Linien for all in all US$4 Billion.

This work will start by showing the special history of the Hereros case. **Chapter 1** will deal with the days of German occupation first. In order to understand the present, one needs to get a grip on the history of things and people. The chapter will show the growing influence of Germany. In an attempt to break free of German rule, the Hereros turned to desperate measures and rose up in rebellion. General von Trotha squashed this attempt with utmost brutality, trying to annihilate the Herero tribe as a whole. Then the grip was a bit 'released' on the battered tribe a bit. Military actions were stopped, but concentration camps and hard slave labour continued to kill thousands of Hereros. In this years of revolt, battle and inhuman treatment an estimated 70-80% of all Hereros perished.



Ending Chapter 1 we will look at Namibia's history after the end of German rule in 1915. A brief summary will show the development under South African control until the first democratic elections in 1989. After that the quest for reparations will be shown. What actions have been taken before the latest action in this quest: a $ 4 billion lawsuits in an American court, launched to claim reparations for the genocide and other atrocities during the time of German colonial rule.

Since Deutsche Bank and DAL were sued besides the Republic of German and this work is especially interested in the transnational corporation component of this case, their actions will be looked at briefly too. Deutsche Bank and Wörmann Linien bought companies allegedly involved in many actions that led to the Genocide and other violations, e.g. making use of slave labour of Herero people, helping organise the war.

**Chapter 2** will look at the different legal scenarios of domestic accountability. Briefly we will focus on the situation the claim is facing in German and Namibian courts and then turn towards the scenario of in an American court. Trying to establish a legal basis for the claim is one objective. After having exhausted the domestic scenarios, the focus will shift once more.

Therefore in **Chapter 3** we will look at the question of accountability of transnational corporations in international law in general. Remembering the Hereros case we will try to recapture the situation and elaborate on problems. Several international attempts of binding instruments for TNCs exist, e.g. the OECD Guidelines for Multinational Corporations (1976). Discovering the legal gap here I will portrait some self-regulatory statutes and scrutinize their effectiveness.

With the result from Chapter 3 being not satisfactory plaintiffs have started to choose a domestic path more often lately to hold transnational corporations accountable. **Chapter 4** will thus take a detailed look at the Alien Tort Claims Act of the United States of America. What problems and difficulties can a lawsuits face under that act? Of special importance is the question of on what ground is the lawsuits instituted under it? Was there a breach of the law of nations or of an United States treaty? Some lines will deal with the phenomenon of civil claims being launched in America. What are the reasons?



**Chapter 5** the focus will shift on the Hereros case again. What would the consequences be for their community if the case does not succeed? We will elaborate on the crucial role of public pressure in cases like this.

General accountability of transnational corporations on international level will be the main object of **Chapter 6.** The difference between the situation now and a hundred years ago will be of importance.

The paper will finish with some conclusions and recommendations in **Chapter 7.** After showing reasons that support the need for international accountability for TNCs and describing ways to optimise the current situation, the paper will end on some closing remarks.

# CHAPTER 1

# HISTORY OF THE GERMAN OCCUPATION OF NAMIBIA

*"His Majesty the German Emperor, King of Prussia Wilhelm I. in the name of the German Empire on the one hand, and Maherero Katyamuaha, paramount chief of the Herero in Damaraland for himself and his legal successors wish to sign a treaty of protection and friendship."*[1]



*"Any Herero found within the German borders with or without a gun, with or without cattle, will be shot. I shall no longer receive any women and children. I will drive them back to their people or I will shoot them. This is my decision for the Herero people. The Great General of the Mighty Kaiser."*[2]

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[1] I.e. Treaty of Protection and Friendship between the German Empire and the Hereros; in: StBVR, 11.Leg.Per. I.Sess. 1903/05, vol.5, p.2771

[2] Proclamation of General von Trotha, in Gewald.1999: 172-173

# 1. The German Occupation of South-West Africa

## 1.1. The Beginning

At the end of the 19th century the country we now know as mainly the tribes Ovambo, Herero and Nama occupied Namibia. Hereros and Nama were nomadic cattle herders, roaming on their territories. Beginning with the German merchant Adolf Lüderitz buying the region around Angra Pequena in 1883, German influence was established. Since Lüderitz did not find the expected diamonds or gold, he sold his company to the Deutsche Gesellschaft für Südwestafrika (German Company for South West Africa), being owned by some of the richest Germans, e.g. Hansemann, Bleichröder, as well as major German banking corporations such as Disconto- Company, Deutsche Bank, Dresdener Bank, etc. In late 1884 the European powers gathered in Berlin to divide Africa into spheres of domination; South West Africa was accepted by the other powers present as a German sphere of interest.

### 1.1.1. Treaty between Hereros and Imperial Germany

On 21 October the same year, the Treaty of Protection and Friendship between the German Empire and the Hereros was signed[3]. For Germany its highest representative in South West Africa at that time, colonial commissioner Heinrich Ernst Göring, signed the treaty as well as the missionary Büttner. For the Hereros Chief Maharero Katyamaha and 10 other chiefs signed the document. The Hereros asked to be under the protection of the German Emperor and he accepted this request. In the early years, this treaty was of no importance, since the official presences of imperial Germany were 24 people, including 21 soldiers of the protection force. Another sign of the minimal importance of the German presence was that the tribes of South West Africa kept fighting with each other, not caring for the Germans. Disregarding this, German settlers and merchants kept coming to South West Africa.

Soon after that, opinions to terminate the involvement in the African colony were being voiced more often. Business started losing interest since the revenues were not existent, but only costs so far. In addition the Hereros and Germans had started to quarrel over two issues. Firstly, the Hereros wanted German military support in their fight against the Nama, as they thought they agreed on in the treaty of 1885[4]. Secondly, German settlers started causing more trouble, disregarding rules and customs of the Hereros. Especially settling close to gravesites

[3] StBVR, 11.Leg.Per. I.Sess. 1903/05, vol.5, p.2771
[4] Drechsler.1984: 51

was a cause of concern[5]. Because of this in 1888 the Hereros after a meeting of 100 dignitaries in Okahandja denounced the treaty with the Germans.

### 1.1.2. Skirmishes, Tactics and German Politics

Nevertheless in the same year the foreign ministry decided to send troops to South West Africa to secure German influence. Only 20 soldiers in the beginning, but their number grew with time[6]. These troops, once they were in the country, were a constant cause of concern for the Hereros, since numerous small skirmishes ensued. In early 1890 the Hereros agreed to reinstate the treaty from 1885, because at that time they were fighting the Witboois and wanted to avoid having to fight at two fronts at the same time. But this time they wanted to German troops to be deployed in their support, since Germany and the Hereros were allies[7].

In July 1890 Nama troops attacked their neighbouring tribe and again the Germans did not come to the aid of the Hereros, but remained neutral. During this time at a moment when the Hereros had retreated from Windhoek to put distance between themselves and the Nama, Governor von Francois occupied this area and fortified the small village. Samuel Maherero, son and heir of Chief Maherero who had died in October 1890, protested against this at first, but seeing the fortifications and military force of the protection force later accepted Windhoek now being German[8].



In Germany insecurity and doubts among business and colonialists was fed by the the following years not being profitable as well, although more land fell under German control. Economic interest was dwindling after years of losses. The capital of the German Company for South West Africa had melted down to 110 000 Reichsmark in 1889 from millions of Reichsmark in the first years. The German empire still was undecided weather to keep the colony and invest large sums or to abandon it. Chancellor Bismarck was careful not to risk the delicate balance of power in Europe by spending resources on colonialism. He also wanted to avoid crossing path with the British Crown and the French Empire in Africa, both focusing on extending their vast realms on that continent. The economical chances in colonization were in Bismarck's eyes not worth the risk of a confrontation. In 1871 he said that colonies for Germany were *"just like the silky sable fur in polish royal families that do not have shirts."*

[5] Hesselbein.1996: 8
[6] 43 soldiers reinforcement in the same year, Westphal.1984: 160
[7] Rohrbach.1907: 235
[8] Hesselbein.1996: 9

With this he declined the offer of France to cede Cochinchina to Germany as reparations for the French-German War[9].

### 1.1.3. The New Kaiser

But in 1888 Kaiser Wilhelm II. came into power. He succeeded his father Kaiser Friedrich III., who had died after only 3 months on the throne. While his father was a liberal minded monarch, Wilhelm II. was very conservative and AUTORITÄR. His striving for power in an aggressive way soon led to tensions with the other European powers. Eventually it was one of the reasons for World War I. But years before that it led to the dismissal of Chancellor Bismarck on the 20 March 1890. Both characters were too headstrong to cooperate any longer[10].

This changed the setting with respect to the quest for colonies tremendously. Kaiser Wilhelm II. strongly supported the German Company for South West Africa and all colonial enterprises. In November 1892, Chancelor Caprivi thus decided to enlarge the protection force to 250 men and 5 months later, Caprivi said in a speech at the Reichstag that South West Africa *"now is German territory and has to remain German territory"*[11]. From now on Imperial Germany and its commercial allies formed a dejure and a defacto German commercial enterprise in South West Africa.



Those reinforcements of the protection force were ordered into battle only a few days after they arrived in April 1893. Von Francois, ignoring his clear orders not to take any military action against natives, attacked the Witbooi tribe at their biggest settlement and centre of their territory, Hoornkranz. Hendrik Witbooi was the only major chief that had not signed a treaty of protection with the Germans yet. Knowing that the soldiers had a 30 day trip via sea and 15 days of hard, exhausting marching with only 6 days of rest through a different climate and territory, the resistance they met in the camp must have been rather week. Since the Witbooi soldiers were well trained and equal opponents to the Germans and since only 1 German soldier was killed, few of the warriors can have been present. The opposition they met was killed merciless. Many women, children and elders were killed. Von Francois orders to his troops in the early morning hours were *"The protection force has the instruction to annihilate the tribe of the Witbooi."*[12] The course for domination of South West Africa was set.

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[9] Schildknecht.2000: 2, 3
[10] Conze.1991: 181
[11] StBVR, 8.Leg.Per. II.Sess. 1892/93, vol.2, p.1359
[12] Schildknecht.2000: 248

## 1.2. The Changes-- Divide et Impera

Now the government took over administration and tried to win settlers to come to South West Africa. New governor Theodor Leutwein, who replaced Governor von Francois in 1894 due to an unsuccessful war against the Witbooie dragging on for years, used diplomacy as well as force to expand ownership and control over the region. Following the strategy of divide et impera he signed treaties with several chiefs, one of them Samuel Maherero, thus exploiting competition among the people of Namibia. With Maherero he concluded several agreements establishing a southern and northern border of Herero territory; on the 6th.Dec. 1894 the river 'White Nosob' was declared the southern border, end of August 1895 the northern border was established. Cattle crossing the White Nosob into 'Land of the Crown' was seized and sold. Of the profit 5 % went to the person seizing the cattle, the rest was divided between German administration and Samuel Maherero. He also received 2000 Reichsmark annually, as agreed on in the southern border agreement[13].

Just like Maherero, the Germans made several other chiefs dependant on them with their ever increasing influence. Against others they used force. In 1896/97 unrest among the Mbandjeru provided Leutwein with the opportunity to strike hard and relentless. After subduing the enemy also 12 000 piece of cattle were seized[14]. Besides 'losing' cattle to German authorities, much cattle was also stolen by means of fraudulent trade or use of force by German settlers or companies.



Leutwein was of the opinion, that only a slow expropriation of the Africans was effective to erect German domination, which was only based on the treaties of friendship and protection. Moving faster and with more force would only have caused a general uprising among the African people[15]. At that time, the German protection force would have been unable to contain a general rebellion.

### 1.2.1. Conflicts and Strokes of Fate

In the coming years, tensions between settlers and Hereros grew. Many cattle was seized after crossing the southern border or simply taken across the river by settlers. The African tribes and thus also the Hereros suffered several strokes of fate. In 1897 a cattle disease had a drastic influence on Herero and Nama life. Within half a year 90% of Herero cattle was dead, while

[13] Drechsler.1984: p.342
[14] Drechsler in Stoecker.1991: 46
[15] Drechsler.1984: p.139

white settlers only lost between 10-45 % due to vaccination of their cattle[16]. The herds grew again with time, but still only numbered about 26 000 piece of cattle in 1902. The former huge herds of cattle used to number far more than 100 000. In comparison to that the German settlers who were without a single cow 10 years before, owned 44 490 piece of cattle[17].

Being half-nomadic pastoralists, the loss of an enormous number of their cattle substantially weakened them. The cattle herds were the centre of all Herero life, economical and social. This disaster for the Hereros was followed by a typhoid fever pandemic claiming 10 000 lives, and in the next two years first a huge locust plague and then an extraordinary drought, worsening their situation even more. The result was that for the first time a large number of Hereros and Nama had to become wage labours for white settlers. It made them dependent on the farmers.

Also the Hereros were losing more and more land to the Germans. The Otavi Railway line was to be built. In comparison to the Swakopmund-Windhoek Line, which only ran along Herero territory, this new line was supposed to cut right through remaining Herero land. In negotiations, the Hereros were forced to give up the land 10 km left and right of the tracks. Already before that some of the Herero leaders started selling land to German authorities to alleviate some of the occurring poverty after the cattle disease and the plagues. Those leaders were not even entitled to sell land according to Herero law, since land was community owned[18]. By this means the German Empire in the course of time managed to gain control of more and more land and took away large parts of the cattle herds. By the turn of the century, the Empire controlled more than half of the land.

Besides their loss of cattle and land to the Germans by seizure or theft, the way the German farmers and soldiers treated the Hereros enraged them. Especially the ones working on farms were victims of violations. In court it was common practice that 7 black witnesses equalled one white witness. Sentences of cases against murderers of blacks clearly shows, that judges regarded them as worth less than other humans: the sentences handed down ranged between acquittal and 3 years imprisonment. It is safe to say, that most cases of battery, murder, rape or other violations never got before a court anyway. But the Hereros were unwilling to remain totally outlawed, without any rights, or at least without anybody acting accordingly. Settlers

[16] See id.: 119
[17] Drechsler in Stoecker.1991: 47
[18] Krüger.1999: 33

and soldiers could mistreat their workers, abuse them, even kill and torture them without any of the German authorities really interfering[19].

The Hereros lost more than half of their land and almost half of their cattle. They felt being without rights in their own country. The Germans were clearly driving them into poverty, making their old way of life as pastoralists more impossible every day.

## 1.3. The Revolt and Defeat

As a result, the Hereros on 12 January 1904 started a revolt. They completely surprised the Germans. Leading them into war was Samuel Maherero, the same leader that cooperated with the Germans for years, maybe trying to correct errors of the past.

The Hereros had the advantage of surprise. In addition to that 3 quarters of German troops were in southern South West Africa fighting the Bondelswarts. Within weeks, the Hereros killed more than hundred soldiers, traders and farmers, entirely men. All Hereroland was quickly under Herero control again. Only fortified positions such as towns, trading posts, etc were still under German control since the Hereros did not try to take those. At this point an estimated 8000 Hereros warriors with 4000 rifles faced 2000 soldiers of the protection force including their reserves and South West African allies[20].



In the following weeks the Hereros won many battles but failed to make substantial progress. Always they withdrew leaving enough time for the Germans to regroup. After getting first reinforcements Leutwein started to free the besieged towns. Still he failed to win an important battle and as a consequence was replaced by Lieutenant General Lothar von Trotha in June 1904. This also drastically changed the strategy of the Germans. Von Trotha had fought in the boxer uprising in China and battled an Arab revolt in German East Africa nowadays Tanzania, always using brute force and killing without remorse. While Leutwein was always considering negotiations to end the war, von Trotha was not interested in this. His target was the annihilation of the Herero people[21].

By late July the Hereros had retreated to Otjozondjupa (Waterberg). About 6000 warriors, their families (about 50 000 people) and cattle waited there, tired after months of battle. In the meantime, von Trotha's troops had grown to 4 000 soldiers, 10 000 horses and cattle, 36

[19] Drechsler in Stoecker.1991: 49
[20] Krüger.1999: 47
[21] See id.: 50

pieces of artillery and 14 machine guns. On 12 August the Germans attacked. Although their plan of encircling their opponents failed, they won a big victory. Approximately 50 000 Hereros were killed before the remaining broke through the German lines and were able to flee, but only into the desert of Omaheke. The German troops only lost 26 soldiers. The war was decided, the Hereros defeated.

