Metadata of the chapter that will be visualized online

Chapter Title	Justice in Transition: On Territory, Restitution and History	
Copyright Year	2014	
Copyright Holder	Springer International Publishing Switzerland	
Corresponding Author	Family Name	**Bachmann**
	Particle	
	Given Name	**Sascha-Dominik**
	Suffix	
	Division	Executive Business Centre
	Organization	Bournemouth University
	Address	89 Holdenhurst Rd, Bournemouth, Dorset, BH8 8EB, UK
	Email	sbachmann@bournemouth.ac.uk
Author	Family Name	**Frost**
	Particle	
	Given Name	**Tom**
	Suffix	
	Division	Law School
	Organization	University of Sussex
	Address	Mantell Building 2b33, Brighton, BN1 9SP, UK
	Email	T.M.Frost@sussex.ac.uk
Abstract	Colonialism has had a huge impact upon the legal systems of countries around the world. The historical impact of the British Empire can still be felt today in countries as diverse as Australia and South Africa. This effect is explored in both these countries, both in its historical form of racial discrimination, as well as the modern consequences of this colonial past. This chapter will reflect on the Aboriginal land rights litigation in Australia, as well as the failed South African Apartheid litigation. By using these as examples, it aims to determine how certain conceptions of the Rule of Law and formal equality can lead to profound and ingrained legal discrimination against indigenous peoples.	
Keywords (separated by "-")	Colonialism - Apartheid Litigation - Aboriginal land rights litigation - Post-colonial restitution - Racial discrimination and transitional justice - TRC in South Africa	

Chapter 4
Justice in Transition: On Territory, Restitution and History

Sascha-Dominik Bachmann and Tom Frost

Abstract Colonialism has had a huge impact upon the legal systems of countries around the world. The historical impact of the British Empire can still be felt today in countries as diverse as Australia and South Africa. This effect is explored in both these countries, both in its historical form of racial discrimination, as well as the modern consequences of this colonial past. This chapter will reflect on the Aboriginal land rights litigation in Australia, as well as the failed South African Apartheid litigation. By using these as examples, it aims to determine how certain conceptions of the Rule of Law and formal equality can lead to profound and ingrained legal discrimination against indigenous peoples.

Keywords Colonialism • Apartheid Litigation • Aboriginal land rights litigation • Post-colonial restitution • Racial discrimination and transitional justice • TRC in South Africa

Introductory Remarks

Writing after the fall of the Berlin Wall, Francis Fukuyama posited the 'end of history', the universalisation of Western liberal democracy as the final form of human government.[1] Western liberal democracy has at its heart the ideas of equal treatment under the law, individual rights and the Rule of Law. Underpinning this is the idea

This chapter is an updated and revised version of the paper "Colonialism, Justice and the Rule of Law: a Southern African and Australian narrative", 2012 *De Jure*, Issue 45, Vol 2, 306–328.

[1] Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).

S.-D. Bachmann (✉)
Executive Business Centre, Bournemouth University,
89 Holdenhurst Rd, Bournemouth, Dorset BH8 8EB, UK
e-mail: sbachmann@bournemouth.ac.uk

T. Frost
Law School, University of Sussex, Mantell Building 2b33, Brighton BN1 9SP, UK
e-mail: T.M.Frost@sussex.ac.uk

N.M. Szablewska, S.-D. Bachmann (eds.), *Current Issues in Transitional Justice*, Springer Series in Transitional Justice 4,
DOI 10.1007/978-3-319-09390-1_4

of legal certainty—that the law must be certain in order to ascertain rights and duties that are applied equally to all.[2] However, the history of Western liberal democracy is inextricably linked to European colonialism. Indeed, the history and implications of the rise of liberal democracy in Europe, to be understood properly, must be read in conjunction with this colonial heritage.

Liberal democracy's development took place in this shadow; the legal systems of many countries around the world bear witness to this intertwined history. It is this relationship which gives rise to a dilemma: the imposition of a legal order defines empire and colonialism; the foundation of an independent legal order marks the birth of the newly independent nation. The law serves both these masters.[3] In a real sense, the ideal of the Rule of Law played a huge part in both the colonial imposition of a legal order and the foundation of an independent legal order after independence.

This chapter explores this paradox. Two main arguments are put forward. First, it is contended that *formal* interpretations of the Rule of Law and equality have historically served to perpetuate oppression and discrimination within a colonial context. This argument is supported through reference to examples of British colonialism in Southern Africa and Australia.

The second argument contends that 'historical justice litigation', litigation which has as its aim the rectifying of past oppression in colonial (now postcolonial) states, attempts to reconcile belief in the Rule of Law and its qualities with an attempt to provide justice for the victims of oppression. In this way, the law is very much attempting to serve its two masters—the aims of ensuring equal treatment and legal certainty. It is in this Janus-faced existence that this litigation proceeds, heading to an uncertain future.

The Rule of Law

In a sense, this chapter is challenging the Rule of Law's use as a general principle of transitional justice. We are concerned not with the application of the principle itself, but its *interpretation*. The phrase 'in a sense' is used here because historical justice litigation is marked by an adherence to the self-same doctrine, although it is a substantive, rather than a formal interpretation of the 'Rule of Law' which is aspired to through such legal action. As Paul Craig has maintained, the dichotomy between formal and substantive conceptions of the Rule of Law is crucially important in determining the nature of the specific legal precepts which can be derived from it.[4] What we contend is that if transitional justice litigation is to succeed, then

[2] Hans Kelsen, *Introduction to the Problems of Legal Theory,* trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 1992).

[3] Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Oxford: Hart Publishing, 2005) 283.

[4] Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework," *Public Law* (1997): 467.

a *substantive*, rather than a *formal* interpretation should be given to the Rule of Law. In this way, the courts can play a crucial role in rectifying past injustices. What is clear, however, is that the interpretation given to the Rule of Law by many courts, in deciding upon historical justice litigation, has had the opposite effect.

The importance of this distinction between formal and substantive versions of the Rule of Law can be seen through an example of a UK statute, the Constitutional Reform Act 2005 (CRA). Amongst other things, the CRA provided for the new UK Supreme Court, replacing the Judicial Committee of the House of Lords. In prefacing the subsequent constitutional changes (the exact content of which are not strictly relevant here), section 1 states:

> This act does not adversely affect –
> (a) the existing constitutional principle of the rule of law.[5]

What the CRA shows is that the Rule of Law is central to the operation of the law in the UK. What the Act does not do is define the Rule of Law. The term appears so self-evident that it seems to need no further definition. This appears plausible at first glance; there are a number of judgments in British courts where judges have invoked the Rule of Law without further definition as justification for their rulings.[6]

Nor is this lack of meaning restricted to the UK. Jeremy Waldron, commenting upon *Bush v Gore* in the United States Supreme Court,[7] noted that the Rule of Law was invoked by both parties' legal teams to support their cases. Waldron's impression was that the use of this phrase meant little more than "Hooray for our side!".[8] Perhaps Brian Tamanaha is right when he described the Rule of Law as "an exceedingly elusive notion" that gives rise to a "rampant divergence of understandings" and is in fact analogous to the notion of the 'Good' in the sense that "everyone is for it, but have contrasting convictions about what it is".[9]

However this lack of definition brings to the fore the importance of whether the Rule of Law is given substantive or formal meaning. The meaning given to the concept can be of crucial importance to how it impacts upon the interpretation and future development of the law. Formal conceptions of the Rule of Law address the manner in which the law was promulgated, the clarity of the ensuing norm and whether the norm was promulgated prospectively or retrospectively.[10] Such conceptions do not seek to pass judgment upon the actual content of the law itself. This can be contrasted to substantive conceptions of the Rule of Law, which seek to develop

[5] Constitutional Reform Act 2005, s 1 (c 4) (UK).

[6] *R v Horseferry Road Magistrates' Court, ex parte Bennett* 1994 1 AC 42 (HL), 62, 64 (Lord Griffiths), 67 (Lord Bridge), 75–77 (Lord Lowry); *A v Secretary of State for the Home Department* 2005 2 AC 68 (HL) [42] (Lord Bingham), [74] (Lord Nicholls).

[7] *Bush v Gore*, 531 U.S. 98 (2000) (SCOTUS).

[8] Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?," in *The Rule of Law and the Separation of Powers*, ed. Richard Bellamy (Farnham: Ashgate, 2005) 119.

[9] Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) 3.

