PART TWO. The Arbitration Procedure and Awards

3. The Luso-German Arbitration Procedure 1919–1928

Following the armistice, the Allies were confronted with the task – among many others – of claiming German reparation payments and to avenge alleged German war criminals. The peace treaty signed on June 28, 1919 did not resolve these questions conclusively. The Allies' governments and most of all their administrations subsequently undertook to negotiate and work out the details. Germany's international relations after 1919, on the other hand, "were governed by the conflict over the consolidation, modification or destruction of the status quo established in [Versailles]."

The peace treaty, a massive bilingual volume of over 200 pages with 440 articles plus annexes, had to regulate many complex issues in great detail. The indemnification of the damages that had arisen from German acts since the beginning of the war (July 31, 1914) and before that Allied Power formally entered into the war was among these issues. In the following chapters the preparations for as well as the initiation and proceedings of the legal dispute concerning the war in the African colonies between Portugal as claimant and Germany as defendant will be analyzed. According to the peace treaty, the dispute was to be referred to arbitration. First, interstate arbitration will be examined in its historical context before and in the course of the negotiations leading to the Treaty of Versailles. Second, the personnel involved in the Luso-German arbitration and their respective competences will be briefly mentioned. Third, the legal procedure itself will be considered by analyzing the Portuguese claims and German responses during an exchange of written arguments, followed by oral testimonies and finally the pleadings of the party representatives before the arbitrator.

During the war, representatives of the Allies claimed that they were "engaged in the defense of international law and justice". These aims were considered "common" and "obvious". But also Germany attempted "to claim the international-legal high ground." Considering the atrocities since 1914, former US Secretary of State Elihu Root was less convinced. In 1921, he remarked that during the war "the world went on for several years without much reference to [the rules of international law]; and the

question now is: How far do they exist?" The Luso-German dispute, fraught with legal problems that grew out of customary international law or provisions of the peace treaty, proved the "indestructible vitality" of these rules. But the dispute was also fraught with questions of international politics and (colonial) history. Further, the interest of the Portuguese public in the indemnification of damages (or – in the German case – the refusal of it) played a significant role in the initiation of the arbitration procedure. And these political influences will thus be taken into consideration too.[1]

3.1 The Treaty of Versailles and Arbitration

In historian Gerald Feldman's frank assessment, the Treaty of Versailles, "no matter how understandable in its historical context,… must be accounted as disaster of the first rank." For defeated Germany this seemed certainly true, even though the existence of one German nation state was – at least – not called into question by the treaty. Apart from the loss of ten per cent of its population, the loss of the colonies and industrial capacity, Germany was liable for reparations. The final sum to be paid was yet to be announced.[2]

With its numerous provisions the treaty "marked a fundamental turning point in the history of international law." Two aspects are of particular relevance in the context of the Luso-German arbitration. First, the Treaty was the "starting point for the era of international organizations", including international tribunals. Second, the Treaty was also "the first punitive peace between sovereigns since the late Middle Ages".[3] Of course, also previously victorious nations stipulated payments in their peace treaties. The Franco-German Treaty of Frankfurt 1871 set forth the payment of a French war indemnity of five billion francs. However, the Treaty of Versailles went beyond these pecuniary aspects and was a far cry from the classical vocabulary of "oblivion" as used in peace treaties such as the Treaty of Westfalia in 1648. In addition to the fact that "Germany renounce[d] all her rights and titles over her overseas possessions"

1 *Kolb* 2007: 7; 189; *Hull* 2014: 1f. quot. Bower (1916); *Root* 1921: 225; *Isay* 1923: iii.

2 *Feldman* 1997: 148; cf. *Day* 1920: 312 'no man on earth…could compose the conflicting interests and win a perfect peace'; *Boemeke/Feldman/G.*1998: 3 TV 'the best compromise'.

3 *Lesaffer* 2004: 5; cf. *Hirschfeld/Krumeich* 2013: 289 TV was 'quite a respectable effort'.

(Art. 119), Article 227 charged the Emperor Wilhelm II, with offenses against international morality. These provisions caused particular outrage in Germany. Most saw these *Schmachparagraphen* (articles of ignominy) as deliberate attempts to humiliate Germany.[4]

Considering the way in which the peace treaty was negotiated and concluded also historians assume that one of its purposes was "to make visible the humiliation of Germany".[5] The most decisive characteristic about the negotiations at Versailles in spring 1919 was the fact that these negotiations – which attempted to create a new world order after the collapse of the old – were *about* the defeated nations, most of all Germany, but were not conducted *with* them. Indeed, it was a *Diktat* rather than a genuine treaty between two parties.[6] Altogether, more than 10,000 councilors participated in one way or another in the negotiations. Never before had the "expansion of the international system" since the nineteenth century be so visible than in these treaty negotiations with lawyers from all corners of the globe. They were organized in over fifty committees and subcommittees; all reporting to the Council of Foreign Ministers and, finally, the Council of Four (Woodrow Wilson, David Lloyd George, George Clemenceau, Vittorio Orlando). Only in late April 1919, when all the articles of the Peace Treaty were virtually formulated, were the Germans ordered to send their representatives. When the German delegation under Foreign Minister Brockdorff-Rantzau (1869–1928) received a completed document on May 7, 1919 he, the German government, political parties, and the public were hit "as if by a cudgel". And still, the Treaty was signed on June 28, 1919. The German Parliament, recognizing the hopelessness of the resumption of war, ratified the document after a stormy debate on July 7, 1919.[7]

In Portugal, despite being among the victorious nations, the situation seemed equally desperate. Since 1917/8, both republics were plagued by political violence and governmental and economic instability. Both republican regimes lacked, in the view of many Germans and Portuguese, political legitimacy. Among German contemporaries there was a "perception … that the previous certainties of their social and moral world were being

4 *Kraus* 2013: 38, the Dutch government refused to extradite Wilhelm II; cf. *Schwengler* 1982: 94f.; *Krumeich* 2001; *MacMillan* 2003: 157f.; *Speitkamp* 2010: 160.
5 *Kolb* 2011: 10 'Sichtbarmachung der Demütigung Dtls'; cf. *Cohrs* 2006: 51; *Krüger* 1986.
6 *Kraus* 2013: 11 ref. to G. Krumeich; 23f.; *Myerson* 2004: 206; cf. *Scott* 1920: 64-79.
7 *Keene* 2012: 479; *Kolb* 1988: 295; 2011: 47-53; 69; 75; cf. *Lorenz* 2008: 59-108; *Boden* 2000.

radically shattered."[8] In both countries, political formations tended towards the extremes: declared enemies of the republican order like monarchists, fascists, conservatives, but also socialists and communists gained at times more influence than the constitutional orders could possibly bear. In Portugal, the dictatorship of the charismatic Sidonio Pais and his assassination in December 1918 further divided the country and resulted in a brief civil war between republicans and monarchists under the "colonial hero" Paiva Couceiro. In early 1919, the American Minister Thomas Birch, when considering the political situation of Portugal, drew a grim picture of the republic since its inception. He concurred with his British and French colleagues who "view[ed] the situation as hopeless."[9] When the Luso-German arbitration was initiated, politicians in Portugal and Germany were barely able to form stable governments; irrespective of the fact that in Portugal the Republican Party dominated the ballots. The outcome here was similar to the German case: Internal faction fighting hindered effective government.

3.1.1 Interstate Arbitration – a Historical Overview

Throughout the nineteenth century third-party arbitration was employed for the settlement of disputes between states. In principle, interstate arbitration stood in contrast to state sovereignty, since a sovereign state (represented by its government) was considered the sole judge of the truth or falsity of any charges laid against it. Furthermore, there was no institution above state parties that could have enforced the execution of an arbitration award. Nevertheless, governments committed themselves to numerous arbitration cases. Mostly, the involved states agreed *ad hoc* to refer a dispute to a third party for resolution. And the arbitration tribunal (a mixed commission or a head of state) to which the dispute was referred was created *ad hoc* for this single dispute. In the second half of the century, states began agreeing *in advance* to make arbitration available in cases of conflict. These bipartite agreements were, however, limited in scope. In particular, the United States concluded arbitration treaties with other countries. "The issues at stake concerned mostly boundary questions, debt recovery, mar-

8 *Fulbrook* 2011: 42; cf. *Nolte* 1999: 74; *McElligott* 2014: 35-38; 42; *Müller* 2014 emphasizes a more positive, 'optimistic' reading of German democracy after 1918.