The skirmishes nevertheless continued for months. On 2 October 1904 Lothar von Trotha issued his infamous "Shoot to kill" order. Its content declared that the Hereros were no longer German subjects and had to leave their old country. Hereros found within South West Africa were to be shot on sight, regardless of weapons or not. Women and children were to be sent back to where they came from, i.e. that means back into the desert which meant certain death[22].

Gouvernor Leutwein did not agree with von Trotha that the Herero nation had to be destroyed. He thought of them as "necessary working material". He was still hoping for negotiations. But von Trotha rejected each offer. In a letter from 27 October 1904 he wrote to Leutwein, that no Herero would be allowed back into South West Africa but had to stay in the Omaheke. He again said, *"the nation has to be destroyed. If I didn't succeed to destroy them with the artillery, then it has to happen like this."*[23]



The result of this policy was that of the 80 000 Hereros in early 1904, only 10 000 to 15 000 had survived this slaughter in early 1905.

## 1.4. After the Revolt

Still during *von Trotha's* reign and also after being replaced by Governor Lindequist in August 1905 concentration camps were built[24]. Seeing that the colony would need the work force potential of the Hereros, they were allowed to return back into their country, but only to be imprisoned in the camps. In 1905 4137 men and 10 632 women and children were locked up behind barbwire fence. And whoever was caught outside of the camps had to endure severe mistreatment such as beatings with a sjambok.

[22] Rust.1905: 25
[23] Drechsler.1984: 164
[24] 12 Dec. 1904 Chancelor *von Bülow* send an order to *von Trotha* to revoke the "annihilation order" and to build „Konzentrationslager"; Nuhn.1989: 351

Although the policy of annihilation was revoked already, the camps proved lethal. Within the first year more than half, 7862 to be precise, died. This was due to the hard labour, malnourishment, the psychological effect of imprisonment; mistreatment and horrible accommodation that added up to the weak condition the Hereros were generally in, being half dead coming out of the Kalahari[25].

As planned the Hereros were used for labour, in the beginning only by the military, but in the second year also companies and farmers could apply for Herero workers. Many of them worked for railway construction projects such as the Otavi line. In April 1906 900 men, 700 women and 620 children worked there. According to correspondence of the Arthur Koppel AG, responsible for the railway construction, the workers were in a horrible condition. For every Herero able to work came 4 Hereros unable to work. In the mines also Herero workers were of utmost importance. There was a shortage of workers leading to the hiring of South Africans[26].

Numerous accounts of the inhumane way the Herero workers were treated have been recorded. They all include beatings, rape, malnourishment, verbal abuse all the time and killings. Hendrik Fraser reports: *"On my arrival in Swakopmund I saw many imprisoned Herero. ... There must have been about 600 men, women and children. They stayed behind a fence on the beach, surrounded by barbwire. The women had to work like men. And it was hard work. ... Over a distance of more then 10 km they had to push completely packed wagons. ... They simply had to starve. Who didn't work, was brutally whipped. ... I personally witnessed six times how a woman was stabbed by a German soldier with his bayonet. I saw their corpses. I was there six months. Day in and day out the Herero died due to exhaustion, the bad treatment and the bad conditions in prison. They were badly nourished and begged for food all the time. ... The German soldiers abused young Herero girls."*[27]

This was the way Hereros were treated after the lost war. Their life was worth next to nothing; protection from German authorities was not existent. The Hereros kept on dying in huge numbers. In 1911 the German colonial administration ordered all Hereros to be counted. The result was the horribly little number of 15 130 Hereros. This means that within 7 years more than 80 % had been killed. Little less than 3 decades before Hitler and the NSDAP took power to lead Germany into World War II with its unimaginable atrocities of the Holocaust,

[25] Drechsler.1984: 251
[26] Krüger.1999: 132
[27] Bridgman.1981: 36

Germany had already committed a genocide in South West Africa. It is important to add that this history of German occupation is mostly uncontested by all parties and historians[28].

## 1.5. Namibia – A Brief Summary of the years 1915-2000

To fully understand today's situation, we will briefly recapture Namibia's history after the end of German rule in 1915.

On the 9 July 1914 British and South African troops invaded German South West Africa, marking the beginning of the World War I. With their official capitulation in 1915 the German rule of Namibia came to an end. According to the Versailles Treaty South-West Africa became a League of Nations mandated territory and was the responsibility of the British Monarch. That responsibility was exercised by South Africa, thus South African civil authorities administered the region. South Africa had to submit a report yearly and send a representative to annual meetings of the Permanent Mandates Commission of the League of Nations in Geneva. All in all, the country became a British colony under South African jurisdiction and administration.

After World War II the Smuts Government tried to incorporate Namibia as a fifth province into South Africa. The new founded United Nations General Assembly did not accept this , disagreeing with Smuts and his argumentation, thus denying the incorporation. The General Assembly asked that the territory be brought under United Nations trusteeship. South Africa refused and continued to control the territory. It also introduced the system of Apartheid into Namibia, creating the same tensions as in South Africa. As a result resistance movements were founded in the years 1958-1960.

On 10 December 1959, the forcible resettlement of black population to Katutura, one of the many homelands, resulted in violent and bloody conflict with the army. Ethiopia and Liberia took action and brought the case before the International Court of Justice, stating that South Africa had violated its commitment laid down in the mandate. On the 18 July 1966 the International Court rejected this by the narrowest of margins, since in the judges opinion neither Liberia nor Ethiopia had any demonstrable legal interests involved in this case. 1971 the International Court supported the UN's view, that South Africa's presence in the territory was illegal. Two years later the South West African People's Organization was recognized at the UN as the sole legitimate representative of the Namibian people.

[28] Möllers.2001: 10

A fight between the Peoples Liberation Army of Namibia (the military arm of the SWAPO) and the South West African Police on 26 August 1966 in Ongulumbashe in the Ovamboland marked the beginning of the guerrilla war. That changed in 1974, when the SWAPOL proved to be unable to handle the situation anymore.

This of course was an embarrassment for the Vorster Government. It was also problematic to involve regular army units since this constituted a clear violation of the original mandate, which prohibited a militarisation of the territory. The situation got more complicated after the coup d'etat in Lisbon on 25 April 1974 ousted the South African allies. The South Africans could not rely on Portuguese patrols in Southern Angola anymore. In the years 1974-1976, the number of soldiers increased from 15 000 to 45 000. Small units patrolling the area became the normal pattern of operation in this war of insurgency and counterinsurgency[29]. PLAN and South African Defence Force with its Namibian units proved to be equally strong, not able to win this war that had thus reached a stalemate in the late 1980s[30].

Parallel to the armed struggle, the political work continued. In 1978 the UN Security Council passed Resolution 435 asking for *"early independence of Namibia through free elections under the supervision and control of the United Nations"*. From 1975-78 the "Turnhallen-Conferences" took place. Representative of ethnic as well as political groups and the churches tried to prepare a declaration of independence. SWAPO did not participate. As a result of these conferences, elections were held in December, which were not recognized by the UN.



The Deutsche Turnhallen Alliance won and officially abolished the Apartheid laws. But in 1983 this government stepped down and was replaced by a government put into power by South Africa, but supported by the Multi Party Alliance. On the 9 November 1989 free elections in accordance with resolution 439, e.g. under UN supervision, were held.

Since then the SWAPO is the ruling party with Sam Nujoma being Namibia's President, winning with large margins and obtaining clear majorities in recent elections. Today the Hereros number about 125 000 again.

[29] Dale.1991: 2
[30] Dicker.1993: 24, 25

## 1.6. The Quest for Reparations

After the struggle for Namibian independence was won and a much less violent time began in the country, the Herero community remembered its old scars. Soon a movement developed asking for reparations. Already in September 1995 Paramount Chief Dr. Kuaima Riruako during the visit of Chancellor Dr. Helmut Kohl issued a statement asking for reparations for expropriation of mobile and immobile property[31]. Kohl ignored and avoided meeting the Hereros and instead preferred to meet with his "dear fellow countrymen" in Windhoek and Swakopmund.

3 years later, the German President Prof. Dr. Roman Herzog visited Namibia. This time, Herzog showed more diplomacy and met with representatives of the Hereros, disregarding the protocol. He agreed to study their claims, but still refused to offer an official apology[32].

In the same year the Hereros tried to take Germany to court in The Hague at the International Court of Justice. An attempt that had to fail utterly, because according to Article 34 I of the ICJ-statute this court is only responsible for dealings between countries. The Herero as an ethnic group of Namibia obviously fail to qualify.

The latest action in this quest is a lawsuit in the United States. It was launched in September 2001 to claim reparations from German Government and German business for the genocide and other atrocities during the time of German colonial rule.



## 1.7. The Involvement during the Time of German Rule of Deutsche Bank and Deutsche Afrika Linien

**Defendant Deutsche Bank** *was the principal financial and banking entity in South-West Africa from 1890 to 1915. Disconto- Company, acquired by Deutsche Bank in 1929, combined with Deutsche Bank to control virtually all financial and banking operations in South-West Africa from 1890 to 1915*[33]. Dominating the financial market, they were the ones making the calls, supporting this mining operation and financing that railway construction. At the time each mining or railway corporation had their own concentration camps with Hereros forced to do work, that eventually killed a huge number of them. For this reason they were a most critical participant in German colonial enterprise in South-West Africa from 1890 to 1915. Deutsche Bank, itself and through Disconto-Company, was involved in literally all

[31] Riruako.1995
[32] Möllers.2001: 11
[33] Statement of Claim, Case No. 01-0004447, Para 4

business in South West Africa. Therefore Deutsche Bank, having known all facts might be directly responsible for and committed crimes against humanity perpetrated against the Hereros.

**Defendant Woermann Line** *was the principal shipping and port activities entity in German South West Africa. Woermann controlled virtually all of the shipping into and out of German South West Africa from 1890 to 1915. Woermann also controlled virtually all harbor construction, entrance and permitting fees, and dock and harbor labor. Imperial Germany leased to Woermann the landing business and the shipping business at each end of German South West Africa's principal ports. Harbor dues were payable directly to Woermann. Woermann also obtained shipping and navigation concessions from the original lessees. Woermann brutally employed slave labour and ran its own concentration camp. Woermann was a critical participant in the German colonial enterprise. Individually and as a member of that enterprise, Woermann might be directly responsible for and committed crimes against humanity perpetrated against the Hereros*[34]. Deutsche Afrika-Linien acquired the Woermann Shipping Line of Hamburg, Germany.

## 1.8. The Result

As a result the plaintiffs ask Judge Jackson *"to impose long-delayed remedies for the atrocities from which the defendants profited."*[35] Besides suing the Federal Republic of Germany as the legal successor of Imperial Germany, the Herero People's Reparations Corporation, the Herero Tribe and individual Hereros thus also sued Deutsche Bank and Woermann Line for $ 2 Billion in the superior court of the District of Columbia for their prominent role in the genocide of the Herero people. The papers were handed to the court in September 2001.

[34] See id.: para 6
[35] See id.: Introduction

# Chapter 2

# Accountability under American, German or Namibian law

## 2. A Lawsuit under American, German or Namibian Law ?

As mentioned above the lawsuit was instituted in an US-American court. Thus the question arises why was it not instituted in Germany or Namibia? We will look at those two scenarios first before turning to the American.

### 2.1. Germany

There are several reasons, why this claim was not instituted in Germany. Firstly, the actions in question happened 98 years ago. In §§ 194, 197, 214 BGB the statute of limitation prescribes 30 years as the maximum period to lay civil charges for persons who suffered damages due to a delict of a third party. For this reason all actions have long come under the statute of limitation. For German civil liability, the answer to the question if German actions constituted a breach of international law or German domestic law is therefore regardless.

Theoretically speaking about the possibility of a lawsuit in Germany, there are two more reasons for not seeking reparations there. The plaintiffs might think that German courts might be biased in favour of Deutsche Bank and DAL for them being German. Without agreeing and thus compromising the independence of German courts, one has to accept that Deutsche Bank is a lobby powerhouse, an international banking corporation of enormous power. Its annual general turnover in 2000 was an estimated € 918 Billion[36], in comparison to South Africa's GDP of € 133 Billion and Namibia's GDP of € 3 124 Billion[37]. The climate might not have been helpful for the Herero cause during trial.



And lastly, even in the more or less not existing chance of a success in Germany, the amount of reparation granted would be rather small and probably nowhere close to the envisaged $ 2 Billion. German courts, applying federal law and using jurisdiction, are very conservative when it comes to granting payments of reparations to victims.

### 2.2. Namibia

Also several reasons exist for the plaintiffs not to choose Namibia as their place of court action. They are very similar to the ones mentioned above in 2.1. Germany.

Firstly, the general support of society for the trial would have been very doubtful. The Hereros are a minority in Namibia. Out of 1.4 Million Namibians, only about 100 000 are

[36] See Appendice II "The 5 largest German Banking Corporations"
[37] Albrecht/Reindel 2002: South Africa column no. 768, Namibia column no. 566

Hereros (7%). The government is largely made up of Ovambo, being the largest ethnic group in Namibia with 47%[38]. It rightly claims that not only Hereros were victims during those days, but all tribes. Today they agree with the German government, that the development aid of approximately DM 1 Billion paid by Germany after its reunification and the help for SWAPO by the German Democratic Republic in its fight for liberation of Namibia are a reasonable compensation[39]. This was not always their position, but will be analysed later. The Herero are the leading opposition tribe and have persisted in pursuing their claim regardless of this criticism. *"It has served to define Herero identity within Namibia, setting the Herero people apart."*[40]

Furthermore one needs to mention, that Paramount Chief Riruako, head of the Herero tribe and thus their representative in the case, has a personal history perceived by many as problematic. He was president of the Deutsche Turnhallen Allianz, which was an ally to South Africa in the years of the liberation war. This past makes some of his countrymen including many in the government of Namibia, being members of SWAPO, quite distrustful towards him, his tribe and the organization he is heading, the Herero People's Reparations Corporation. The government declined to offer support[41].

Again the amount of money granted to the victims, in the case of the Hereros winning the case, would have been miniscule in comparison to any sum granted by a US judge in his verdict. But since there is no ground for a legal claim in Namibia with the civil law the claim is simply not justiciable in Namibian courts[42].

## 2.3. Result

Section 2.1. and 2.2. showed several reasons why the case was brought to the District Court of Columbia. Summing up those reasons shows:

1. Lack of support or opposition for the lawsuit in Namibia / Germany
2. Difficult legal hurdles such as the statute of limitation and material law problems and
3. The amount of damages paid being a lot higher in the event of a successful trial.

A closer look at some problems such as the political and public dimension of lawsuits like this will follow later. Now we will look at the American domestic scenario where the case is being heard now.

[38] See id.: Namibia column no. 565
[39] Harring.2002
[40] See id.
[41] Möllers.2001: 12
[42] Harring.2002

## 2.4. United States of America

In September 2001 the Herero launched a lawsuits in the United States. To outsiders this comes as a surprise, since neither plaintiff nor defendant is of US origin, but Namibian and German. But the development of the principle of universal jurisdiction and its adoption by the US legal system opened the way for new claims. The principle *"provides all states with jurisdiction over a limited category of crimes deemed to be of universal concern. Under this principle, the nature of the offense itself, rather than the location where the offense takes place or the nationality of the perpetrator or victim, entitles a court to exercise jurisdiction."*[43] Although the universality principle was developed in criminal jurisdiction and still mostly is of importance there, it by now may also give rise to civil jurisdiction in US courts[44].

And so, not surprisingly, the plaintiffs claim that in this case *"jurisdiction is founded [...] on principles of universal jurisdiction applicable to crimes against humanity, genocidal practices and human rights atrocities."*[45] In the course of the trial the defendants elected to remove the case to the federal court, thus changing the formal setting again. Since changes such as this might occur again, the focus will not be on the formal problems of this specific case, since later changes might make parts of this work obsolete. Regardless of the court and differing formal hurdles, common to all possibilities known to the author is that the actions allegedly committed by the defendants must constitute a breach of international law or US treaty law, but concerning provisions extending its protection to the plaintiffs. Only this will thus invoke enforceable civil liability for non Non-American citizen. Since Imperial Germany and its commercial allies formed a *dejure* and a *defacto* German commercial enterprise in South West Africa the two parties are also responsible for each other's actions. Some of them cannot be separated or seen separately anyway.

The question we are facing now is where did that alleged breach of the law of nations occur? There are several possibilities, which will have to be checked.