[10] Craig, "Formal and Substantive Conceptions of the Rule of Law", 467.

certain substantive rights which are claimed to derive from, or be based upon, the Rule of Law. The Rule of Law found these rights, which can be used to distinguish between 'good' laws which comply with such rights, and 'bad' laws which do not.[11]

The potential difficulties of establishing substantive conceptions of rights and duties can be illustrated with reference to the doctrines of substantive and procedural due process in US Constitutional Law. Substantive due process asks the question, under the due process clause of the Fourteenth Amendment, of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose. Procedural due process asks whether the government has followed the proper procedures when it takes away life, liberty or property.[12] However, Supreme Court opinions have never defined substantive due process, which looks to whether there is a sufficient substantive justification or a good enough reason for such a deprivation to occur; it is a contextual standard.[13]

Chemerinsky provides an example to illustrate the divergence between both approaches. Under the Fourteenth Amendment, the word 'liberty' has been held to provide to parents a fundamental right to the custody of their children.[14] In this context, procedural due process requires the government to give notice and a hearing before it can permanently terminate custody.[15] Contrarily, substantive due process requires the government to show a compelling reason that would demonstrate an adequate justification for terminating custody.[16] Procedural due process gives no wider guarantee for 'fairness' beyond the requirement that the correct procedures are followed. Substantive due process appears much more intangible than procedural due process, and cannot be easily or succinctly described. The content of substantive due process is driven more by Rawlsian conceptions of 'fairness' than by any exhaustive list of attributes.[17]

The tension between procedural and substantive viewpoints is exacerbated in respect of the Rule of Law. For instance, Joseph Raz has commented upon the tendency to use the Rule of Law as a shorthand description of the positive aspects of any given political system.[18] John Finnis finds himself with a similar definition of the Rule of Law. Finnis describes the Rule of Law as "the name commonly given to the state of affairs in which a legal system is legally in good shape".[19]

The content of this foundational legal concept will differ greatly depending upon whether a procedural or substantive viewpoint is adopted. This is the case as there are certain principles which can be posited as forming part of the Rule of Law. The

[11] Craig, "Formal and Substantive Conceptions of the Rule of Law", 467–468.

[12] Erwin Chemerinsky, "Substantive Due Process," *Touro Law Review* 15 (1999): 1501.

[13] Chemerinsky, "Substantive Due Process," 1501.

[14] *Santosky v Kramer*, 455 U.S. 745, 753 (1982) (SCOTUS).

[15] *Lassiter v Department of Social Services*, 452 U.S. 18, 27 (1981) (SCOTUS).

[16] *Santosky*, 762.

[17] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1999).

[18] Joseph Raz, "The Rule of Law and its Virtue" in *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979) 210.

[19] John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980) 270.

most important can be said to be the principle that all persons are to be treated equally under the law. Thomas Paine perhaps explained it best:

> That in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries that law ought to be King; and there ought to be no other.[20]

The implications of this principle, equal treatment under the law, differ depending on whether formal or substantive definitions of equality are adopted. Formal equality is as old a principle as Western political philosophy: if two persons have equal status in at least one normatively relevant respect, they must be treated equally with regard to this respect. As Aristotle stated, we are to "treat like cases alike".[21]

However, it is an emphasis upon formal equality which we argue here has characterised historical colonial discrimination in both Southern Africa and Australia. Successive colonial measures adopted a very narrow procedural, formal conception of the Rule of Law and equality; indigenous populations were not treated as having equal status in normatively relevant respects,[22] which justified a discriminatory regime being applied favouring non-indigenous peoples.

This focus upon procedure meant that the original racist attitudes which underpinned discrimination did not get challenged. Historical justice litigation attempted to disturb such thinking and assumptions by arguing in favour of a substantive version of the Rule of Law, where the law can take account of past injustices and attempt to rectify past wrongs.

The Savage Economy of Jurisprudence

Historical justice litigation is marked by an acute historical sense. This emphasis upon history requires us to engage with the intellectual premises of colonial law-making.[23] The notion that a colonial country is imbued with 'primitive' law and it is the 'gift' of the law of the coloniser becomes, for Douzinas and Gearey, one of the central justifications for the colonial state.[24]

Peter Fitzpatrick has shown that the distinction between the savage and the civilised has historically run through English jurisprudence.[25] There is created a European identity, opposed to the figure of a pre-modern savage who inhabits a pre-modern world. The savage must be 'civilised' through the imposition of civilised,

[20] Thomas Paine, *Common Sense* (Mineola, NY: Dover Publications, 1997) 31–32.

[21] Aristotle, *Nicomachean Ethics*, ed. Jonathan Barnes (Princeton: Princeton University Press, 1984) Book 5 3, 1131a10–b15.

[22] The term 'indigenous' is a complex term in the southern African context. The term 'indigenous' here refers to the inhabitants of southern Africa and Australia of non-British origin.

[23] Douzinas and Gearey, *Critical Jurisprudence*, 286.

[24] Douzinas and Gearey, *Critical Jurisprudence*, 286.

[25] Peter Fitzpatrick, *The Mythology of Modern Law* (Abingdon: Routledge, 1992) 65.

European law. This mindset is illustrated in the Privy Council decision of *In re Southern Rhodesia*, where Lord Sumner argued that:

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.[26]

Such a mindset ran through British colonialism in Australia in the eighteenth and nineteenth century.

As French and Lane explain, the indigenous people of the Australian continent were long thought of as wandering tribes,[27] who were "living without certain habitation and without laws".[28] The Australian colonies were almost universally seen as 'settled' rather than 'conquered'; the lands of modern day New South Wales were deemed 'uninhabited' by civilised peoples and therefore in no way could be conquered. This was confirmed in the case of *Cooper v Stuart* in 1889:

> The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to the circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.[29]

Kent McNeil argued that the Privy Council reached its conclusion about the absence of any system of Aboriginal law without any evidence of the nature of Aboriginal society.[30] *Cooper v Stuart* fits the traditional narrative; namely that Australia was claimed by the British Crown under the legal doctrine of *terra nullius*, literally 'no man's land'.

The historian David Reynolds has been very influential in disseminating this view.[31] For Reynolds, land rights for Aboriginals were recognised in the nineteenth century by the Imperial Colonial Office in London.[32] It was the settlers, governments and courts in the colonies that ignored land rights in defiance of the law.[33] For this traditional narrative, *terra nullius* was a misconception, masking the fact that Aboriginals were recognised as having rights. This can be supported—in 1836, the case of *R v Murrell* extended to Aboriginal people the right to be subject to the laws

[26] (1919) AC 211 (HL) 233–234.

[27] Justice Robert French and Patricia Lane, "The Common Law of Native Title in Australia," *Oxford University Commonwealth Law Journal* 2 (2002): 16.

[28] *MacDonald v Levy* (1833) 1 Legge 39, 45 (NSWSC).

[29] *Cooper v Stuart* (1889) 14 App Cas 286 (PC) 291.

[30] Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), 122.

[31] David Reynolds, *The Law of the Land* (Melbourne: Penguin, 1987).

[32] Reynolds, *The Law of the Land*, 97–103.

[33] Reynolds, *The Law of the Land*, 140.

of the colony.[34] Essentially, Reynolds contended that Aboriginal dispossession was simply a mistake[35]; this way of thinking assumes that if Australia had not been classified as *terra nullius* in 1788 Aboriginals would have had legal rights.[36] Thus if *terra nullius* could be overruled, the legal system of Australia could be "healthy once more".[37]

Despite this narrative, no case ever stated that Australia was *terra nullius*.[38] The reason for this was simple: Aboriginal land rights were not denied on the basis of a legal doctrine, but rather upon the operation of power. *Terra nullius* describes the discourses of power which operated to legitimate the dispossession of Aboriginal peoples.[39] The founding ideals of the Enlightenment led to a colonial mindset which favoured 'progress'.[40] This sense of progress led to a desire to civilise the 'savage'. Colonial powers expressed their identity through the denigration of those who were perceived to be 'unlike' themselves and could be subjected to that civilising process.[41]

The Australian Aboriginals, regarded as 'low in the scale of social organisation', were ignored in considering the title to land in a settled colony.[42] As the legal historian David Neal has stated, "as a practical matter, the Aborigines stood outside the protection of the Rule of Law".[43] The absence of legal rights for Aboriginals was a self-evident truth. The internal ideological mechanisms of the law meant Aboriginal people were labelled as non-conformists, and denied the law's benefits.[44] 'Like persons' were treated 'alike'; however, Aboriginals were not 'alike' to Europeans, and therefore not to be treated equally under the law. There are echoes of *Plessy v Ferguson*, the 'separate but equal' decision of the US Supreme Court.[45]

An example of this can be found in 1842 in South Australia, where several Aboriginal men and women were hung extra-judicially after being suspected of murder. The Governor of South Australia, Governor Gawler, requested an opinion from Cooper CJ of the South Australian Supreme Court in response to public

[34] *R v Murrell* (1836) 1 Legge 72 (NSWSC).

[35] Reynolds, *The Law of the Land*, 230.

[36] David Ritter, "The "Rejection of Terra Nullius in *Mabo*": A Critical Analysis," *Sydney Law Review* 18 (1996): 28–29.