9 NARA RG 84, Lisbon, v. 168: 800, USML to SoS, 14.1.19; cf. *Meneses* 1998a: 109f.

itime seizure, territorial questions, private claims, mutual claims, claims after insurrection or civil war, claims made due to act of war, illegal arrest, and fisheries." Researchers have identified more than 220 tribunals. During the First Peace Conference at The Hague a Permanent Court of Arbitration (PCA) was created by the "Convention for the Pacific Settlement of International Disputes" (July 29, 1899; revised during the Second Peace Conference by the Convention of October 18, 1907). In 1900 seventeen signatory states had ratified this Convention. However, states that were party to the Conventions of 1899 and/or 1907 were not obliged to employ the means provided by the PCA. The set-up of "special arbitral tribunals" was a valid alternative to the recourse to PCA tribunals.[10]

When Arthur Nussbaum, shortly after the Second World War, spoke of the century from Waterloo to the Marne as the "most progressive" for international law, interstate arbitration procedures as well as the faith placed in their effectiveness played part in this notion. Arbitration awards were generally accepted as being an important source of international law and its "development and enhancement". Major cases such as the *Alabama* claims or the *Fur Seal* arbitration (USA vs. GB, 1872; 1893) "enriched international law directly or indirectly with recognized rules."[11] "Progress both in the conduct of arbitration and in the negotiation of agreements to arbitrate paved the way for a regularization of the process of arbitration".[12]

Portuguese governments had had their own experiences with international arbitration awards, especially in the colonial context. Since 1870, Portugal had had several disputes with Great Britain (*Bolama*, *Delagoa Bay*, *Barotseland*) and the Netherlands (*East Timor*) related to the delimitation of boundaries and the sovereignty over colonial territories, which were referred to arbitration.[13] Some of the awards had been favorable to

10 *Riemens* 2010; *Langhorn* 1996: 52; cf. *Vec* 2011; *Herren* 2009; *Justenhoven* 2006; *Hudson* 1933: 441; *Myers* 1914.

11 *Nussbaum* 1947: 238; *Isay* 1923: 417 'Höherentwicklung des Völkerrechts'; cf. *Wehberg* 1913: 301.

12 *Hudson* 1933: 441; cf. *Isay* 1923: 410-416 cf. *Koskenniemi* 2001: 98; *Gaurier* 2014: 659-63.

13 RIAA: Portugal vs. UK reg. the dispute about the sovereignty over the Island of Bolama, 21.4.1870 (v. XXVIII: 131-140); UK vs. Portugal reg. territories formerly belonging to the Kings of Tembe and Mapoota, on the eastern coast of Africa, including Delagoa Bay, 24.7.1875 (v. XXVIII: 157-162); UK vs. Portugal reg. questions relative to the delimitation of their spheres of influences in East Africa (Manica Plateau), 30.1.1897 (v. XXVIII: 283-322); UK vs. Portugal reg. the Barotseland boundary, 30.5.1905 (v. XI: 67-69); Netherlands vs. Portugal reg. the boundary of East Timor, 25.6.1914 (v. XI: 490-517); *Fisch* 1984: 407-25; *Mártires Lopes* 1970.

Portugal. On the other hand, Portugal also had to face the fact that the willingness to arbitrate a particular dispute was often considered a concession by the other party and recourse to force was still a possibility. In 1890 the Portuguese had hoped that the above-mentioned dispute with Great Britain about the upper Zambezi territories could still be decided by an arbitrator. However, Lord Salisbury "cut this hope short by refusing to consider outside mediation" about Matabeleland.[14]

Even though Germany was "averse to international arbitration law as a matter of principle", it nevertheless ratified the PCA Convention. Since 1889, Germany had been party to a number of international arbitration cases, also in a colonial context.[15] This practicability and feasibility of interstate arbitration raised high hopes for its contribution to an extended peace in Europe and beyond; "conclusion of arbitration agreements proceeded at an almost feverish pace." In retrospect, the world before 1914 "looked as if it were developing a system of conciliation and arbitration".[16]

3.1.2 The Cost of War – Portuguese Finances and Claims for Reparations

The British and American delegates to the Peace Conference in Paris were probably "the most prepared" in January 1919 to push through their agenda.[17] However, the Portuguese government had also initiated preparations for the upcoming negotiations, most of all to achieve two objectives: the territorial integrity of the colonies (and if possible an extension) and sufficient reparations in kind and in money from Germany and its allies. A few weeks after the armistice, Portugal's President Sidónio Pais sent his Foreign Minister Egas Moniz (1874–1955) to London to meet Arthur Balfour. The two discussed Portugal's participation in the peace negotiations. As

14 *Nowell* 1947: 16; cf. *Ralston* 1929: 228.

15 *Petersson* 2009: 96; cf. *Carl* 2012; *Schlichtmann* 2003: 384; *Ralston* 1929: 232; RIAA: Germany vs UK relating to Lamu Island, 17.8.1889 (v. XXVIII: 237-248); Germany vs. UK, USA reg. Samoan Claims, 14.10.1902 (v. IX: 15-27); Germany vs. Venezuela (Mixed Claims Commission) 1903 (v. X: 363-476); Germany, France, UK vs. Japan reg. real estate tax, 22.5.1905 (v. XI: 51-58); Germany vs. France reg. consular jurisdiction (Casablanca deserters), 22.5.1909 (v. XI, pp. 126-131); Germany vs. UK reg.Walfish Bay, 23.5.1911 (v.XI: 263-308).

16 *Hudson* 1933: 441; *Mowat* 1933: 674; cf. *Arcidiacono* 2005:14f.; *Kennedy* 1997: 132.

17 *Samson* 2006: 149; cf. *Kolb* 2011: 56; *MacMill.* 2003: xxviii; 3; *Burnett* 1940; *Lansing* 1921.

they continued to prepare for the Paris conference – and following the assassination of Pais on December 14, 1918 – Moniz' delegation soon found itself trapped between forces close to the exiled republicans under Bernhardino Machado and Afonso Costa working to undermine Moniz's position and the unfriendly attitude of fellow Allies. Most of all the French pointed to an alleged pro-German leaning of Pais and were eager to minimize Portuguese representation in the upcoming negotiations. Considering their conflicting national interests, the Allies had to invest considerable efforts into reaching an agreement among themselves about the question of how to deal with Germany. Nevertheless, Moniz managed to secure membership for his country in four of the commissions of the Peace Conference. He provided the Reparation Commission with a first estimate of the Portuguese losses during the war, putting the total at £130,420,000, of which £75,433,000 had been spent on military operations. Portugal's officials had high hopes for the outcome of the conference: the settlement of (war) debts "through a mix of reparations and a deal with London" seemed an inevitability given Portugal's sacrifices during the war. The delegation also intended to seek compensation for the damages done by Germany, most of all in the colonies, and, finally, a share in the battle fleet seized from Germany.[18]

With the republican forces gaining the upper hand in Portugal's civil war, Moniz's position weakened. In February 1919, a new government was formed in Lisbon that informed him that the Portuguese delegation was to also include Afonso Costa and Norton de Matos, "the most important figures in the interventionist pantheon." On March 17, Moniz, who had dueled Norton de Matos in 1912 over a political dispute, had to make way for Afonso Costa. The latter hoped to use this position "to redeem interventionist politics and revive his own career." However, the former Prime Minister, and the men he summoned to his delegation, Augusto Soares, Norton de Matos, Teixeira Gomes, and João Chagas, Portugal's ministers in London and Paris during the war, "arrived too late on the scene to have any significant influence over the … content of the Treaty".[19]

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18 *Meneses* 2010: 79-85; *Pitcher* 1991: 65, from 1914-1918 '[m]uch of the government's finance was devoted to the war efforts … costs were estimated at between £60,000,000 and £80,000,000, £10,000,000 of it in Africa … raised through borrowing or printing money'.

