REPARATIONS UNDER INTERNATIONAL LAW: A CASE STUDY OF THE HERERO GENOCIDE OF NAMIBIA

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Abstract

A century ago now, South West Africa (as it then was) fell under German Colonial rule. The German Colonial Government not only exploited the natural resources that South West Africa had to offer, but also its inhabitants. Amongst those to have felt the full wrath of German exploitation were the Herero and Nama peoples. In 1904 under the Command of Lotha von Trotha, the German Imperial Government perpetrated inhumane and destructive acts upon the Herero. They were full out to completely wipe out and exterminate the Herero tribal group.

The acts perpetrated upon the Herero by the Germans are reminiscent of a crime long since known as ‘genocide’ and have since become recognized internationally as such. Under the leadership of Paramount Chief Kuaima Riruako, the Herero people have laid claims for reparations against the German government. However, these claims were rejected for failure to disclose a cause of action among other things, jurisdiction included. These are the challenges stagnating the reparation claims of the Herero and which I duly seek to overcome with the help of current law on reparations and genocide

In answering this question, I shall outline the importance of paying attention to the recent developments in not only the laws on genocide and reparations, but also the rules on state responsibility and inter-temporal law. It will be shown in the paper that the factors mentioned above, go a long way in addressing and indeed offering hope to what has so far been a long, delayed and frustrating process for the Ovaherero of Namibia.

List of Abbreviations

UN -United Nations

ILC - International Law Commission

ACHPR -African Charter on Human and Peoples' Rights

ICERD -International Convention on the Elimination of Racial Discrimination

CCPR -Covenant on Civil and Political Rights

UNDHR -United Nations Declaration on Human Rights

ECOSOC -Economic and Social Council (UN)

PCIJ- Permanent Court of International Justice

ICC –International Criminal Court

ILR –International Law Reports

Chapter 1Introduction

That a wrong done to an individual must be redressed by the offender himself or by someone else against whom the sanction of the community may be directed is one of those timeless axioms of justice without which social life is unthinkable.

Justice Guha Roy, High Court of Calcutta, 1961[1]

This paper examines the right to reparations of indigenous peoples under international law, vis-à-vis the Herero genocide. It reviews the historical background of the Herero, the uprising and the subsequent extermination by the Germans of large numbers of the Herero population.

The research paper also accentuates the legitimacy of the Herero claims in as far as the current laws on genocide and reparations are concerned. In particular, the paper will also examine the meaning and scope of the concept of reparations, developments and so forth, paying attention also to, the qualifications or entitlements as well as barriers to reparations with a view to recommending a viable legitimate solution to the Herero reparation claims.

Problem Statement

Indigenous claims for past wrongs are arising in all parts of the world. Indeed, abuses perpetrated against indigenous peoples represent perhaps the largest number of claims for historical injustices.[2]At this point in time, however, we are concerned with but one specific case; the Herero of Namibia.[3]

In September 1995, when German Chancellor Helmut Kohl visited Namibia, some 300 Herero tribal members led by Paramount Chief Kuaima Riruako presented a petition demanding US$600 million in reparations for alleged genocide during the Namibian war of 1904-7, where German forces and settlers killed some 75-80 per cent of the Herero indigenous population.[4]

[1] 'Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law? 55 AJI (1961) 863.
[2] Shelton D 'The Present Value of Past Wrongs' F Lenzerini *Reparations for Indigenous Peoples: International & Comparative Perspectives* (2008) Oxford: Oxford University first page of article?- 51.
[3] Own emphasis.
[4] Harring L S 'German Reparations to the Herero Nation': An Assertion of Herero Nationhood in the path of Namibian Development? Available at< http://www.law.cuny.edu/faculty-staff/S Harring/s Harring pubs.html>

The Herero have also pursued their claim for redress by filing a lawsuit against German companies Deutsche Bank, Terex Corporation and Woermann Line in a US Federal Court for the District of Columbia. The complaint asks for US$2 billion from the Companies, asserting that they were allied with imperial Germany in the Herero war.[5]

The Herero People's Reparations Corporation lost their case in the U.S that they instituted against the German Companies for failure to state a cause of action upon which their claims could be based.[6]The case was as shall be seen later, instituted to seek reparations for the genocidal acts perpetrated upon the indigenous Ova Herero of Namibia over a century ago by the German imperial government.

The question I seek to answer is, whether current international law provides any remedy for the Herero people as far as the 1904-1908 War for liberation is concerned? Ultimately, are there any internationally recognized and accepted norms on which to base such expectation?

Historical Development of the Herero Genocide

To the total surprise of the Germans a great uprising of the Herero broke out on 12 January 1904. The Herero rose as one man under the leadership of their supreme Chief Samuel Maharero, who thus reversed the ill-conceived policy he had pursued thus far in a turn-about due largely to the pressure brought upon him by the lesser chiefs.[7]It was the systematic expropriation of the Herero and their consequent status of rightlessness that impelled them to their national uprising against German imperialism. They neither could nor would live any longer under these conditions. 'They preferred to die arms in hand rather than wait in resignation until their last possession had been taken away from them'.[8]

[5] Christopher Munnion 'Namibian Tribe Sues Germany for Genocide' filed 31 January 2003 available at <http://www.telegraph.co.uk/news/main.jhtml?xml=new/2003/01/31.xml.>last accessed on 5 July 2011.
[6] Frederick L '*Legal Grounds for the Herero Compesation Claims*' (2009) NAMTHESIS.
[7] H Drechsler *Let Us Die Fighting* Berlin:Akademi-Verlag (1966) 132.
[8] ibid

The Legal Issue

The issue herein, is, whether or not international law provides a remedy of reparations for the Ova Herero as far as the genocide is concerned? Do they have a legitimate claim?

Objective of the Paper

The objective herein is simply to find a legal solution to the problem of reparations claims of the Ova Herero where diplomatic ventures and all else tried before have failed. As well as, to give advice and recommendations to all stakeholders involved. In doing this, the author will explore at length developments in international reparations law and will be guided by the principles of state responsibility, the Genocide Conventions and other important international law doctrines.

Methodology

The majority of the research will be library based; thorough readings of prominent scholars will guide the research process. It will to a large extent be desktop based. Interviews, as well as Newspapers and Television media will also be used in the sourcing of information relevant to the study.

Literature Review

Since the coining of the term ‘genocide’ by Alfred Lemkin, the law on genocide has undergone enormous transformations, from the criminalization of the act to its international prosecution. There is a wealth of literature on ‘’genocide’’ and the genocidal and hideous acts perpetrated upon not only the Herero but other tribes of Namibia. However, not much has been written on the basis and legal argumentation of the indigenous peoples claims, herein the Ova Herero of Namibia.

Lenzerini J has written on the reparations of indigenous peoples. His book titled Reparations for Indigenous Peoples: International and Comparative Perspectives will be used to further advance arguments in favor of the Herero claims. Drechsler H and others have all written considerably on the ill-treatment, torture and exploitation the natives suffered at the hands of the German Imperial government, all which will go a long way in highlighting just how strong a claim the Herero people have against the German Government for reparation.

A lot of literature exists on the subject of genocide. However, as far as reparations for genocidal acts are concerned, not much has been written on the Herero claims. Lenzerini opines that reparations are essential in affording redress for past injustices.

Prior to developments in reparations law, a foundation had to be laid for the outlawing of certain acts which would then, lead to reparations. The Genocide Convention is a major work on the prohibition and prevention of genocide. Paolo Gaeta’s Commentary on the Convention will go a long way in dissecting the different parts and aspects of the laws on genocide as per the genocide Convention. Certain aspects of international law such as inter-temporal law, state responsibility and human rights law affect the right to reparations greatly, herein; consideration will be given to these. Brownlie I and Aust’s books on international law will cover this part of the paper.

In as far as the legality of the Herero claims, not many have written on the subject. Harring in his Article titled Herero Reparations: An Assertion of Herero Nationhood in Namibia, talks about the background of the compensation claims as well as the damages and suffering of the indigenous Ovaherero of Namibia, he too however, falls short of really advocating for the legality of these under international law.

Licory Fredericks on the other hand, is the only author so far, whose work has been able to aid the arguments on the justification and legality of these claims in light of international law. In her Dissertation titled Legal Grounds for the Herero Compensation Claims, she explores the claim of the Herero, from its origins to the damages and loss suffered by the natives. She does not stop there, but goes further to apply the different international Conventions, laws and principles to the issue of the Herero claim. Herein, her paper will be relied on greatly for the purpose of advocating from a legal point of view, for the claims sought by the Herero.

Chapter 2 Historical Development of the crime of Genocide under International law

The origins of criminal prosecution of genocide began with the recognition that persecution of ethnic, national and religious minorities was not only morally outrageous; it might also incur legal liability[9]. As a general rule, genocide involves violent crimes against the person, including murder. Because these crimes have been deemed antisocial since time immemorial, in a sense there is nothing new in the prosecution of genocide to the extent that it overlaps with the crimes of homicide and assault.

According to Schabas, however, genocide almost invariably escaped prosecution because it was virtually always committed at the behest and with the complicity of those in power.[10] Historically, its perpetrators were above the law, at least within their own countries, except in rare cases involving a change in regime.

In human history, the concept of international legal norms from which no state may derogate has emerged only relatively recently.[11]International law's role in the protection of national, racial, ethnic and religious groups from persecution can be traced to the Peace of Westphalia of 1648, which provided certain guarantees for religious minorities. These concerns with the rights of national, ethnic and religious groups evolved into a doctrine of humanitarian intervention which was invoked to justify military activity on some occasions during the nineteenth century.

[9] Schabas W Genocide *in International Law 'The Crime of Crimes'* 2 Ed (2009) Cambridge: Cambridge University Press page 14.
[10] ibid
[11] Ibid

Early Developments in the Prosecution of Genocide

The new world order that emerged in the aftermath of the First World War, and that to some extent was reflected in the 1919 Peace Treaties, manifested a growing role for the international protection of human rights.[12]Two aspects of the post-war regime are of particular relevance to the study of genocide. First, the need for special protection of national minorities was recognized. This took the form of a web of treaties, bilateral and multilateral, as well as unilateral declarations. The world also saw the first serious attempts at the internationalization of criminal prosecution, accompanied by the suggestion that massacres of ethnic minorities within a state's own borders might give rise to both state and individual responsibility.

Such may be exemplified by the following: several decades later, after adoption of the Genocide Convention, the United States government told the International Court of Justice that 'the Turkish massacre of Armenians' was one of the 'outstanding examples of the crime of genocide'.[13] The wartime atrocities committed against the Armenian population in the Ottoman Empire had been met with a joint declaration from the governments of France, Great Britain and Russia, dated 24 May 1915, asserting that, 'in the presence of these new crimes of Turkey against humanity and civilization, the allied Governments publicly inform the Sublime Porte that they will hold personally responsible for the said crimes all members of the Ottoman Government as well as those of its agents who are found to be involved in such massacres'. It has been suggested that this constitutes the first use, at least within an international law context, of the term 'crimes against humanity'.