[37] Ritter, "The "Rejection of Terra Nullius in *Mabo*"," 29.

[38] Ritter, "The "Rejection of Terra Nullius in *Mabo*"," 9.

[39] Ritter, "The "Rejection of Terra Nullius in *Mabo*"," 12.

[40] Douzinas and Gearey, *Critical Jurisprudence*, 287.

[41] Douzinas and Gearey, *Critical Jurisprudence*, 287; Fitzpatrick, *The Mythology of Modern Law*, 70.

[42] *Mabo v Queensland (No 2)* 1992 175 CLR 1 (HCA) [39].

[43] David Neal, *The Rule of Law in a Penal Colony: Law and Politics in Early New South Wales* (Cambridge: Cambridge University Press, 1991) 17. Neal here adverts to a substantive view of the Rule of Law, one which we feel historical justice litigation also forwards.

[44] Ritter, "The "Rejection of Terra Nullius in *Mabo*"," 11.

[45] *Plessy v Ferguson*, 163 U.S. 537 (1896) (SCOTUS).

protests over the hangings 'on the amenability of the Aborigines to European law'.[46] Cooper CJ replied:

> It is impossible to try according to the forms of English law people of a wild and savage tribe whose country, although within the limits of the Province of South Australia, has never been occupied by Settlers, who have never submitted themselves to our dominion.[47]

Ultimately, it was the civilised, European conception of the Rule of Law which was imposed on all persons in Australia. The whole of native society was seen as deviant, or potentially deviant.[48] The laws of Australian governments were made for the common good and for the benefit of the common man. However, historically the common man had been the non-Aboriginal man, and excluded the Aboriginal man.[49]

The Stolen Generations in Australia

After the British settlement of the Australian continent in 1788, until the mid-nineteenth century, European policy towards Aboriginals was fundamentally genocidal.[50] The policy of dispossession, contributing to the decline of the Aboriginal population, led to a view that Aboriginals were a 'dying race', with extinction a certainty in the face of the robust and supreme European way of life.[51] However, by the end of the nineteenth century, it became clear that traditional Aborigines were not going extinct. In addition, a large amount of sexual contact between Aboriginal and non-Aboriginal populations had produced a growing mixed-race population, referred to as the problem of the 'half-caste':

> There was a growing realisation that the descendants of a dying race might continue to haunt a White Australia for generations.[52]

This led to a State-wide program to eliminate Aboriginality, and in turn protect civilisation, represented by White Australia.[53] Robert van Krieken saw two elements

[46] Irene Watson, "Buried Alive," *Law and Critique* 13 (2002): 262.

[47] Alex C Castles, *An Australian Legal History* (Sydney, Law Book Co.,1982) 524–525; Russell Smandych, "Contemplating the Testimony of 'Others': James Stephen, the Colonial Office, and the Fate of Australian Aboriginal Evidence Acts, Circa 1839-1849," *Australian Journal of Legal History* 8 (2004): 237.

[48] Fitzpatrick, *The Mythology of Modern Law*, 111.

[49] Department of the Parliamentary Library Information and Retrieval System, 'Pat Dodson: Mabo, Reconciliation and National Leadership', National Press Club, 15 September 1993 <http://hdl.handle.net/10070/91167>.

[50] Robert van Krieken, "The barbarism of civilisation: cultural genocide and the 'stolen generations'," *British Journal of Sociology* 50 (1999): 303.

[51] Russell McGregor, *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880-1939* (Melbourne: Melbourne University Press, 1997).

[52] McGregor, *Imagined Destinies*, 134.

[53] Charles Blackton, "The dawn of Australian national feeling, 1850-56," *Pacific Historical Rev* 24 (1955): 121–138.

to this civilising offensive: first, regulation of the case of the problem, the sexual intercourse between whites and blacks, through 'protective' legislation.[54] As a result, Australian Aborigines were subject to a huge degree of regulation, governing their sexual relations, marriage, employment, income, property ownership, education and custody of their children.[55] The aim was to quarantine white and 'mixed-bloods' from 'full-blood' Aborigines, to allow the full-blood group to continue down the path of extinction.[56]

Second, Australia made use of the pre-existing social technology which had been in place in Europe since the sixteenth century for dealing with the problems of social discipline of the working classes. The removal of Aboriginal children from their parents was based upon pre-existing practices concerning unacceptable 'problem' groups in Western Europe—in this way, the Rule of Law was being maintained; Aboriginals were not considered 'equal' to Europeans, and therefore could justifiably be treated differently. Legislation was passed which made the State, rather than the parents, the legal guardian of all Aboriginal children. By the 1930s, any child of Aboriginal descent could be removed from their family and placed in a government institution to be trained in ways of 'civilisation'.[57]

The Human Rights and Equal Opportunity Commission's *Bringing Them Home* Report in 1997 estimated that between 1910 and 1970 between one in three and one in ten Aboriginal children were removed from their parents.[58] The ultimate aim of White Australia was to 'absorb' or 'assimilate' Aboriginal Australia, an aim motivated by knowledge of the eventual destruction of Aboriginal culture and a humanitarian concern to civilise Aboriginals: "Europeanization is inevitable".[59]

It was not until 1967 that Aboriginals were included in the Australian census for the first time, and it took until 1969 for all Australian States to repeal the legislation allowing for the removal of Aboriginal children under the policy of 'protection'. In short, the pervading discourse changed in Australia. When Aboriginals started to bring cases claiming rights to dispossessed lands the Courts were faced with a dilemma: why had the judiciary not protected Aboriginal land rights for the first 183 years of white settlement?[60] In answering this question, the Australian Courts

[54] van Krieken, "The barbarism of civilisation," 305.

[55] Pat O'Malley, "Gentle genocide: the government of Aboriginal peoples in Central Australia," *Social Justice* 21 (1994): 48.

[56] Anthony Moran, "White Australia, Settler Nationalism and Aboriginal Assimilation," *Australian Journal of Politics and History* 51 (2005): 168–193.

[57] van Krieken, "The barbarism of civilisation," 305; Anna Haebich, *For Their Own Good: Aborigines and Government in the Southwest of Western Australia, 1900-1940* (Nedlands, WA: University of Western Australia Press, 1988) 350.

[58] Human Rights and Equal Opportunity Commission "Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families" (1997) http://www.austlii.edu.au/rsjlibrary/hreoc/stolen/index/html (accessed on 2012-04-23).

[59] Ronald Berndt and Catherine Berndt, *From Black to White in South Australia* (Chicago: University of Chicago Press, 1952) 275.

[60] Ritter, "The "Rejection of Terra Nullius in *Mabo*"," 27.

utilised the very principle of the Rule of Law. However, their interpretation of the Rule of Law has formally legitimated past oppression, by declaring such oppression as the foundation of the modern Australian State. This could further entrench this historical repression, and casts doubt upon the efficacy of future historical justice litigation within Australia.

A Short Overview of Britain's Impact on South Africa's Apartheid Policies

South Africa: A Triangle of British, Boer and Black Conflict and Concession

Just as in Australia, British colonialism also had a huge impact in defining forms of belonging in South Africa. South Africa's racial policies have to be studied before the backdrop of its history of conflict among its many peoples, tribes or nations. South Africa is marked by a triangle of ethnic, cultural and racial conflict and compromise.[61]

There are various examples for this observation. This is first a struggle between white British and the British and the "Boers",[62] as the new nation of "Afrikaners" was referred to, culminating in the Boer War of 1899–1902. Finally there was a struggle between a major section of "white" South Africans and the majority of non-white South Africans, leading to the creation of the new South Africa of 1994.

The arrival of Jan van Riebeek, a young Dutch employee of the Dutch East India Company at Table Bay in April 1652, marked the beginning of a permanent white presence and, up to 1994, dominance in a region which was to become South Africa. It also marked the beginning of the development of the Afrikaner nation.

The history of the South African people is rich in symbolic events of ethnic collective suffering which shaped the identity of its people, influenced their actions and continues to exert its influence to this day. For the Afrikaners, the Boer War constitutes one such event.[63] The British decision to establish 'concentration camps' for interning non-combatant family members of the Afrikaner 'Boer' commandos led to

[61] Hermann Giliomee, *The Afrikaners—Biography of a people* (London: C Hurst & Co Publishers Ltd, 2012) for an authoritative and uncompromising overview of the South African history from the perspective of the white Afrikaner minority; Graham Leach, *South Africa* (Abingdon: Routledge, 1986) for an contemporary account of South Africa's apartheid and its violent challenges during the last decade of its white minority rule; David Welsh, *The Rise and Fall of Apartheid* (Johannesburg: Jonathan Ball Publishers, 2009) for an informative and comprehensive account of the rise and fall of Apartheid.