19 *Meneses* 2010: 89f.; *Meneses* 2009a; *Norton* 2001: 178; 268f.; cf. *Costa* 1914.

As the crisis in Portugal "reached a peak in the years 1919–20" and the rural and urban masses suffered great misery, Afonso Costa, hoping for the solidarity of the Allies, drew a grim picture in Versailles of the damage the war had done to Portugal and the resulting financial and social situation:[20]

> "The extraordinary expenditure borne by the Portuguese State on account of its military participation in the war on land and at sea, in Europe and Africa … amount to £79,007,000 … The Portuguese economic loss occasioned by the war, in accordance with the calculations of financial experts, amount to £225,000,000... which represents 37 to 47½ per cent of the Portuguese public wealth … Having regard to these figures and to the economic situation in Portugal before the war, it will easily be seen that the reconstruction of the country will be impossible unless the war costs and the economic damage be repaid."[21]

During the negotiations in 1919, "it turned out [that Costa] was more revanchist than even the French". No Wilsonian vision of a new world order could "replace the punishment of Germany and the redistribution of its wealth as the most immediate Portuguese goals."[22]

At the same time, fact-finding missions led by former governors were sent to Angola and Mozambique. They were charged with assessing of the "damages caused by the Germans" and had to obtain "proof" from "small commissions" set up for the purpose of collecting the claims of individuals and government entities.[23] Since 1915, the Portuguese administration had begun to prepare its arguments for reparation claims. The army had collected reports from soldiers who had witnessed the German attacks along the Kunene and Kavango Rivers.[24] Since 1918, different governments in Lisbon had attempted to assess the entire Portuguese war costs. A first

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20 *Wheeler* 1978: 126; AHD 3p ar 25 m 12-Reparações, 2ᵉ S.Com. Séance 28.3.19, Ax 3: 11.

21 NARA RG 84, Lisbon, v. 168: 800, Peace Conference, Prot. no.6, 6.5.19: 43. The US Consul in Funchal (Madeira) described a destitute population. The poor 'often have only one meal [of porridge] a day…the poverty here at this time exceeds that of any place I have ever visited.' NARA RG 84, Lisbon, v. 169: 848, USC Funchal to USML, 28.2.19. In comparison to 1914, in October 1919 the prices for bread had increased by 310%, for wheat flour by 483%, for potatoes by 566%, for coal by 900%. Government attempts to alleviate the shortage ended in failure, as the law professor A. Salazar criticized. NARA RG 84, Lisbon v. 169: 850.1, USML to SoS, 18. 10.19; *Madureira* 2010: 654; *Wheeler* 1978: 127; *Meneses* 2009: 22; *Birmingham* 2011: 157.

22 *Meneses* 2010: 66; 94; 97; cf. *Leitão de Barros* 2005; *MacMillan* 2003: 45; 57.

23 BAB R 3301/2284: 3, A. Costa: Notes complémentaires, Paris, 29.6.20.

24 AHU MU DGC Angola, Pt 5, 5ª Rep, Cx.996, Varão: Auto de averiguações sobre os acontecimentos ocoridos no forte ... de Naulila, 5.2.15; Vasconcelos e Sá on Cuangar, 26.1.16.

memorandum was presented by Moniz in Paris in February 1919 detailing the "immense losses" caused by the Germans in Africa. But in 1920 Afonso Costa had to "urge Lisbon to hurry the process of establishing the complete Portuguese reparation bill". Finally, in May 1920 Costa presented a memorandum on the damages suffered by the Portuguese state and its citizens to the Supreme Council and the Reparation Commission: "34,457 soldiers sent to Africa and 63,062 to France; 3,800 killed in Africa, 40,000 wounded, or rendered incapable of work (including locally recruited men); 1,787 killed in France, along with 12,483 wounded. … 273,547 people had lost their lives in the colonies as a result of the conflict". Costa claimed that due to the invasion and German "incitement" the revolt in Angola lasted for more than two years (a German official noted with irony on the page margins that German forces had surrendered already in "Korab 9.7.1915!"). Two maps of southern Angola attached to the memorandum showed the degree of devastation and indicated the mortality among the population "due to the German invasion" at 70 per cent among the Cuamatos, Humbes, and Dongoenas; the losses of the Kwanyama were assessed at 30 per cent. In total, Costa claimed "8,641,159,994 GM" (or £432,057,994) in reparations. He added that the *total definitif* "will still be higher". However, this "truly staggering sum" was dismissed by Britain's delegate to the Reparations Commission, John Bradbury (1872–1950). As one of the British government's foremost economic advisors, he was eager to avoid further burdens being laid upon Germany preventing it from restarting the economy and becoming able to pay reparations.[25]

There seemed to be a "general belief in [Portugal] that Dr. Costa would succeed in obtaining financial reparations from the Peace Conference." However, the American minister in Lisbon was unable to confirm the figures presented in Versailles. But he – even assuming an exaggeration by Costa – admitted a financial situation in Portugal "critical in the extreme". When he demanded reparations in Versailles, Costa, "the most beloved and most hated of Portuguese", was fighting for his political survival. Yet, the "weeks and months that followed saw the systematic defeat of Afonso Costa at the negotiating table": Portugal would not be a voting member of the Inter-Allied Commission on reparations; Portugal would not be one of the recipients of the 20 billion gold marks Germany had to pay immedi-

25 *Meneses* 2010: 128f.; BAB R 1001/6634: 30 (transl.) Memo, 17.2.1919; BAB R 3301/2284: 13, Costa: Notes complémentaires, 29.6.20 'Montant des dommages'; 28 'Sud de l'Angola'.

ately to some of the Allies; the worst of all: future reparation payments would not included military expenses or the war's impact on international trade. While Costa, Soares, and Norton de Matos had "hoped that the [T]reaty … might rehabilitate [war] interventionists", the "inescapable conclusion" from these points was: "Portugal had been defeated at the negotiations in Paris."[26]

The seizure of German ships in 1916 "represented the only important increase of national industrial income accruing to Portugal through the war." Not the least the domestic turmoil and the excessive government spending had resulted in an international loss of face that weakened Costa's position at Versailles. Despite hyperinflation, a mounting budgetary deficit, growing debts and without tangible sources of income Portugal's government was unwilling to sell its colonies or to apply rigid austerity. "Instead, Portugal appeals to the Peace Conference for financial aid and, in spite of growing deficits, she increases the budget for each ministry … and continues to increase outlays on her useless army and obsolete navy."[27]

During the negotiations in Paris and afterwards, the Allied representatives found it most challenging to restrain the hopes of their electorate regarding gains and reparations to be obtained from Germany. After more than four years of merciless warfare and relentless propaganda that depicted the war almost as a crusade for one's own ideals and the corresponding demonization of the enemy ("hell is too good for the hun"), moderation seemed inapposite. Furthermore, the totality of Germany's defeat was aggravated by the fact that at the end of the war there were no relevant neutrals left who could have mediated between the parties during the negotiations and who may have prompted the victors to show restraint.[28]

3.1.3 Whose Slice? – the Fate of Germany's and Portugal's Colonies, 1919

During the war, German politicians hoped for considerable gains in African territory following an armistice – most of all the Belgian Congo

26 NARA RG 84, Lisbon, v. 168: 800, USML to SoS, 1.9.19; *Meneses* 2010: 163; 99; *Wheeler* 1978:132.
27 NARA RG 84, Lisbon, v. 168: 800, USML, 1.9.; 830, 23.9.19; cf. *Norton* 2001: 269.
28 *Kolb* 2011: 42.

and Portuguese colonies.[29] After the defeat, by far most German political groups were in agreement that German colonies should be "returned". Propaganda efforts to that effect were pervasive and even a few "Afro-German activists" promised in a petition their loyalty to Germany *if* provisions of German colonial law discriminating against Africans would be abolished in a future German colonial empire. The Allies, on the other hand, concurred that Germany must not be permitted to return to the colonies. The question of their allocation and administration, however, haunted Allied policy makers before and during the Peace Conference. As a result, Germans saw themselves reduced to the position before 1884 when "German imperialists were aspiring to something the country did not have. This perceived lack of empire … spurred irredentism after 1919".[30]