### 2.4.1. The General Act of the Berlin Conference 1884

2.4.1.1. In 1884 at the request of Portugal, German chancellor Otto von Bismarck called together the major western powers to negotiate questions and end confusion over the control

[43] Harvard Law Review.2001
[44] The probably most prominent example of legislation allowing this kind of cases is the Alien Tort Claims Act. Later we will take a closer look.
[45] Statement of Claim, Case No. 01-0004447, Introduction

of Africa. Bismarck appreciated the opportunity to expand Germany's sphere of influence over Africa and desired to force Germany's rivals to struggle with one another for territory[46].

Fourteen countries were present, represented by their ambassadors when the conference opened in Berlin on 15 November 1884. The countries represented at the time included Austria-Hungary, Germany, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway (unified from 1814-1905), Turkey and the USA[47].

In his opening speech Chancellor Bismarck surprised the representatives. In the formal invitation economical questions and ways of occupation were mentioned as the topics to be dealt with. But the chancellor now proposed to also include a discussion about the topic of responsibility for the indigenous population, i.e. prevent slavery, genocides, etc[48]. This proposal was first of all driven by economic interest, not necessarily due to a philanthropical belief. To open and create a market in Africa for the products of the nations of Europe and America was one of the main goals of this conference, but allowing slavery and other atrocities would have been absurd. The president of the board of trade Josef Chamberlain said: *"the natives will grow angry and bitter und will not want to trade with Europe, if they are mistreated."*[49] Atrocities of any kind would also have reduced the number of possible 'clients'. This resulted in Article 6 and 9 imposing the duty on signatory states to take care of the indigenous population and secure their well being, e.g. prevent slavery and slave trade.



2.4.1.2. Several actions during German reign might amount to a breach against Article 6 and 9 of the General Act of the Berlin Conference: treatment of the indigenous population in the early years, the military actions during the Herero revolt and the treatment of the indigenous people after the defeat. Since no provisions for a delict due to a breach of Article 6 and 9 can be found in the General Act, general rules of delict of international law are applicable.

According to those rules, the state responsible for the delict has an obligation to make reparations as far as possible, primarily natural restitution (recreate the situation before the

[46] Schildknecht.2000: 76, 77
[47] See id.: 78
[48] See id.: 236
[49] See id.: 237

delict) and if that is not possible, pay damages up to the full amount[50]. Besides suffered material damages also idealistic damages can be considered[51].

2.4.1.3. In this case one needs to understand what rights have been breached and thus who is the injured party. Here the delict might lie within the General Act of the Berlin Conference, a multilateral treaty of international law, only binding for signatory states and only creating duties and rights for the signatories[52]. A breach of these rights by the Germans would thus only have created a liability towards the other signatory states, but neither to Namibia or the Herero. This means that if any of the three actions, the military actions during the Herero revolt and the treatment before and after this rebellion, would have been a breach of the Berlin Agreement, i.e. a delict of international law, only the other signatories of the agreement could have claimed damages, restitution, etc. Since this part of the work is trying to establish the possibility of a breach of international law or US treaty law extending its protection to the Herero, we will need to scrutinize the agreement of the Berlin Conference no longer. The question if the aforementioned actions are a breach of the agreement is of no concern and needs not to be answered.



**2.4.2. Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land 1899**

2.4.2.1. In the last year of the 19th century several codifications of humanitarian law were drafted in The Hague being *"the first significant modern treaties on jus in bello."*[53] The topics among others were the rules of land and maritime warfare, asphyxiating gases and expanding bullets. One of the codifications was the Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land. Some Herero leaders have claimed, that Germany breached this treaty and has thus committed a breach of international law[54].

This convention in its annex stipulates many rules of humanitarian law that found its way into the Geneva Conventions after the World War II. Annex Article 4 orders prisoners of war to be treated humanely. According to annex Article 7 *"prisoners of war shall be treated as regards*

[50] Chorzów case PCIJ, 1927, Ser.A 17, p.29, 47
[51] Seidl-Hohenveldern.2000: 1684-1686
[52] Art.34 Vienna Convention on the Law of Treaties 1969. This article was obviously not existent yet at the time of the Berlin Conference, but this article is a codification of customary law accepted throughout the world since the middle of the 19th century.
[53] Ratner & Abrams.1997: 45
[54] Möllers.2001: 11

*food, quarters, and clothing, on the same footing as the troops of the Government which has captured them."* And due to annex Article 23 (c) it is especially prohibited to kill or wound enemies, that are unable to defend themselves or have surrendered at discretion.

2.4.2.2. Many actions by the Germans clearly violate articles of the Convention (II) 1899, but for the same reason that the Articles of the Berlin Agreement are of no concern to us, this codification remains unimportant: it is not applicable. Article 2 states that *"The provisions contained in the Regulations mentioned in Article I are only binding on the Contracting Powers, in case of war between two or more of them. [...]"*

Herero activist Mberumba Kerina claimed that the Hague Convention of 1899 outlawed reprisals against civilians on the losing side[55]. This is true, but due to the aforementioned article 2 the convention is only applicable in the case of two or more contracting powers declaring war on each other. Postponing the question of Namibia being a colony of Germany at the time of the start of the rebellion or only after the total subjugation, it is clear that Namibia was not a member to the treaty. With only one contracting power being involved it is therefore not applicable.

**2.4.3. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. 1907**

2.4.3.1. This convention came just 8 years after Convention (II) and basically was its update. It replaced the older convention for powers that had signed it (Article 4), making several changes. Much of it remained the same, many articles were left unchanged, e.g. the Annex Articles 4, 7 and 23 (c) mentioned in 2.4.2. (a).

The most important difference was a new Article 2: *"The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention."*

2.4.3.2. A case of war between contracting parties is not necessary for application anymore. This means, that all act of 'warfare' within one of the signatory countries falls under Convention (IV), also cases of rebellion and uprisings. Therefore in comparison to Convention (II) the actions against the Herero by the Germans might constitute a breach of

[55] Harring.2002

international law. But this Convention was only signed in October 1907 after the end of the Herero rebellion in early 1907. This might collide with the principle of *nullum crimen sine lege, nulla poena sine lege*.

2.4.3.3. This principle is a fundamental pillar in international criminal law and prohibits the assigning of guilt on acts not considered as crimes when committed. The maxim of 'no crime without law, no punishment without law' is established in many ways in most legal systems[56]. Examples are constitutional prohibitions of *ex post facto* laws, provisions in international human rights instruments prohibiting prosecutions of acts not criminal at the time of their perpetrations or judicial rules of construction limiting use of analogy in interpreting criminal laws[57]. It dates back to Roman roots and is therefore accepted throughout Europe and all countries with legal traditions coming from Europe (America and mostly former colonies of European countries), i.e. throughout the whole world. Since this tradition dates back centuries, this special maxim has been entrenched in most legal codification or in case law systems for centuries, too. It was also existent at the time of drafting the Convention (IV) and is therefore applicable.

2.4.3.4. We will have to distinguish between actions up to 1907 and actions after the signing of the Convention (IV). The actions up to 1907 before Germany became a signatory to Convention (IV) are excluded from applicability due to the *nullum crimen sine lege* principle as shown above. But actions in Namibia after Germany became a signatory might fall under the Convention (IV). But due to the fact that rebellious acts and armed resistance on Herero side had stopped after the battle at Waterberg and at the latest by mid-1905, classifying the forced labour, extrajudicial killings and other atrocities as actions against belligerents would be absurd. The Hereros were totally subjugated and therefore in no way belligerents any more.

2.4.3.5. Therefore a breach of international law, here the Convention (IV) provisions, by the German atrocities before the signing is not possible due to the *nullum crimen sine lege* principle. The actions afterwards until 1915 do not constitute a breach of the provisions of Convention (IV).



[56] Ratner & Abrams.1997: 19, 20
[57] Bassiouni.1992: 87-107

**2.4.4. Customary Law, International Law Conventions and Nullum Crimen Sine Lege**

2.4.4.1. As we have seen there is no international law codification prior to the German actions in Namibia under which area of protection the Herero fall. And due to the principle of *nullum crimen sine lege* codifications after the time of 1915 (end of German rule) are not applicable.

Experience has shown that most codification result from customary law. Without a doubt there is a tendency to write customary law down in a multilateral convention signed by the vast majority of states, thus clarifying it, making it more precise and much easier to handle[58]. Proving something to be customary law can be much more difficult than having a written convention with its huge number of signatories. Turning this around means that the delicts laid down in codifications drafted after the German atrocities might also have been crimes in customary law of the time when they were committed. The crimes mentioned in the statement of claim are Genocide, Crimes Against Humanity, Slavery and Forced Labour. Let us try to trace down their development and see, if one of those atrocities was a crime in customary international law at the time in question.

2.4.4.2. Genocide: The crime of Genocide as such is a relatively new one that only developed after the gruesome atrocities that the Nazis brought upon millions of people, especially Jews during 1933-1945. The term 'genocide' finds its origin in works of Raphael Lemkin. *"The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group."*[59]

In 1946 the United Nations initiated the drafting process for the Genocide Convention[60] that two years later bore fruits. The result was the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide. The definition of Genocide in Article 2 is regarded as part of international customary law[61]. It has now also been incorporated as Article 6 of the Rome Statute of the International Criminal Court Statute[62].

[58] Wüst in Hemmer.2001: para 35
[59] Lemkin.1944: 79
[60] General Assembly Resolution 96 (I), U.N. Doc. A/64/Add.1, at 188-89 (1946)
[61] Anderes.2000: 180
[62] See Appendice I: The Rome Statute of the International Criminal Court

The Hereros claim, that the Germans committed a genocide in Namibia are almost uncontested in historical scholary writings[63]. But seeing that this concept was first mentioned in Lemkins work in 1944, it is impossible for it to have been a crime in customary law during German occupation of South West Africa. Maybe the separate actions adding up to what we now call genocide were crimes in customary law, but not the crime of Genocide, as we understand it today.

2.4.4.3. Crimes against Humanity: (a) Besides the crime of Genocide, international law has developed the legal figure of Crimes against Humanity. It largely remained outside of international treaties and conventions and was thus heavily founded in customary law until the end of the 20th century[64]. Then it was codified several times, e.g. in Article 5 of the Statute of the International Tribunal for Yugoslavia (1993) and Article 3 of the Statute of the International Criminal Tribunal for Rwanda (1994). The final step in the codification of this customary law figure is Article 7 of the Rome Statute of the International Criminal Court. The definition says that any of the acts enumerated in Article 7 (a) – (k) *"as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"* constitute a Crime against Humanity. Included in the enumeration of acts are among others murder, torture, slavery, apartheid and enforced disappearances.



(b) First attempts to classify actions deemed today as Crimes against Humanity came in 1919 after World War I. A special fifteen-member Allied commission wrote a report for the Preliminary Peace Conference dealing with the conduct of the Central Powers in World War I. The majority agreed that they had committed numerous acts *"in violation of the established laws and customs of war and the elementary laws of humanity"*[65], such as the massacre of Armenians by the Turkish. But the two American members disagreed, arguing that the concept of laws of humanity is more a question of moral law, lacking *"fixed and universal standards"*, and were thus *"not the object of punishment by a court of justice."*[66] Seeing the dissenting view, the question arising is, can this position by the majority be regarded as customary law?

(c) To accept a norm as part of customary law two elements are necessary: general practice *(consuetudo)* and the recognition of this practice as law *(opinio iuris)*. General practice means

[63] The two exceptions are Prof. Huber and Brigitte Lau; see Hesselbein.1996: 52
[64] Ratner &Abrams p.45
[65] Preliminary Peace Conference Report.1919: 115
[66] See id.: 144

that the large majority of international law subjects abide by the norm. This way of acting needs to be of a certain duration, uniformity and universality among the subjects[67]. The *consuetudo* with respect to the crime of 'Crimes against Humanity' is questionable, thinking of the numerous wars in the years prior to World War I and the way they were fought[68]. Returning to the *opinion iuris* question, one can only say that it is highly questionable if those criteria were met at the time when the Germans committed the atrocities in South West Africa. As shown there was not even a clear consensus on that legal figure at the end of World War I. In this case thirteen out of fifteen panel members agreed. But it was entirely made up of members of the victorious allies. In addition to the dissenting American view we therefore do not know the legal opinions of the Central Powers Turkey, Germany or Austria-Hungary, since no representatives were present. Also during the German occupation with the subjugation of the Herero Nation as a whole, not a single official statement was made by any nation present at the Berlin Conference condemning German conduct, asking them to treat the Hereros humanely[69]. This silence also makes an existing opinio iuris unlikely.

(d) There are clearly more facts indicating that there was no such thing as 'Crimes against Humanity' in customary international law in the early 20th century. Due to those insecurities, its existence at that time has to be denied.



2.4.4.4. Slavery: (a) Already the scholar Grotius thought that it is an unnatural situation, that one human should be owned by another[70]. Nevertheless slavery was a scourge of mankind for the next decades to come until at the end of the 18th century things began to change. International law was still in its infancy regarding the protection of individuals directly. So far protection only existed through mediation of the nation states[71]. The leading nation spearheading this change was Great Britain. Public opinion, influenced by puritans, philanthropists and the economical-political weight of plantation owners in the West Indies unable to compete against the romantic states strongly supporting and relying on slavery, was supporting the move to ban slavery. With time nations such as France followed, resulting in the *Déclaration des Puissances sur l'abolition de la traite des Nègres, 8 February 1815*. The declaration stated the signatories opinion that the abolition of slavery was a political necessity. But no provisions as to 'when' or 'how' were included[72].

[67] Epping in Ipsen.1999: §16 para 2, 4, 5
[68] Japan-Russia 1904-1905; Boerwars 1899-1902
[69] Schildknecht.2000: 307
[70] Grotius.1939: Lib. II, Cap. V, XXUII-XXXII
[71] Schildknecht.2000: 296
[72] See id.: 297

Thus Great Britain started building a system of bilateral treaties[73]. Slave trade on sea was prohibited and ships could be checked at random for slaves or if their equipment revealed them as a slave ship. With time all European nations regarded slave trade as illegal, and most of them enforced the prohibition. In addition to the *consuetudo* regarding slave trade, the ever growing number of treaties prohibiting slave trade strongly indicated an *opinio iuris*. After the end of the American civil war in 1865, abolition was enforced throughout the whole country and slave trade was incorporated in international customary law as a crime. In 1884 the Berlin Conference agreed on the innovation of also banning slave trade on land[74].

(b) Summing up different treaties, slave trade is the transport of indigenous Africans away from their continent for profit and facts indicating beyond doubt that a ship is especially equipped for slave trade for profit. Slavery means, that an African is a legal subject belonging to someone else[75]. In contrast to that forced labour according to the 1930 Convention Concerning Forced or Compulsory Labour is defined as *"all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily"*.[76]

(c) No slavery occurred before the rebellion in South West Africa, but after the subjugation the Hereros were forced to work for the Germans and were held in concentration camps. The question is, if this amounts to slavery or slave trade.



The Hereros and other Africans were not made legal objects belonging to someone else, i.e. de iure there was no slavery in South West Africa. But *de facto* the Hereros were forced to work for the Germans. Even worse, since the single Herero did not belong to the company or individual he worked for, he was dispensable. If his work caused an illness or killed him, a new worker would replace him[77]. The company did not suffer any loss due to that. This means that in most cases they were treated worse than slaves, since those at least have a value to its owner.

[73] Only the year of the first treaty will be mentioned. Some countries signed up to three bilateral treaties with Great Britain. These are some of the countries: Portugal (1815), Spain (1817), Netherlands (1818), Schweden-Norway (1824), Brasil (1826), the German hanseatic cities (1837), Texas (1840), Mexico (1841)
[74] Schildknecht.2000: 298
[75] See id.: 298
[76] Some categories like cases of national emergency are specifically excluded, but not important here.
[77] Drechsler.1984: 222

In international law several indications exist denying an extensive interpretation of the term 'slavery'. In 1897 the British Empire subjugated a rebellious tribe in Betschuanaland and ordered five years of forced labour for half of the 3 800 captured Africans. This indicates a restrictive definition of slavery, since the British together with the Americans were still spearheading the abolition of slavery movement. That makes it unlikely that they themselves committed slavery on such a scale. Numerous other accounts of similar actions probably amounting to forced labour exist: the treatment of Africans in the Congo belonging to Belgium; the Chinese coolies and labour trade in general; a law in French – Madagascar ordered natives to do forced labour; in the Dutch colony Surinam up to three months of forced labour was a penal sanction for natives. Some of those actions were critized as inhumane and wrong, but not categorized as slavery or slave trade[78].

(d) Therefore no slavery existed in South West Africa during German occupation.