What follows next will be a discussion of the further developments in the recognition and prosecution of genocide starting with the trials at Versailles & Leipzig.

[12] Schabas W *Genocide in International Law 'The Crime of Crimes'* 2ed (2009) Oxford: Oxford University Press page 16.
[13]'Written Statement of the United States of America', Reservations to the Convention on the Prevention of Genocide (Advisory Opinion), Pleadings, Oral Arguments, Documents, pp. 23-47 at p. 25. Ibid

Versailles and the Leipzig trials

The idea of an international war crimes trial had been proposed by Lord Curzon at a meeting of the Imperial War Cabinet on 20 November 1918. The British emphasized trying the Kaiser and other leading Germans, and there was little or no interest in accountability for the persecution of innocent minorities such as the Armenians in Turkey. The objective was to punish 'those who were responsible for the war or for atrocious offences against the laws of war[14]. At the second plenary session of the Paris Peace Conference, on 25 January 1919, a Commission on the Responsibility of Authors of the War and on Enforcement of Penalties was created.[15]Composed of fifteen representatives of the victorious powers, the commission was mandated to inquire into and to report upon the violations of international law committed by Germany and its allies during the course of the war. The Commission's report used the expression 'Violations of the Laws and Customs of War and of the Laws of Humanity'.[16] Some of these breaches came close to the criminal behavior now defined as genocide or crimes against humanity and involved the persecution of ethnic minorities or groups.

Scholars also took up the tide in the debate against genocide. Among the most prominent on the subject of genocide was a Polish lawyer, Raphael Lemkin.Raphael Lemkin contributed immensely towards the development of the law and study on genocide. What follows is a brief but conclusive detail on the works and devotions of Lemkin, to the study of genocide.[17]

Raphael Lemkin was born in eastern Poland. He worked in his own country as a lawyer, prosecutor and university teacher. By the 1930s, internationally known as a scholar in the field of international criminal law, he participated as a rapporteur in such important meetings as the Conference on the Unification of Criminal Law.[18]He initiated the World Movement to Outlaw Genocide, working tirelessly to promote legal norms directed against the crime.

[14] Schabas W. Genocide in International Law 'The Crime of Crimes'(2009) Cambridge: Cambridge University Press page 17.
[15] Tillman SP *Anglo-American Relations at the Paris Peace Conference of 1919* (1961) 312 Princeton: Princeton University Press.
[16] Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of America and Japanese Members of the Commission of Responsibilities, Conference of Paris (1919) 23 Oxford: Clarendon Press.
[17] Own emphasis
[18] Shabas W Genocide in International law 'The Crime of Crimes' 2ed (2009) Cambridge: Cambridge University Press page 491.

Lemkin was present and actively involved, largely behind the scenes but also as a consultant to the Secretary-General, throughout the drafting of the Genocide Convention.

Lemkin created the term 'genocide' from two words, genos, which means race, nation or tribe in ancient Greek, and caedere, meaning to kill in Latin. Lemkin proposed the following definition of genocide:

[A] co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.

The objective 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.[19]

His work went a long way in introducing the term to the majority of the world, so much so that it was to be used in the not too distant future.

The Nuremberg Trial

Referring to article 6 (c) of the Charter of the International Military Tribunal, the indictment of the International Military Tribunal charged the defendants with 'deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles, and Gypsies'.[20]

The United Nations War Crimes Commission later observed that '[b]y inclusion of this specific charge the prosecution attempted to introduce and to establish a new type of international crime'.[21]

[19] ibid
[20] France et al. v. Goering et al (1946) 22 IMT 203, pp.45-6.
[21] United Nations War Crimes Commission, History p 197.

In his closing argument, the French prosecutor, Champetier de Ribes, stated: 'this is a crime so monstrous, so undreamt of in history through the Christian era up to the birth of Hitlerism, and that the term "genocide" had to be coined to define it.[22] He spoke of the 'greatest crime of all, genocide'.[23]

The British prosecutor, Sir Hartley Shawcross, also used the term in his summation: 'Genocide was not restricted to extermination of the Jewish people or of the Gypsies. It was applied in different forms in Yugoslavia, to the non-German inhabitants of Alsace-Lorraine, to the people of the Low Countries and of Norway.

Although the final judgment in the trial of the Major War Criminals, issued 30 September – 1 October 1946, never used the term, it described at great length what was in fact the crime of genocide. More than fifty years later, the International Criminal Tribunal for Rwanda noted that 'the crimes prosecuted by the Nuremberg Tribunal, namely the Holocaust of the Jews or the "final solution", were very much constitutive of genocide, but they could not be defined as such because the crime of genocide was not defined until later'.[24]

General Assembly Resolution 96 (1) of 11 December 1946

The Nuremberg judgment was issued on 30 September-1 October 1946 as the first session of the United Nations General Assembly, then sitting in Lake Success, New York, was getting underway. Cuba, India and Panama asked that the question of genocide be put on the agenda. The matter was discussed briefly, and then referred to the Sixth Committee where, on 22 November 1946, the same three states proposed a draft resolution on genocide.[25] Cuba's Ernesto Dihigo, who presented the text, noted that the Nuremberg trials had precluded punishment of certain crimes of genocide because they had been committed before the beginning of the war. Fearing they might remain unpunished owing to the principle of *nullun crimen sine lege*, the representative of Cuba asked that genocide be declared an international crime, adding that this

[22] France et al. v. Goering et al (1947) 19 IMT 531.
[23] ibid
[24] Prosecutor v Kambanda (Case No. ICTR 97-23-s) judgment and sentence, 4 September 1998, Para 16.
[25] Schabas W Genocide in International Law 'The Crime of Crimes' (2009) Cambridge: Cambridge University Press page 52.

was the purpose of the draft resolution.[26] In the course of the debate, the notion that the resolution be completed with a full-blown convention soon began to circulate. The draft resolution as prepared by the sub-committed and approved without change by the Sixth Committee, was adopted on 11 December 1946 by the General Assembly, unanimously and without debate.

Resolution 96 (1) states:

> Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the and aims of the United Nations.
>
> Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.
>
> The punishment of the crime of genocide is a matter of international concern.
>
> The General Assembly, therefore
>
> Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices-whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds-are punishable;
>
> Invites the Member States to enact the necessary legislation for the prevention and punishment of the crime…

Because it is a resolution of the General Assembly, Resolution 96 (1) is not a source of binding law, nevertheless, as the International Court of Justice wrote in 1996:

[26] ibid

The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinion juris.[27]

The fact that it was adopted unanimously and without debate enhances its significance. Moreover, Resolution 96 (1) has been cited frequently in subsequent instruments and judicial decisions, reinforcing its claim to codify customary principles.[28]

The subsequent affirmation of the Resolution is a great sign of solidarity between the states of the world and is indeed symbolic of developments in the law on genocide.[29]

This show of solidarity between the nations of the world was to later manifest itself into an important development, the Genocide Convention.

The Genocide Convention

The Genocide Convention is principally concerned with prosecution of individuals who perpetrate genocide.[30]A remarkably short time has passed between the introduction of the word genocide by Raphael Lemkin in 1941, and the unanimous adoption by the UN General Assembly of Resolution 96 (1) on the crime of genocide in 1946.[31]

The General Assembly Resolution not only proclaimed genocide as a crime under international law, it also called for organized international cooperation designed to facilitate 'the speedy prevention and punishment of the crime of genocide' and invited the Economic and Social Council (ECOSOC) to present the General Assembly with a draft convention to that effect.[32]

The outcome of this legislative process was the Convention on the Prevention and Punishment of the Crime of Genocide.[33]

[27] Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion) [1996] ICJ Reports 226 Para. 70.
[28] One such is the case of Israel v Eichmann (1968) 36 ILR 277.
[29] Own emphasis
[30] Schabas W *Genocide in International Law 'The Crime of Crimes'* 2ed (2009) Cambridge University Press 491.
[31] Gaeta P *The UN Genocide Convention 'A Commentary'* (2009) Oxford: Oxford University Press page 4.
[32] ibid
[33] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.

Genocide in terms of the Convention is defined in Article 2 which provides:

" In the present Convention, 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 a 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".[34]

Prevention and Punishment of Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention or 'Convention'), as stated in its Preamble, rests on the recognition that 'at all periods of history genocide has inflicted great losses on humanity'.[35]This recognition is the rationale for its objective: [36]'to liberate mankind from such an odious scourge'. 'International cooperation' has been conceived as the sine qua non condition for achieving this objective.[37]Such cooperation was to follow two separate, albeit related, paths: ex ante prevention and ex post punishment.

Article I of the Convention provides:

The contracting Parties confirm that Genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish. Herein, Article I of the Convention comprises three elements: (i) the categorization of genocide as an international crime; (ii) the obligation to prevent genocide; (iii) the obligation to punish genocide.

[34] Article 2 of the Genocide Convention 1948
[35] ibid
[36] Preamble to the Convention ibid
[37] The Preamble states: 'the contracting parties, being convinced that, in order to liberate mankind from such an odious scourge, international cooperation is required'.

The Definition and Elements of Genocide

In criminal law, each and every element of a crime alleged to have been committed must be proven. Criminal law distinguishes between mens rea and actus reus. In other words, the person alleged to have committed a crime must possess both the intention to commit the crime and act towards the execution of his intention.

Article II of the Convention on the Prevention and Punishment of the Crime of Genocide [38](hereafter the 'Convention') contains the definition of genocide and therefore forms the 'heart' of the Convention's regime. The definition laid down in Article II consists of two distinct elements: the requisite intent and the individual act. The first element is addressed in the opening clause of the definition.

Genocide requires the specific intent to destroy in whole or in part a national, ethnic, racial or religious group as such.[39]The second element, on the other hand, the individual act, is addressed in sub-paragraphs (a) to (e). This exhaustive list includes acts against the physical or psychological integrity of members of the group, against the existence or biological continuity of the group, and-as is arguably the case in (e)-the cultural existence of the group.[40]

The Prosecution of Genocide (Case illustrations)

The Rwanda Genocide, 1994

The genocide in the tiny Central African country of Rwanda was one of the most intensive killing campaigns-possibly the most intensive-in human history. Few people realize, however, that the genocide included a marked gendercidal component; it was predominantly Tutsi and moderate Hutu males who were targeted by the perpetrators of the mass slaughter.

[38] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.
[39] Gaeta P The UN Genocide Convention: A Commentary (2009) Oxford: Oxford University Press page 89.
[40] ibid

This gendercidal pattern was also evident in the reprisal killings carried out by the Tutsi-led RPF guerrillas during and after the holocaust.[41] The word gendercidal herein, refers to the killing of a certain gender of people.