[62] Giliomee, *The Afrikaners*, 34–35, for a description of the Boer "race"; the term is not used derogatively in the context of the chapter.

[63] F.A. van Jaarsveld, *Lewende Verlede* (1961) 68–69; 73–74 for an analysis of Afrikaner history and ideology.

the death of more than 20,000 Boer women and children in some 66 camps.[64] This invention by the British military high command together with the applied tactics of 'scorched earth' as a punitive means of fighting an asymmetric war of guerrilla warfare shaped Afrikaner identity. It ultimately gave rise to *Afrikanerdom*, a new nationalistic and religious identity among South Africa's white Afrikaners,[65] and fuelled a conception of the British as a past and sometimes present enemy.[66]

The establishment and implementation of Apartheid[67] as official state policy and the victimisation of the *African* majority after 1948 have, at least partly, their roots in this British–Boer conflict. Afrikaner identity transcended its own victimisation in the camps towards the justification for own human rights violations in the wake of Apartheid.[68]

African and other "Non-White" suffering under post-1948 Apartheid and Suppression can be best summarised in Former President's De Klerk's apology, which highlighted the daily plights, violations and humiliations, which non-white South African citizens had to endure:

> I apologise in my capacity as leader of the NP to the millions who suffered wrenching disruption of forced removals; who suffered the shame of being arrested for pass law offences; who over the decades suffered the indignities and humiliation of racial discrimination.[69]

Apart from such omnipresent discrimination and victimisation, two particular events in history exemplify the brutality of the Apartheid regime: the 'Sharpeville shootings' of 1960,[70] when South African police opened fire on black demonstrators and killed 69 people, and the Soweto uprising of June 16, 1976.[71] South Africa's Apartheid policies of institutionalised discrimination and persecution of its non-white people cannot be isolated from these forming historical events.

[64] Leach 31 numbers the total number of Boer concentration camp victims at 26,000. Africans who also fought on the side of the Boers and who were also subjected to internment suffered a similar fate with high mortality numbers in the British camps, see Thomas Pakenham, *The Boer War* (London: Abacus, 2007) 510.

[65] Van Jaarsveld, *Lewende Verlede*, 66–67 for a description of Afrikaner identity.

[66] A sentiment which sometimes still resonates today and found its way into contemporary Pop culture as the success of the singer Bok van Blerk shows. Van Blerk landed a hit in 2006 with his rendition of "De La Rey", which commemorates the above British atrocities and calls for Boer unity.

[67] Coined on the Afrikaans "Apartness".

[68] Giliomee, *The Afrikaners*, xiv, recognises the Afrikaner as "both victims and proponents of European imperialism".

[69] "De Klerk Apologises Again For Apartheid" *South African Press Association* (1997-05-14) http://www.justice.gov.za/trc/media/1997/9705/s970514a.htm.

[70] Welsh, *The Rise and Fall of Apartheid*, 72–73; *SAHO* at http://www.sahistory.org.za/topic/sharpeville-massacre-21-march-1960 (accessed on 2012-04-20) offers a wide variety of online sources. Sharpeville Township was once more in the headlines in 1984 when civil unrest erupted.

[71] Also known as the Soweto Youth Riot, which spread over the whole country and were only contained in October 1977. There was a repeat of these riots in Soweto and Sharpeville in 1984—Leach, *South Africa*, 128ff. See Welsh, *The Rise and Fall of Apartheid*, 101–102 for an account of the divergent Afrikaner opinion on the Soweto 1976 shootings. Both events serve as manifestations of the will of the black majority to take active action against white minority rule, action which moved away from passive resistance to out and out protest and even armed struggle.

Apartheid

Apartheid, the system of racial segregation in South Africa, would today qualify as not only a state delict/tort, a violation of a state's international obligation of a peremptory nature,[72] but also as one of the four core crimes of international criminal law, the international crime against humanity.[73] The South African system of Apartheid was not an invention by the Afrikaners, nor unique in twentieth century's policies of racial segregation: what made Apartheid different from other examples of racial segregation, discrimination and hate past and present was that it systematically institutionalised a legal framework for such treatment.

The Nationalist Party which came to power in 1948 established a legal framework of an institutionalised system of racial discrimination and exclusion, second only to the example of Nazi Germany's race legislation, highlighted by the *Nürnberger Gesetze*, or Nuremberg Laws of 1935.[74] Apartheid legislation governed the fields of racial segregation, jobs and employment, political rights and freedoms, citizenship, land and property rights, education and freedom of movement.[75] It fell to the courts of South Africa to enforce Apartheid law: the judiciary became a trusted pillar in enforcing Apartheid's law and policies.[76] This "top to bottom" enforcement was supplemented by a broad based implementation which allowed for 'flexible' oppression—the white minorities were active stakeholders in such oppression.[77] Consequently, Apartheid did not require the availability of security and police assets in exceptional high numbers.[78]

The legal foundations of apartheid were British in origin and nature: while Britain can be credited with having ended slavery and slave trade in the Cape during the 1830s,[79] it also laid the legal foundations of social domination and racial

[72] Part (4) of the Commentary to Article 40 of the ILC Draft Articles on State Responsibility, *Yearbook of the International Law Commission, 2001, vol. II, Part Two*, where racial discrimination and apartheid are listed as potential peremptory norm violations of international law.

[73] Article 7 Part 1 of the *Statute of the International Criminal Court*, where the crime of apartheid is listed as one of the elements of crimes against humanity, lit (j); See Article 5 of the *Statute of the International Tribunal for the Former Yugoslavia*, 25 May 1993, UNSC Res. 827 (1993) which criminalises as crimes against humanity.

[74] The *Nuremberg Laws of 1935*. The "Law for the Protection of German Blood and German Honour" and the "Reich Citizenship Law" stripped German Jews of their national identity and restricted interracial social as well as professional interaction, establishing the first prerequisite for the later *Shoah*.

[75] *Truth and Reconciliation Commission of South Africa Report Volume 1* ch 13 http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf (last accessed 2012-04-24) for a detailed overview of all major apartheid legislation within a topical context.

[76] Welsh, *The Rise and Fall of Apartheid*, 74–75; reference is also made to the Treason Trial from 1956 to 1961 which resembled one of the last 'fair' trials where the rule of law was still upheld.

[77] Referring to white Afrikaners as well as English speaking South Africans.

[78] Giliomee, *The Afrikaners*, 551–552.

[79] With Emancipation Day on 1 December 1838 marking an early "freedom" day in South African history.

segregation through legislation. In 1856, the first *Masters and Servants Act* came into force,[80] which was used to deny collective social rights to unskilled workers and was basically used to regulate African labour relations. Such social racial segregation was enhanced by further subsequent legislation, such as the *Franchise and Ballot Act of 1892*.[81]

The creation of the Union of South Africa also saw the first legal enshrinement of racial segregation policies. The *Natives Land Act* (*No. 27 of 1913*) prohibited Africans from owning land outside designated reserves, laying the foundations for post-1948s Apartheid's Homeland or "Bantustan" policies.

South Africa's past serves as a case study of the changing role of perpetrator and victimhood: the legislative measures taken by the British authorities pre-1948, in concert with British colonial rule which saw its fair amount of ruthlessness in Southern Africa, meshed together with the widespread Afrikaner perception that own victimhood could be used to justify own wrongs.[82]

The Role of Historical Justice Claims in Remedying the Past

Introduction

> Human rights litigation contributes to an important long-term objective: working toward a world in which those who commit gross violations of human rights are brought to justice swiftly, in whatever country they try to hide.[83]

Historical justice litigation has lofty aims: namely the addressing of historical wrongs ranging from slavery, crimes against humanity and genocide. Such litigation encompasses a substantive vision of the Rule of Law: that equal treatment under the law includes redress for past wrongs, and that justice is as important a part of the Rule of Law as legal certainty. In our reading of such litigation, we see such a substantive reading of the Rule of Law as an inherent good. Historical justice litigation aims to balance legal certainty against justice for past wrongs. However, it is in running into formal conceptions of the Rule of Law that such litigation has stumbled in the courts.

Two approaches to such litigation are considered: the 'extraterritorial' approach and the 'territorial' approach. The extraterritorial approach involves the bringing of litigation in countries not connected to the original human rights violation; the focus here will be upon cases brought in the United States (US) under the Alien Tort Statute (ATS). The territorial approach focuses upon litigation brought within the

[80] This Act forms part of a wider legislative effort in the UK (and its territories) to regulate relationships between employers and employees; the last of these Acts was passed in 1904.

[81] Effectively limiting the African vote by tying it to financial and educational minimum requirements.

[82] Van Jaarsveld, *Lewende Verlede*, 64.