2.4.4.5. Forced Labour: (a) As mentioned in 1.4. and 2.4.4.4. an extensive system of forced labour was installed in South West Africa after the defeat of the Herero tribe. Seeing the definition of the 1930 Forced Labour Convention, those acts clearly amount to forced labour. But the claimant's opinion that this constituted a crime in international law at that time is not correct. As just shown above in the enumeration of vast number of examples throughout the world, this was common practice in these days and legally not problematic. Thus this system of forced labour also is not a breach of international law.



2.4.4.6. Result: The crimes of Genocide, Crimes Against Humanity, Slavery and Forced Labour, generally accepted today in international law, were thus not part of the customary law at the time of German occupation of South West Africa.

**2.4.5. Natural Law**

2.4.5.1. Background: *"True law is right reason in agreement with nature, universal, consistent, everlasting, whose nature is to advocate duty by prescription and to deter wrongdoing by prohibition. Good men obey its prescriptions and prohibitions, but evil men disobey them. It is forbidden by God to alter this law, nor is it permissible to repeal any part of it, and it is impossible to abolish the whole of it.[...]There is now and will be forever one law valid for all peoples and all times."*[79] This is the definition of natural law in the words of

[78] Schildknecht.2000: 301-303
[79] Cicero: On the Republic

Cicero. He states a theory claiming that all law is derived from the nature of mankind. Therefore this source and thus that law is above all laws made by men. The natural law theory originates from the philosophers of Greece and the Roman Empire[80]. This theory was from then on incorporated into the legal-philosophical world.

In the middle ages Grotius derived the contract theory from this, arguing that between the state and its people a 'contract' for their own safety exists, also developing the concept of the law of nations. With the contract theory Hobbes and Pufendorf argued for the right of the royal state to absolute sovereignty; in their opinion this contract could not be terminated. Locke disagreed, saying the people can terminate it if their regent disregards the natural law[81]. Some authors try to continue this train of thoughts by claiming that there are some crimes breaching legal rights of international law that are and always have been inherent to humans in general, e.g. genocide, crimes against humanity and slavery[82]. This would mean, that irrespective of their date of occurrence the actions of the Germans in Namibia constituted crimes in international law.

2.4.5.2. Statutory Limitations Convention: Prove for this theory could be the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*[83]. The first sentence of Article 1 states that *"no statutory limitation shall apply to the following crimes, irrespective of the date of their commission"* following the definitions of war crimes and crimes against humanity. Interpreting the wording, this convention might be applicable to delicts of the past.



But speaking against this is the wording of Article 2: *"If any of the crimes mentioned in Article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals [...]."* Here the convention stipulates who it is applicable to, if a crime is committed. It does not say 'were', but only 'is'. This strongly indicates that only future crimes under Article 1 will not fall under a statute of limitations anymore, not past ones. In addition it is naïve to believe that any state would have signed this convention if it had opened the door to civil liability due to maybe century old crimes. Also if it this is natural law – inherent to humans- what would this convention be good for anyway? The law would be applicable regardless of signatories and convention; that is supposed to be

[80] Hilgemann & Kinder.1999: 71
[81] Hilgemann & Kinder.1999: 256
[82] Möllers.2001: 11
[83] November 26th, 1968, 754 UNTS 73

nature of natural law. The intention of the signatories therefore can only have been to prevent future Crimes against Humanity and War Crimes from falling under a statute of limitations. Thus the Statutory Limitations Convention does not offer any help on the idea of extensive natural law.

2.4.5.3.The Theory and Result: Seeing that the author was not able to find any legal contemporary source supporting this extensive natural law theory, this opinion is in the best case a clear minority opinion in legal writing.

Arguments against it are readily available. Firstly, the idea of rights inherent to humans is logical, but rather in a moral and not in any way legal dimension. Without a doubt, genocides are morally outrages regardless of the date of their commission. But legally, the concepts of *nulla poena sine lege*, customary and treaty based law are much more convincing. Disregarding those would not further the human rights cause at all, because it would cause much damage. All Crimes against Humanity or War Crimes ever committed would become eligible for legal process, because due to the theory these rights were inherent since the first steps of mankind. Also this extensive natural law theory is a step back in history. In *De iure belli ac pacis libri tres* Grotius clearly saw that there was a necessity for the law of nations, because the moral rights of humans needed a legal frame to be generally applicable and protected. Grotius left behind Ciceros position that stated that *"[t]here is now and will be forever one law valid for all peoples and all times."* As a result, the author is highly critical of this theory and cannot support it.



**2.4.6. The ‚Treaty of Protection and Friendship' of 1885**

A breach of a treaty, bilateral or multilateral, is a delict in international law. This delict causes liability on the side of the delictual state. Seeing that a Treaty of Protection and Friendship between the German Kaiser and the Herero was concluded in 1885, the question arises what is the nature of this contract and also of the presence of Germany in South West Africa. Is this contract a treaty of international law or rather a contract between the state of Germany and one of its subjects, the Herero tribe, living in the German colony of South West Africa? Was the relationship one of international law or German domestic law? Without a doubt at some time in the occupation of South West Africa the law applicable changed to German domestic law, regardless of what version one supports, since even a possible international law relationship changed in the end.

In the literature and in official statements there was no consent as to how to call South West Africa. Commonly used were colony, area of protection, protectorate and sphere of interest[84]. So this is no indication, since those terms are inconclusive. Arguments exist for both sides. We will discuss them.

2.4.6.1.Arguments for Domestic German Law Relationship between Germany and the Herero

This version argues that South West Africa and thus also Herero territory was occupied by Germany according to customary international law just a few years after establishing their first presence. It became a colony and thus actions by the Germans fall under German law.

Prerequisite for the application of the customary law rule of effective occupation is, that the territory in question was not under the domination of another sovereign power, but instead qualifies as a *territorium nullius*[85]. If the tribe of the Herero constitutes another sovereign power and occupies the territory in question, then to accept a German occupation at this early point in time is not possible.

(a) Sovereign states in South West Africa: We need to ask what are the elements of a state in international law? It comprises of three elements: territory, people and the exercising of power by a single entity[86]. That means that within a territory with fixed boundaries, a power claiming sole sovereignty and with the prospect of lasting rule over the population of that territory exists[87].

Leading the tribal society of the Herero in South West Africa was a chief or captain. Together with his family and lower ranked chiefs they formed the upper class. His powers were limited by rules of society that also included his competences and duties. Normally several tribal groups with their own chiefs formed the whole tribe with their paramount chief. The link between them differed from group to group, very often relying on wealth, wise marriage politics, military abilities and the personal abilities of its chief[88]. The structures of power in the indigenous society of South West Africa were constantly changing. In retrospective it is not clear where a chief derived his authority to rule. Often groups left a tribe and constituted a new one or it was simply absorbed by a different tribe. The existing bonds between chiefs and their paramount chief are similar to the early system of feudalism in Europe, but with often

[84] Hesselbein.1996: 26
[85] Gloria in Ipsen.1999: §23 para 26
[86] Seidl-Hohenveldern.2000: para 622
[87] Gloria in Ipsen.1999: §23 para 2
[88] Riegner.1911: 23

changing bonds. Therefore it is difficult to see a sole sovereignty and the prospect of a lasting rule over the population[89].

It is also questionable if the Herero tribe occupied a country within fixed boundaries. Indeed almost every tribe had a main kraal (such as Hoornkranz for the Witbooi). Also chiefs asked tribute from merchants and travellers passing through their territory or doing trade there. People could be banned from the tribe's territory[90]. But still the tribal societies of South West Africa were all pastoral ones, i.e. tending their herds the majority of the tribe led them to grazing ground throughout the year crossing large distances. Sometimes they did not visit one grazing ground for years. In their perception the grounds being the most distant from their main kraal was the outer border of their territory. But nevertheless different tribes used the same grazing ground or water hole. Also those borders kept shifting together with the splitting and absorbing of tribe units. Sometimes places were avoided since an enemy tribe with a superior military force was nearby or simply were chased of their grazing grounds, losing substantial numbers of livestock[91]. Thus borders were not clearly fixed.

As a result of the lack of clear borders and no lasting sole sovereignty no states existed in South West Africa prior to German occupation. The territory was free to be occupied.



(b) German Occupation of SWA:

Occupation of a territory in international law requires three elements[92]:

*1. Actions by a State Representative:* Actions in South West Africa to occupy the territory were taken by German representatives, e.g. consul Nachtigal, colonial commissioner Göring or Governor von Francois.

2. *Animus Occupandi*: Germany's will to occupy this territory showed in numerous actions, e.g. the Germans successful attempts to prevent other nations from getting a piece of the territory by signing bilateral contracts with Portugal[93] and England[94] through which the German sphere of interest was established. In 1890 it was bordered by colonies of its fellow Europeans and made South West Africa a territory with clearly determined borders. Since the

[89] Schildknecht.2000: 199
[90] See id.: 200
[91] See id.: 201
[92] Gloria in Ipsen.1999: §23 para 28-30
[93] DkolGG.1893 Vol.I: 89: Declaration between the Imperial German and Royal Portuguese Government regarding the boundaries of their possessions and spheres of interest from the 30 December 1886
[94] DkolGG.1893 Vol.I: 92: Treaty between Germany and England on the Colonies and Helgoland from the 1 July 1890

coastal line of South West Africa was under German control or at least not occupied by other nations due to them respecting the German claim, no other nation was able to compete with Germany for the occupation of the colony. Another indication is the ever-growing number of financial resources as well as manpower that Germany was willing to spend on SWA.

*3. Effective Exercising of Power:* Due to two facts, the demands regarding the effective exercising of power in South West Africa for occupation are rather low. Firstly, there was no competition for occupation[95]. Secondly, due to the bad habitability of large parts of the territory, the intensity of administration needed to effectively exercise power is rather low, too[96]. Several acts exercising power show the effective occupation. One of the first acts were regulations regarding the *droit acquis* (acquisition of rights), settling disputes with Great Britain regarding legal positions of some of its citizens in South West Africa[97]. Many legislative acts were passed, e.g. a declaration that natives were only allowed to grant mining concessions with the imperial commissioner's consent; restrictions on trade with firearms and ammunition or restrictions on occupation and trading with land[98]. The African tribes generally accepted those acts. Lastly there was a constant increase of influence and of administration.

Summing this up, Germany according to international law effectively occupied the territory. Giving an exact date is difficult, but seeing all those acts, claiming an occupation by the year 1890 is justifiable[99]. Thus it is of no interest if the contract of 1885 concluded between Germany and the Hereros was an international law treaty or not, because at the latest by 1890 South West Africa became a German colony and legal questions would be dealt with according to German law.



(c) Actions under German Law: On 9 November 1900 the Reichstag passed legislation, in this case the new version of the Protection Territory Act[100], become applicable to all German areas of protection. It stipulated that German laws were applicable to whites in the colony, whereas Herero remained mainly under Herero law. This was interpreted as a voluntary self-restrainment of German authority and as a sign of subsidiarity. As mentioned in 1.2.1. this largely remained illusory, because in the case of Germans having trouble with the Hereros, they just dragged them in front of German courts or simply applied the law of the

[95] Schildknecht.2000: 216
[96] Seidl-Hohenveldern.2000: para 1137
[97] Schildknecht.2000: 216-218
[98] See id.: 223-224
[99] See id.: 235
[100] RGbl 1900: 812

jungle. And in case of Hereros having troubles with Germans, those complaints mostly went unanswered. A judicial way for Hereros to claim reparations from Germans did not exist[101].

Also the German military actions did not breach German law. In case of rebellion, states act to defend their sovereignty. The fact that the Herero were pushed to the limit by the Germans first and that German actions were exceeding the actually necessary to break the spirit and stop the rebellion is without consequences. The actions were morally wrong, but regardless of that it was common practice throughout the world to deal harshly with rebels. This common practice was based on domestic law. Thus out of domestic German law no liability for actions of Germans can result. Even if one disagrees here, all claims would have come under the statute of limitation anyway. Let us now turn to the second possibility.

2.4.6.2.Arguments for an International Law Relationship between Germany and the Hereros

(a) Rebutting the Arguments of 2.4.6.1.(a): There are also arguments supporting the opinion, that the Herero and other tribes in South West Africa were subjects of international law, i.e. states. In 2.4.6.1.(a) the lack of a state territory and sole power with the prospect of a lasting rule over the population denied the recognition as a state.

This has been critized[102]. Firstly a core territory always existed, situated around the main kraal, meeting the first requirements of the three-element-theory. That much of the other land was under dispute is problematic. But comparing this situation to times of warfare in Europe where regions were conquered and lost, the country that just lost control over that strip still retained its status as a state. Still the rest of its country clearly constitutes a distinguished territory. The second argument is in line with the first one: in European history, allies switched sides too, joining forces with different rulers. Sometimes even king were replaced, the authority of the state strongly damaged. Nevertheless the country did not lose its status as an international law subject. The same should apply to the Herero society with a system of power being headed by the paramount chief. These states concluded elaborate treaties with each other and respected them, e.g. the Peace of Okahandja[103]. Supporting this opinion were a number of contemporary legal scholars[104].

[101] Hesselbein.1996: 34
[102] See id.: 28, 38-43
[103] Bridgman.1981: 172 Appendice: The Peace of Okahandja; published in the Cape by Government Notice No.470 of 1870
[104] Zorn, Ullmann, Bendix, all in Schack.1923: 101, 107, 116

(b) One international subject enough? The scholar Schack also claimed that only one state party to the contract was necessary for application of international law, if the state party treated the other party like an international law subject and in the contract it became clear that the law of nations was supposed to be applicable[105]. Interpreting the wording of the 1885 contract, it sounds like equals concluding a contract. Subjugation or similar things are not mentioned, a complete or partly giving up of Herero sovereignty plays no part.

(c) Result: If agreeing with the arguments of (a) and (b) the Herero tribe was a subject of the law of nations or at least the contract concluded between them and Germany was a treaty of international law. Therefore a breach of this contract is a delict causing the duty to make restitutions or pay damages as shown above. A grave breach of the contract causes termination of the contract[106].

(d) Conclusion: Many actions during the German presence after 1885 might be called breaches of this contract of friendship and protection: the lack of military support against the Nama in July 1890; the annexion of the Windhoek area by von Francois; the continuing expropriation of land and cattle by means of theft and fraud; the mistreatment of Hereros by Germans including battery, rape and killings. If those actions are only regarded as breaches of the contract, it still remains valid. But the declaration of war by the Herero Tribe terminates the contract. A mere suspension during the time of battle is not possible, because war is the opposite of the contract's purpose, thus rendering it void[107]. For this reason the most hideous crimes, the ones committed after the beginning of the rebellion in 1904, definitely do not fall under the contracts provision and can thus not constitute a breach of it because it was already terminated.

(e) Following this argumentation, Germans actions from 1885 – 1904 constitute a breach of a treaty of international law, causing delictual liability. Actions after 1904 do not fall under this contract and can thus not cause any contractual liability. After the subjugation South West Africa then became a duly German colony and the explanations in 2.4.6.1.(c) are applicable.

2.4.6.3. Result

The question if and when South West Africa became a German colony, if the contract of 1885 was an international law treaty or not, i.e. if the arguments of 2.4.6.1 or 2.4.6.2 are more

[105] Schack.1923: 115
[106] Article 60 (1), (2) of the Vienna Convention. Applicability see footnote 52.
[107] von Heinegg in Ipsen.1999: §15 para 77

convincing, the author will not decide here. These questions caused much discussion among contemporary scholars before World War I already and will thus be left to be answered in a work focussing on that topic.

### 2.4.7. A Breach of International Law by the Germans possibly opening the door to civil liability under American Law --- Result

Except for the possible breach of a contract of international law (see 2.4.6.2.), no other possible breach was to be found. The other possibilities (2.4.1.-2.4.6.1.) due to numerous reasons did not turn up any action by Germany, that might have been in conflict with the contemporary law of nations.

## 2.5. Result— Accountability under American, German or Namibian Law

After an extensive search in three countries for possible legal means of holding German transnational corporations involved in South West Africa accountable, the meagre result is that maybe a contract of international law was concluded between the Herero Tribe and Germany. And even this opinion is under much criticism. The other alleys all turned out to be dead-end streets. Seeing the accounts of atrocities this hardly seems right.



After having exhausted the domestic options, the paper will now turn towards the international scenario. The question of accountability of Transnational Corporations in International Law has been left untouched so far.