Such actions did however, not go unnoticed, and the international community was on hand to take action with the aid of international law in bringing the culprits to book. In the wake of the holocaust, the U.N. established the International Criminal Tribunal for Rwanda (ICTR), based in Arusha, Tanzania. In September 1998, the Tribunal issued its first conviction on charges of genocide, against the former mayor of the Rwandan town of Taba, Jean-Paul Akayesu. As Rudy Brueggemann points out, this marked "the first time ever [that] a suspect was convicted by an international tribunal for the crime of genocide."[42]

A day later, the ICTR sentenced the former Hutu Prime Minister, Jean Kambanda, to life in prison; he had pled guilty to "genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide and two charges of crimes against humanity." A total of thirty-two other Rwandan Hutu officials are currently awaiting trial. However, according to the Public Education Center of *The New York Times*, "after five years, the Tribunal's accomplishments are still often overshadowed by its failures. Its operations are slow, unwieldy, and at the worst of times unprofessional, and its own limited mandate conspires with international indifference to undermine its core message." [43]

In *United States of America v Alsotter*[44] the court made repeated reference to General Assembly Resolution 96 (1):

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

[41] Available at<http://wikipedia.org/wiki/Rwanda Genocide#ICTR> last accessed 29 September 2011.
[42] Available at< http://www.oz.net/rudybrue/rwandapage.htm> last accessed 29 September 2011.
[43] Available at< http://www.publicedcenter.org/rwanda.html> last accessed 29 September 2011.
[44] 148 3 T.W.C

The highlight of prosecution of the crime of genocide by a national court was carried out by the State of Israel in the matter between *Attorney-General of Israel v Eichmann*[45].

Adolf Eichmann, a Nazi official in World War II, was abducted from Argentina and taken to Israel for trial under Israeli law for his involvement in the genocide against the Jews during the War. Eichmann was prosecuted under the "Nazi and Nazi Collaborators" Punishment Law of 1961 which was modeled on the genocide provision of the 1948 Genocide Convention. Eichmann challenged the jurisdiction of the Israeli Court with reference to Article 6 of the Genocide Convention, which stipulates: 'Persons charged with genocide or any of the acts enumerated in Article 3 shall be tried by a competent court of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.'

In rejecting Eichmann's objections, the Israeli District Court held:

> A clear distinction ought to be drawn between the first part of Article 1, which lays down that "the Contracting Parties confirm that genocide, whether committed in time of peace or in war, is a crime under international law"-a general provision which confirms a principle of customary international law as "binding on states even without any conventional obligation"-and Article 6, which comprises a special provision undertaken by the Contracting Parties with regard to the trial of crimes that may be committed in the future.

In Canada, a trial for "crimes against humanity" was carried out on the basis of a 1987 Canadian Statute that permits retrospective application of international law. In its judgment the court recognized the existence of 'crimes against humanity' under international law before 1945.[46]

[45] (1961) 36 ILR
[46] Regina v Imre Finta 1989 69 O.R. (2d 557)

The question of retrospective application of the Convention

In endeavoring to tackle this question, it is important to note the existence of genocide as a crime prior to the drafting of the Convention.[47]Sarkin helps us in this regard, he submits:

In 1946 before the Genocide Convention was even drafted (or acceded to by any states) genocide was already recognized as an international crime.[48]Similarly so too, this is verified by the text of a 1946 General Assembly Resolution stating: The General Assembly therefore affirms that genocide is a crime under international law which the civilized world condemns.[49]Both Namibia and Germany are parties to the Convention[50].

The atrocities perpetrated by the Germans on the Ova Herero of Namibia clearly evidence acts of genocide. In assessing the issue of whether, the Convention applies to such; we ought to consider the writings of prominent scholars.

Zayas in reference to the preamble of the Convention stresses that it is important to note that the contracting parties do not "declare" or "proclaim" for the future, but "confirm" that genocide is already an international crime.[51]Moreover, he says, in view of leading publicists in public international law, the Convention of 1948 was not constitutive of a new offence in international law termed "genocide", but was declaratory of a pre-existing crime; in other words, the Convention merely codified the prohibition of massacres, which was already binding international law.[52]In this sense, Zayas continues, the Convention is necessarily both retrospective and future oriented. It is also worth noting that the drafters of the Convention did not expressly exclude the retroactive application of the Convention.[53]

Herein, the above analysis is indicative of the possible application of the Genocide Convention to the Herero genocide claims.

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[47] Frederick L. *Legal Grounds for the Herero Compensation Claims* (2009) NAMTHESIS 22-21.
[48] ibid
[49] ibid
[50] With Germany having acceded to the Convention on the 24 November 1954 and Namibia on the 28 November 1994. < http://en.wikipedia.org/wiki/list of parties to the Convention>last accessed on the 28 July 2011.
[51] Frederick L (note 43 above) ibid.
[52] ibid
[53] For in-depth coverage on this subject see A de Zayas <http://alfreddezayas.com/law history/armlegopi.shtml> last accessed on 5 July 2011.

Having laid the foundation for the thorough discussion of the issue, it is now time to explore the people at the heart of the issue and what indeed led us to the point we are at right now, the issue of the Herero-German Compensation Claims.

Paradoxically, measures such as the establishment of reserves and the July 1903 Statute of Limitations of Contracts, designed to remedy abuses, had the opposite effect. The creation of reserves made it clear to the Herero that the amount of land still left to them was dwindling rapidly while the decree establishing a 12 month time limit for the enforcement of claims on Africans caused traders to press even harder for the repayment of their debts. These measures were factors that hastened the outbreak of the rebellion.[54] But these aren't the only reasons or factors that led to the revolt of the Herero against the Germans. Herein, a discussion into these is necessary.

[54] Drechsler H. *Let Us Die Fighting: The Struggle of the Herero and Nama against German Imperialism* (1966) Berlin: Akademie-Verlag page 132.

Chapter 3The Herero Genocide of 1904

Apart from the above mentioned another factor acting as a catalyst was the construction of the Otavi railway. The building of the railway line from Swakopmund to Windhoek, which affected only the southern part of Herero land, had soon left no land suitable for farming anywhere along its length. Even more worrying for the Herero was the projected construction of the Otavi line which was to cut right across Herero land.[55] In relation to being robbed of their land, the Herero also suffered great human rights abuses at the hands of the Germans.

A serious problem which has so far gone unmentioned but that went a long way towards bringing matters to a head was the state of rightlessness to which the Africans had been reduced by the Germans. Displaying a blatantly racist attitude, the Germans described the Africans as baboons and treated them accordingly. The gamut of the high-handed measures they inflicted on them ranged from doses of "paternal care" (i.e. whipping) to plain murder. To explain such outrageous behavior they often pleaded diminished responsibility due to "tropical frenzy", a term specifically invented for this purpose.

When a German was put on trial-an event of extremely rare occurrence- the judge would, as a rule of law, dismiss the charges or impose very light sentences. As a matter of principle, courts tended to call in doubt the credibility of African witnesses. Indeed, these were the days when the German Colonial League demanded that the testimony of seven Africans would be deemed equivalent to that of one white man.

'Deprived of all their rights, Africans had the feeling of being slaves in their own country'. To make matters worse, the Germans completely ignored the solemn promise they had made in Article 3 of the so-called Treaty of Protection and Friendship with the Herero that they would respect the latter's habits and customs. The Herero, for their part, had not forgotten the provisions of the agreement, but with the Germans persistently violating them, they, too, were no longer bound by the terms of the treaty.

The Herero were full of complaints that the Germans were flouting their customs and habits and raping their women and young girls. Although this was not denied by the Germans, it is

[55] ibid

symptomatic that not a single case of rape came before a court in South West Africa before the Herero uprising. The Germans looked upon such offences as mere peccadilloes.

A graphic description of what happened when an African had the temerity to protest against the rape of his wife was given as follows:

"The overseer of the kraal, a German, and two of his cronies had locked themselves in with the wife of a native, probably after having administered a large dose of schnapps to her. Her husband, who had got wind of the matter, rushed to the house, hammering at the door and demanding the release of his wife. Thereupon one of these heroes came out to give the black man a good hiding, a practice which, albeit forbidden, is fairly common-place here. However, the black man offered resistance and, after having himself struck a blow, fled into his hut.

The whites, blazing with anger, dragged him out and maltreated him, subsequently bundling him off to the police station where he was given fifty lashes into the bargain for having assaulted a white man".[56]

Surely these were acts which would anger any rational man and it would only be a matter of time before they would say enough is enough.[57]

The Initial Blow

By 1904 the Herero had so many reasons for rebelling that it might be more profitable to ask why they had not acted sooner, rather than why they revolted when they did.[58]First, every Herero was alarmed at the progressive loss of land. Up to 1900 hectares only a minor portion of the Herero hereditary lands had been alienated, but with the completion of the railroad to Windhoek the pace of alienation accelerated rapidly, so that by the end of 1903 three and one-half million

[56] Berner Tagwacht Social Democratic Paper Switzerland cited in Dressler H Let Us Die Fighting: The Struggle of the Herero and Nama against German Imperialism(1966) Berlin: Akademie-Verlag pages 132-4.
[57] Own emphasis.
[58] Bridgman J.M. *The Revolt of the Hereros* (1981) Berkely California: University of California Press Page 57.

hectares out of a total of thirteen million had been lost, and the day when the Herero would not have enough land to continue their traditional way of life was fast approaching.[59]

White settlers normally referred to black Africans as "baboons" and treated them accordingly. As one missionary reported:

> "The real cause of the bitterness among the Hereros toward the Germans is without question the fact that the average German looks down upon the natives as being about on the same level as the higher primates (baboon being their favorite term for the natives) and treats them like animals. The settler holds that the native has a right to exist only in so far as he is useful to the white man. It follows that the whites value their horses and even their oxen more than they value the natives."[60]

The Herero or at least a large portion of them had decided that German rule meant not only personal humiliation and economic ruin but the end of their traditional way of life.[61]Given this conviction they saw little reason to wait and see if conditions would improve.

By 1903 the tinder was ready and only a spark was needed to set Herero land aflame.[62] This spark would later manifest itself in the ordering of war by the Supreme Chief of the Herero, Samuel Maharero.

Samuel Orders War

"I am the principal Chief of the Herero. I have proclaimed the law and the just word, and I mean for all my people. They should not lay hands on any of the following: Englishmen, Basters, Berg Damara, Namas, and Boers. On none of these shall hands be laid. I have pledged my honor that this thing shall not take place. Nor shall the missionaries be harmed. Enough!"[63]In addition, Samuel prohibited the killing of women and children. According to Bridgman, militarily, Samuel's prohibition makes sense.

[59] ibid
[60] Drechsler H *Suidwestafrika* Page 349.
[61] ibid
[62] ibid
[63] Bridgman J.M. *The Revolt of the Hereros* (1981) Berkely California: University of California Press page 57.

By not molesting the Boers and the English he reduced the number of his enemies and held open the possibility of British assistance in the event the rebellion sparked a colonial war in South Africa.[64]Samuel Maharero tried to enlist the support of the other natives in South West Africa under the slogan "Africa for Africans".[65]In the weeks before the outbreak of the rebellion he wrote a number of letters to the various Orlam and Hottentot Chiefs, pleading with them to join in a common front against the Germans.