[83] Beth Stephens, *International Human Rights Litigation in U.S. Courts* (Leiden: Brill, 2008) 23–24.

same territory as the original human rights violation. The Australian land rights litigation provides an example of this. The legal challenges in the Australian courts have led to a much wider political and social debate about the colonial past in Australia, which is to be welcomed. However, the focus of this chapter is to look at the nature of the legal challenges themselves, and to consider the potential failures of certain interpretations of the Rule of Law to provide justice for past wrongs.

It is the way in which the Rule of Law has been interpreted by courts that potentially calls into question whether historical justice claims, through the legal process, can provide justice to the victims of human rights abuses. Only by addressing this challenge can such litigation fulfil its potential to supplement the other existing forms of human rights protection available in International Law, as well as to complement the non-legal justice movements, which aim to protect human rights.

ATS Litigation

The emergence of the so-called extraterritorial historical justice litigation before courts of the US can be traced to the 1990s, when the two Holocaust lawsuits were heard and the still on-going *Apartheid*[84] lawsuit was filed. *In re Holocaust Victim Assets Litigation* (*Swiss Gold Bank* case),[85] it was alleged that Swiss banks had been complicit in knowingly retaining and concealing the assets of Holocaust victims, accepting and laundering illegally obtained Nazi loot and transacting in the profits of slave labour. The case led to a $1.25 billion settlement in 1998. The second Holocaust case, the *Nazi slave labour* case,[86] was a class action against DAX-listed[87] German corporations for the use of forced 'slave' labour during World War II by defendant corporations and/or their legal predecessors. While these cases were 'successful' as they led to out of court settlements, other instances of historical justice litigation have been less successful. The so-called "Brooklyn slave labour case", *In re African-American Slave Descendants Litigation*,[88] as well as the Herero litigation, where the German genocide against the Herero was made the subject of a cause of action,[89] were unsuccessful.

[84] *In re South African Apartheid Litigation*, 02 MDL 1499 (S.D.N.Y. 2009) continued the original 2004 case of *In re South African Apartheid Litigation* 346F. Supp. 2d 538 (S.D.N.Y. 2004).

[85] 105F Supp 2d 139 (EDNY 2000).

[86] *In re Nazi Era Cases Against German Defendants Litig* (2000) 198 FRD 429 (DNJ) MDL No 1337 DNJ Lead Civ No 98-4104 (WGB).

[87] DAX is the acronym for *Deutsche Aktien Index* where the major German (public) corporations are listed.

[88] 375F.Supp. 2d 721 (N.D. III. 2005).

[89] Stephens, *International Human Rights Litigation in U.S. Courts* 541–548; Rachel J Anderson, "Redressing Colonial Genocide: The Hereros' Cause of Action Against Germany," *California L Rev* 95 (2005): 1155; Jeremy Sarkin and Carly K Fowler, "Reparations for Historical Human Rights Violations: The International and Historical Dimensions of the Alien Torts Claims Act Genocide Case of the Herero in Namibia," *Human Rights Rev* 9 (2008): 331.

This modern form of litigation began in 1980, when the US Court of Appeal for the Second Circuit decided in the seminal case of *Filártiga v Pena-Irala*.[90] In *Filártiga*, the plaintiff was a non-US citizen, the sister of a man who had been kidnapped and tortured to death in Paraguay by a police officer. The Filártiga family contended that this act was retaliation for the political activities and beliefs of the man's father. A murder case was brought in Paraguay, but the case did not progress. Both the deceased man's sister, and the torturer, Peña-Irala, separately came to the United States. The sister received political asylum, whereas Peña stayed on a visitor's visa. Damages were sought by Ms Filártiga against Peña for the torture suffered by her brother.

Jurisdiction of the American courts to hear the dispute was deemed proper as the defendant's alleged conduct violated a well-established international law norm, and the United States had an interest in not providing a safe harbour of those defendants who commit such conduct.

The Second Circuit based its decision on the ATS, which was part of the federal Judiciary Act 1789.[91] Today, its original meaning and purpose are uncertain.[92] Indeed, even the ATS itself is short:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.[93]

The ATS remained almost unutilised for human rights protection until *Filártiga*. This is not to state that the ATS was redundant; it was used as the basis for a child custody suit between aliens,[94] as well as determining title to slaves on board an enemy vessel taken on the high seas.[95]

The plaintiffs in *Filártiga*, in using the ATS to bring the alleged torturer in question to justice, opened up the possibility of using the ATS to pursue human rights violations across the world. Since 1980, the ATS has been used by plaintiffs to initiate civil legal actions against other individuals and in some instances, even states,[96] as perpetrators of human rights violations. Such litigation advances a wider message, beyond justice for the individual plaintiff. It sends a message that violators of norms of international law can be held accountable for their actions, civilly if not criminally. Such accountability sends out the message that legal impunity does not reign.

[90] *Filartiga v Pena-Irala* 630F 2d 876 (2d Cir) 1980.

[91] *Filartiga v Pena-Irala* 630F 2d 876 (2d Cir) 1980. The ATCA/ATS was only used on a few occasions prior to *Filartiga*; Symposium, "Corporate liability for violations of international human rights law," *Harvard Law Review* 114 (2001): 2033.

[92] Carolyn A D'Amore, "Note, *Sosa v Alvarez-Machain* and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?," *Akron Law Review* 39 (2006): 596.

[93] 28 USC § 1350.

[94] *Adra v Clift*, 195F. Supp. 857 (D Md) 1961.

[95] *Bolchos v Darrel*, 1 Bee 74, 3 Fed. Cas. 810 (DCSC) 1795.

[96] Such as terrorism, *Smith v Socialist Peoples Libyan Arab Jamahiriya* 101 F 3d 239 (2d Cir 1996) for the terrorist Lockerbie bombing of 1988.

What has been forwarded by plaintiffs is a substantive conception of the Rule of Law, incorporating the adherence of basic human rights norms. ATS plaintiffs appear to view the Rule of Law as protecting against human rights violations. However, this vision has not been uncritically accepted by US courts. In particular, the recent Supreme Court case of *Kiobel* has the potential to change the way in which the ATS will be applied in the future.[97] To explore the implications of the *Kiobel* case, it is necessary to view the history of ATS litigation following *Filártiga*.

The ATS was seen to provide one of the few extraterritorial opportunities for natural persons to seek civil redress for human rights violations. Since 2000, litigation was started in US courts under the ATS against Multi-National Companies (MNCs). This development should have been foreseen at the time. *Filártiga* appeared to open the doors of American courts to civil claims against individuals who violated norms of international law. The laws of the United States also hold that:

> In determining the meaning of any Act of Congress … the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.[98]

Plaintiffs have sought to use this section of the United States Code to apply the ATS to corporate personalities. It is worth noting that corporations have also been given rights under the First Amendment, relating to political speech,[99] and the Fourteenth Amendment, guaranteeing equal treatment under the law.[100] The ATS cases against corporations seem to be making a broader point: namely if the Supreme Court extends constitutional protections to corporations, then corporations should also have duties, and can be held liable for breaching these.

As a result, over the past decade, there have been ATS cases brought against corporations for their alleged collusion in crimes against humanity, war crimes and torture.[101] Prior to *Kiobel*, not all of these cases were successful.

---

[97] *Kiobel v Royal Dutch Petroleum*, 569 U.S. (2013).

[98] I USC §1.

[99] *Citizens United v Federal Election Commission*, 558 U.S. (2010) (SCOTUS).

[100] *Santa Clara County v Southern Pacific Railroad*, 118 U.S. 394 (1886) (SCOTUS).

[101] Hennie Strydom and Sascha Bachmann, "Civil liability of gross human rights violations," *Journal of South African Law* 3 (2005): 454-457; "Shell on trial - Oil giant in the dock over 1995 murder of activist who opposed environmental degradation of Niger Delta" *The Independent* (2009-15-26) http://www.independent.co.uk/news/world/americas/shell-on-trial-1690616.html (accessed on 2012-04-24); *John Doe I v. Unocal Corp,* 403 F.3d708 concerned allegations of corporate complicity in forced labour and torture. The case was settled out of court in 2006; "Historic advance for universal human rights: Unocal to compensate Burmese villagers" http://www.earthrights.org/news/press_unocal_settle.shtml (accessed on 2012-04-23); *Wiwa v. Royal Dutch Petroleum Co*., 226 F.3d 88 (2d Cir 2000); the case was based on the alleged involvement of the Royal Dutch/Shell oil group in human rights abuses in Nigeria, leading to the 1995 torture and murder of the environmental and community activist Ken Saro-Wiwa and was settled out of court in 2009; *Sarei v. Rio Tinto*, *PLC*, 487 F.3d 1193, 1198 (9th Cir) 2007, regarding alleged complicity of corporations in the commission of war crimes committed by Papua New Guinean Security Forces.