# CHAPTER 3

## THE POSITION OF TRANSNATIONAL COMPANIES IN INTERNATIONAL LAW IN GENERAL AND THE QUESTION OF ACCOUNTABILITY





"THE COMMON AIM OF GOVERNMENTS ADHERING TO THE GUIDELINES IS TO ENCOURAGE THE POSITIVE CONTRIBUTIONS THAT MULTINATIONAL ENTERPRISES CAN MAKE TO ECONOMIC, ENVIRONMENTAL AND SOCIAL PROGRESS AND TO MINIMIZE THE DIFFICULTIES TO WHICH THEIR VARIOUS OPERATIONS MAY GIVE RISE."[108]

[108] Preface of OECD Guidelines for Multinational Corporations

## 3.1. Transnational Companies in International Law

### 3.1.1. Definition of Transnational Companies

Transnational Corporations are organizational units, which during participation in the economical quest for profit develop activities across at least one border, i.e. in at least two countries[109]. This obviously also includes small enterprises, but the focus should be on major players with vast economical power such as Deutsche Bank.

### 3.1.2. Normal Person in International Law

The normal actors in international law are states, signing treaties, negotiating with other countries, etc. Concerning individuals the general principle of mediation of individuals is still applicable. This principle regards the individual as a simple object, thus denying him rights and duties on the level of international law. Only by mediation of the state it is citizen of, the individual is linked to international law, remaining object of it[110]. This means that an individual is primarily citizen of his state; their connection to international law lies in their domestic law.

### 3.1.3. Legal Persons in International Law and Implications for the Hereros Case

Coming from normal persons to legal persons, we face the same situation. In the case of *Barcelona Traction, Light and Power Co.* the International Court of Justice decided that the legal personality of a transnational corporation is equal to a regular citizen[111]. As yet, TNCs lack legal subjectivity in international law and are objects of international law. For this reason a country can be held liable for the action of a transnational corporation if its actions result in a breach of law on foreign territory that can be regarded as a breach of international law. Other treaties such as the Universal Declaration of Human Rights also require individuals or companies to protect the rights of third parties and not to infringe them[112]. But even if this is contradicted, provisions for accountability of those objects are not existent. This responsibility of holding violators accountable rests with the governments and thus on domestic level.

Seeing that the Barcelona Traction decision is from 1970, it is clear, that at the time of German occupation of South West Africa no accountability due to international law instruments for transnational corporations existed. Deutsche Bank and DAL for this reason

[109] Epping in Ipsen.1999: §8 para 14
[110] See id.: §7 para 1; Seidl-Hohenveldern.2000: §53 para 927
[111] *Barcelona Traction, Light and Power Co.*, Belgium vs. Spain, INT.GERI 3, para.70 (1970)
[112] Anderes.2000: 108

cannot be held liable on the level of international law either. And holding the violators accountable on the domestic level is impossible for the government due to the statute of limitations.

The Herero case is genuine with its history. But without a doubt parallels to other cases exist with respect to the involvement of a corporation such as Deutsche Bank and the question of legal accountability. This problem of a lack of accountability is a general one. Seeing the economical power of Deutsche Bank and that of Namibia[113], it seems that this problem needs fixing. We will begin with an introduction into the general situation of transnational corporations in the economical world and especially their position in their host countries. Then we will see what happened in international law after the Barcelona Traction case. What might be the development in the future?

### 3.1.4. Transnational Corporations and Host Countries: Power and Dependencies

3.1.4.1. Benefits and Disadvantages for the Parties: Theoretically the relationship between a TNC and its host country is a win-win situation for both parties. The transnational corporation benefits from cheap human resources, natural resources, less regulations concerning labour rights and environmental protection, tax and legislative advantages; the host country in return hopes to see the creation of new jobs, economical growth, more tax revenue, technological and organizational gain of knowledge, an improvement of the standard of living in general[114].



In reality things are less simple. Besides these benefits, most host countries will have to cope with problems such as a bad labour treatment, rapid exploitation of natural resources with little care for the environment, repatriation of profits by transferring it into the county of the parent company with out reinvestment in the host country, furthering of local corruption, etc[115].

3.1.4.2. Controls & Dependencies: The majority of problematic and often unaccounted transnational corporation action takes place in developing countries. Those countries face the problem, that they desperately need to attract foreign direct investment to gain any of the advantages shown above, all aiming to improve the general living standard of society. The result is a strong dependence of the host country on the transnational corporation. But just like

[113] As a reminder: Turnover 2000 Deutsche Bank € 918 Billion; GDP 2000 Namibia € 3.124 Billion
[114] Anderes.2000: 12
[115] See id.: 13

a company can start business in country X because of favourable economic framework, it can shut down its operations and move its subsidiary to country Y if that favourable framework changes (unless exploitation of natural resources takes place). The developing country then loses jobs, knowledge and the other advantages. For this reason control of TNC action is rather limited in many developing countries[116].

The geographical location of the companies does not make controls any easier. 89 % of transnational corporations have their headquarters in the USA, Japan or the EU. They account for two thirds of all foreign direct investment[117], mostly dealing through subsidiary companies. Efficient control of a TNC parental company in the country where its headquarters are is also very difficult, because the actions deemed problematic happened thousands of kilometres away. This shows an essential part of problem. The one side, afraid that the company might move its operations, is not willing to control the company. Nor would it seem possible to some to control it, looking at the financial means that a huge transnational corporation commands compared to the means of struggling developing countries. And the other side is mostly not interested in the conduct of the company.

Several 'codes of conduct' trying to create some kind of accountability on a voluntary basis were created in the years following the *Barcelona Traction* decision, proving that the problems mentioned above were well known.



## 3.2. Codes of Conduct drafted by International Organisations

### 3.2.1. Introduction

Just like most countries agree that transnational corporations only have an object status in the law of nations, most of them agree that there is a need to somehow regulate them internationally[118]. But this general opinion did not result in any treaty or something similar. Instead it suffered the fate that no agreement as to how this regulation should look, was found among the nations. For this reason, international organisations drafted 'codes of conducts'. The codes mentioned in 3.2.2.- 3.2.5. are voluntarily for the states and the corporations as well. No legal obligation is created. Therefore we will only deal briefly with this 'soft law', since with the lack of legal enforceability it is a very weak tool.

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[116] Anderes.2000: 12, 13
[117] WIR 1999 p. 21, 82
[118] Rubin.1995: 1282; U.N. Department of Economic and Social Affairs, The Impact of Multinational Corporations on Development and International Relations (Report of the U.N. Group of Eminent Persons), U.N. Doc. E/5500/Add.1 (1974) p. 54

### 3.2.2. OECD Guidelines for Multinational Corporations, 1976[119]

In the mid-eighties, the developing countries had gained much influence in the UN. The focus on many things changed in their favour, e.g. decolonisation. Therefore the OECD Guidelines were strongly supported by the USA, trying to create a counterweight to possible UN codifications on transnational corporation conduct[120]. With this background the work of 1977 was more of a guideline for protection of investments.

It has been updated twice since then (1990 and 2000) and regardless of the 1977 approach still being predominant, the guidelines now include proposed standards in environmental questions, anti-corruption measures, competition, etc. It refers to things such as sustainable development, respect of human rights or abstention from improper involvement on the domestic political scene. As an example Para 8 asks the enterprises to *"contribute to the development of environmentally meaningful and economically efficient public policy, for example, by means of partnerships or initiatives that will enhance environmental awareness and protection."*[121]

The OECD is quite active on the conduct of Multinational Enterprises, publishing an annual survey and sometimes case studies[122]. Also seeing the development from a paper focusing on protection of investments to a broader set of guidelines is encouraging.



### 3.2.3. ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 1977

After 5 years of work between governments, employers and employees organisations, these three parties agreed on the *International Labour Organisation Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*. It covered about the same areas like the OECD paper from the year before, e.g. health, equality, safety and wages. The declaration also asks the parties to show respect for human rights referring to the UN Universal Declaration of Human Rights, several ILO Conventions and the laws and customs of their host country[123].

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[119] The OECD on TNCs see www.oecd.org/EN/documentation/0,,EN-documentation-93-nodirectorate-no-no-no-28,00.html
[120] Muchlinski.1995: 578
[121] OECD Guidelines 2000 para 8
[122] E.g. Multinational Enterprises in Situations of Violent Conflict and Widespread Human Rights Abuse
[123] Anderes.2000: 121

### 3.2.4. Code of Conduct by U.N. Commission for Transnational Corporations, 1978-90

1974 the General Assembly of the United Nations created the Commission for Transnational Corporations and the Information and Research Centre on Transnational Corporations[124]. The third world countries tried to emphasize on regulations for business conduct for transnational corporations while at the same time the first world countries wanted to emphasize on protection of 'their' corporations[125]. With the two parties of regulation supporters and status quo supporters represented in the commission, work was difficult.

Nevertheless they managed to agree on a codex, because they only drafted some general (legally non-binding) standards. Some of the provisions dealt with respect for human rights, transparency of company structure and policy, no interference with domestic affairs of the host country, environmental safety and anti-corruption measures. The parties were not able to come to an agreement concerning expropriation, equal treatment, respect for international law, mediation outside of the courts, definition of transnational corporation and the question of transfers of technology[126]. Until today the codex has been improved three times in 1983, 1988 and 1990 [127].

Again this codex is a step forward. It creates the idea of a 'good corporate citizen', respecting cultural values and tradition in the host country, emphasizing the need to protect environment and people[128].



### 3.2.5. Other Standards

Several other standards were drafted in the following years, e.g. the Agenda 21[129], most of them referring to the previous ones. Some in contrast to that only dealt with only one specific topic like pesticides[130]. In 1999 at the World Economic Forum in Davos, Kofi Annan, the Secretary General of the United Nations, asked the present business leaders to start a 'Global Compact' to give a human touch to the global markets[131].

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[124] ECOSOC Res. 1913, U.N. ESCOR 57th Session, Supp. No.1A, 31, U.N. Soc.E/5570/Add.1 (1974) und ECOSOC Res. 1908, U.N. ESCOR 57th Session, Supp. No.1A, 13, U.N. Soc.E/5570 (1974)
[125] Anderes.2000: 122
[126] See id.: 123
[127] The 1990 text see CTC, Draft Code of Conduct on Transnational Corporations, U.N. Doc. E/1990/94 (1990)
[128] A result of the shock the Bhophal case caused among the International Community. More on that case later.
[129] UN Conference on Environment and Development, Annex II,29,UN Doc.A/CONF.151/26/Rev.1(Vol.1) 1992
[130] International Code of Conduct on Distribution and Usage of Pesticides of the FAO;
FAO Conference Res.10/85, 28.11.1985
[131] Anderes.2000: 130, for an extensive review see WIR 1999, 353 Box XII.1.

### 3.2.6. Result

The number of drafts all dealing with the same topic shows, that there is a sense of need to regulate the conduct of transnational corporations, but also provide security for investments. But the fact that all those drafts are working on a voluntary basis being 'soft law' shows that no real consensus was reached so far. Those guidelines are all very weak tools. Surely many TNCs stick to their provisions, but in that one case where they do not adhere to them, it does not have legally enforceable consequences. No damages can be claimed and many companies only pay lip service.

## 3.3. Attempts of Self-regulatory instruments

### 3.3.1. Introduction

With the growing number of non-governmental organisations focusing on corporate conduct especially in developing countries, something changed. Reports in the media after non-governmental organisation research on corporate entities conduct involved in human rights abuses sometimes created a public stir. Shareholder value of those companies decreased and clients approval dropped sharply. The public reputation that companies had, often through advertisement campaigns costing huge sums, were endangered. To prevent this from happening, some companies adopted self-regulatory principles[132].



### 3.3.2. ‚Sullivan' Principles

Reverend Leon Sullivan, board member of General Motors, created this set of principles in 1984. Its aim was to give guidelines to transnational corporations active in South Africa that wanted to support social justice and eliminate Apartheid. After 2 years about 200 out of 260 American corporations in South Africa had adopted the Sullivan Principles. Their performances were supervised and rated by D. Reid Weedon, a senior vice president of Arthur D. Little. This created a pressure to cope with the adopted measures and most companies did indeed. Still the companies applying these principles did not reach any of their two goals. Neither was apartheid abolished due to them nor was it an attractive alternative to use the principles instead of the termination of operations in South Africa[133].

### 3.3.3. ‚MacBride Principles'

Dealing with the problem of security and equality for catholic workers in protestant Northern Ireland, the 'MacBride' principles enjoyed far less support in the local TNC community. Only

[132] See id.: 135
[133] See id.: 137

32 out of 80 American joint stock companies doing business in the region adopted them. Without the public pressure but difficult political problems, they remained only marginally important[134].

### 3.3.4. Codes of Conduct by the International Chamber of Commerce

Already in 1972 the International Chamber of Commerce drafted its *Guidelines for International Investments* describing responsibilities for corporations and governments. In 1990 before the Rio Conference the Chamber added another instrument, the *Environmental Guidelines and their Business Charta for Sustainable Development*, including 16 principles of environment management[135]. The Chamber also supports the *Global Compact* of the UN.

### 3.3.5. Global Policy by Transnational Corporations

Forced/encouraged by civil society and media pressure, some corporations have adopted own business principles. Especially companies manufacturing goods to be sold directly on the American or European market are inclined to prevent bad media coverage to hurt their image. The reason is, that the clients have the choice between these goods and other competitors. If company A is allegedly involved in forced labour, children labour, etc, the client will buy from company B. Thus predominately companies in the clothing industry have own guidelines dealing with labour rights, safety, health standards, some even supporting civil and political rights[136].



The number of companies using this kind of intern regulations still remains small[137]. And since many companies being involved in developing countries are independent from American / European clients due to them extracting natural resources and not manufacturing consumer goods, they do not see the need to draft a 'limiting' regulation.

## 3.4. Results

What are the consequences of these standards, regulations and guidelines for this work regarding the Herero case first and then the general situation? As shown, the process of drafting them began in the seventies and eighties. Therefore they have no influence on the case of the Herero tribe, because these instruments did not exist back then.

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[134] See id.: 138
[135] In a survey among 150 TNCs dealing in consumer goods only 25 had adopted own human rights regulations; WIR 1999, p. 360
[136] Anderes.2000: 141, 142
[137] WIR 1999, p. 361

Seeing the consequences of those instruments on today's situation, the results are sobering. The number of principles, regulations and guidelines from which only a few have been mentioned, seems large. But in comparison to the large number of transnational corporations in today's' global economy the number in fact is rather small. Seeing this sets the proportions straight. The most important fact regardless of the actual number of the regulations still is that they lack any kind of legal mechanism of accountability. This would be the most effective 'incentive' to motivate companies to adhere to the instruments.

Still the question remains: what are the consequences, if not legal ones, of those standards for today? Companies pledging to adhere to standards like the Code of Conduct by the U.N. Commission for Transnational Corporations create a clear moral obligation on themselves. Those obligations will result in company intern standards and policies. If they are breached this will thus only lead to intern measures if at all. Therefore NGOs and organisations like the ILO cannot make much use of those instruments, because they lack legal enforceability. Both sides know that and act accordingly. Thus the consequences for our case are minimal.

Is it likely that new legally binding guidelines will be drafted soon on an international, domestic or company intern level? Seeing the decades that have gone past since the *Barcelona Traction* decision, seeing the difficulties that occurred only to agree on non-binding guidelines in international organisations, seeing the lack of implementation of intern measures, it makes it very unlikely that changes will come soon[138].



[138] Anderes.2000: 133

# CHAPTER 4

# ACCOUNTABILITY OF NON-AMERICAN TRANSNATIONAL COMPANIES ON THE DOMESTIC LEVEL

## THE ALIEN TORT CLAIMS ACT



*THE DISTRICT COURT SHALL HAVE ORIGINAL JURISDICTION OF A CIVIL ACTION BY AN ALIEN FOR A TORT ONLY, COMMITTED IN VIOLATION OF THE LAW OF NATIONS OR A TREATY OF THE UNITED STATES.*[139]

[139] Alien Tort Claims Act of 1789 (28 U.S.C. §1350 (1994))

## 4.1. The ATCA --- Introduction

As we have seen, international mechanisms of accountability for transnational corporations involved in human rights violations do not exist yet. In most cases, legally non-binding guidelines, principles or company intern regulations are not in place either. That means that in most cases, just like the Hereros case, appropriate mechanisms of accountability will not be found in the country where the violations occurred or in the country of origin of the company either. Thus plaintiffs now chose to take a different route that has become more popular over the last few years: the Alien Tort Claims Act.