To Hendrik Witbooi, the leader of the Hottentots and long-time foe of the Hereros, Samuel wrote:

> "All our obedience and patience with the Germans avails us nothing. My brother, do not go back on your word and stay out of the fighting, but rather let all the people fight against the Germans and let us be resolved to die together rather than to be killed by Germans through mistreatment, imprisonment, or some other way. Further, you should inform all your captains who are subject to you that they too should stand and fight".[66]

It is clear from the above analysis, that, the natives had far grown tired of the oppression and maltreatment at the hands of the settlers [Germans].[67]

On January 12 1904, the Herero launched their first attacks. During the next ten days almost every farm, village, and fort in Hereroland was attacked or at least threatened by marauding bands of natives.

The majority of the German farms were destroyed during those hectic days.[68]However, regardless of their upper hand, be it for the time being, the Herero were very humane in their conduct of the war. They fought exclusively against German men, the missionaries being spared as were women and children.[69] As the reports of one disaster after another poured into Berlin during March and April 1904, a sense of frustration came over the high command.

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[64] ibid
[65] ibid
[66] Drechsler H *Let Us Die Fighting: The Struggle of the Herero and Nama against German Iperialism* Berlin: Akademie Verlag page 73.
[67] Own emphasis.
[68] Bridgman J.M. *The Revolt of the Hereros* (1981) Berkely California: University of California Press Page 73.
[69] Drechsler H *Let us Die Fighting*: *The Struggle of the Nama and Herero against German Imperialism* Berlin: Akademie-Verlag Page 151.

The military hierarchy, which up to that time had viewed the events in South West Africa with a certain detachment, became passionately interested in ending the war and their embarrassment as soon as possible.[70]

The German Response to the Uprising

As a first step in righting the boat, the general staff decided that Leutwein must go. After his repeated defeats it was clear to everyone that he lacked the ruthlessness, the military acumen, and the will necessary to bring the war to a rapid and successful conclusion. To replace Leutwein the general staff selected General von Trotha, a seasoned colonial fighter who had won a reputation for ferocity in German East Africa a decade before.[71]In entrusting von Trotha with the task, the emperor was careful not to limit his freedom of action by any specific instructions or directives."His majesty the emperor and King only said to me that he expected that I would crush the uprising with any means necessary and then inform him of the reasons for the uprising"; thus von Trotha explained his commission to Leutwein.[72]

"I know the tribes of Africa," he continued. "They are all alike. They only respond to force. It was and is my policy to use force with terrorism and even brutality. I shall annihilate the revolting tribes with streams of blood and streams of gold. Only after a complete uprooting will something emerge."

It is clear from the above that, this new General, von Trotha was going to stop at nothing, in the exercise of his mandate. He was bent on the total and complete annihilation of the Herero.[73]

Accordingly massive reinforcements were called for by the General, hastily prepared and dispatched to South West Africa. Between May 20 and June 17 five troop transports left, carrying 169 officers and administrators, 2185 men, and 2000 horses. Added to the more than 2000 men already in South West Africa, this gave the Germans close to 5000 men to deal with a tribe which Leutwein estimated had only 2500 rifles and a limited supply of ammunition.

[70] Bridgman J.M. *The Revolt of the Hereros* (1981) Berkeley California: University of California Press page 111.
[71] ibid
[72] ibid
[73] Own emphasis

The May and June reinforcements were only the first installment of a steady flow of troops which would eventually reach almost 20,000 men. On June 16, 1904, von Trotha arrived at Okahandja where he held his first interview with Leutwein. Leutwein presented him with a draft proclamation offering amnesty to the Hereros if they would lay down their arms at once. However, von Trotha would have none of it.

"I said at once that in principle I was against such a means of handling the uprising and that such a procedure ran completely counter to the intentions of His Majesty," he wrote of Leutwein's proposal.[74]Leutwein feared that von Trotha's methods would destroy one of the priceless assets of the colony, namely its people, but he bowed to von Trotha's decision and thereafter confined himself to his civilian administrative duties which, since the military controlled all, were largely proforma.

Indeed, Leutwein's fears were soon to become reality.[75]Von Trotha continued to draw up his forces, by July the German army in South West Africa included 25 companies of mounted troops, 36 artillery pieces, and 14 machine guns. By the end of July, 4000 men and 10,000 horses and oxen were deployed in a great circle around Waterberg. After reinforcements had been moved up, von Trotha made preparations for a decisive assault on the Herero south of the Waterberg. The German Commander-in-Chief ordered the Waterberg to be surrounded by his troops.[76] But there could be no question of encircling and destroying the Herero given the vastness of territory and the lack of a sufficient number of men to seal the whole area of the Waterberg.[77]It shall be seen soon enough, just as to how this seeming backfiring of the plan, was to be exploited by the General.

On 4 August 1904 von Trotha announced his "directives for the attack on the Herero". The order clearly spelt out the General's aim of annihilating the Herero.[78]Although the General's method of alignment of his troops was somewhat peculiar, as a matter of fact, it was not due to

[74] ibid
[75] Own emphasis
[76] Drechsler H *Let Us Die Fighting: The Struggle of the Herero and Nama against German Imperialism* Berlin: Akademie-Verlag page 154.
[77] ibid
[78] "I will… attack the enemy simultaneously with all forces under my command to destroy him". See Drechsler H *Let Us Die Fighting: The Struggle of the Herero and Nama against German Imperialism* Berlin: Akademie-Verlag 155.

incompetence on the part of the general that led to this arrangement of the forces; rather it was a well-thought out plan that the Herero should break through towards the south and perish in the desert there.

A study prepared by the General Staff is quite explicit on this point:

"If, however, the Herero were to break through, such an outcome of the battle could only be even more desirable in the eyes of the German Command because the enemy would then seal his own fate, being doomed to die in thirst in the arid sandveld".[79]Von Trotha had but one aim: to destroy the Herero nation. He believed that the easiest way of achieving this was to drive the Herero into the Omaheke Desert. But as the author opines, "such crime can only be described as genocide".[80] He made his intent clear in his extermination order.

The Extermination Order

> "I, the Great General of the German Soldiers address this letter to the Herero people. The Herero are no longer German subjects. They have murdered, stolen, cut off ears, noses and other parts from wounded soldiers, and now refuse to fight on out of cowardice. I have this to say to them:
>
> Whoever turns over one of the Kapteins to one of my garrisons as a prisoner will receive 1,000 Marks and he who hands over Samuel Maharero will be entitled to a reward of 5,000 Marks. The Herero people will have to leave the country. Otherwise, I shall force them to do so by means of guns. Within the German boundaries, every Herero whether armed or unarmed, with or without cattle, will be shot.
>
> I shall not accept any more women and children. I shall order shots to be fired at them. These are my words to the Herero people.
>
> Signed: the Great General of the Mighty Kaiser
>
> Von Trotha

[79] Ibid
[80] ibid

The date fixed by the General for the German assault was 11 August 1904, after two days of fierce fighting, in which the Germans brought into action 30 pieces of artillery and 12 machine guns, the Herero had to yield to the Germans' superiority in weaponry. In their attempt to pierce the German lines they ultimately discovered the only weak point-south east of the Waterberg-and achieved a breakthrough there as von Trotha had anticipated in his sinister scheme. Stretching out before them was the sandy waste of the Omaheke Desert. The study of the General Staff would later note laconically: "The arid Omaheke was to complete what the Germany army had begun: the extermination of the Herero nation.[81]Only a few thousand persons escaped to become refugees in what is now Botswana. Most of the traditional Herero lands today remain in the hands of German colonial descendants and are the mainstay of Namibian agriculture.[82]

So it is owing to this order by General von Trotha that, many Herero men and women perished and that, those surviving today are landless and destitute.

[81] Drechsler H. *Let Us Die Fighting: The Struggle of the Herero and Nama against German Imperialism* Berlin: Akademie-Verlag page 156.
[82] Sidney L Harring (note 4 above) 393.

Chapter 4 Basis for the Herero Reparation Claims

In a joint position paper from the Nama and the Ova Herero people on the issue of genocide and reparations, the Nama and Herero traditional leaders, taking into account the turning down of their people to get redress for the past wrongs, have therefore, resolved to state their position and demands for reparation for the crime of genocide committed against their ancestors by the imperial German Government of Kaiser Wilhelm II in 1904-1908.[83]

Their assertions are as follows:

- We start from the position that what happened during that dark period in the history of our country and to our people was genocide against them for no other crime by them except for refusing to be colonized and for which they decided to wage a just war of resistance to colonialism.
- The issue of genocide was already emphasized, underlined and admitted by the German Minister of Economic Cooperation and Development, Ms Heidemarie Wieczorek-Zeul, when on 14 August 2004, Okakarara, Namibia, she said, inter alia:

When the Herero resisted, General von Trotha's troops embarked on a war of extermination against them and the atrocities committed at that time would today be termed genocide and nowadays a General von Trotha would be prosecuted and convicted.

The German Minister further stated:

- We wish, from the outset, to draw the attention of the two governments and the two parliaments that she was speaking in her capacity (to quote from her maiden speech) "as the German Minister for Economic Cooperation and Development and as a representative of the German Government and the Parliament".
- We take that to be true, authoritative and binding on the conscience of the German Government and Parliament.
- The extermination orders issued by General von Trotha were the official decrees in terms of which the Ovaherero and the Nama were to be "exterminated" or "annihilated"; it was accepted, endorsed, authorized and budgeted for by the German

[83] Fredericks L. *Legal Grounds for the Herero Compensation Claims* (2009) NAMTHESIS.

> Government and Parliament. All that constituted intent and von Trotha brutally and ruthlessly carried out his mandate, after which he was happily decorated with the highest German Imperial Medal of Honor, the "Pour le Merite", and then congratulated by Kaiser Wilhelm II himself.

The decoration of the highest Medal of Honor and the appreciative words of the Kaiser must be understood against the background of the atrocities of General von Trotha against our ancestors who were inter alia:[84]

- Murdered brutally;
- Exterminated;
- Their properties destroyed and confiscated without any compensation whatsoever;
- Decapitated;
- Subjected to all kinds of conditions of hardships, e.g., poisoning of waterholes, public hangings, driven into the Kalahari Desert where many died of hunger and thirst etc.

In the premise, the Nama and Herero Chiefs claim that all these acts constitute, in terms of international law, a crime of genocide, for which they demand just reparation.[85]

The Herero did not "invent" their demand for reparations. Rather, it is derived entirely from their careful reading of modern German history. Germany is making reparations to both individual Jews and the State of Israel for acts of genocide in the 1930s and 1940s, scarcely thirty years after the Herero War. The Herero ask an obvious question: what is the legal or moral distinction between German genocide directed at Jews and German genocide directed at Africans? Surely, in the modern world, a racial distinction cannot account for this fifference in policy. Or is this distinction based on some meaningful difference between genocide in the Herero War and World War Two? As it was simply put by Mburumba Kerina, a Herero activist, "(T)he concerns of the Herero must be seen in the same light as that of the Jewish people."[86]

[84] Ibid
[85] ibid
[86] Sidney Harring, German Reparations to the Herero Nation: an Assertion of Herero Nationhood in the Path of Namibian Development? Available at <http://academic.udayton..edu/race/o6hrights.georegions/africa/Namibia01.htm >last accessed 6 October 2011.