The successful Holocaust litigation cases consisted of the *Swiss Gold Bank* case and the *Nazi Slave Labour* case. In the case of *In re Holocaust Victim Assets Litigation*,[102] a class action was brought against the three large Swiss banks, alleging that they had violated international law by knowingly retaining and concealing the assets of Holocaust victims, accepting and laundering illegally obtained Nazi loot and transacting in the profits of slave labour. The case was never decided in court but led to a $1.25 billion settlement in 1998.[103] This perhaps shows the main impact of the ATS: corporate defendants were driven to settle out of court, instead of risking an adverse judgment at trial. A settlement, whilst not apportioning blame, does at least provide monetary reparations, which of course would be what is awarded in a successful tort claim.

The second case, *In re Nazi Era Cases Against German Defendants Litigation*,[104] was a class action against German corporations for their alleged complicity in the Holocaust by using slave labour in their production lines during World War II. This highly politicised case ended with a settlement in 1999 when the defendant corporations and the German government agreed to establish a jointly funded $5 billion foundation for compensating the surviving victims of Nazi slave labour.

These successes led many more extraterritorial claims to be filed. These have included the Herero Reparation cases and the decade long Apartheid lawsuits, which came to an end in August 2013, when the Second Circuit Court dismissed the appeal case.[105]

Acts of genocide, crimes against humanity as well as slavery were committed by the German Empire against the nations of the Herero,[106] the Great Namaqua, Boschmans and Hill Damaras in its former colony German South West Africa in the late nineteenth and the early twentieth century.[107] These acts were the subject of reparation lawsuits brought before US Federal Courts in 2004. The Hereros sued Deutsche Bank and the Deutsche Afrika-Linien Gmbh & Co shipping line (as the legal successor to the former Woermann Line) for alleged participation in crimes against humanity, genocide, slavery and forced labour.[108]

[102] 105 F Supp 2d 139 (EDNY) 2000.

[103] Stephens, *International Human Rights Litigation in U.S. Courts*, 543.

[104] 198 FRD 429 (DNJ) MDL No 1337 DNJ Lead Civ No 98-4104 (WGB) (2000).

[105] Stephens, *International Human Rights Litigation in U.S. Courts*, 543 ff for an overview of related lawsuits within their topical context; *In re South African Apartheid Litigation*, 02 MDL 1499 (SDNY) 2009 continues the original unsuccessful 2004 lawsuit, *In re South African Apartheid Litigation* 346 F. Supp. 2d 538 (SDNY) 2004. For the dismissal see the plaintiffs representations' statements at http://pressoffice.mg.co.za/KhulumaniSupportGroup/PressRelease.php?StoryID=242251(shtml (accessed on 2013-10-13).

[106] See Anderson, "Redressing Colonial Genocide: The Hereros' Cause of Action Against Germany" for a summary of the political and legal questions surrounding the Herero's cause of action against Germany.

[107] Gesine Krüger "Coming to Terms with the Past" *GHI Bulletin* 37 (2005): 45–49; Casper Erichsen and David Olusoga, *The Kaiser's Holocaust: Germany's Forgotten Genocide and the Colonial Roots of Nazism* (London: Faber & Faber, 2010).

[108] BBC News "German bank accused of genocide" (2001-09-25) http://news.bbc.co.uk/1/hi/business/1561463.stm.

The plaintiffs failed to convince the Court to recognise US jurisdiction for a private cause of action for violations of customary international law.[109] In short, the ATS was found to be inapplicable. We can see in this judgment a key *formal* virtue of the Rule of Law: namely legal certainty. Such a position assumes that to open up US Courts to all potential extraterritorial claims would render the law uncertain and completely indeterminate. There would be no real limiting principle with which to determine claims. Despite this failure, the topic of restitution and rehabilitation for Germany's colonial crimes remain important to the peoples of Namibia.[110]

The consequences of South African Apartheid are a clear example in showing exactly why the ATS litigation has been favoured by non-US citizens who wish to claim reparations for past wrongs. South Africa established in 1995 the Truth and Reconciliation Commission (TRC) to investigate and record the human rights abuses which occurred under Apartheid. Under certain circumstances, the TRC could grant immunity from prosecutions in the form of individual amnesty.[111] Chaired by former Archbishop Desmond Tutu, the TRC's main purpose was to contribute to South Africa's transitional peace building by emphasising reconciliation and rehabilitation over criminal prosecution.[112] One of its declared objectives was to use reparation as a form of moral and legal rehabilitation.[113] This was to be achieved by securing payment of reparations directly to individual victims and/or their relatives through a state-run reparation scheme for the compensation of as many as 22,000 victims.[114] The TRC recommended the establishment worth R2.8 billion for the payment of final reparations to the victims of apartheid.

Whether the TRC managed to exceed in respect to all expectations set in it will remain open to debate.[115] What remains beyond doubt is the fact that the failure of two consecutive South African governments to implement the TRC's recommendations regarding individual monetary compensation has undermined the original

[109] *Herero People's Reparations Corp. v. Deutsche Bank, A.G* 370 F.3d 1192 (DC Cir) 2004; Stephens, *International Human Rights Litigation in U.S. Courts*, 1194-95.

[110] Ida Hoffmann, "German Acknowledgments A Milestone in Our Struggle," *The Namibian* (2012-04-12) http://www.namibian.com.na/columns/full-story/archive/2012/february/article/german-acknowledgments-a-milestone-in-our-struggle. (accessed on 2012-04-20).

[111] *Promotion of National Unity and Reconciliation Act*, No. 34 of 1995.

[112] *Justice in Transition booklet explaining the role of the TRC* http://www.justice.gov.za/trc/legal/justice.htm, (accessed on 2012-04-23).

[113] TRC, *A Summary of Reparation and Rehabilitation Policy, Including Proposals to be Considered by the President* http://www.justice.gov.za/trc/reparations/summary.htm; *Truth and Reconciliation Commission of South Africa Report Volume 5* (2003) ch 5, 173–195 http://www.justice.gov.za/trc/report/finalreport/Volume%205.pdf and Preamble to the *Promotion of National Unity and Reconciliation Act*, No. 34 of 1995.

[114] Sascha Bachmann, *Civil Responsibility For Gross Human Rights Violations—The Need For A Global Instrument* (Pretoria: Pretoria University Law Press, 2007) 40–43.

[115] *Truth and Reconciliation Commission of South Africa Report Volume 1* ch 1, where the chairperson sums up some of the criticisms and challenges directed at the TRC during the duration of its work http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf. For a current summary, see South African Coalition for Transitional Justice *(SACTJ)* "Background: Facing Apartheid's Legacy" http://ictj.org/our-work/regions-and-countries/south-africa.

objective of the TRC to rehabilitate the victims of the days of the Apartheid struggle.[116] The 2011 plan of the government to make provision for the payment of educational assistance and health benefits for the victims of apartheid and their children was regarded by many activist groups as being too superficial and not in the spirit of the TRC's original aims.[117] Consequently, *The Khulumani Support Group of Apartheid Victims* called upon President Jacob Zuma to honour the obligation to implement all of TRC's recommendations.[118]

This failure to implement a proper reparation disbursement policy in a timely fashion failed to close an accountability gap which prepared the way for the later Apartheid litigation cases. *In re Apartheid Litigation* refers to the now dismissed litigation arising from the alleged collaboration of US and international MNCs with the former South African Apartheid government in committing international human rights violations by aiding and abetting its military and security apparatus.

Originally brought as a class action in 2002, the original lawsuits targeted 20 corporate defendants.[119] Dismissed in 2004 by the US District Court for the Southern District of New York on grounds of lack of subject matter jurisdiction under the ATS, the cases were allowed to proceed on appeal in 2009, albeit against a reduced number of defendants, namely Daimler, Ford, General Motors, IBM and Rheinmetall Group.[120]

The Apartheid cases illustrate the complexity of addressing historical claims and the wider repercussions for states affected. South Africa is the perpetrator state as well as the country of the victims, and also the host state to many corporate defendants and therefore depending on such Foreign Direct Investment. The South African government under former President Mbeki's opposed the litigation and filed *Amicus Curiae* accordingly.[121] This opposition was withdrawn under President Zuma in 2009, when support for hearing such a case before a US court was made

[116] Neither former president Thabo Mbeki nor President Jacob Zuma showed much interest in implementing the TRC's recommendations. The only exception was the initial disbursements of R48.37 million by Nelson Mandela's President's Fund, which paid out grants of R3,000 to the 17,100 applicants in November 2001. The median annual household income in SA at that time was around R21,700; Strydom and Bachmann, "Civil Liability for Gross Human Rights Violations," 466–467.