This US-American law has become an important tool for plaintiffs seeking remedies against perpetrators of human right violations, but their own domestic legal system does not enable them to sue there or the political situation makes it impossible to have a free and fair trial. Choosing an American court can be the solution.

Today being 213 years old, it was almost forgotten[140] until in 1980 the case *Filartiga v. Pena-Irala*[141] brought it back to life. This trial is regarded as a landmark case in human rights litigation, since it opened the door to American courts for civil liability claims against perpetrators[142]. Since 1980 more than 30 lawsuits were brought to trial under the ATCA. Although this seems to be a rather small number, this can be regarded as a success, seeing the tough legal hurdles to make it through the pretrial only. Especially in the very recent past, class action suits based on the act against prominent corporations and countries caused a stir in the media, e.g. the Holocaust lawsuits and recent lawsuits against companies that supported the Apartheid regime.



I will show the general development regarding the Alien Tort Claims Act, its current judicial interpretation and some general problems for plaintiffs (4.2.-4.6.8.).

## 4.2. The Filartiga Decision and the development in ATCA Decisions

**4.2.1.The Case:** In 1976 Joelito Filartiga was tortured and killed. Responsible for this was general inspector America Pena-Irala, member of the Paraguayan police force. Dr. Filartiga, the father of the 17-year-old Joelito, was a well-known critic of the military regime of General

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[140] *Bolchos v. Darrel*, 3 F.Cas. 811 (D.C.S.C. 1975) und *Adra v. Clift*, 195 F. Supp. 865 (D.Md. 1961), dealing with maritime law and a question of custody, were the only cases before the Filartiga lawsuit.

[141] *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir.1980); *Filartiga v. Pena-Irala*, 577 F.Supp. 867 (E.D.N.Y. 1984)

[142] Blum & Steinhardt. 1981: 98; Burke.1983: 321; Goodman & Jinks.1997: 463

Alfredo Stroessner in Paraguay. Dr. Filartiga laid criminal charges against Pena-Irala in Paraguay, but to no avail.

In 1978 Pena-Irala left Paraguay for the United States, which he entered on a tourist visa. It expired and he remained in New York illegally. Dr. Filartigas daughter lived in Washington D.C. and got word of Pena-Iralas whereabouts. She informed immigration authorities and Pena-Irala was arrested. While in prison waiting to be expelled, he received a summon and court papers, accusing him of being responsible for Joelitos death and demanding $10 million compensatory and punitive damages. The lawsuit was based on the Alien Tort Claims Act.

**4.2.2.The Decision:** The district court rejected the case claiming lack of subject-matter jurisdiction[143]. That verdict was overturned in 1980 by the United States Court of Appeals for the Second Circuit, because *"deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus whenever an alleged torturer is found and served with process within United States borders, the ATCA provides jurisdiction."*[144]

Judge Kaufmann argued, that torture is accepted as a crime universally and has thus become part of the law of nations. He argues, that proof for this are provisions in the U.N. Charta, the Universal Declaration of Human Rights and the fact that torture is a punishable offence in more than 55 countries.

This Filartiga approach was under fire in 1984, when in the case of *Tel-Oren v. Libyan Arab Republic* it was decided, that although subject-matter jurisdiction existed, the victims lacked the individual authorization to take the perpetrators to court, because *"[i]nternational law typically does not authorize individuals to vindicate rights by bringing actions in either international or municipal tribunals."*[145] But although Judge Borks opinion of the Tel-Oren case found initial support, the Filartiga approach succeeded over it[146]. It is now generally accepted and has been the basis for the later rulings.



[143] *Filartiga v. Pena-Irala*, Para 79-917 (E.D.N.Y. May 15, 1979)
[144] See id.: 630 F.2d 876, 880 (2d Cir. 1980)
[145] *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d. 817 (D.C.Cir.1984)
[146] Randall.1986: 488

## 4.3. PLAINTIFF UNDER THE ATCA?

Possible plaintiffs under the statute are:

1. The actual victim or his/her legal guardian,
2. The legal representative of the estate of the deceased victim or
3. The beneficiary(ies) of the victim(s)[147].

Common to the three categories is that they must be non-US Americans citizen. These fall under the US American Tort Law.

## 4.4. DEFENDANT UNDER THE ATCA?

Possible defendants under the statute are:

1. Individuals,
2. Private corporate bodies,
3. Non-governmental organisations,
4. Foreign countries or
5. The U.S. government[148].

A decisive question when dealing with this act is the definition of the crime in question: first of all does the plaintiff fall under its protection from human rights violations? And secondly, if those rights have been breached, does the plaintiff derive a right to lay charges against the perpetrator under the Alien Tort Claims Act from that?



It is important to bear in mind, that many breaches of international law require acts by the state to create liability in front of courts. For example the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[149] is applicable to state officials or persons acting by official authority (state actor) only. In contrast to that, other breaches of international law are by definition applicable to state actors as well as private individuals, e.g. slavery, war crimes and genocide.

### 4.4.1. The Question of State Actor

For many crimes, a "state actor" as mentioned in the Filartiga case[150] is a prerequisite to qualify as a breach of international law. This is based on the decision in Kadic v. Karadzic[151] where the judge decided, that for some breaches of customary law, state actors can be

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[147] Stevens & Ratner.1996: 42
[148] Anderes.2000: 163
[149] G.A. Res. 39/46, Annex, UN GAOR, 39th Sess., Supp. No.51, at 197, UN Doc. A/39/51 (1984)
[150] *Filartiga* v. Pena-Irala, 639 F.2d 880: "under the color of law"
[151] *Kadic v. Karadzic*, 70 F.3 232 (2d Cir., 1995)

responsible just such as private individuals do. The relationship of the state actor to the private actor, if any, might thus be decisive. Several tests exist to reveal their nature[152].

**a) Test of "Nexus":** There needs to be a sufficient link between the government and the plaintiff's action in question, so that the action is deemed to be state action. Administrative acts, approval, acceptance or subsidies alone do not create liability for the state[153]. It needs to be involved substantially in the action, e.g. state officials conduct acts conflicting with either domestic or international law[154]. The decision in *Beanal v Freeport-McMoRan Inc* found that state officials simply observing do not create liability. Freeport private security personnel conducted acts conflicting with the law. But the criteria of the Nexus test was not met, since the plaintiff did not show, if the military personnel acted in support of the mining corporation or if the personnel was simply watching[155].

**b) Test of "Symbiotic Relationship":** 'Symbiotic relationship' means, that the state, i.e. its representatives / officials and the private party are dependant on each other. A financial and physical unity is necessary, then the state actor is part of the action in question[156]. In *Beanal v Freeport-McMoRan Inc.* the court found, that the plaintiff did not meet the criteria of this test either, although Freeport was given long term mining rights by the Indonesian Government and the government was an investor into the corporation. This was not enough to accept a symbiotic relationship between government and company. Official state rules, official funding or official approval of the act in question thus does not necessarily create a symbiotic relationship[157].



**c) Test of "Joint Action":** The criteria are met, if *"state officials and private parties have acted in concert in effecting a particular depriviation of rights"*. Furthermore *"a substantial degree of cooperative action"* between state and private party has to exist[158], sharing a common, unconstitutional goal. *"Joint action"* is created by conspiracy, but also *"where a private party is a 'wilful participant in joint action with the state or its agents.'"*[159] A private

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[152] Tests a) – d) see Anderes.2000: 166 - 168

[153] *Beanal v Freeport-McMoRan Inc.*, 969 F.Supp. 377 with reference to *Gallagher v. Neil Young Freedom Concert*, 49 F.3d. 1448 (10th Cir.1995)

[154] See id., with reference to *Burton v. Wilmington Parking Authority*, 365 U.S. 725 (1972)

[155] *Beanal v Freeport-McMoRan Inc.*, 969 F.Supp.378.

[156] See id., with reference to *Burton v. Wilmington Parking Authority*, 365 U.S. 725 (1972)

[157] See id., with reference to *Gallagher v. Neil Young Freedom Concert*, 49 F.3d. 1448 (10th Cir.1995)

[158] *John Doe I v. Unocal Corp.*, 963 F. Supp. 880, 891 (D.C. Cal. 1997) with reference to *Gallagher v. Neil Young Freedom Concert*, 49 F.3d. 1448 (10th Cir.1995), quoting *Collins Womancare*, 878 F.2d 1154 (9th Cir. 1989)

[159] See id., with reference to *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996)

party is only liable, *"if the particular actions challenged are inextricably intertwined with those of the government."*[160]

**d) Test of "Public Function":** If a private entity carries out a typical duty of government generally accepted as a core duty of a government only, then this action can be a deemed an act of state[161].

**e) Rome Statute of the International Criminal Court and Result:** Those tests and cases mentioned show, that US-American jurisdiction is of the opinion, that under the ATCA private parties can be held liable, also when dealing with crimes needing a state actor.

On 1 July 2002 the Rome Statute of the International Criminal Court came into power. One needs to ask, if this is of relevance to the question of state actor. Article 25 of the Statute stipulates that *"[t]he Court shall have jurisdiction over natural persons pursuant to this Statute"* and Article 28 says that *"[t]his Statute shall apply equally to all persons without any distinction based on official capacity"*. Seeing that the definitions of Genocide (Article 6), Crimes against Humanity (Article 7) and War Crimes (Article 8) do not limit its application to state actors or non-state actors[162], it is obvious that the Statute indeed is applicable to every natural person. But since the United States are not members to the treaty, it is without relevance here, since it does not provide the plaintiff with a "treaty of the United States" thus enabling him to sue under the Alien Tort Claims Act. An interesting question nevertheless is, if the crimes stipulated in the statute become part of the law of nations due to the vast majority of UN members also becoming signatories. If that catalogue becomes part of the law of nations it would be binding on the US, too. America would probably not even object to that, since the Americans, although rejecting the Rome Statute, never questioned the crime catalogue, but only critized the question of possible sovereignty of the court over Americans.

As this question remains unanswered for now, the necessity of those tests remains untouched by the provisions of the Rome Statute and thus the criteria of 'state actor' is still of importance under the Alien Tort Claims Act.

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[160] *Mathis v. Pacific Gas & Electric Co.*, 75 F.3d 498, 503 (9th Cir.) and *Beanal v Freeport-McMoRan Inc.*, 969 F.Supp.363, 379 (E.D.La 1997)

[161] *Beanal v Freeport-McMoRan Inc.*, 969 F.Supp.363, 379 with reference to *Jackson v. Metropolitan Edison C.*, 419 U.S. 352 (1974)

[162] e.g. Art.7, 2.(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

## 4.5. Motions to Dismiss

There are several motions to dismiss that will end the court action if they are successful.

### 4.5.1. "Act of State doctrine"

This doctrine denies American courts to admit lawsuits in which official acts of a foreign governmental representative on its own territory would need to be declared invalid or illegal[163]. In general *"it is only when officials having sovereign authority act in an official capacity that the act of state doctrine applies."*[164]

The few times the act of state doctrine was used in a human rights trial, the court dismissed it[165]. Thus it seems unlikely that it will be a tough hurdle for plaintiffs. This is even more so, since claiming the act of state doctrine to apply creates a precarious situation for the plaintiff, because he therefore has to argue, that the alleged human rights violations are part of his political agenda and have been authorized by the state. Thus this doctrine will hardly be of any protection to transnational corporations, since they would need to claim that the host country authorized its actions.

### 4.5.2. "Political Question Doctrine"

A defendant can claim that the case is a political question and can thus not be judged by a court. Again this claim has so far been dismissed every time it was used in connection with the ATCA[166]. The American government in its Filartiga amicus letter also voiced its opinion: *"The courts are properly confined to determination whether an individual has suffered a denial of rights guaranteed him as an individual by customary international law. Accordingly, before entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus that the right is protected and that there is a widely shared understanding of the scope of this protection. When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human*



[163] *W.S.Kirkpatrick & Co., Inc., v. Environmental Tectonics Corp. International*, 493 U.S. 405 (1990)
[164] *National Coalition Government of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 352 (C.D.Cal. 1997)
[165] *See id.*, 176 F.R.D. 329 (C.D.Cal. 1997); Kadic v. Karadzic, 70 F.3d 250 (2d Cir. 1995) the Defendant did not make use of the act of state doctrine, but the court said, that it did not apply; Stephens & Ratner, p. 139
[166] e.g. *Kinghoffer v. S.N.C. Anchille Lauro*, 739 F. Supp. 854 (S.D.N.Y. 1990)

*rights.*"[167] The doctrine of political question should thus not be admissible to Alien Tort Claims Act lawsuits in general. Therefore this doctrine also poses no threat to the claims.

### 4.5.3. Domestic legal remedies are exhausted

In international law, like all modern domestic systems, the exhaustion of legal subsidiary remedies is necessary before help can be looked for elsewhere. This means that before bringing the case to the US, all appropriate domestic legal remedies need to be exhausted. Exemptions are ineffective remedies or the case of unjustified delay. Also administrative actions need not necessarily be exhausted if those seem to be inappropriate or without sense.

### 4.5.4. Forum Non Conveniens

**a) The Principle:** This motion gives a judge the power to dismiss a case although the parties meet all the admissibility criteria, if the trial would be more appropriate and more just in a different forum[168]. 28 U.S.C. §1404 (a) of the federal law says *"[F]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."*

According to the precedent cases of *Gulf Oil Corp. v. Gilbert* and *Piper Aircraft Co. v. Reyno*[169] the defendant has to prove two things. Firstly, an appropriate alternative forum does exist and secondly, that the private and public interest in having the trial in front of a foreign court outweighs the interest to have it in the US.



**b) The Example of Bhopal:** The case of *In re Union Carbide Corp.*[170] shall serve as an example. The class action suit was the result of the death of 2 000 people and injuries to over 200 000 people, caused by gas leaking from the chemical plant Union Carbide India Limited. Besides thousands of Indian citizens the Government of India was plaintiff to the case, too.

The district court concluded, that since the plaintiffs are not inhabitants of the US, their choice of the USA as their place of jurisdiction cannot get as much attention as a lawsuit by inhabitants of the US[171]. In addition to that the district court decided that although the Indian

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[167] *Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in Filartiga v. Pena-Irala*, I.L.M. 19 (1980) 585
[168] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947)
[169] See id.; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)
[170] *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984*, 809 F.2d 195 (2d Cir. 1987), cert. Denied, 484 U.S. 871 81987)
[171] See id. 809 F.2d 198

legal system does have some disadvantages in comparison to the American, the Indian system still provides an appropriate alternative forum.

Judging the question of private interest the court found that many witnesses and sources of proof were in India. Witnesses cannot be forced to follow a summons of an American court. The part played by Union Carbide, the American parental company of Union Carbide India Limited, in the disaster was rather small, because Union Carbide withdrew from the management of the Indian plant long ago. Furthermore the court found, that the (American) public interest justified a dismissal of the case, because a) Indian interest in the outcome of the case outweighed American interest by far and b) the workload and strain for an American court would be substantially larger[172].

This case shall serve as a typical decision when dealing with the Forum Non Conveniens. Only in the case of the alternative forum offering legal remedies, that are obviously unsuitable and unsatisfactory reducing its character of a legal remedy to an unacceptable minimum, then this difference might swing the balance in favour of the plaintiff. The decision in this respect is largely at the digression of the courts[173].



**c) Principle of Forum Non Conveniens in Human Rights Cases:** This motion of dismissal became more important since the judiciary ruled cases involving TNC action admissible under the statute.

In cases of human rights violations by a regime trying to preserve its power by all means, legal action in the domestic courts often is useless, since the regime controls the judiciary. It will slap down any case against itself. In the case of *Piper Aircraft Corp. v. Reyno* the court came to the following conclusion: "*If the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all ... the district court may conclude that dismissal would not be in the interests of justice.*"[174]

This means, that if an appropriate alternative forum (to the US) for legal remedies does not exist, and in the case of an government using commonly denounced means such as torture or control of the judiciary it surly does not, the *forum non conveniens* is not applied[175]. Two

[172] See id. 809 F.2d 199, 201
[173] *Piper Aircraft Corp. v. Reyno*, 454 U.S. 254, 257 (1981)
[174] See id., 454 U.S. 254 (1981)
[175] e.g. *Kadic v. Karadzic*, 70 F. 3d 250 (2d Cir. 1995)

examples for such human rights cases lacking an appropriate alternative forum are *Cabiri v. Assasie-Gyimah*[176] or *Eastman Kodak Co. Kavlin*[177].

The cases involving transnational corporations often prove more vulnerable to the *forum non conveniens* since there is no necessary alliance between TNCs and state actions. Therefore the domestic courts in the country where the human rights violations were committed can be an appropriate alternative legal forum to the US forum.