This is but all the Herero are asking for, equal treatment of their claim as that of the Jewish people who have been justly compensated. Why not the same treatment for them as well for the harm and injustice done to them by the Germans?[87]

Germany and Responsibility

In 1995, the United Nations Whitaker Report classified the aftermath as an attempt to exterminate the Herero and Nama peoples of South-West Africa, and therefore one of the earliest attempts of genocide in the 20th Century.[88]German officials had until now not wanted to admit guilt and responsibility for the 1904 genocide in fear of compensation claims made by parts of the Herero community. By not admitting responsibility, Germany did not have to fear legal steps as the genocide was made before international law criminalized crimes against humanity.[89]

In 1998, German President Roman Herzog visited Namibia and met Herero leaders. Chief Munjuku Nguvauva (late) demanded a public apology and compensation. Herzog expressed regret but stopped short of an apology. He also pointed out that special reparations were out of the question[90]. This stance seemed to have taken a twist with the German government in a small way, taking responsibility for the acts of their predecessor government.

On August 16, 2004, at the 100th anniversary of the start of the genocide, a member of the German government, Heidemarie Wieczorek-Zeul, Germany's Minister for Economic Development and Cooperation officially apologized and expressed grief about the genocide, declaring amidst a speech that: "We Germans accept our historical and moral responsibility and the guilt incurred by Germans at that time".[91]

[87] Own emphasis
[88] Available at< http://en.wikipedia.org/wiki/Herero and Namaqua #aftermath> accessed 29 September 2011.
[89] ibid
[90] The Journal of the Turkish Weekly Monday 9 February 2009 available online at<http://www.turkishweekly.net/new/64283/first genocide of the 20th century Herero and Nama genocide.html>last accessed on the 28 July 2011.
[91] Sasha Romanowsky Analysis of an Apology: A Critical Look at Genocide in South West Africa and its Effects on the Herero and Nama People. Available at <http://www.history.ucsb.edu/faculty/marcus/classes/133papers/1096RomanowskyHereroGenocide.htm>last accessed on the 29 July 2011.

Minister Wieczorek-Zeul demonstrated the German will to recognize its responsibility and contribute towards relevant funding already while in Okakarara. Here, she inaugurated a German funded cultural centre at Waterberg, where the worst massacres had taken place. The center is dedicated to the history and culture of the Herero people. She ruled out paying special compensations, but promised continued economic aid for Namibia which currently amounts to $14 million a year.

The Ova Herero/ Ova Mbanderu Council for the Dialogue on the 1904 Genocide (OCD1904) said the German government should take unconditional responsibility and give an official apology and restorative justice to the people of Namibia. Speaking at the handover ceremony of 20 Namibian skulls in Germany, OCD 1904 Chairperson Chief Alfons Kaihepovazandu Maharero said the German government has persisted with a degree of intransigence on this matter since Namibia's independence, hiding "behind the excuse of Blanket development".[92]"[Development] assistance to Namibia as a matter of bilateral agreements between the two governments must not have [an] umbilical link to the restorative justice we are demanding…the government must direct the restorative justice directly to the affected communities through their government and not in a form of development assistance to [the] Namibian government", said Maharero.[93]

Despite the continued calls for reparations by the Herero nation towards the German government, nothing has so far been forth coming. These have only but, amounted to a tentative apology. Many Herero however expect more from the German government, which during the last decades has paid large compensations to the Jewish people and other victims of the Nazi genocide. In August 2004, then German Minister of Economic Cooperation and Development Heidemarie Wieczorek-Zeul publicly apologized for the genocide, but was rebuked in the German parliament for having taken a reconciliatory stance. This prompted the OCD 1904 group to say that there was no formal apology, which it feels has negative impact in the progress towards reconciliation between the two nations.

[92] The Namibian Tuesday October 4 2011 page 5.
[93] ibid

They remain of the opinion that any process of true reconciliation cannot be pursued through unilateralism, but would require an unconditional process based on a structured dialogue between those on both sides of the conflict divide.[94]

While the moral arguments for a possible compensation for the Herero are gaining strength in Germany, this is however not always the case in Namibia. Namibia is the principal receiver of German development aid in Africa and the Namibian government wants this aid to keep flowing without restrictions and preferences for one ethnic group. The same sentiments were echoed by Professor Mburumba Kerina "and reparation must not only be based on the Herero and Nama alone. We also had Ndonga people. During that time, Chief Samuel Maharero appealed to King Nehale (Mpingana) to send reinforcements and he did."[95]

This can be inferred from the recent blame laid on government through its reluctance to take up the Reparations case against Germany. Recently, they have been finger-pointing between the two governments, with each blaming the other for being reluctant to take the matter forward. Recently as well, the Namibian Foreign Affairs Minister, Honorable Utoni Nujoma had to answer questions from a NUDO MP who had wanted to know what practical steps have been taken by government on the motion of genocide and reparations.[96]

It appears to me that this reluctance by government, as it has been labeled by many, pertains to the fact that only the Herero and Nama will stand to gain when and if the reparations payments are ever made by the German government. Herein, I would like to quote the Hon. Dr Mulongeni, a media expert who recently stated "money is the root of all evil" with it there is evil and without it, seemingly so too.[97] Herein the concomitant conclusion is that, the reluctance by government is the fact that money will go to only particular groups and not the nation or government. Whatever the fact maybe, these people are right and justified in their actions and I think government ought to get involved and really take up the challenge for the sake of its people.

In spite of this seemingly reluctant stance by government, the Ova Herero have not waivered and have initiated programs to advance their struggle for reparations.

[94] This was stressed by Chief Alfons Maharero at the Handover of the Namibian skulls in Berlin Germany.
[95] New Era Friday September 30 2011 page 5
[96] New Era Monday March 14th 2011 'Namibia Prods Germany on Reparation' page 4.
[97] Dr Mulongeni made this speech on Television on the National Broadcaster (the NBC) Talk of the Nation on the 26 September 2011 in a debate about the Herero Reparations Case.

The Ova Herero Genocide Association

The Association of the Ova Herero in the U.S.A was launched on the 12th of January 2008, at the Holiday Inn, Orangeburg, New York with about fifty people in attendance.[98]The aim of the site is to accommodate persons interested in learning about the history of the genocide as well as steps that were taken in pursuance of their claims against the German government.[99]The Association also has a Constitution and by-laws which provide for the objectives and purposes of the Association.[100]

Proposed Reparation Package

The Nama and Ova Herero traditional leaders maintain that as a result of the War, their ancestors lost not only their lives, but also their only means of livelihood in the form of land and its natural wealth; livestock; and other forms of properties without any compensation whatsoever.[101]

Based on these grounds, the reparation package is put forward for the consideration of the German government, which includes, inter alia, the following aspects:

1. The purchase of land on which to settle or resettle their displaced and disinherited people here in Namibia and/or elsewhere (in the Diaspora);[102]
2. The building of Educational institutions in designated areas; health centers; capacity building of their people in various appropriate technologies through special funding, scholarships, bursaries etc.
3. Creation of a substantive fund for the sustenance of the above stated aspects.

They further emphasize, they aren't looking for any confrontation with the German government, nor with its people at all; they are however, seeking redress for the wrongs of the past in order for the wounds to heal and for resultant genuine reconciliation and peaceful co-existence among

[98] Fredericks L. Legal Grounds for the Herero Compensation Claims (2009) NAMTHESIS page 11.
[99] ibid
[100] For more information on the Constitution of the Association, visit< www.Ovahererogenocideassociationusa.org> last accessed on the 6th July 2011.
[101] Fredericks L *Legal Grounds for the Herero Compensation Claims* (2009) NAMTHESIS Page 12.
[102] ibid

the Nama/Ova Herero and the German people in their country and for lasting friendly bilateral relations between the two countries.[103]

It has come to suffice that, among the German contentions are the fact that, Germany provides a lot of money already to Namibia in development aid. Similarly, the reluctance on the part of Germany is also attributed to the fact that, the atrocities were committed over a century-ago and thus, Germany feels hard-done by the expectation to compensate.[104]This however, should not be a detriment to the claims of the Herero which are of course their entitlement under international law. The law on reparations sets out clearly that, where a wrong is done to another under international law, redress must be effected. Herein, developments in the arena of reparations are worth discussing to further substantiate the claims of the Ova Herero and Nama peoples.

[103] ibid

[104] Sasha Romanowsky Analysis of an Apology: A Critical Look at Genocide in South West Africa and its Effects on the Herero and Nama People. Available at <http://www.history.ucsb.edu/faculty/marcus/classes/133papers/1096RomanowskyHereroGenocide.htm>last accessed on the 29 July 2011.

Chapter 5 Development of the Law of Reparations under International Law

During the sixty years after the Second World War, the evolution of human rights law has ineluctably continued as a flood which permeated and, to a certain extent, transformed the whole body of international law.[105] Today, the obligation of states to respect human rights-and to ensure their respect within their jurisdiction-presupposes not only the obligation to refrain from conduct which may directly lead to the violation of internationally recognized individual or collective rights, but also the duty to prevent and repress violations of non-state actors acting within the jurisdiction of the state concerned (i.e. enforcing compliance with human rights standards by private actors); the duty to investigate violations; to carry out appropriate action against the violators; to grant effective access to justice in favour of the victims; to provide them with adequate remedies and reparations.[106]

The Definition of Reparations

According to the Oxford English Dictionary, the concept of 'reparation' includes any 'measure aimed at restoring a person and/ or community of a loss, harm or damage suffered consequent to an action or omission'.[107] The term in point also indicates the 'action of restoring something to a proper state', or the 'action of making amend for a wrong done'. The Oxford Dictionary uses the terms 'amends' and 'compensation' as tantamount to 'reparation', while indicating this latter term (as well as 'redress' and 'relief') as being synonymous with 'remedy'.

In the legal discourse concerning indigenous peoples the notion of reparation used in the framework of state responsibility may be adopted to the subject of remedial justice for human rights violations.