During and after the war the accusation of the enemy to be unfit to rule over "natives" was an argument regularly used. It was part and parcel of the general propaganda war that pitted "barbarism" against "civilization". In 1915, pro-German circles distributed a pamphlet in the United States entitled "British Rule in India" that left no doubt about the brutality of British officials.[31] The British government, after the occupation of GSWA, ordered the collection of material that would prove German atrocities. This material was not an end in itself, since the protectorate's administrator E.H. Gorges was requested to "giv[e] reasons why … GSWA should remain under British rule". The resulting *Blue Book*, printed as Parliament Publication in August 1918 brought to light a grim picture of the "treatment of the natives under German rule". It was, as one official in London's Colonial Office stated after reading the draft, "a most effective and moving document." Quotations from Africans about horrifying bestialities committed by Germans were underlined by photographs showing executions or the results of excessive flogging.[32] Accoding to the Governor-General of South Africa, Lord Buxton, the Germans "have shown themselves to be totally unfitted for the responsibility of governing the native races of [GSWA]". In contrast with "British and South African benevolence", the critical evaluation of German colonization was to show that

29 Cf. *Wolff* 1984: 289 (# 222: 28.9.15) on a meeting with W. Solf about future colonies.

30 *Gerbing* 2010: 86; *Gissibl* 2011: 161; cf. *Samson* 2006: 137-170; *Carrington* 1960: 434.

31 TNA FO 115/1905: 140, Br. Amb. Was. D.C. to FO, 17.8.15; *Cana* 1915: 365 'Their intrigues in South Africa … stamp the German government with indelible shame and warrant in full the complete expulsion of Germany from Africa.'; cf. *Louis* 1967.

32 TNA CO 532/109: 280 Davis, 26.3.18; 284, Gorges to L. Botha, 21.1.18; *Gewald* 2003.

the practices in GSWA violated the norms of 'civilized' colonial powers.[33] Thus, in "the interest of the natives it would be criminal to hand back [the colonies] to Germany". Concepts such as "civilization, humanity, and ethics" became part of a colonial dispute. Evidently, however, the "colonial subjects of Germany never experienced any moment of liberation.[34]

At least half of the German nationals living in GSWA, GEA, or other colonies were repatriated in 1919. Their property was often expropriated by the Allies. According to Article 297 b–i Treaty of Versailles, Germany was obliged to pay reparations to its nationals for the liquidation of their property in the colonies. Back in Germany, the *Kolonialdeutschen* founded pressure groups that fought in vain for 'fair' reparation payments. The government – for years – was willing to pay only sums that accounted for hardly ten per cent of the amounts claimed.[35]

For Portugal having sided with the Allies did not "remove the threat to the empire's survival." Once more, it seemed threatened by foreign "expansionism". The political and financial conditions in Portugal were so grave that the liquidation of its colonies was considered "possible" in 1919 when the re-ordering of the map of Africa was negotiated.[36] However, having lost two empires in the past, the spice trade in the 'East' during the seventeenth century and Brazil in the nineteenth century, politicians in Lisbon were not inclined to administer a third colonial demise of Portugal in Africa – Africa that had since the fifteenth century "bec[o]me ... a laboratory of expansion, the primordial space of imperial and colonial campaigns"[37] Similar to the British who had discussed war aims in Africa, the Portuguese had their own intentions with regard to the disposal of the German colonies. Britain and Portugal were not only cooperating, they "remained rivals" during and after the war. In 1914, the British government had pressured Portugal *not* to become belligerent, suspecting Lisbon would make "inconvenient demands for more territory" in Africa. In 1919,

33 TNA CO 532/109: 908, Buxton to CO, 15.2.18; *Hartmann* 1998: 272. Germany was considered unfit to be entrusted with a mandate by the League of Nations to 'civilize native peoples.' Thus it was no longer among the 'progressive nations' and was denied a place in the League of Nations cf. *Grewe* 1982: 476; *RKA* 1919; *Klotz* 2005: 141; *Kuss* 2010: 336.

34 TNA FO 373/6/13, GSWA. Foreign Office Handbook, No.119, 3/1919: 19; *Poley* 2005: 12.

35 *Wallace* 2012: 215; *Aas/Sippel* 1997: 76; 90-4, payments were lost during the inflation.

36 *Roberts* 1986: 496. NARA RG 84, Lisbon, v. 168: 800, USML to SoS, 11.8.19; *Penha Garcia* 1918: 132; 134. When Germany put its conditions for peace in 1918, including the repartition of Africa, Portuguese politicians feared seriously for the integrity of the Empire.

37 *Blackmore* 2009: 1; on negotiations in 1919 about mandates cf. *MacMillan* 2003: 98f.

the Portuguese indeed claimed the south of GEA. They demanded to be given a mandate too over German colonies if Belgium would receive a mandate. In the end, Belgium secured Burundi and Rwanda (as mandate) and Portugal merely received the small Kionga triangle which rounded of Mozambique south of the Rovuma River (as sovereign possession). Both nations were not present during the debates on the allocation of mandates.[38]

The fact that German troops had entered Mozambique and continued to loot its northern provinces for months without being repulsed by its troops was just as humiliating for Portugal as the need for Allied support to drive out the invaders in 1918. Some argued that the South African troops under Smuts deliberately aimed at "forc[ing] Lettow-Vorbeck into Portuguese East Africa, which would enable the South Africans to capture that colony." The poor Portuguese military performance as well as the appalling conditions of Africans witnessed by British officers during their sojourn in Mozambique gave rise to demands to place Portugal's colonies under the mandate system of the League of Nations just as the German colonies. Britain's Foreign Secretary Balfour argued for such a solution in 1919 and demanded an inquiry into the Portuguese administration of Mozambique. Given the reports that called for an end of Portugal's rule characterized as "corrupt, inefficient, and cruel", the colonial "capacity" of the Portuguese was questioned. This echoed an older "Victorian concept of imperialism in that if Portugal was unable to fulfill its colonizing mission, then the 'white man's burden' should pass to those more capable."[39]

The Portuguese delegation fought hard against this notion widespread among Allied officials. Lecturing the Supreme Council about Portugal's "unforgettable services to Humanity and Civilization, especially in the African continent, which it has been watering with its blood since the 14th century", Costa keenly rejected doubts about Portugal's "colonizing ability".[40] Seeing the Portuguese position shaken by these accusations, he requested in April 1919 Bernhardo Botelho da Costa (1864–1948), a judge having served in Goa, Angola, and Cape Verde, to "verify the state of relations between the authorities of Mozambique and the native population" in light of the British reports. After one year of travels across Southern

38 *Samson* 2006: 5; *Stone* 1975: 732; cf. *Ferreira Mendes* 1940: 229; *Nowell* 1947: 14.
39 *Samson* 2006: 26; 2013: 214; *Almeida-T.* 2010: 98; *Cann* 2001: 146; cf. *Norton* 2001: 270.
40 Transl. in *Meneses* 2010: 120f.; cf. *Jerónimo* 2009; *Samson* 2006: 157; 163.

Africa and numerous interviews da Costa concluded that the reported "abuses …[were] of relative insignificance"; violence was due to the war. Pointing to inconsistencies in the British accusations, he affirmed that "our colonial administration, in terms of native policy, is on a par with our neighbors'".[41]

Apart from the British accusations, the Portuguese were faced with a second (sub-) imperialist "threat". While "hopes of securing a position of domination in South Africa" and aspirations for Angola and the Congo were held vigorously against the Germans in 1918,[42] Louis Botha and Jan Smuts were eager to "extend South Africa's influence on the [African] Continent". Since 1917 Smuts had attempted to organize a land swap with the Portuguese, leaving South Africa with southern Mozambique, including the harbors of Lourenço Marques and Beira, in exchange for the southern part of GEA. He continued in Paris to press for this plan, but it failed; just as Smuts' scheme to incorporate Southern Rhodesia into the Union of South Africa. Already during the war, the South African government desired to fulfill the "age old dream" of incorporating GSWA into the Union. However, this kind of annexation was prevented by President Wilson. The Treaty of Versailles merely trusted the Union with the administration of the "mandated" territory of SWA, overseen by the League of Nations. A great redistribution game of colonies, as envisioned by South African and French colonial enthusiasts with an eye on the Portuguese and Spanish "enclaves" in West Africa, was eagerly avoided by the Americans and the British.[43] From Paris, Afonso Costa warned of the "South African pretensions to Portuguese territory as 'a terrible danger'". On Costa's request Mozambique's Governor Álvaro de Castro and former Foreign Minister Freire de Andrade arrived in Paris to meet with Botha and Smuts in April 1919. Their response to the South African plans was an outright rejection of any incorporation and the promise to enhance development. Also subsequent schemes for land swaps were refused by all Portuguese governments.[44]

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41 *Newitt* 1981: 41; *Hespanha* 2010: 184-9; cf. *Great Br.* 1920; *MacMillan* 2003: 48;105.