### 4.5.5. Immunity

The Foreign Sovereign Immunity Act (FSIA) protects foreign governments and their representatives against civil liability suits under the act[178]. But the FSIA does in general not protect individual plaintiffs. Also it only protects state agents acting within their authority and lawfully. The Philippine Head of State Marcos was not protected by the FSIA, because according to the judges *"[a]n official acting under color of authority, but not within an official mandate, can violate international law and not be entitled to immunity under the FSIA."*[179]

The question of immunity is not of much relevance, since the focus on lawsuits against transnational corporations. Thus we will leave it at this brief look into the problem.



## 4.6. "A Tort in Violation of the Law of Nations"

Application of the Alien Tort Claims Act requires a breach of law, either of a treaty of the United States or a tort in violation of the law of nations. Until today not a single human rights lawsuits under the statute based on a breach of a US treaty came to trial. This is largely due to the fact, that the United States has hardly signed any human rights treaties. They tend to presume that human rights have become part of the law of nations without themselves signing the relevant treaty[180].

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[176] 921, F. Supp. 1189 (S.D.N.Y. 1996) Courts in Ghana were not appropriate due to potential physical danger for the plaintiff.
[177] 978 F. Supp. 1078 (S.D. Fla. 1997) The plaintiffs argued successfully, that Bolivian courts are corrupt and slow, thus a fair solution in time is unlikely.
[178] 28 U.S.C. §1330, 1601-1611 (1994), amended by 28 §§ 1603-1611 (Supp. III 1997)
[179] *Estate II*, 25 F.3d 1467 (9th Cir.1994), cert. denied, 115 S.Ct. 934 (mem.)
[180] Henkin.1993: 626

In American jurisdiction eight "torts" under the ATCA have been recognised: torture, summary execution, genocide, war crimes, disappearance, arbitrary arrest and imprisonment, cruel, inhumane or humiliating treatment and slave labour[181]. We will briefly look at them.

### 4.6.1. Torture

Torture is generally recognized as a crime in International Law and the prohibition of torture is considered part of the jus cogens[182]. ACTA jurisdiction recognised torture as a prosecutable offence under the statute[183].

### 4.6.2. Summary Execution

Several cases have been accepted as falling under the statute and clearly showed, that summary execution are a breach of international law[184].

### 4.6.3.Genocide

Genocide is defined in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), Article 2 and the Rome statute, Article 6 as follows:
*"Genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*

*(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.*

This definition is regarded as part of international customary law[185]. Furthermore according to Article IV of the Genocide Convention *"persons committing genocide [...] shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."* Thus state action is not an requirement.

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[181] Anderes.2000: 178
[182] U.N.ESCOR, 42d Session, Agenda Item 10 (a), 1, U.N.Doc. E/CN.4/1986/15 (1986)
[183] e.g. *John Doe I v. Unocal, Inc.*, 963 F. Ssupp. 890 (C.D.Cal. 1997); *Wiwa v. Royal Dutch Petroleum*, No. 96-8386, para.1 (S.D.N.Y. 1996)
[184] *Beneal v. Freeport-McMoRan*, 969m F.Supp. 365 (E.D.La.1997); *Wiwa v. Royal Dutch Petroleum*, No. 96-8386, para.1 (S.D.N.Y. 1996)
[185] Anderes.2000: 180

### 4.6.4. War Crimes

Humanitarian Law, i.e. the law during war, is without a doubt the most accepted international law seeing that for example the four different Geneva Conventions have been ratified by 180 signatory states. Many provisions of humanitarian law have become part of customary international law. Correction of grave breaches of this law can thus be pursued under the Alien Tort Claims Act[186].

### 4.6.5.Disappearances

In 1992 the General Assembly of the United Nation adopted a resolution saying that *"[i]n addition to such criminal penalties as are applicable, enforced disappearances render their perpetrators and the State and State authorities which organize, acquiesce in, or tolerate such disappearance liable under civil law..."*[187]. This is the culmination of a development of condemning the disappearances, caused by the huge number of cases especially in South America in the seventies. In 1988, the *Forti II* decision was the first to view disappearances as a breach of the law of nations[188]. That was confirmed shortly after that in *Xuncax v. Gramajo*[189].

### 4.6.6. Arbitrary Imprisonment

In *Forti I* the court found *"sufficient consensus to evince a customary international human rights norm against arbitrary detention."*[190] More importantly arbitrary imprisonment is recognised as a breach of international law in several international human rights declarations[191].



### 4.6.7. Cruel, Inhuman or Humiliating Treatment (CIHT)

After some discussion with several decisions denying the CIHT the status of a breach of international law, mainly due to the problem of a clear definition, the case *Xuncax v. Gramajo* with its distinct and thorough analysis of the treatments brought the breakthrough[192]. Before that the cases of *Paul v. Avril* and *Abebe-Jiri v. Negewo* already decided that CIHT was actionable under the Alien Tort Claims Act[193].

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[186] *Kadic v. Karadzic*, 70 F. 3d 242 f. (2d Cir. 1995)
[187] G.A.Res. 47/133, Art. 1(2), U.N. Doc. A/Res/47/133 (18.12.1992)
[188] Forti II, 694 F.Supp. 709 (N.D.Cal. 1988);
[189] 886 F. Supp. 185 (D.Mass. 1995)
[190] 672 F.Supp.1541 (N.D.Cal. 1987)
[191] Universal Declaration of Human Rights, Art.9; International Covenant on Civil and Political Rights, Art.9
[192] 886 F. Supp 187 (D. Mass. 1995)
[193] *Paul v. Avril*, 901 F.Supp. 330 (S.D.Fla. 1994); *Abebe-Jiri v. Negewo*, 72 F.3d 844 (11th Cir.1995)

### 4.6.8. Slave Labour

In *John Doe I v. Unocal, Inc*[194] the judges decided that slave labour is a breach of international law. The prohibition of slave labour is according to the decision even part of *jus cogens* and interpreted it as slave trade.

As we can see, the number of recognized 'torts' actionable under the act is slowly but steadily growing. This shows that the importance of the Alien Tort Claims Act as an instrument in the quest for reparation and justice is on the increase, even though the procedural hurdles mentioned are numerous and definitely tough.

## 4.7. Result

There is no doubt that the formal and material requirements to succeed in a lawsuit under the Alien Tort Claims Act are tough. But seeing the growing number of case, fulfilling those requirements is possible. This piece of legislation allows suing for damages and is a revolution of civil liability. The importance of this we will only grasp with time and more cases.



[194] 963 F.Supp. 890 (C.D.Cal. 1997)

# CHAPTER 5

# AN OUTLOOK ON THE QUEST OF THE HERERO FOR REPARATIONS AND LOCAL IMPLICATIONS

## 5.1. The Herero Situation

The Herero situation of today is still dominated by the results of German politics. The Herero land and mostly all indigenous tribes territory in former South West Africa was swept clean of black influence. German settlers build large farms and in the time of post German rule, many Germans stayed. During South African occupation, many Boer settlers became their neighbours, creating a *"European agricultural economy that prevails today"*.[195]

## 5.2. Public Pressure – The NS-Slave Labour Case

To change this the lawsuit against Germany, Deutsche Bank and DAL was launched. But as shown in Chapters 2 and 3, the legal chances are slim. A case sometimes mentioned when discussing the Herero lawsuits is the case of reparations after the Holocaust and more recently, reparations paid to victims of forced labour during World War II[196]. Neither of the cases had a foolproof legal basis either, but still the claimants succeeded. The most important difference as it seems is the question of publicity, i.e. developing public pressure.

The case of the victims of forced labour during World War II was present in the media all the time. It was a major cause of concern to German business in general as literally all had been involved. Besides being present in Germany, the American media covered the topic extensively, too, scaring the German corporate world even more. In the end, Germany and German business settled out of court with the claimants, agreeing to pay about € 5 Billion in reparations. There are two motives for that. First, the German companies were afraid of the effect on customers that the reports of gruesome details during a major lawsuit might have had. A loss of reputation was very likely, resulting in shrinking sales records. Second, the claimants might have won the lawsuit and the defendants might have been ordered to pay damages several times higher than what they settled out of court for.



## 5.3. Public Pressure – The Herero Case

The court case is continuing since it was started in September 2001. It seems that the defendants did not see a reason to favour the out of court solution. This is directly linked to the missing public pressure. Deutsche Bank is not afraid of losing customers because hardly anyone knows about this case. Proof for this is the result of the simple test of entering two different search strings on www.google.de. The first search string of 'Herero Case' turned up

[195] Harring.2002
[196] see id.

11 hits. Entering the string 'NS Zwangsarbeiter' the number of hits rocketed up to 6010 [197]. There have been a few articles in late 2001 reporting the new lawsuit in America in newspapers. Most of the papers only mentioned it with a few lines. Some publication with legal background or focusing on Southern Africa reported on the case, but they do not reach a large number of readers.

Harring claims that *"[t]he Herero are aware that reparations regimes operant in the world today are political and not legal. But, these political actions have a common history of being moved by extensive legal posturing, creating a powerful moral climate supporting reparations, and shaping public opinion."* [198] If the Hereros indeed try to create that powerful moral climate, they have not succeeded at all.

## 5.4. Lack of Public Pressure due to Lack of Support in Namibia?

As mentioned in 2.2. the Hereros do not enjoy the support of the state of Namibia. Support in society is also doubtful. The official position of Namibia was different in the first years of independence. Back in 1992, Namibia's government thought that reparations were appropriate legally. They also supported the Resolution on Reparation for Exploitation and Slavery in Africa by the OAU. The ambassador of Namibia in Germany said, that reparations would be claimed for damages caused to both the human and natural resources[199].



Interestingly, the position of Germany has also changed quite a lot. In 1990 the reunited Germany commented on a claim by paramount chief Riruako saying that for bilateral questions the government of Namibia is the relevant authority. They also said, that they were waiting for claims brought forward by Namibia. Back then, still being enthusiastic about the miracle of reunification and the chance for this new Germany, all parties in the Bundestag supported a generous solution[200].

All this is 10 years ago. Now the positions have shifted. Namibia thinks, that German support during the liberation struggle (by the German Democratic Republic) and development aid (by reunited Germany) adding up to about DM 1 Billion are an adequate compensation. Germany dismisses any claims as legally non-enforceable. Also the idea of paying large sums of

[197] see www.google.de ; visited 10 Oct. 2002
[198] Harring.2002
[199] ASB-Rundbrief.1993: 17
[200] Möllers.2001: 11

reparations in this economically troubled times should be a strong deterrent for corporate Germany and the government.

## 5.5. A Carrot and a Stick

The Hereros position is not very strong. They lack the support of Namibia's government and probably Namibia's society. Gaining their support would enhance their position in negotiations with the Deutsche Bank and DAL a lot. Let us look at a possible way that all parties might benefit from. This example will focus on the Deutsche Bank.

### 5.5.1. Namibia

Incentives for President Nujoma to change his mind and support the Hereros might be the possibility of gaining funds. Also this topic might be a valuable smokescreen for him to draw away the attention from other problems. He seems to be using this smoke screen strategy every few months. In 1999 Namibia sent thousands of its troops to the Democratic Republic Congo to join a military alliance including Zimbabwe and Angola[201]. Then in March 2000 he started a continued verbal onslaught on homosexuals in Namibia, saying there was no place for them in Namibia[202]. Now President Nujoma tries to make use of the Zimbabwe crisis. He increases pressure on the white farming community with his repeated calls for a land reform. Expropriation of farms is not a taboo anymore[203]. In reality the problem of land reform lies with the *"[l]eaden-footed bureaucracy, rather than commercial farmers dragging their heels".*[204] Nujoma and other SWAPO cadres always point fingers at the white farming community as being arrogant and unwilling to sell. But the Institute for Public Policy Research Institute, Windhoek, found that the Namibian bureaucracy *"is the main reason why it would take decades before black Namibian farmers would own half of commercial farm land."*[205]

This shows, that Nujoma's should think about joining forces with his fellow Namibians from the Herero tribe and pursue a claim with more substance on the bilateral level, rather than continuing to strain relations with Germany, England, his white countrymen, the Hereros and Nama by calling for farm expropriations or even worse Zimbabwean style land grabs.

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[201] Inambao.2001
[202] Afrol.com.2002
[203] Hamata.2002
[204] Grobler.2002
[205] see id.

### 5.5.2. Deutsche Bank

If this alliance would be reached, the two could use a 'carrot and stick' tactic on the German company Deutsche Bank. With the official support, the public pressure will grow substantially. It is also important to bear in mind, that Deutsche Bank is also being sued for involvement in trade relations with the Apartheid Regime. It is likely, that during this trial and media coverage, they will also mention previous wrongs of defendants. The Herero case will surely be mentioned and might be 'embarrassing'.

Economically thinking this situation also offers a chance to Deutsche Bank. Repairing some of the damages that among others the Disconto Company did cause, maybe setting up a foundation, scholarships and support for the land reform in Namibia, Deutsche Bank could turn this into a publicity triumph not only in Namibia or Southern Africa, but more importantly also back in Germany. Major corporations seldom are very popular, especially banks. Deutsche Bank, one of the major financing banking entities in the world is no exception. Also donations like that are tax-deductable. And seeing the sums that Deutsche Bank commands, it is clear that money they see as peanuts would be a substantial sum to Namibia/Hereros. Lastly, repairing damages one caused is simply the morally right thing.



The result would be an improved reputation of Deutsche Bank, improved reputation for President Nujoma and financial gains for Namibia and lastly financial damages or other measures mentioned above for the Hereros.

### 5.5.3. Chances

Unfortunately this scenario is not likely, although the advantages for all parties are at hand. Still several reasons speak against it. Beginning with official Namibia: they will not risk their good bilateral relations with Germany. They heavily rely on German aid. Also in the case of a legal success, Germany would probably decrease its aid involvement in Namibia. Deutsche Bank on the other hand will try to use its strong position and just wait until the lawsuit falls together. Lastly if there would have been any chance that all parties get together and settle this now and forever in the way describe above, this would already have happened.

## 5.6. Outlook

The Hereros position is not easy. Without a doubt, they hold the moral high ground over the Deutsche Bank, DAL and Germany. This group worked together to extract profit from Namibia and committed countless atrocities in the whole of Namibia. They caused a lot of

pain and suffering, not only in the past, but the consequences are still present. The Hereros argument, that they do not think that German development aid paid to Namibia is enough of reparations simply because this aid allegedly is used predominantly for Ovambo, does make sense. Unfortunately the public in Germany is not interested much in Namibia except as a tourist destination. There has not been a general debate in society on the question of reparations for human rights abuses in the former colonies. And with the German economy struggling, about 4 million people without work, a political constellation blocking reforms[206] and many other problems, the majority society is not interested in this kind of debate at present.

### 5.6.1. Possible Consequences

If the Herero tribe does not succeed with their quest for reparations, either by lawsuit or a settlement, what would be the consequences? As Harring said, this trial and the whole topic has served to set the Hereros apart and clearly define them as a tribe. After having lost a core pillar of their traditions with the land and cattle herds, this common objective has served to bind the different groups within the tribe together again. Few possibilities are left to them to pursue the legal way of getting reparations. Without the support of Namibia and a lost case in America, the Hereros would run out of options.



The effect would be very dangerous. This common idea of fighting for justice and reparations seems to serves as a substitute for the common culture of their pastoral society. If the lawsuit does not succeed, neither of the two elements will remain. It is likely that opposition inside the tribe to Paramount Chief Riruako would blame him; heated discussions would endanger the unity of the tribe. The tribe would remain without land or funds, only left with the scars of the past. This setting is sure to create tensions running high due to bitterness and anger within the tribe. To know that one holds the moral high ground and to see that justice is not and will not be served is dangerous to every group.

Without wanting to go to deep into domestic Namibian politics, this might be another reason for the government and President Nujoma not to support this ethnic group. The Hereros are the major opposition tribe to the ruling Ovambo[207]. Tensions within the tribe would weaken its ability to put up a strong opposition.