All measures aimed at restoring justice through wiping out all the consequences of the harm suffered by the individuals and/ or peoples concerned as the result of a wrong, and at re-

[105] Lenzerini F *Reparations for Indigenous Peoples: International & Comparative Perspectives* (2009) Oxford: Oxford University Press page 4.
[106] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN G.A. Res. 60/147 of 16 December 2005, Para 2.
[107] Online version, available at < http:// dictionary. Oed. Com> last accessed on 27 June 2011.

establishing the situation which would have existed if the wrong had not been produced are thus suitable of being considered as reparations.[108]

In the terminology of human rights, the aim of reparations is to 'render justice by removing or redressing the consequences' of a tort in favor of the victim(s) of such tort, or 'to rectify the wrong done to a victim, that is, to correct injustice'.[109]

The requirements of Reparations

As for the requirements of reparation, it must first of all be adequate. Reparation must also be effective: this means that it must be efficient in restoring the tort suffered (in all its components, including spiritual, social, moral, and economic) and re-establishing the pre-existing situation.[110]

'Adequacy' and 'effectiveness'

The basic criteria to be taken into particular account for assessing whether a measure of reparation may be actually considered as adequate and effective are the following:

1. The measure of reparation taken must be proportionate to the gravity of the breach and the harm suffered taking into account the peculiar circumstances of the specific case (objective criterion).
2. The measure of reparation taken must be considered as adequate and effective (irrespective of whether it is included among the 'canonical' forms of redress contemplated by the relevant international legal instruments) by the persons, groups or communities which it is addressed, provided that they act in good faith (subjective criterion).[111]

'wrong', 'tort', 'prejudice', 'loss', 'damage'

In considering the 'pathological' moment that leads to the production of the situation from which the right to reparation arises, as well as the effects produced to the prejudice of the victim(s), the nature and content of the terms 'wrong', 'tort', 'prejudice' 'loss', 'harm', 'damage' or other

[108] Statement of the Permanent Court of International Justice in the Factory at Chorzow case.
[109] D Shelton *Remedies in International Human Rights Law* 2 Ed (2005). Oxford page 7.
[110] Principle 4 of the van Boven Principles.
[111] Ibid

similar expressions are to be evaluated primarily through the subjective lens of the perception of the persons and/ or groups concerned, and not under stereotyped criteria.[112]

In other words, the terms in point are not to be interpreted as necessarily requiring the production of an economic loss, physical damage or any other kind of predetermined effect, especially with respect to indigenous peoples, whose holistic philosophy of existence is drastically different from the materialistic vision of life of the Western world.

As a consequence, the author holds that, any modification of the pre-existing conditions affecting the life of indigenous peoples is potentially suitable for consideration as a 'wrong', 'tort', 'prejudice', etc, when it is perceived as such by the persons and or communities concerned, provided that it may be reasonably qualified as a breach of a right belonging to the community concerned or to any of its members.[113]

The author is also of the view that, the term 'right' is to be intended broadly, so as to include cultural rights.[114]

'Action' or 'omission'

Any situation producing a right to reparation for human rights breaches (whether claimed by indigenous peoples or not) necessarily arises from an event which is the result of an 'action' or an 'omission[115]. In assessing the meaning of the terms, the effects of such conduct, whether it results or not in a breach of internationally protected human rights are to be evaluated.

[112] Lenzerini F *Reparaions for Indigenous People: International & Comparative Perspectives* (2009) Oxford: Oxford University Press Page 15.
[113] ibid
[114] ibid
[115] ibid

Barriers to reparations

The foregoing analysis of the possible paths that international law may indicate in order to provide reparation for indigenous peoples would not be complete without a reference to the barriers that still exist to redressing this type of past injustice.

At the legal level, the most common argument against reparation for historical injustices is the principle of non-retroactivity of the law. Even if wrongs to indigenous peoples constitute a breach of today's human rights standards-so the argument goes-such standards may not be applied retroactively.[116]Another barrier at the procedural level is the passing of time and the consequently prescriptive effect of time limits and statutes of limitations. More fundamentally, the question may be raised whether or not it is fair to require nations, groups or individuals to make reparation for injuries to indigenous peoples that occurred a long time ago and were caused by a different generation of people. At the political level, the barriers may be even more formidable. The acceptance of a duty to provide reparation to native peoples may spoil the carefully cultivated myth of the founding fathers of a nation. At the same time, reparation claims of a particular tribe or group of indigenous peoples may be opposed on political grounds by the government of the country to which the tribe belongs. The Namibian government, predominantly composed of the Ovambo tribe, opposes the claim of the Herero on the basis that all people in Namibia were exploited by the Germans, and none should be singled out for reparations.[117]

For each of these arguments, however, one can make many counter-arguments in favor of reparations.

[116] Soifer A 'Redress, Progress and the Benchmark Problem' (1998) 40 Boston College Law Review 525.
[117] Shelton D 'Reparations for Indigenous People: The Present Value of Past Wrongs' Lenzerini F *Reparations for Indigenous People: International & Comparative Perspectives* (2009) Oxford: Oxford University Press 47, 59.

Arguments in favor of Reparations

The objection of non-retroactivity of today's standards does not hold in the event of abuses of indigenous peoples that were illegal also at the time of their perpetration under international agreements or other instruments for the safeguarding of indigenous peoples interests.[118]But even in the absence of specific protecting instruments in force at the time the injury occurred, the principle of non-retroactivity would not cover the most serious breaches of human rights and humanitarian law.

It would indeed, be difficult to defend a position whereby acts of genocide, mass deportation, and deprivation of the means of livelihood of indigenous peoples were sheltered from legal scrutiny and responsibility on the dubious assumption that they were 'legal' at the time of their commission.[119]Furthermore, Article 15 of the Convention[120]states "criminal acts of individuals are not protected by the principle of non-retroactivity of the law when they are according to 'general principles of law recognized by the community of nations'. By analogy the same principle holds good in relation to wrongful acts committed by states. Further, most indigenous claims to reparation concern restitution of ancestral land and property which were the object of illegitimate acts of deprivation a long time ago but the effects of which continue today. So, in these cases there is no issue of retroactivity at all.

The argument based on the statute of limitations, although reflecting the sound principle of certainty of the law, also has its limits in the context of the present discussion. First, it is a barrier only in judicial proceedings and in civil actions where the judge is constrained by the application of procedural rules of the forum. But the same barrier does not apply to extra-judicial negotiations or to the enactment of appropriate legislation on reparation, in which the principle of good faith and the need to acknowledge the moral dimension of historical injustice should be the decisive factors.[121]

[118]Francionni F 'Reparations for Indigenous People: Is International Law Ready to Ensure Redress for Historical Injustices?' Lenzerini F *Reparations for Indigenous People: International & Comparative Perspectives* (2009) Oxford: Oxford University Press 27, 43.
[119] ibid
[120] UN Covenant on Civil and Political Rights
[121] Francionni F 'Reparations for Indigenous People: Is International Law Ready to Ensure Redress for Historical Injustices? Lenzerini F *Reparations for Indigenous People: International & Comparative Perspectives* (2009) Oxford: Oxford University Press 27, 43.

As for the objection that it would be unfair to require reparation from the present generation (states, companies or individuals) for the acts of their predecessors against indigenous peoples, it seems to turn the argument on its head. What is actually unfair, and unacceptable, is to turn a blind eye to the unjust enrichment of states, communities, companies and individuals made, directly or indirectly, as a consequence of the abuses or the spoliation of indigenous peoples. Fairness, therefore, does not militate against reparation but, on the contrary, it demands restitution, whenever possible, compensation for unjust profiting, and, at the very least, recognition of past wrongs, apology to indigenous peoples and guarantees of non-repetition.[122]

Much more complex is the case of political objections to reparation. Governments may oppose indigenous peoples within their jurisdiction who seek reparation in judicial or diplomatic fora, for a number of valid reasons. They may see the action for reparation of indigenous peoples as incompatible with the principle of equality of all people before the law, which would require that all victims of historical injustices, such as colonialism, apartheid or foreign domination, should be entitled to the same treatment and the same opportunities for reparation. At the same time, governments engaged in a difficult process of national reconciliation may see the autonomous initiative of indigenous groups to seek reparation as divisive and destabilizing at a time when the political process is trying to establish a new constitutional equilibrium. This is the case with South Africa in relation to apartheid reparation suits in foreign jurisdictions.[123]

The foregoing analysis has shown that a legal basis for a right of reparation of indigenous peoples can be found in the law of international human rights and humanitarian law. According to Francionni, However[124], the specific provisions granting a right to reparation in these areas of the law are essentially treaty norms. The question remains whether and to what extent there is an indigenous peoples' right to reparation under customary international law.

[122] ibid
[123] ibid.
[124] ibid.

The examination of international practice, according to Francionni[125], has shown progressive signs of a progressive development of international law toward the recognition of a customary right to reparation for victims of serious violations of human rights and humanitarian law.

He accords such recognition firstly: to the adoption by the UN General Assembly on 21 March 2006 of Resolution 60/147 containing the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of Humanitarian Law.[126] However, it would be foolish to think that international law grants indigenous peoples a complete and unconditional right to reparations for injuries suffered in the past.[127]As alluded to by Lenzerini earlier, there are still jurisdictional hurdles and substantive legal barriers that may impede recognition or the exercise of this right at the level of international law. He opines that the most suitable way to overcome these barriers is to be found in an eclectic approach that, on the one hand combines traditional interstate remedies with more modern techniques of direct access by individuals and peoples to international justice, and, on the other hand, brings together judicial remedies with political and diplomatic processes.

As far as the first approach is concerned, it can be discerned in the judgment of the ICJ in the Avena Case[128]where the court recognized the double obligation of the defendant state to provide reparation to the state and to the individual victim of the breach. Another example is the German reparation practice with respect to Israel and the individual victims of the Shoah.

The second approach is based on the realistic assessment that international practice shows that there is precious little chance for indigenous peoples to obtain reparation outside of the existing treaty mechanisms to enforce human rights. In this instance, the author makes reference to the EU Convention and The American Convention. Therefore, an eclectic approach entails that judicial remedies, before domestic or international courts, should be pursued having in view some form of political settlement that will entail restitution, whenever possible, compensation, acknowledgment of the wrongful act and guarantee of non-repetition, as in practice has already

[125] Francionni F 'Is International Law Ready to Ensure Redress for Past Injustices?' Lenzerini F *Reparations for Indigenous People: International & Comparative Perspectives* (2009) Oxford: Oxford University Press 27, 44.
[126] UN General Assembly, Sixtieth session, 21 March 2006. A/ Res/60/147.
[127] Francionni F. 'Is International Law Ready to Ensure Redress for Historical Injustices'? Lenzerini F. *Reparations for Indigenous Peoples: International & Comparative Perspectives* (2009) Oxford: Oxford University Press page 44.
[128] Avena and Other Mexican Nationals (Mexico v United States of America) ICJ Reports 2004 p 12.

happened in relation to many claims.[129]The memory and legacy of past injustices haunts contemporary international law.[130] Striving for truth and justice, which includes reparation, is part of a system based on the rule of law and on the equal dignity of all human beings.

Indigenous peoples are unquestionably entitled to remind us of the past atrocities that colonizers and foreign conquerors visited upon them in the name of empire and racial superiority.[131] They are surely entitled to demand reparation for the deprivations and suffering they endured in that not so distant past. Be this as it may, the memory of past injustice has also a dark side: the feeding of a sense of enmity and the lingering on old resentment which may hinder reconciliations and solidarity in the society of the present time.[132]Ensuring that the memory of past injustices does not manifest itself in present and persistent rancor is probably the most important function of reparation for past injustices. Through the millennia, the human record is replete with episodes of genocide, slavery, torture, forced conversions, and mass expulsion of overrun peoples.[133] Many such incidents, even from centuries ago, remain alive in collective memory and sometimes resurge as a background to modern international and internal conflicts; indeed, many oppressed groups recognize that the existence, boundaries and multi-ethnic populations of modern states are largely the result of acts and omissions that would be unlawful if done today.