[117] South African History Archive *Draft Regulations released for payment of reparations to apartheid victims* (2011) http://www.saha.org.za/news/2011/May/draft_regulations_released_for_payment_of_reparations_to_apartheid_victims.htm, (accessed on 2012-04-23). The South African Coalition for Transitional Justice criticised these regulations in its *Comments On The Draft Regulations Published By The Department Of Justice Dealing With Reparations For Apartheid Era Victims* (2011) http://ictj.org/sites/default/files/SACTJ-South-Africa-Reparations-Submission-2011-English.pdf.

[118] "Khulumani Memorandum to the President" (2012) http://www.khulumani.net/reparations/corporate.html.

[119] *In re South African Apartheid Litigation; Ntsebeza et al. v. Citigroup et al* (EDNY) 346 F. Supp. 2d 538 2004; Bachmann 34–36.

[120] *In re South African Apartheid Litigation* 02 MDL 1499 (SDNY) 2009.

[121] This decision was taken in order to prevent any damage to present and future foreign investment in South Africa and must be seen before the background that the original amount of remedies sought, totaled 400,000,000,000 US $. "It's state v apartheid victims" *Mail & Guardian* (2005-10-21) 5 for a brief overview of the controversy in South Africa.

public.[122] Again showing the effect of the ATS pre-*Kiobel*, General Motors settled the case in 2012 by compensating 25 plaintiffs.[123]

These cases showed that the ATS was used as a method by which past atrocities, committed by state and non-state actors alike, can be compensated through civil actions. These civil actions appealed to a wider, substantive version of the Rule of Law, one which placed restitution for past wrongs to be as important a part of the law as certainty. However, this option may now be foreclosed due to two recent Supreme Court decisions.

Sosa and Kiobel [AU1]

These two cases have served to greatly limit the scope and applicability of the ATS. They have limited the Act's jurisdictional scope and applicability in such a way that the previous successful cases under the Act may not succeed if brought before US courts today. This limitation is based in part upon a formal construction of the Rule of Law, a construction which places legal certainty as *more* important than historical justice. It is this view which we criticise.

Sosa involved a claim by a Mexican citizen against another Mexican citizen for a kidnapping that occurred in Mexico.[124] This case concerned how to apply the ATS to a post-Nuremburg world of individual accountability for human rights abuses. The ATS does not give causes of action, and the majority of the Supreme Court held that the grant of jurisdiction is "best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations".[125] These violations would have to infringe the 'law of nations'.[126] The Court, following William Blackstone, declared that such violations at the time of the passage of the ATS were restricted to three specific offences—violation of safe conducts, infringement of the rights of ambassadors, and piracy.[127] The causes of action for the ATS today would have to "rest on a norm of international character accepted by the civilised world and defined with a specificity comparable to the features" of the three violations known to Blackstone.[128]

The Court strictly limited the category of offences which were defined by their universal acceptance, their obligatory nature and high degree of specificity. The

[122] "State supports apartheid-era victims" *IOL—News for South Africa* (2009-09-03) http://www.iol.co.za/news/politics/state-supports-apartheid-era-victims-457265?ot=inmsa.ArticlePrintPageLayout.ot, (accessed on 2012-04-23).

[123] Adrian Ephraim, "US General Motors settles apartheid reparations claim" *Mail & Guardian Online* (2012-02-29) http://mg.co.za/article/2012-02-29-us-general-motors-settles-apartheid-reparations-claim, (accessed on 2012-04-24).

[124] *Sosa v Alvarez-Machain*, 542 U.S. 692 (2004) (SCOTUS).

[125] *Sosa*, 724.

[126] *Sosa*, 714.

[127] *Sosa*, 715.

[128] *Sosa*, 724-725.

Sosa dictum limited the scope of potential historical claim action within the boundaries set by the *Forti* test[129] and was criticised heavily by the human rights community.[130] Consequently, it is presumed that only severe violations of international human rights and international law of a *jus cogens* nature may qualify as such a 'law of nations' violation and grant US jurisdiction for an ATS civil action.

Thus the Court had a formal construction of the Rule of Law in mind in ensuring certainty of the common law. Indeed this view is reinforced by the fact that the Court contended that a cause of action which satisfies the first three heads (violation of safe conducts, infringement of the rights of ambassadors, and piracy) can still be non-justiciable if prudential considerations such as public policy weigh in favour of non-justiciability.[131]

This limitation upon the jurisdiction of the ATS was extended in *Kiobel*. The plaintiffs in *Kiobel* were residents of Ogoniland, located in the Niger Delta in Nigeria. They brought a claim under the ATS against Royal Dutch Petroleum and Shell, corporate entities, alleging that they aided and abetted the Nigerian Government in committing human rights abuses, including extrajudicial killings, crimes against humanity and acts of torture, in Ogoniland.

[AU2] The Supreme Court were faced originally with the question of whether corporate civil tort liability under the ATS was justiciable, or whether corporations were immune for tort liability. During oral argument, Justice Alito expressed concern at the very extraterritorial nature of the ATS:

> The first sentence in your brief in the statement of the case is really striking: "This case was filed … by twelve Nigerian plaintiffs who alleged … that respondents aided and abetted the human rights violations committed against them by the Abacha dictatorship … in Nigeria between 1992 and 1995". What does a case like that—what business does a case like that have in the courts of the United States?[132]

Justice Alito clarified the Court's concern in *Sosa*—why should offences committed abroad be justiciable in American courts? Do prudential considerations (ensuring certainty in the law) disqualify such extraterritorial actions? This concern for key formal principles of the Rule of Law led the Supreme Court to order *Kiobel* to be expanded and reargued. The new question the Court considered was:

> Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.[133]

---

[129] The *Forti* test consists actually of two parts, *Forti I* and *II* with the former outlining the requirements for the *jus cogens* nature of actionable torts and the latter defining the "universality" criteria thereof, *Forti v. Suarez-Mason* 672 F Supp (ND Cal 1987) 1531.

[130] Bachmann, *Civil Responsibility For Gross Human Rights Violations – The Need For A Global Instrument*, 17–18.

[131] *Ibid*.

[132] *Kiobel* oral transcript 11 http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf, (accessed on 2012-04-23).

[133] See http://sblog.s3.amazonaws.com/wp-content/uploads/2012/03/10-1491-order-rearg-3-5-12.pdf, (accessed on 2012-04-23).

In April of 2013, the Court reached its conclusion. Although all nine Justices voted to dismiss the case, they did so for different reasons, in a 5-4 split. The Justices were divided over *how* to interpret the ATS in relation to its potential extraterritorial application.

The majority of the Court decided that the presumption in American law against the extra-territorial application of laws applies to the ATS.[134] This presumption serves to ensure legal certainty, as it aims to protect against judicial interference in international relations.[135] The majority referenced *Sosa* in stressing that judicial caution was needed in considering the scope of the ATS,[136] and stated that nothing in the text, history or purposes of the ATS gave any indication that the statute's framers intended that it has extra-territorial application.[137] This means that under this reading, the ATS is not to be interpreted as making the United States a forum for the enforcement of international norms.[138] Specifically, the ATS is presumed not to apply to conduct which occurs in the territory of another sovereign. The majority was clearly concerned that to do so would lead to US citizens being brought before other nations' courts for alleged violations of the law of nations occurring anywhere in the world.[139]

The potential of extraterritorial historical justice litigation is curtailed here through a concern to secure legal certainty and a formal reading of the Rule of Law. This decision questions whether the successful litigation brought under the ATS in the past would succeed today. This is underscored by the fact that the majority clearly stated that the reason for denying the claim was that "all the relevant conduct took place outside the United States".[140] Mere corporate presence in the United States is not enough to bring a claim under the ATS—the claims much touch the territory of the United States with "sufficient force" to displace the presumption.[141] [AU3] Although the majority left the details of when this sufficient force would be present, we can gain an idea of the limitations of the future applicability of the ATS from the minority's judgment. Here, Breyer J made the point that only violations of international norms akin to piracy would stand under the ATS.[142] In short, only those people, like the torturer, would be a *hostis humani generis*, like the pirate. Crucially, even the minority here made the point that corporate complicity in acts of torture and genocide would not be enough to engage the ATS, even if the corporations in question conduct business in the United States.[143]

[134] *Kiobel v Royal Dutch Petroleum*, 569 U.S. (2013), slip.op. at 6 (Roberts CJ).

[135] *EEOC v Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).

[136] *Sosa v Alvarez-Machain* 542 U.S. 692, 727–728 (2004).

[137] *Kiobel v Royal Dutch Petroleum*, 569 U.S. (2013), slip.op. at 6-13 (Roberts CJ).

[138] *Kiobel v Royal Dutch Petroleum*, 569 U.S. (2013), slip.op. at 12 (Roberts CJ).

[139] *Kiobel v Royal Dutch Petroleum*, 569 U.S. (2013), slip.op. at 13 (Roberts CJ).