[206] Bundestag dominated by SPD/Grüne; Bundesrat dominated by CDU/CSU
[207] Harring.2002

# CHAPTER 6

# FROM THE NAMIBIAN CONTEXT TO THE GENERAL QUESTION OF TNC ACCOUNTABILITY AT PRESENT

*"General Motors has a greater revenue than any state in the Union and the fifty biggest corporations in the U.S. have greater revenues than the fifty states. . . Future students of the twentieth century will find the history of a firm like General Motors a great deal more important than the history of a nation like Switzerland."*[208]


*"The nonterritorial and globe-circling activities of these TNCs make them less subject to the will of individual nation-states and enable them to play states off against each other. TNC involvement, particularly with third world governments, has often resulted in substantial TNC influence on host governments, and that influence has not always served those governments's best interests."*[209]

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[208] Turner.1970: 135
[209] Charney.1983: 766

## 6.1. Changes

The Herero Case is genuine because there have been hardly any lawsuits regarding cases that far in the past. As shown this makes things very difficult, because the legal basis is questionable. If the same atrocities would be committed today, the situation would be very different indeed. There are many advantages, but also plenty of disadvantages.

### 6.1.1. Advantages

6.1.1.1. NGO & Media: One important difference to the world of a hundred year ago is, that now two parties if they work together, command a lot of power: the media and the non-governmental organisation community. The diversity of NGOs is huge. Of course and luckily, also in the field of human rights numerous organisations exist, e.g. Amnesty International, Human Rights Watch. Their objective is the protection of human rights and enhancement of the respect for them around the world. Their independence provides them with the opportunity to control the conduct of governments and companies. Using new tools like the internet and modern air travel gives them many options. The world of today seems much smaller than hundred years ago. If non-governmental organisations work together with the media, they can be a powerful duo in the case of human rights abuses; the organisations as investigators and messengers, the media spreading the word to the people. As said before, governments and companies both need the support of the people. Otherwise the one is not going to be re-elected and the other one will suffer financial losses.



6.1.1.2. The Law: In comparison to the world a hundred years ago, the legal reality has changed dramatically. In modern international law and customary law, human rights are entrenched deeply. Many conventions and instruments offer mechanisms of accountability for perpetrators[210]. Also domestic laws evolve to promote and defend human rights.

6.1.1.3. Respect for Human Rights: Last but by no means least; the general respect for human rights has grown. The vast majority nowadays agrees on universal rights of every human being, regardless of sex, race or origin. The world of the last 3 centuries was full of preposterous 'civilized nations' claiming to spearhead the dawn of a new era, bringing salvation and wealth to the 'uncivilized natives'. Instead they treated others inhumanely, destroying societies, killing millions. The world of today is by no means a Garden of Eden.

[210] The most recent one might also become the most important one: the Rome Statute of the International Criminal Court.

Too many spots in this world still struggle, people suffer and die every day. Many harsh lessons were needed, incredible atrocities committed, but without a doubt the idea of human rights, being entrenched in domestic and international law, is one of the main pillars of today's world.

### 6.1.2. Disadvantages

6.1.2.1. TNC Power: The power of transnational corporations has grown substantially too. Today they command incredible power, being financially more potent than a large number of nations. 500 TNCs are responsible for 80% of all foreign direct investment, adding up to 70% of the trade of goods and to 30% of the GDPs worldwide[211]. The quote of Turner needs no further explanation. Also these conglomerates have become more flexible. They have subsidiaries all over the world, have diversified their economical involvements to many sectors and are much more independent. They can close operations and move if they want or have to.

6.1.2.2. Dependencies: This leads us to the second point. While their independence is growing, the dependence on them by states has also grown. Developing nations, as mentioned before, mostly have a choice that can be summed up as choosing between the frying pan or the fire. Also powerful countries like Germany are closely linked to transnational corporations, needing their capital, the jobs they create and the taxes they pay. The current situation is summed up in Charney's quote.



6.1.2.3. Limits to NGOs & Media Power: There are clear limits to the power of the media/NGO duo. Besides the dependencies between country – TNC, there are also strong ties between media and TNCs. Advertisement is vital for the media and creating the major part of their turnover. Pressuring the media is thus possible for the company, e.g. companies might decide to advertise in a less critical newspaper.

Also creating pressure is very unlikely if the company involved is quite resistant to consumer reactions, e.g. mining companies. Consumer pressure by the people is impossible and people tend to forget fast. So the transnational corporation will just have to sit and wait. If the people as the consumer cannot put pressure on the company by simply buying a competitor product, it leaves the states with the obligation to act. But mostly they will simply pay lip service but not put the money where their mouth is, e.g. sending a note of protest and public criticism.

[211] WIR 1999 p.9, picture 1.2

Voicing support for the idea of human rights is cheap. Too often the international community or the people will simply remain inactive. Indifference is the biggest enemy.

## 6.2. 'ABC' FOR VICTIMS

The changes mentioned above showed that the situation now has more facettes. Briefly giving some ideas on what do to in the case of a transnational corporation breaching human rights in a developing country will be this paragraphs objective. Since there is no suitable international law instrument regarding transnational corporation action, this will play no part here.

A: As shown it is of utmost importance to create public interest for the topic. The companies breached the rights already, so simply asking them to refrain from repeating the crimes is very naïve. If they did it once and got away with it, they might do it again. Creating public pressure and the scenario of shrinking sales and criticism is the main task. Also this has to take place where it will hurt the perpetrators economically, i.e. not in the developing country, because the sales there will be small. The home country of the transnational corporation and other major sales markets need to be targeted. That means that most likely the European Union, North America and Japan will be targeted, because not only does the majority of transnational corporations originate from this regions, but they are also the most important markets for corporations.



B: Launch a lawsuit where possible. Quite often the courts of developing countries might prove insufficient and subject matter jurisdiction under the Alien Tort Claims Act is possible. Also the domestic courts of the home country are an alternative, especially if they are from the already mentioned regions. This lawsuit will create a second front for the TNC, because the risk of losing this suit is real. The damages might be very high, depending on the kind of human rights abuse.

C: These two tools combined intensify each other. A lawsuit present in the media is increasing the pressure. And the public interest in the case will be beneficial for a court case (see 4.5.4. the question of public / private interest in the *forum non conveniens*).

This scenario illustrates how victims might try to gain compensations. Obviously this is just a theoretical approach that is more complicated in reality. But the possibility of following this course of action exists.

# CHAPTER 7

# Conclusions & Recommendations

## 7.1. International Accountability for TNCs

Recapturing the previous chapters adds up to a picture full of problems and some glimmers of hope. The case of the Herero community showed the difficulties to gain reparations for crimes perpetrated long ago. The protection of human rights was by no means sufficient at the time. This has changed for the better by now, but many loopholes remain. Especially the gap in international law regarding the transnational corporation status is of concern. Many reasons exist that support the idea to give legal subjectivity to TNCs in international law.

### 7.1.1. Reason #1: Character of TNCs:

Most transnational corporations are more internationally based than closely linked to their country of origin, earning more than half of their annual turnover in business outside of their home country. They can also shift their operations at will and if needed. They are global players and not in any way limited to national borders[212].

### 7.1.2. Reason #2: Economical Power

As mentioned before transnational corporations control incredible economical and thus political power. But still they are not players in international law whereas small countries such as Namibia have to comply with international law. Comparing the turnover of Deutsche Bank and the Namibian GDP has clearly shown the inequality. Still Namibia is subject to tougher rules[213].



### 7.1.3. Reason #3: Inability of some Countries to controll TNC conduct

Third world countries cannot or do not want to control transnational corporations. The home country mostly is not interested in controlling the TNC (the reasons for both are given in 3.1.4.2.). This leaves the companies more or less out of any system of legal accountability. At least transnational corporations will not be forced to comply with the laws and respect human rights. A situation like this needs a remedy.

### 7.1.4. Shape of an International Instrument

There is clearly a need for a legal instrument on international level. To lay down rights and duties of transnational corporation as well as of host countries should be its objective. This instrument needs to be legally enforceable, that means TNCs must be held accountable for misconduct. Scholars have argued that the United Nations should be authorized to control

[212] Anderes.2000: 109
[213] see id.

TNC conduct, but after registration with the UN, the registered companies should also enjoy the protection of the UN[214].

### 7.1.5. Outlook

Is it likely that the envisaged changes in 7.1.4 will be realized any time soon? Unfortunately not, because right now several parties prevent this idea from coming true. First of all the TNCs themselves, because the less regulations exist, the less limited they are. This is obviously convenient, but very Machiavellian style thinking and morally wrong. Other parties, the governments of host country and home country, do not try to start a process that might lead to international accountability for the same reasons they are refusing to control transnational corporations. They are too dependent on them and seem to be afraid. For the same reason, legislative action on the domestic level is unlikely. 87% of transnational corporations come from three regions, a situation that is calling for national legislation. But if countries prevent instruments of international law to be drafted, why should they adopt national legislation instead?

Only a major change in public opinion about TNCs could lead to international legislation, but right now people are very indifferent. Historically, changes in public opinion came about after crimes / atrocities became known, creating a moral climate asking to prevent anything like this from happening again[215].



For these reasons, accountability in international law for transnational corporations is still far away.

## 7.2. Optimising the current Situation

The dull chances of international legislation becoming reality soon makes it very necessary to make the most out of the current situation. Several options to optimise human rights protection exist.

### 7.2.1. Convincing the TNC Community

Interested non-governmental organisations and governments, regardless if they are from the so-called 1st or 3rd world, need to lobby the community of corporations. The object is to

[214] Seidl-Hohenveldern.2000: para 1351
[215] E.g. Genocide Convention, Geneva Convention, Universal Declaration of Human Rights after World War II

convince them, that they will benefit too if they respect or even enhance human rights. The reasons are as follows:

7.2.1.1. The first reason unfortunately is the weakest one, calling on the conscience and moral beliefs of the transnational corporation community. After all respecting human rights and humans is the morally right thing to do.

7.2.1.2. The number of lawsuits against transnational corporations is increasing, new precedents keep enlarging the legal boundaries. Showing companies that they are risking being sued and that this risk is very real is important. Especially if sued under the Alien Tort Claims Act statute and losing the case, they risk losing large sums of money.

7.2.1.3. A manufacturer of consumer goods needs to be aware of the risk, that news about his human rights conduct and possible lawsuits can cause serious economical damages. The NGO / media duo gives information to the people. In this global world of internet and mass media, there are very few corners in this world that are completely unmonitored. To prevent a loss of reputation resulting in shrinking sales after bad news, the TNC for this reason needs to comply with general human rights standards.



7.2.1.4. We have seen that transnational corporations are very influential and powerful. They should think of using this for the better. A good corporate citizen is beneficial for the region and the people. This might improve life standards substantially. This in return will create stability in the region and reduce the risk of civil unrest or even civil war. The benefit for the TNC is obvious: the risk of expropriation or disruption of production and thus losses is minimized. Production is optimised, because the workers are motivated. Enhancing human rights in general and getting involved in the community to increase the standard of living creates security for the corporation's investment. Also this can be used for public relations reasons in the home country or other major markets.

7.2.1.5. The scenario of 7.2.1.4. might also be even more beneficial in the long run. Creating security and improving the standards of living will be positive for the whole country. With time it might create a market for goods produced by the TNC community. This comes very close to one of the ideas of the Berlin Conference in 1884 (see 2.4.1.1.).

### 7.2.2. Strengthening non-governmental organisations

Regardless if transnational corporations can be convinced to uphold and enhance human rights, the position of non-governmental organisations needs to be strengthened. This is a way especially for 1st world governments to increase control over transnational corporations without giving it an obvious official touch. This might create tensions between the TNC and the government. Together with non-governmental organisations operating world wide, the objective for the governments should be to support local human rights / labour rights groups. The financial and organisational support can enhance controls of human rights conduct in general in regions. Of course, the transnational corporation conduct would thus be monitored as well.

### 7.2.3. Individual Criminal Accountability

The International Criminal Court in The Hague being set up at the moment will also provide another valuable addition to this puzzle of protecting human rights from being infringed by transnational corporation conduct. Besides the dominating economical reasons to respect human rights, this reason targets the individuals. So far the risks described above rested with the company. But the prospect, that individuals will be held responsible in The Hague for committing one of the serious crimes of Article 5-8, should be a strong deterring factor. This applies to anybody, regardless of their official capacity, i.e. a position as a head of state or as chief executive officer of a transnational corporation.



## 7.3. Closing Remarks

### 7.3.1. The Herero Situation

This paper has tried to describe the case of the Herero community, showing its problems in the course of their quest to get reparations for the damages that others inflicted upon them. Legally it seems unlikely that the German companies involved will lose the case in America and be ordered to pay[216]. Regardless of that, the Hereros without a doubt hold the moral high ground. Having studied the atrocities it would only seem appropriate that the perpetrators, that also substantially benefited financially, accept their responsibility.

Deutsche Bank and DAL, but also the numerous other companies that have not been sued, but still have their dark history in Namibia should see their responsibility: with their funds and influence, they could strengthen Namibia by helping the Hereros and thus supporting the

[216] The author did elaborate on the question of the liability of the Federal Republic of Germany, since this was not this papers topic.

opposition in political Namibia; a necessity for a democracy. Supporting human rights organizations and projects in general in Namibia would also be another way of helping, simply because Namibia is a very young democracy. The respect for human rights is not that deeply entrenched yet, which is also indicated by the problematic human rights record in recent years. Many Namibians still remember the long occupation by South Africa and the liberation war, which was also full of human rights violations[217]. As mentioned President Nujoma continues to be a regular source of irritation with his remarks on gays, the involvement in the Democratic Republic Congo and now the switch from willing seller, willing buyer policy of acquiring land for resettlement to a more aggressive policy[218]. It would be a good way of active reparations if those companies seize their chance of helping Namibia to become a stable and successful democracy.

But regardless of moral high ground or not, the German transnational corporations will not pay unless some pressure forces them to do so. It would be naïve to think so. Otherwise they would have already done that. The need to create public interest and pressure has been described. That the Hereros can indeed create this pressure is doubtful. They also would have already done that if they had the ability. Therefore some of the parameters need to change; external help is needed, i.e. official Namibia changes its mind and lends support or the lawsuit against companies doing business with Apartheid South Africa develops so much pressure that the Herero case benefits from that. With this being unlikely the success of the case and the outcome of this quest for reparations remains uncertain.



### 7.3.2. The General Situation

The situation of reparations for human rights atrocities of pre-convention era is difficult to categorize legally. It seems that few legal grounds for reparations exist. This process is more political than legal. This was also indicated in emotional discussions about slavery or colonial crimes. Claiming reparations seems to be a process involving the media creating pressure and lawsuits lending legal credibility to the quest. All in all this should create a morale atmosphere forcing the defendants to settle out of court, because their loss of reputation is increasing every month the lawsuit continues. So far none of the cases like the question of NS slave labourers went the whole distance.

[217] On this topic in general, see Dicker.1993
[218] see Footnotes 203-205

The general situation regarding transnational corporation conduct and possible accountability of today is complicated. There have been improvements largely due to growing non-governmental organisation and media influence. The position of transnational corporations seems unchanged for the last few decades. This is hardly satisfactory regarding their power. But if the ideas of 7.2. to optimise the current situation are put into place, this could improve the situation a lot within the present legal boundaries. Of course loopholes remain, especially if companies more or less immune to public pressure are involved. Nevertheless the question of public pressure is decisive again. It seems that furthering human rights and the need to protect them has to be entrenched in societies.

These closing remarks show again, that the current system is quite flawed. The fact that success or failure seems to rely on public pressure clarifies the need for more objective means of accountability. Transnational corporations should be accountable in international law due to the many reasons mentioned. In the current setting it is surprising that misconduct is not occurring more often. Therefore human rights groups and interested governments should combine their efforts and start a process of lobbying organisations, transnational corporations and governments critical about this idea.

In this 21st century this kind of injustice is unacceptable. The Hereros have suffered under German occupation. Denying them help now is just like inflicting damage upon them again, because this will create tensions maybe too strong for Herero society. Transnational corporations and governments need to learn a lesson from that fate, accept their responsibilities and act accordingly.

# APPENDICE

## I. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

[...]

### PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

#### Article 5
#### Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.



2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

#### Article 6
#### Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(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.

Article 7
Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;



(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

[...]

Article 8
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;



(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

[...]

## II. The 5 Largest German Banking Corporations

Turnover in Billion DM

| Name | Turnover 2000 | Turnover 1999 |
|---|---|---|
| 1 Deutsche Bank AG | 1.838.545 | 1.642.633 |
| 2 Bayerische Hypo- und Vereinsbank AG | 1.401.380 | 984.281 |
| 3 Dresdner Bank AG | 945.640 | 776.163 |
| 4 Commerzbank AG | 899.021 | 727.647 |
| 5 Westdeutsche Landesbank Girozentrale | 782.410 | 770.116 |

## III. Map of Namibia-Today