42 TNA CO 532/109: 285 E. Gorges to L. Botha, 21.1.18; cf. *Nasson* 2014: 457; *Millin* 1937.

43 *Davenport* 1978: 189; *Samson* 2006: 7; 90; 139; 154; TNA CO 532/109: 16, GG Buxton to CO, 10.1.; 244, 31.1.18; *Andrew/Kanya-F.* 1978: 12; 1974: 80; 89; 98; cf. *Wallace* 2012: 216f.; *Botha* 2007: 18; *Berat* 1990: 4; *Hyam* 1972; *Koller* 2001: 190 on demilitarization.

44 *Meneses* 2010: 94f. ; *Samson* 2006: 160f.; 2013: 182; 219; *Pimenta* 2008: 104.

3.1.4 Arbitration before Reparations – § 4 of the Annex to Art. 297–298 TV

Among the victorious nations, the Treaty of Versailles derived its legitimacy also from the promised exercise of legal proceedings in order to bring to justice perpetrators and to establish exact amounts of reparation payments. Prime Minister Lloyd George (1863–1945) promised to "put the *Kaiser* on trial". Most famous is the vow by the First Lord of the Admiralty Eric Geddes (1875–1937) during the British elections in December 1918: "The Germans … are going to pay every penny; they are going to be squeezed as a lemon is squeezed – until the pips squeak". In June 1919, the Allied governments responded to a German rebuttal of the draft peace treaty: "Justice … is the only possible basis for the settlement of the accounts of this terrible war, [and] reparation for wrongs inflicted is of the essence of justice." The emotional debates about the definition of "reparations" to be paid by Germany to the Allies – the "thorniest issue of the immediate postwar period" – have been recurrently analyzed.[45] A mere sketch of the resulting Part VIII of the Peace Treaty will suffice here: Foreign Minister Rantzau's offer of February 1919 to pay 100 billion gold marks as German compensation for war damages (if Germany was to retain its territorial integrity of 1914) was turned down. Against the intentions of President Wilson, the British and French delegations fought hard for a broad definition of "reparations" in order to incur not only (private) damages to property but (as far as possible) the *entire* costs of war, including the pensions of soldiers, widows, and orphans – an obligation never before included in a peace treaty. In addition, Germany had to supply weaponry, coal, chemicals, hundreds of vessels, machinery, construction materials, agricultural implements, livestock etc. to enable the reconstruction of areas destroyed by the war. Placed at the beginning of Part VIII of the Peace Treaty, Article 231 (the so-called "war guilt" clause – that incidentally makes no mention of war guilt) was designed to stipulate Germany's overall legal obligation to pay reparations (in the future). But Article 232 in fact narrowed German responsibility to "compensation for all damage done to the [Allied] civilian population … and to their property

45 Quot. *Gomes* 2010: 14; *Hull* 2014: 10; *Cohrs* 2006: 60; cf. *MacMillan* 2003; *Stevens*on 2004: 420; *Ronde* 1950; *Scott* 1920: 160-9; *George* 1933; 1938.

during the period of belligerency".[46] Since Allied experts could not agree about Germany's ability to make such payments, *no* total amount of reparation obligations was laid down in the Treaty of Versailles. Instead, Article 233 set up a reparation commission to determine the amount of damage and to announce the total amount to the Germans latest on May 1, 1921; in the meantime, Germany had to pay 20 billion gold marks, in merchandise, ships, gold, or otherwise.[47]

In Germany a "curious mix of fury, hatred, disappointment and deep depression" dominated after signing the Treaty in June 1919. The legitimacy of the Treaty's obligations was never accepted. The "wonder" that Germany's unity was maintained and the "compromises" upon which the Treaty lasted were not recognized by most Germans.[48] There was a genuine feeling that the new order was unjust. The subsequent months saw German attempts fail to influence the Allies towards a more lenient policy. Germany's foreign policy stood at its lowest point (*Tiefpunkt*).[49]

The reparation provisions were heavily criticized in some circles, most notably by John M. Keynes (1883–1946), who served in Versailles as deputy of the British Chancellor of the Exchequer. In defense of these provisions David Lloyd George later referred to precedents of massive reparation payments by France in 1815 and 1871 and reminded his readers: "The liability to pay compensation for damage done by a wrong-doer, and the payment by the defeated suitor of the costs incurred in a vindication of justice are among the integral principles of law in every civilized community. States are not immune from the application of that elementary doctrine of jurisprudence."[50] French President Raymond Poincaré (1860–1934) argued in a similar vein: "It surely did not seem unnatural that Germany, who declared war on France and lost, should be obliged to pay her

46 Art. 231 'The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.' *Marks* 1978: 232; cf. *Hershey* 1921: 415; *Parker* 1926: 177f.; *Lamont* 1930: 336f.; *Kolb* 2007: 30; 189. Art. 231 became the focus of German protests against 'Versailles'. It was called a 'lie' and most Germans interpreted its rationale as a moral discreditation of Germany, cf. *Hiller* 1932: 50; *Myerson* 2004: 201; 207.

47 *Kolb* 2011: 64f.; *Marks* 1978: 231; *Ferguson* 1998: 406; *Krumeich/Hirschfeld* 2012: 242; *Cohrs* 2006: 58f.

48 *Kraus* 2013: 31f. 'Mischung aus Wut, Hass, Enttäuschung und tiefer Depression'.

49 *Kolb* 1988: 302; cf. *Feldman* 1997: 147 'peace terms … constituted an immobilizing shock'.

50 D.L. George: The Truth about the Peace Treaties, London 1938: 437, in: *Myerson* 2004: 196.

creditors at least as fully as France creditors expect to be paid, and that wanton damage done by Germany on French soil should be repaired by Germany rather than by France."[51]

The question what Allied nation would receive which proportions of the German reparations was eagerly contested between the Allies. And the dispute was exacerbated by its "distinct transatlantic dimension": The Americans demanded the repayment of inter-allied war-debts in full; causing Britain and France "to put screws on the German reparation 'debtor'." This is not the place to penetrate the "arcane mysteries of Reparations Commission prose". However, during the negotiations it became evident that "Minor Powers" (as official terminology put it) would receive only minuscule percentages: In 1920, Portugal was accorded 0.75 per cent of all German reparation payments, which in 1921 were fixed at 132 billion gold marks. Future agreements foresaw further reductions of the Portuguese fraction of the total amount of payments to 0.66 per cent.[52]

While the disappointment in Portugal about the reparation provisions was undisputable, it was clear at least to the politicians present at the negotiation table that the details of German payments were yet to be defined in *future* negotiations. In Lisbon, the government encountered stiff opposition to the ratification of the Treaty considered by many deputies as disrespectful to the sacrifices of Portugal. Afonso Costa himself did not hide his disappointment. During the negotiations he had "vehemently opposed the terms" sanctioned by French, British, and American jurists. But conceding the "open-ended nature" of the Treaty's reparation-sections, he urged ratification. He knew that "German reparations [were] an excruciatingly tangled thicket" and that there were additional provisions, in part hidden in Annexes to the Treaty, which foresaw further German payment obligations.[53]

Among those, the Treaty provided for a number of cases where arbitration procedures should be applied to determine the amounts of payments. Article 304 (in the Treaty's "longest and most complicated" Part X, "Economic Clauses") provided for Mixed Arbitral Tribunals (MAT) that had to investigate claims not by governments but by Allied *nationals* who had

51 *Poincaré* 1929: 528; cf. *Day* 1920: 303f.; *Boemeke/Feldman/Gl.* 1998: 4; *Gomes* 2010: 27.