[140] *Kiobel v Royal Dutch Petroleum*, 569 U.S. (2013), slip.op. at 14 (Roberts CJ).

[141] *Kiobel v Royal Dutch Petroleum*, 569 U.S. (2013), slip.op. at 14 (Roberts CJ).

[142] *Kiobel v Royal Dutch Petroleum*, 569 U.S. (2013), slip.op. at 3 (Breyer J).

[143] *Kiobel v Royal Dutch Petroleum*, 569 U.S. (2013), slip.op. at 14-15 (Breyer J).

Kiobel appears to point to the fact that the future of historical justice litigation as a notion of restorative justice may have to focus upon territorial challenges, rather than extra-territorial challenges. The ATS is foreclosed through a narrow reading of what the Rule of Law allows a legal system to do.

Australia: Native Title, Mabo and Beyond

The Australian response is one which, post-*Kiobel*, appears most suitable for historical justice litigation: through the State in question allowing such claims, the Rule of Law, and the legal certainty which forms a part of the Rule of Law, are maintained. Only those citizens of a State can bring such cases. This could allow legal certainty to be balanced against historical justice being granted to those victims of past wrongs. However, using the seminal case of *Mabo* as a lens, we can view how courts still feel constrained by the formal qualities of certainty in granting judgments. This can lead to a situation where justice is still not forthcoming for the victims who ask for it.

In *Mabo*, the High Court of Australia had to decide whether 'native title' existed in Australian law, 100 years after *Cooper v Stuart* denied that such title existed. Although *Mabo* involved a land rights claim, rather than a tort claim as in *Kiobel*, it is still an example of historical justice litigation. More importantly, *Mabo* is instructive in illustrating the potential pitfalls of territorial historical justice claims.

The High Court faced head on the traditional narrative of Australia: the doctrine of *terra nullius*. Most interestingly, *terra nullius* was not mentioned in the first 183 years of Australian jurisprudence, nor mentioned before the Court in oral argument.[144] The first description of Australia as *terra nullius* occurred in a 1979 case, *Coe v Commonwealth*.[145] There, the High Court held that Australian sovereignty, founded upon *terra nullius*, was not justiciable in Australian courts. The High Court in *Mabo* thus declared that they were faced with a choice. Either they could apply the existing authorities and deny that Aboriginals had rights to land, or overrule those cases.[146] The Court chose to overrule *terra nullius* and declare that native title existed in Australian law.

For Brennan J, delivering the leading judgment, overruling the cases was necessary as otherwise their authority would destroy the equality of all Australian citizens before the law.[147] Brennan J argued passionately for equality and justice under the law, values buttressing the Rule of Law. Crucially, Brennan J contended that *Mabo* presented the Court with a fundamental clash of principles. First was the fact that the dispossession of the Aborigines underwrote the development of the Australian

[144] Ritter, "The "Rejection of Terra Nullius in *Mabo*"," 22.

[145] *Coe v Commonwealth* (1979) 53 AJLR 403 (HCA).

[146] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 [39].

[147] *Mabo* [63].

nation.[148] Second, the Court argued that it could not adopt rules if those rules would fracture the skeleton of principle that gives the law its shape and internal consistency—the Rule of Law.[149] It is worth noting here that the High Court placed legal certainty at the heart of the Rule of Law, giving it a very formal construction.

What is most important here is that *terra nullius* was treated by the Court as a foundational legal principle, when the reality of Australian colonialism was that it was no such thing. The denial of Aboriginal land rights was not based on a legal doctrine, as Henry Reynolds would have it, but upon the brute assumption that Aboriginals were savages without civilisation. Aboriginals were "physically present, but legally irrelevant".[150]

Thus the High Court *created* a conflict in relation to the Rule of Law. By treating *terra nullius* as the founding legal doctrine of the Australian legal system which dispossessed Aborigines, they ensured that the rejection of *terra nullius* would be seen as evidence of the progress of the law.[151] Thus the Court couched its judgment in the language of reconciling the (fictional) foundational act of dispossession with the (fictional) fact that this act was the condition of the on-going existence of Australia.

The Court distinguished between the *acquisition* of sovereignty and the *consequences* of the acquisition of sovereignty. The former, held the Court, is not subject to review by the Court as it is that sovereignty that gives the Court power to rule on the matter at hand. The latter issue was justiciable. From this the Court held that the Crown gained title to Australia through the act of *terra nullius*; in other words, the Crown gained the right to create property rights but where none had been created it was possible for native title to continue to exist.[152] This right was entrenched in the Native Title Act 1993.[153] In this way, Aboriginal communities could gain land rights if they could show that they had 'continual association' with the land from the time of colonisation.

Mabo is crucial to our argument as it is a clear example of how legal decision-making often adheres to the certainty of the legal system, and places such certainty at the heart of the Rule of Law. As such, it forms a "symbolic legitimation ritual".[154] Historical justice, which could be reconciled with legal certainty in a broader, substantive application of the Rule of Law, is curtailed in a manner different to the legislation in the United States. The formal interpretation of the Rule of Law here

[148] *Mabo* [82].

[149] *Mabo* [28]-[29].

[150] Gerry Simpson, "Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence," *Melbourne University Law Review* 19 (1993): 200.

[151] Ritter, "The "Rejection of Terra Nullius in *Mabo*"," 30.

[152] *Mabo* [55].

[153] Native Title Act 1993 (Cth) (NTA). There has been a huge development in native title litigation, and non-legal political action, since *Mabo*. However, given the centrality of the *Mabo* case to the developments in the field, we focus upon it here.

[154] Simpson, "Mabo, International Law, Terra Nullius and the Stories of Settlement," 207.

involves the application of general principles ('native title') and treating like cases alike.[155] However, this formal legal equality is tied to the concept of the legal person.[156] Kerruish and Purdy have stated that this means that people are free (stripped) of *all* their characteristics. Equality at law has this dual freedom: all those who come before the law are *equally* stripped of their actual characteristics and *equally* presumed to be responsible for their actions.[157] In the case of *Mabo*, by assuming that Aboriginals are free actors, the law misdescribes the historical reality of racism and discrimination, but does so in a way that legitimises the overlooking of this fact—namely formal equality under a version of the Rule of Law. The gains of *Mabo* were achieved within the supremacy of the liberal, Anglo-American Rule of Law framework.[158]

What is more concerning for the question of redress for past wrongs, the High Court ruled that the original act of sovereignty was not justifiable in the court system. By refusing to engage with *terra nullius*, itself a fiction, the court not only legitimises its jurisdiction, but actually legitimises the very act of dispossession that was based upon a colonial racism. As Paul Coe stated, the High Court, in rejecting *terra nullius*, "threw away a name but retained the substance".[159] *Terra nullius* still provides the foundation of the Australian state, meaning that Aboriginal dispossession is now legally set in stone, but is perversely legitimated by the claim that the law is acting in a non-discriminatory manner. Things were changed in order for things to remain the same.[160]

Conclusion

This chapter has explored the potential and pitfalls of historical justice litigation with reference to two instances of British colonialism: Australia and South Africa. Formal constructions of the Rule of Law, with their emphasis upon legal certainty, have curtailed the search for justice on the part of victims of human rights litigation. In Australia Aboriginals have to defer to the supremacy of the common law of the former British colonial masters, and ignore past injustices in order to have their rights to land legitimated by the same system of law which legitimated their very dispossession. In South Africa, the failure of the government to provide

[155] NTA s 225; Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978).

[156] Walter Otto Weyraucht, "Law as Mask—Legal Ritual and Relevance," *California Law Review* 66 (1978): 699.

[157] Valerie Kerruish and Jeannine Purdy, "He "Look" Honest, Big White Thief," *Law, Text, Culture* 4 (1998): 150.

[158] Ritter, "The "Rejection of Terra Nullius in *Mabo*"," 32.

[159] Paul Coe and Peter Lewis, "100 % Mabo," *Polemic* 3 (1992): 143.

[160] Ritter, "The "Rejection of Terra Nullius in *Mabo*"," 33.

742 adequate reparations to victims of Apartheid has led to individuals starting
743 extraterritorial litigation under the ATS. However, even here formal conceptions of
744 the Rule of Law have led the US Supreme Court to seemingly foreclose the options
745 for aliens to bring claims. In order to bring about the very historical justice that
746 marks both these forms of litigation, courts will have to construct a *substantive*
747 conception of the Rule of Law, which values the rectification of human rights
748 abuses above legal certainty as a general principle. It is with this uncertain conclu-
749 sion that this chapter ends.

Author Queries

Chapter No.: 4 0002177593

Queries	Details Required	Author's Response
AU1	Please check the hierarchy of heading levels for correctness.	
AU2	Can "The Supreme Court were…" be changed to "The Supreme Court was…"? Please check	
AU3	Please check the phrase "the claims much touch the…" for clarity.	