Indigenous peoples and national minorities have lost their traditional lands to others, and members of indigenous communities have been killed, excluded and subjected to discrimination by invaders who enriched themselves through privilege and the suppression of pre-existing societies.[134] In light of these, it is essential to look at the ways in which States should and indeed have responded to these in cases where they have done so.

[129] Note above 45.
[130] ibid
[131] ibid
[132] ibid
[133] Shelton D. 'The Present Value of Past Wrongs' Lenzerini F *Reparations for Indigenous People: International & Comparative Perspectives* (2009) Oxford University Press 43.
[134] ibid

State responses to Reparations Claims

States and governments have responded to the proliferating claims for reparations either by taking some positive action or by rejecting the claims in their entirety.[135]

The following is an analogy of the forms of reparations that may be granted.

a) A prevalent action in recent years has been the issuance of a formal apology for the commission of past wrongs.

Apology can serve different purposes. It can acknowledge the suffering of others, as when expressing sorrow over the death of a loved one. It can also be an acceptance of fault leading to redress.[136] It is only in the last instance that an apology may carry with it legal implications, establishing a causal link between the action of the speaker and the injury suffered.

The possibility that any apology may serve to buttress legal claims can make government officials reluctant to express regret over historical injustices.

b) Restitution

The responsible state is under an obligation to re-establish the situation that existed before the wrongful act, [137]in so far as this is 'not materially impossible' or 'does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation. Restitution is the re-establishment of the status quo ante only, any further damage being a matter for compensation.[138]

C) Compensation

Compensation is the most common form of reparation, either alone or together with restitution or satisfaction, or both.

[135] ibid
[136] ibid
[137] Aust A. *Handbook of International Law* (2005) Cambridge: Cambridge University Press Page 419.
[138] ibid

The responsible state is under an obligation to compensate for damage caused by its wrongful act insofar as it has not been made good by restitution.[139]

d) Rejection

Governments have rejected some claims on the basis that there was nothing illegal about their acts at the time they were committed. [140]

The Australian stance for example, was despite recommendations for an apology and compensation contained in the government commissioned official report on the matter.[141]

The Legal Framework of Reparations

Reparations to indigenous people may be afforded through (1) interstate claims based upon state responsibility and diplomatic protection; or (2) a human rights claim brought by victims directly against the responsible state.[142]

State Responsibility

In international law as a precondition, there must be a wrong that qualifies as legal damage. The term 'damage' according to Whiteman[143]presupposes the existence of an international claim based upon a wrongful act or omission. In international relations as in other social relations, the invasion of the legal interest of one subject of the law by another legal person creates responsibility in various forms determined by the particular legal system. [144]

Today one can regard responsibility as a general principle of international law, a concomitant of substantive rules and of the supposition that acts and omissions may be categorized as illegal by reference to the rules establishing rights and duties.[145]In short, the law of state responsibility is concerned with the incidence and consequences of illegal acts, and particularly the payment of compensation for loss caused.

[139] ibid
[140] The Australian government is one of those that have denied reparations, to members of the 'Stolen Generations' of Aboriginal children taken from their families as part of a government assimilation policy.
[141] ibid
[142] Shelton D (note 119 above) 59.
[143] M Whiteman *Damages in International Law* (1937) Reprinted William S Hein & Co. 1978) P 8.
[144] Brownlie I *Principles of Public International Law* 3ed (1979) Oxford: Clarendon Press Page 431.
[145] ibid

In a report of the Spanish Zone of Morocco Claims[146]Judge Huber said:

'Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation is not met, responsibility entails the duty to make reparation'. Furthermore, in its judgment in the Chorzow Factory (Jurisdiction) [147]proceedings, the Permanent Court stated that: 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.'[148]For a state to be responsible, the conduct in question must be attributable to the state. The general rule is that only the conduct of a state's organs of government or its agents (persons acting under the direction, instigation or control of those organs) can be attributable to the state.[149]Articles 8 to 11 deal with conduct that is not that of a state organ etc., but is nevertheless attributable to the state.[150] The conduct of a person or group of persons is considered an act of a state if in fact that person is acting on the state's instructions or under its direction or control (Article 8). They can be private persons and the conduct does not have to involve governmental activity. Thus a state is responsible for the acts of private groups that carry out, say terrorist attacks on its instructions. Conduct will be attributable to the state if it was an integral part of a specific operation directed or controlled by it.[151]The law of state responsibility enshrines the principle that every breach of an international obligation attributable to a state carries with it a duty to repair the harm caused.[152] The principles that an international delict generates an obligation of reparation, and that reparation must insofar as possible eradicate the consequences of the illegal act are the foundation of the international law on remedies.[153]According to Fitzmaurice, 'the notion of international responsibility would be devoid of content if it did not involve a liability to make reparation in an adequate form'.[154]

[146] ibid
[147] (1927) PCIJ
[148] ibid
[149] Aust A. *Handbook of International Law* (2006) Cambridge: Cambridge University Press page 410.
[150] ILC Draft Articles
[151] See Nicaragua v USA ICJ Reports (1986)
[152] Shelton D 'The Present Value of Past Wrongs' Lenzerini F *Reparations for Indigenous People: International & Comparative Perspectives* (2009) Oxford: Oxford University Press 47, 59.
[153] ibid
[154] *The Law and Procedure of the International Court of Justice* (1986).

Doctrine of Continuous Violations

According to Graham[155] the basic theory behind the continuing violation doctrine is deceptively easy to explain. In some situations, continuing misconduct by a defendant will justify the aggregation or parsing of its misbehavior, with the effect of rescuing a plaintiff's claim or claims from the statute of limitations. The potency of this doctrine was on full display in the recent case of Bodner v Banque Paribas[156].The plaintiffs herein brought a suit in the late 1990s to recover property allegedly misappropriated by the Nazis and their accomplices during World War II. The passage of several decades between these seizures and the institution of the plaintiff's lawsuit seemed to dictate dismissal of the putative class' claims pursuant to the applicable statute of limitations. Much to the defendants' surprise and chagrin, however, the Bodner court determined that if the plaintiffs' allegations were true, the statute of limitations had not yet begun to run on their claims. But instead the defendants' allegedly ongoing refusal to return the plaintiffs' property would represent a "continuing violation'' of international law that persisted up through the time of suit.[157]The continuous violations doctrine thus breathed new life into claims that otherwise might have accrued and expired more than a half century ago.

From the above it can be seen that, in order for the doctrine to apply, there has to be some continued violation of a human right. The "doctrine" is said to undermine the repose interests that statutes of limitations try to protect while offering few countervailing benefits to befuddled plaintiffs[158].Herein, I share the views opined by Frederick L in her dissertation[159].

According to Frederick, the Herero, as in the case with many other ethnic groups in Namibia, lost considerable property, i.e. land and livestock.[160] The effects of that loss are still felt by the persons who are the descendants of the victims today because, as it happens in the normal cause of events, the descendants would have become entitled to their ancestor's properties in one way or the other.[161]In the absence of any kind of act which serves to return the property that was

[155] 'The Doctrine of Continuing Violations' Gonzaga Law Review Vol 43:2 Available at <Http://ssrn.com/abstract=1133232> last accessed 27 July 2011.
[156] ibid
[157] ibid
[158] ibid
[159] Titled *Legal Grounds for the Herero Compensation Claims* (2009) NAMTHESIS.
[160] ibid
[161] ibid

taken from the victims of the genocide, the gross human rights violations are still continuing today.[162]Thus, the doctrine of continuous violations may be invoked to bring a cause of action within the prescribed period of time that a claim is enforceable. In the current case, this would be to the advantage of the Herero[163].

Inter-temporality

The resolution of a reparations claim for historical injustice may require a determination of the law applicable to events that commenced or were concluded long ago.

International dispute resolution bodies have expressed the notion of inter-temporality, that the rights and duties of parties are determined by the law in force at the time a claim arises.[164]In the Island of Palmas Case[165] arbiter Huber declared that inchoate claims of sovereignty arose upon discovery of new lands, based on the law at the time of discovery, but that the maintenance of sovereignty depended upon how the law and facts evolved. Thus original title could be divested according to legal developments, based on the distinction between the creation of rights and the continued existence of rights.

In the Advisory Opinion on Namibia[166] the ICJ also took an evolutionary approach to legal obligations, finding that the terms of the mandate over South West Africa 'were not static' but were by definition evolutionary, as also, therefore, was the concept of the sacred trust. It appears to me from the above, through inference that, in our assessment of the issue of temporality we need to pay attention not only to the laws in place at the time of commission of the act, but also of the developments, evolutions of the law having taken place since the commission of the act in question.[167]In as far as the current discussion is concerned, the issue of temporality is essential. It will be shown in the round-up of the major conclusions and recommendations that, in relation to

[162] ibid
[163] My Emphasis
[164] Shelton D. 'The Present Value of Past Wrongs' Lenzerini F. *Reparations for Indigenous Peoples: International & Comparative Perspectives* (2009) Oxford: Oxford University Press 47, 62.
[165] (USA v Netherlands) (1928) 2 UNRIAA 829
[166] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Advisory Opinion [1971] ICJ Rep 16.
[167] My own emphasis.

the current issue of the Herero reparation claims, the law at the time does not at all affect the claims of the Herero negatively.[168]

Universal Jurisdiction

It is exceptional for states to have jurisdiction under their law over crimes committed abroad by foreign nationals against foreign nationals. This is due to issues in international law such as that of territoriality and territorial jurisdiction. But certain crimes- piracy, slavery, torture, war crimes, genocide and other crimes against humanity-are so prejudicial to the interests of all states, that customary international law does not prohibit a state from exercising jurisdiction over them, wherever they take place and whatever the nationality of the alleged offender or victim.[169]

This is known as 'universal' jurisdiction, although states have generally been reluctant to exercise it in cases where they have no connection with the persons involved. This universal jurisdiction makes it possible for a state to exercise jurisdiction on aliens, who are not in any way connected to it, for offences that are gross violations of international law. Such crime is justifiably repressible as a matter of international public policy.[170]

Human Rights Law

The right to a remedy is a part of international law, contained in global and regional human rights treaties and other instruments.[171] Related norms are found in humanitarian law instruments and in international criminal law, where the Statute of the International Criminal Court makes provision for the award of reparations to victims of international crimes.[172]

[168] Own emphasis
[169] Aust A. *Handbook of International Law* (2006) Cambridge: Cambridge University Press Page 45.
[170] Own emphasis
[171] The UNDHR provides that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or laws.' See also European Convention for the Protection of Human Rights, Article 13, African Charter on Human and Peoples' Rights Articles 7, 21, 26..
[172] Shelton D. 'The Present Value of Past Wrongs' Lenzerini F. *Reparations for Indigenous Peoples: Comparative & International Perspectives* (2009) Oxford: Oxford University Press 47, 65.

The Basic Principles and Guidelines

The Basic Principles and Guidelines on Reparation follow the jurisprudence of human rights bodies by including both procedural and substantive dimensions to the right to reparations. The procedural requirement to provide access to justice forms the contents of Part VIII.