52 *Cohrs* 2006: 68; *Marks* 1969: 356; Miller Memo, 21.11.18, *FRUS* 1919: 355; *Pfleiderer* 2002: 22; 306 on distribution keys of Spa Conference (1920) and Young Plan (1929); *Santos* 1978: 240.

53 *Meneses* 2010: IX; 90; 102; *Marks* 1978: 231.

suffered damages since the beginning of the war.[54] When the MATs began their work the lawyer Hermann Isay (1873–1938), Germany's leading experts on the Treaty, spoke of a "bitter reality that mendaciously and disruptively interferes with German economic life."[55] It seemed a matter of fact that these private claims should not be adjudicated before ordinary national courts as this would have run counter to the principle of international law that no sovereign state was to stand before foreign courts. Given more than one-hundred years of Anglo-American experience with interstate disputes being referred to arbitration, the solution to refer to arbitration also private claims against Germany growing out of the war seemed thus "self-evident".[56]

§ 4 of the Annex to Articles 297–298 (hereinafter § 4), which formed the legal basis of the claims laid against Germany by Portugal, did not refer to an MAT, but to a single arbitrator, appointed by the Swiss federal president and president of the ICRC, Gustave Ador (1845–1928). According to § 4, "[a]ll property, rights and interests of German nationals within the territory of any Allied… Power and the net proceeds of their sale,… may be charged by that Allied… Power… with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied… Power entered into the war." The arbitrator had to assess the "amount of such claims".[57]

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54 *Scott* 1920: 173; cf. *Isay* 1921; Art. 297 (e) 'The claims made in this respect by [Allied] nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Arbitral Tribunal …'; Art. 304 (a) 'Within three months from the date of the coming into force of the present Treaty, a Mixed Arbitral Tribunal shall be established between each of the Allied and Associated Powers on the one hand and Germany on the other hand. Each such Tribunal shall consist of three members. Each of the Governments concerned shall appoint one of these members. The President shall be chosen by agreement between the two Governments concerned.'

55 *Isay* 1923: iii; 421 considered the Franco-Ger., Anglo-Ger., and Belgian-Ger. MAT the most important; their case-law unfolded the greatest influence upon later tribunals.

56 *Isay* 1923: 147 'Im X. Teil des VV erscheint zum erstenmal ein in dieser Form und in diesem Umfang allen früheren Friedensverträgen unbekannter Gedanke: die Begründung von vermögensrechtlichen Ansprüchen einzelner Staatsangehöriger der Siegerstaaten gegen den unterlegenen Staat.' ref.to Art. 297 e, f; Art. 298, Annex § 4; Art. 300 e-f; p. 423; but *Kaufmann* 1923: 19, aus § 4 ergebe sich kein ‚Individualanspruch, sondern er ist lediglich dem Staat als solchem gegeben, dessen Neutralität durch Schädigung seiner Bürger verletzt worden ist.'; cf. *Sauser-Hall* 1924; *Göppert* 1931.

57 § 4 'All property, rights and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with

This sort of claims was included in the Treaty on request of the United States, since they "would cover any claims the United States might desire to make on account of the sinking of such vessels as *Lusitania* [May 7, 1917, when the US was still neutral]… or on account of other pre-war acts committed by the German authorities in violation of the rights of the American citizens."[58]

Given the complexity of the wording of § 4, mentioning three categories of claims, there was barely any question arising out of it that was not disputed. The "frequent obscurities" and "numerous lacunae" of the Treaty left much room for legal arguments – a few of which will be mentioned here: It started with the question who was entitled to claim under § 4. Traditionally, German jurists defined "international law as a *jus inter gentes* in the strictest sense; its subjects are the independent states only and never individuals".[59] However, Hermann Isay in his monumental work on "individual rights and interests under the Peace Treaty" argued that individuals were entitled to claim under § 4, as its enumeration commenced with "claims by [Allied] nationals".[60] On the other hand, German government lawyer reasoned that contrary to Article 297 (e), claims according to § 4 were *not* open to individuals of the Allied Powers. These claims were open only to the Governments themselves whose neutrality had been violated by an act committed to one of their nationals. In accordance with general principles of law, claimants under this article were on-

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regard to their property, rights and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the MAT provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied … Power with regard to their property, rights and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied.' Cf. *Scott* 1920: 176; list of MAT *Isay* 1923: 444; on liquidation *Gaurier* 2014: 715.

58 *Baruch* 1920: 104; cf. *Isay* 1923: 199; *Fuchs* 1927: 264; *Parker* 1926: 175; 178.

59 *Masters* 1930: 361 ref. to Hatscheck; on Art. 4 Weimar Constitution and int'l law *ibd*. 381f.

60 *Isay* 1923: 425 'Unklarheiten', 'Lücken'; 198 Es 'können die StA…Ansprüche auf Schadensersatz gegen [Dtl.] erheben'; 148f. He underlined that § 4, while making Germany the debtor of the Allied nationals, did not establish direct liability of Germany towards these nationals. Next to the wording of individual articles, this was justified by the systematic argument that the TV did not establish claims under private law, since it was concluded under international law.

ly entitled to damages which arose *directly* out of the alleged violation of (inter-)national law and were causally connected to it. Furthermore, only damage to property, rights and interests and *no* damage done to *individuals* could be claimed under § 4.[61] The basis of claims raised under § 4 was not particularly defined. However, the provision that the claims must grow out of "acts committed" by German authorities during a period between July 31, 1914 and before that Allied Power entered into the war, made it clear that these acts would have to bear the features of a delinquency[62] and must thus be acts violating an existing domestic or international norm.[63]

The mentioning of an arbitrator in the *Lusitania-clause* was one of the few negotiation successes of the German delegation in May 1919. After the Germans had received the treaty text on May 7 they were given fourteen days to respond. Most of the German proposals were rejected in the Allied response (*Mantelnote*) of June 16. However, the Allies agreed to organize a plebiscite on the future of Upper Silesia. And they conceded to the German request to have assessed by an arbitrator all Allied "neutrality claims"; thus giving up government control over the amounts to an independent lawyer.[64]

Provisions similar to § 4 were included in the Treaties of Saint-Germain-en-Laye, Trianon, and Berlin. Isay assumed that "probably only American claims will come into question." However, § 4 gave rise to hundreds of claims of individuals against Germany or Austria that were han-

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61 BAB R 1001/6637, Dt. Staatsvertreter Anglo-German MAT [Detmold] to RMW, 23.7.23; similar *Kaufmann* 1923: 19; *Isay* 1923: 198f. cf. *Schmid/Schmitz* 1929; *Fuchs* 1927: 261; the reading of § 4 by British officials differed. It was stated that the claims under this provision 'are dealt with in exactly the same manner as if they were claims under Article 297'. TNA CO 323/877/29, v. 27: 488, Notes on the procedure, Encl. III a; 492, Encl. III b (1921).

62 *Baruch* 1920: 296f.: 'it is in the quality of illegality alone which in law gives rise to a right of reparation. International law and the municipal jurisprudence of all civilized nations are in accord in this respect'; *Kaufmann* 1923: 19.

63 An arbitrator deciding a case of a British national against Germany discussed the meaning of 'acts committed'. He dismissed that it would included 'any measure of the German authorities which may have the character of an exceptional war measure.' Having no 'neutral meaning…the acts contemplated in § 4 are such as were considered by the framers of the Treaty as acts to be blamed, acts which were wrong, and which therefore imply a liability on the part of Germany. § 4 is not limited to such acts as constituted a distinct violation of a clear rule of international written law. There is no provision in § 4 which may warrant such limitation and it must be remembered that, precisely with regard to warfare, international law, even to-day, leaves a very wide field open to controversy.' TNA FO 328/1: 14, X/3, Chatterton vs. Germany, 8.11.23.

64 PA R 52528, AA to DG Bern, 10.12.20; *Isay* 1923: 63; *Fuchs* 1927: 265f.

dled by numerous arbitrators starting in 1922 and lasting at least until 1930. The claims were often dismissed (e.g. for not having proved that German authorities had "committed" acts before the outbreak of the war); payments awarded were rather small, amounting from £20 to £300.[65] The Luso-German arbitration was thus exceptional not only in that it was brought against Germany by the Portuguese Government on behalf of its nationals *and* for loss of *government* property and revenue, but also because it was by far the most expensive and most politically charged.

Given the "systematic defeat of Afonso Costa at the negotiating table" in Versailles, the Portuguese government tried to insert all governmental and private claims into the arbitration under § 4: The legal proceedings were expected to deliver the results that could not be secured diplomatically in 1919. In Berlin, the arbitration was meant to ensure that Germany would not have to pay damages in addition to what would be agreed in the negotiations subsequent to the Peace Treaty. This arbitration procedure was part of the question of German reparation payments and this brought about the continuous presence of the war after the Peace Treaty.[66]

3.2 Personnel Involved

It has been repeatedly remarked that there is no "sociology of international law".[67] Among those who deplore this gap in the research literature is Martti Koskenniemi, who calls for a "social history of international law" that could, among other things, "connect international law's development to the development of international law as a professional practice. Who have been the international lawyers? How have they been trained? What types of activity have they been engaged in? Have foreign offices followed their opinions?" The following sub-chapters aim at responding to these questions for the Luso-German arbitration, thereby situating the involved lawyers in their "real world [context] where agents make claims and counterclaims, advancing some agendas, opposing others."[68]

The legal discourses of the arbitration proceedings took place in a complex environment whose structural frame can be described as follows. (1)

65 *Isay* 1923: 199 also on Belgian claimants; TNA FO 328/1, Arbitrations under § 4, 1922-30.
66 *Meneses* 2010: 163; *Kolb* 2011: 94.
67 *Luhmann* 2008: 339 FN 94 no 'Soziologie des Völkerrechts'; cf. *Huber* 1910: 62.
68 *Koskenniemi* 2004: 65 on 'possibilities for a historical sociology of int'l law'; 2014: 123.

The "producers" of the discourses, the party representatives, were university trained lawyers, or more precisely high-ranking functionaries of different ministries, supported by colonial (military) officials who were more well versed in the factual situation on the ground. (2) The "addressees" of the discourse were the arbitrator(s), who had to be convinced of the accuracy and the plausibility of the party representative's statements. As the award would be published in the end, the (political) public also indirectly became an addressee (in rare cases, also the arbitrators became 'producers' when they issued ordinances to the parties). (3) The setting or *milieu* where these discourses were developed and finally presented to the arbitrator(s) consisted first of all of the ministerial and lawyer's offices. But the international social environment should also be taken into consideration: the long train journeys to Lausanne, Berlin, Paris, and Lisbon where the party representatives applied the finishing touches to their arguments; the grand hotels, legations, and court houses where they met their adversaries and the arbitrator(s); testimonies were also given in the colonial setting of SWA and Angola, which went into the discourses of both party representatives. (4) The tools used by them were the doctrinal techniques and contemporary modes of legal discourse as taught in law schools and refined by experience in court proceedings. The writings (legal memoranda) and pleadings during the arbitration procedure were not academic exercises, but statements compiled for one specific aim: to convince the arbitrator and win the case.

Both parties were aware of the fact that the future arbitration award would depend not only on the applicable norms, the witnesses and the evidence presented during the procedure, but most of all also on the arbitrator himself. Like any other individual, he held convictions, had a political standpoint, interests, preferences, and disinclinations; all of which could influence his assessment of the evidence presented and ultimately his arbitration award. These are basic assumptions of legal sociology and must be taken into consideration when studying how both parties evaluated their chances of success. Like any other party to a legal dispute, both parties had to ask for the conditions of a favorable award right from the start.

All persons involved in the case (with the exception of some witnesses) were accomplished, well-paid, polyglot gentlemen, wearing dark suits and working in elegant, wood-paneled bureaus. They belonged to the administrative (and in part the political) elite of Portugal and Germany. Many originated from the silk-gloved world of pre-1914 ministries and diplomacy. The arbitrator(s) and representatives were qualified jurists who knew

well their elevated rank in society. Over the next decade they were to meet each other throughout Europe not only for the Luso-German arbitration but also for numerous other conferences, arbitrations, and signing of conventions. They were part of "the highly mobile cosmopolitan European middle and upper classes of the late nineteenth and twentieth century, at home throughout Europe and meeting in its large hotels."[69] In addition to their intelligence, eloquence, experience, and legal wit, their self-confidence and the conviction that they were representing a just cause before an international audience were pivotal for the ultimate success. Not the least their self-assurance was based on the "sense among international lawyers that they were part of a cosmopolitan project that had a long pedigree".[70]

3.2.1 Who is to Decide? – Appointing an Arbitrator, 1920

In October 1918, Portugal's government appointed a commission to collect and examine information about the property, rights and interests of German nationals within Portugal and about Portuguese property, rights and interests in Germany.[71] Afonso Costa knew that his most important task would be to secure reasonable terms for Portugal and its nationals in order to receive compensation for the damage caused by Germany. Once the Peace Treaty was signed, he urged Foreign Minister Melo Barreto to initiate its ratification. Only "those who had ratified it would be able to pursue their interests", namely "pressing Portuguese claims for all kind of reparations" and would be able to ask for the appointment of an arbitrator according to § 4. However, still in January 1920, Costa had to remind the Minister that he could only initiate the arbitration procedure after the ratification. By February 1920, "Teixeira Gomes had met Gustave Ador, who had shown his willingness to name an arbitrator… – but this, of course,

69 E.g. the *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 13.4.30 (The Hague-Conference for the Progressive Codification of International Law) was signed by Göppert for Germany and by Caeiro da Mata, Barbosa de Magalhães, d'Avila Lima for Portugal, League of Nations, Treaty Series, v. 179: 89, No.4137; *Schmale* 2010: 20.

70 *Koskenniemi* 2004: 61; cf. *Galindo* 2012: 89; 97: 'Trying to argue the existence of a certain consciousness in international law of the past is different from saying international lawyers of the past were aware that they shared a certain consciousness.'; *Koskenniemi* 2001: 102.

71 NARA RG 84, Lisbon, v. 165: 860, Senator José E.C. de Almeida to USML, 23.11.18.

could only happen if the treaty was ratified." This happened finally on March 31, 1920.[72]

The Portuguese delegation in Paris was now in a position not only to press for a more favorable interpretation of Article 237 TV on the distribution of German reparation payments among the Allies. It could also initiate the arbitration procedure according to § 4. This was all the more pressing since it had become evident that compensation for the damages suffered by Portugal in Africa before March 1916 would not be discussed at the reparation commission's meeting in Spa (July 1920). There, the Allies agreed on the percentage of German reparation payments each of them would receive; the total amount to be paid, however, was still to be negotiated. At the same time, the Portuguese were faced with demands from Great Britain for repayments of the wartime loans to Portugal.[73] Payments from Germany were thus a matter of urgency for Lisbon. However, the appointment of an arbitrator became more complex than anticipated by the Portuguese party.

Unlike the MATs, which were composed of three-person-bodies (each party appointed one national who in turn had to agree on a [neutral] third arbitrator to head the MAT), § 4 provided for one "arbitrator" only. It did not stipulate his nationality or "neutrality". But the fact that the Swiss Federal President Gustave Ador was named to appoint the arbitrator indicates that the framers of this provision assumed that Ador would appoint either one of his nationals or a citizen of another neutral state; thereby avoiding the potential characterization of § 4 as a tool of "victor's justice". § 4 neither stipulated a particular place of trial nor limited who should determine the place. This was another major difference to the MATs.[74] As § 4 did not stipulate who should request Mr. Ador to appoint an arbitrator, the Portuguese lodged requests with several institutions to initiate the arbitration.