Victims 'shall' have equal access to an effective judicial remedy, although administrative or other remedies may be provided in accordance with domestic or international law.[173]Furthermore, access to justice 'should' include all available and appropriate international processes in which a person may have legal standing. The guidelines continue by emphasizing that: To make access to justice effective, states 'should', inter alia, disseminate information about available remedies, take measures to protect victims and witnesses and 'facilitate assistance' to victims. Part IX details the forms of reparation and other appropriate remedies. This part affirms that reparation 'is intended to promote justice' by redressing injury and thus should be proportional to the gravity of the violations or the harm suffered.[174]

The above is all too well, symptomatic of the enormous strides international law has undertaken to safeguard the rights of exploited and marginalized minorities.[175]

[173] See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN G.A. Res. 60/147 of 16 December 2005 Para 2.
[174] ibid
[175] Own Emphasis.

Chapter 6 Conclusions

As noted above[176] contemporary international law is haunted by the memory and legacy of past injustices. Bearing this in mind, what follows should be an investigation into how international law deals with such claims. Can the [177]demand for reparation be accommodated within the existing international norms and remedial processes?

Indigenous peoples' claims are premised on some form of deprivation or abuse that constitutes a violation of fundamental human and peoples' rights. Therefore, international human rights law is the most obvious branch of international law for verification of the legal basis and scope of a right to reparation for breach of the primary rules.[178]International human rights norms create obligations that are owed by states directly to individuals under their jurisdiction.

The foregoing analysis has shown that a legal basis for a right of reparation of indigenous peoples can be found in the law of international human rights. In recent times claims for reparation for human rights violations have proliferated.[179] In many instances they have led to effective redress for victims in that states have recognized their responsibility for human rights violations and restored the damages suffered by the persons concerned through several measures, including restitution and compensation.

The trail of broken dreams according to Lenzerini[180] has thus started to be unpaved. He however, holds that, the road to be covered for achieving effective justice for the injustices suffered by indigenous people is still very long. International law has also come a long way in its recognition of the right to reparations of victims.

Article 11 paragraph 2 of the UN Declaration affirms that:

> States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural,

[176] Lenzerini F *Reparations for Indigenous People: International & Comparative Perspectives* (2009) Oxford: Oxford University Press page 27.
[177] ibid
[178] ibid
[179] Lenzerini F Reparations for Indigenous People: International & Comparative Perspectives (2009) Oxford: Oxford University Press page 114.
[180] ibid

intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Also, Art 28 explicitly proclaims the right of indigenous peoples to 'redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent'.

Several reasons support affording reparations for the past and present wrongs done indigenous peoples, however difficult it may be to determine the appropriate nature and sweep of remedies. Firstly many abuses continue today and violate existing human rights norms binding on all states, entitling the victims to access to justice and substantive reparations. Even many historical acts were illegal under national or international law at the time they were committed. The victims have been unable to secure redress for political reasons, or because evidence was concealed, or procedural barriers prevented them from presenting claims. In such circumstances, lapse of time should not prevent reparation for harm caused by the illegal conduct.[181]

Secondly, states, communities and individuals have unjustly profited by many of the abuses, garnering wealth at the expense of the victims. The economic disparities created have continued over generations, often becoming more pronounced over time. As one author puts it: 'not seeking financial restitution, in the face of documented proof that financial giants worldwide are sitting on billions of dollars in funds made on the backs of…victims, which they then invested and reinvested many times over.., amounts to an injustice that cannot be ignored'.[182]Thirdly, many indigenous claims have a compelling moral dimension because acknowledged wrongs were committed during or after the emergence of the concept of the equal and fundamental human rights of all persons[183].Payment of damages is a symbol of moral condemnation of the abuses that occurred. Human rights were part of positive law in states of Europe and North America by the end of the eighteenth century, and at least partially recognized in other countries from the

[181] Shelton D 'The Present Value of Past Wrongs' Lenzerin F *Reparations for Indigenous People: International & Comparative Perspectives* (2009) Oxford: Oxford University Press 47, 48.
[182] Bazyler M 'The Holocaust Restitution Movement in Comparative Perspective' (2002) 20 Berkeley Journal of International Law 11-41.
[183] Shelton D "The Present Value of Past Wrongs" Lenzerini F *Reparations for Indigenous Peoples: International & Comparative Perspectives* (2009) 47, 49.

same period. If human rights are truly inherent and universal, then they should apply not only territorially, but temporally and provide a basis to judge past practices.[184]

Fourthly, proponents of reparations also assert that present generations have a responsibility for the past. Every individual is born into a society or culture that has emerged over time and that shapes each person, making the past part of the present and giving the society and individuals a historic identity. International law, recognizing that institutions or collective entities such as states have continuity over time, provides that a change of government does not absolve a state of responsibility for wrongful conduct.[185] In the final, an apology as a form of reparation is sought and supported because it acknowledges the suffering of victims and the legacies of that suffering in contemporary society. The acknowledgement in itself can be restorative and help promote better relations today.

With these supporting rationales, historical as well as current wrongs are the subject of a growing number of legal and/or political claims by indigenous peoples seeking reparations.[186] The United Nations Conference on Racism, held in Durban in 2001, debated the issue of reparations for past wrongs. In the main, the Conference discussed two themes (1) the treatment of victims of racism, racial discrimination and tolerance and (2) creation of effective remedies, recourse, redress and other measures at all levels of governance.

The language proposed by the Preparatory Conference of the Americas proved divisive, as it

> Acknowledged that the enslavement and other forms of servitude of Africans and their descendants and of the indigenous peoples of the Americas, as well as the slave trade, were morally reprehensible, in some cases constituted crimes under domestic law and, if they occurred today, would constitute crimes under international law
>
> and accepted that
>
> These practices resulted in substantial and lasting economic, political and cultural damage to these peoples and that justice now requires substantial national and

[184] ibid
[185] ibid
[186] Shelton D "The Present Value of Past Wrongs" Lenzerini F Reparations for Indigenous Peoples: International & Comparative Perspectives (2009) 47, 50.

> international efforts to repair such damage. Such reparation should be in the form of policies, programs and measures adopted by the states which benefited materially from these practices, and designed to rectify the economic, cultural and political damage, which inflict the affected communities and peoples.[187]

The infringement of certain rights collectively exercised by indigenous peoples, which are inherent to the safeguarding of their cultural identity, has the inescapable consequence of leading to the breach of certain individual rights protected by international law at both the treaty and customary level.[188]This has been confirmed by virtually all international monitoring bodies established by multilateral human rights treaties, including the ICCPR, the Committee on Economic, Social and Cultural Rights (with regard to Art 12 ICESCR), CERD (with respect to the prohibition of racial discrimination provided for by the 1965 Convention on the Elimination of All Forms of Racial Discrimination), the Inter-American Court of Human Rights and the African Commission of Human and Peoples' Rights.[189]

Recommendations

Fredericks opines that a unification of the claim might be a good idea in the furtherance of the reparation claim and help breathe new life into it. I strongly agree with this. This will not only show solidarity but, by including other stake holders, government too; more pressure will be cast on the German government. However, this is not to imply that, by raising the claim on their own, the Herero are not entitled to succeed.

The Herero reparation claims have been an issue for a long time now, the main reason being Germany's reluctance to pay the claimed reparations. Among some of the contentions by the German government are the following: firstly, the atrocities happened over a century ago; secondly, Germany contributes a lot in development aid to Namibia already.

[187]Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban 31 Aug-8 Sept 2001 UNGAOR at 5-7 UN Doc A/CONF 189/12 (2002).
[188] 'Collective Implications of Human Rights Standards' cited in Lenzerini F *Reparations for Indigenous Peoples: International & Comparative Perspectives* (2009) Oxford: Oxford University Press109.
[189] ibid

In light of this continued unwillingness by the Germans to fulfill their obligation, the Herero instituted claims which thus failed on the following grounds: firstly, in the Case against the Deutsche Bank, the court saw it fit to dismiss the application on the rationale that, the Herero Reparation Corporation had failed to state a claim upon which relief could be granted. Herein, the said claim is evident to all; it has been widely documented in the vast majority of literature written about the German atrocities on the Herero people of Namibia. Herein, the court would have been better advised to consider the claims under the ambit of continuing links. The fact that these claims arose over a century ago does not make them less of a claim today.

The Herero people suffered greatly at the hands of the Germans, the effects of which are still felt today. Many of them are landless today due to the seizures of their lands by the German Imperial Government. Not only that but, they were deprived of many other rights inclusive too, the right to culture and their traditional way of life. This said, Germany continues to be liable for these claims in as far as the redress sought is not forthcoming. By its continued reluctance to pay, the German government continues defeating international law and depriving and infringing upon some of the human rights of the Herero and the abuse continues meaning, so too does the claim.

Herein, I strongly recommend that, the court which next adjudicates on the matter take cognizance of the fact that, a claim does indeed exist, and upon which relief can and should rightly be granted. As far as the issue of statute of limitations is concerned, the actions of the German government can be labeled as continued misconduct by a defendant, herein, justifying the aggregation of its behavior with the effect that, the actions rescue the plaintiffs' claims from the statute of limitations. As opined by Graham[190], this will offer countervailing benefits to the beduffled plaintiffs, herein the Herero of Namibia.

Germany's continued inability to pay is inexcusable. The acts of the then German government amounted to genocide which is an international law crime from which Germany cannot escape responsibility. As per the argument of liability in terms of the Genocide Convention, yes, the language of the Convention does not expressly provide for the retrospective application of the law on genocide, but, nor does it provide against it. In this regard, inter-temporal law is essential.

[190] 'The Doctrine of Continuing Violations' Gonzaga Law Review vol 43:2 available at <http://ssrn.com/abstract=1133232> last accessed 27 July 2011.

As far as the German atrocities are concerned, they should be interpreted in such a way as to pay attention not only to the fact that genocide was not prosecutable at the time, but also to the recent developments and evolutions in the law since then. Herein, is Germany liable? The question should be answered with a strong yes. This is because bearing in mind the developments in the law on genocide since the 1904-1908 Wars; the law is such that, if perpetrated today, the acts would still amount to genocide.

Under the doctrine of state responsibility, the acts of the then government are attributable to the current government and which must account and take responsibility for such. In this regard, I strongly urge international pressure be heaped on Germany to pay the said reparation claims. This will go a long way in proving to everyone that, all people are indeed equal under international law and that, international law is the for each and everyone's protection. It will also show that, international law making bodies and international legal instruments are not in force just for the sake of it, but demand obligations of states.

Herein, Germany should rightfully respect the international law and give in to its obligations. The current law on reparations is substantial to cover the reparations claims of the Herero. Reparation has become entrenched in international law as a jus cogen. This is evident from the vast amount of case law on the subject. If a country or peoples suffer violations or deprivations of some rights, it is now trite, under international law that, such state responsible for the deprivation be brought to book and redress those injustices.

Germany hereto, should similarly under the scope of reparations in international law, affect redress to the Herero people for the loss and harm suffered at its hands.

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