In April 1920 Portugal's Minister in Paris and Afonso Costa approached the French Foreign Minister Jules Cambon requesting him to take the matter of appointing an arbitrator to the Conference of Ambassadors, which was charged with overseeing the execution of the Peace Treaty. However, the Conference of Ambassadors, consisting of Cambon and representatives from the United States, Great Britain, Italy, and Japan,

72 *Meneses* 2010: 108; 110 (Costa to MNE, 22.10.19; 5.1.; 23.2.20).
73 Cf. *Meneses* 2010: 113; *Kraus* 2013: 41.
74 *Isay* 1923: 424; cf. *Strupp* 1923: 662; *Miller* 2011:19 illusion of neutral third; *Bass* 2000: 9.

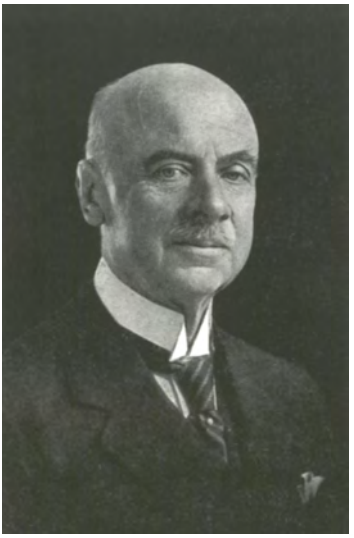
concluded in May "that it is for Portugal to inform Mr. Ador directly". The Portuguese delegation took this as an affront. Costa complained that the Conference "tells an Allied Nation… that it has nothing to do with the matter, and that she must look after herself". Was there an intention to reduce Portugal's rights? Were the Great Powers distancing themselves from the Portuguese claims? After Costa's protests, the Conference reconsidered the issue and passed a formal resolution that Portugal could "address Mr. Ador directly".[75]

In the meantime, the Portuguese minister in Bern had met with Ador in April 1920 who, after having asked details about the payment of the arbitrator, requested Aloïs de Meuron (1854–1934) to take over. § 4 did not stipulate anything about the qualifications of the "arbitrator", but it was apparently self-evident that only a man with legal training would be qualified for this task. De Meuron, a Protestant lawyer from Lausanne who was renowned for his pleas in important criminal cases, accepted. On August 15 he was formally nominated arbitrator of the Luso-German dispute.[76] The German Minister in Bern, Adolf Müller (1863–1943), informed his Foreign Office that de Meuron was a liberal-democratic member of the Swiss National Council (*Nationalrat*) since 1899. After further investigation he characterized de Meuron as one of the "most reputable lawyers of Lausanne, he is considered an able jurist and a respectable personality" with "considerable influence" over the *Gazette de Lausanne*, whose administrative council he presided. It was said that de Meuron had had German clients before the war; however "he had never made a secret of his anti-German disposition".[77]

75 TNA FO 893/4/2: 61, Notes of Meetg No.36,4.5.;542, No.45,26.5.20; *Meneses* 2010: 126.

76 de Meuron studied law (member of *Zofingia* fraternity) in Lausanne, Heidelberg, and Paris. He was admitted to the bar in 1879. From 1899 to 1928 he was member of the National Council and was member of several parliamentary and interparliamentary commissions. The Lt.-Colonel was member of the International Committee of the Red Cross, the Legal Commission of International Aviation, the Interparliamentary Union, and participated in several commissions set up by the Locarno Treaties. www.hls-dhs-dss.ch/textes/f/F4340.php.

77 PA R 52528, Ador to DG Bern, 15.9.20; DG to AA, 17.9.;8.10.20; cf. *Kaufmann* 1923: 18.



Ill. 32 Aloïs de Meuron

The practice of international law was excellently remunerated. In 1921 de Meuron received 10,000 Swiss Francs (around 115,115 Marks) "advance payment" from both parties. In 1924 de Meuron requested from them an "additional advance" of 10,000 Swiss Francs and another 10,000 Swiss Francs were paid to him in July 1928, before the arbitration award was published.[78] The German Finance Ministry repeatedly expressed its discomfort with these extraordinary amounts that were paid by the Foreign Office upon mere request and without any formal (contractual) basis.[79]

3.2.2 How to Decide? – the Competences of Arbitrator de Meuron

Already in spring 1915 the German Minister in Lisbon, Rosen, attempted "to come to some amicable settlement [with the Portuguese government]

78 PA Bern 1763, de Meuron to DG Bern, 7.7.28.

79 BAB R 1001/6638: 35-39, AA, 5.12; 27.11.24; 43, AA to RFM, 5.12.24. The RFM requested an 'accounting from de Meuron regarding the usage [of the money]...or hope[d] that the Portuguese demands will be turned back and that Portugal must return the advance. At any rate, the 10,000 Swiss francs can no longer be considered for a repayment from the *Reichsdiamanten* funds.' Cf. cpt 5.1.

about the African questions". However, in June he judged these attempts in a letter to the American Minister to be "impracticable" in light of the "manifested hostile intentions towards Germany".[80] Convinced that "justice" was not exclusively a result of the application of the law, Germany's government attempted also after the war to find a diplomatic solution with the Portuguese to avoid legal proceedings. But after the formal nomination of an arbitrator this proved unlikely. In October 1920, de Meuron asked the parties to nominate their representatives for the case and invited them to a meeting to discuss formal aspects of the arbitration.[81]

Within the German Foreign Office, a guessing game about the Portuguese intentions began, since it was not known what kind of damages the Portuguese government or individuals would claim. It also did not seem easily apparent for which claims mentioned in § 4 the arbitrator would have competence to decide. The Foreign Office informed the Ministries of Justice, Finance and Reconstruction (Colonial Department – the former Colonial Office) about the new case. It was assumed that the German Minister in Bern would suffice to represent the German interests for the time being.[82] The Foreign Office and the Ministry of Justice agreed that de Meuron could assess only the so-called neutrality damages. The German Minister Adolf Müller was accordingly instructed. He responded that de Meuron did not know yet either what kind of claims the Portuguese would raise and whom they would appoint as their legal representative. For the planned negotiation with the Portuguese and de Meuron Müller was eager to receive details about the rules of procedure from other arbitral tribunals (Müller, a social democrat, was a trained medical doctor[83]). Before the first meeting took place, the Foreign Office provided Müller with an additional instruction that he should insist that the arbitrator would have to decide not only on the amounts due for the claimed damages but that he would have to decide first and foremost on the *merits* of the Portuguese claims. Only if this had been established for each individual case, the arbitrator could assess the amount of damages Germany would have to

80 NARA RG 84, Lisbon, v. 152: 700, DGL Rosen to USML Birch, 22.6.15.

81 PA R 52528, de Meuron to DG Bern, 18.10.20.

82 PA R 52528, AA to Ministries of Justice, Finance, Reconstruction, 8.11.20.

83 *Doß* 1977: 258; *Pohl* 1995. This appointment of an 'outsider' was a rare exception in the history of German diplomacy and was possible only in the context of the German revolution and the reforms of the Foreign Service. The Legation in Bern was one of the first among German legations that integrated the Consulate General and the commercial reporting into its realm.

pay. The procedural rules of the MAT were considered inapposite for an arbitration under § 4. Rather, the German Foreign Office emphasized the necessity to allow each party to present their case in writing and to respond to the reasoning of the adversary. In line with domestic rules, oral proceedings could also be envisaged.[84]

On January 21, 1921 the Portuguese Minister to Switzerland, Bartolomeu Ferreira, the legal counselor at the German Legation Dr. Köhler and de Meuron met in Bern. Given the Swiss arbitrator, the Portuguese and German Legations in Bern would over the next years serve as the link between de Meuron and the Foreign Ministries that administered the arbitration for their respective governments. De Meuron and, according to the minutes, also Ferreira agreed to the German point of view that under § 4 only those cases could be decided by the arbitrator that occurred between July 31, 1914 and before Portugal entered into the war (March 9, 1916). Other cases would be discussed before the Luso-German MAT in Paris. While the Germans assumed that only a very limited set of cases could be brought before arbitrator de Meuron, Ferreira made clear that Lisbon aimed at bringing a considerable number of claims to the fore. The government had called on its citizens to report their individual claims and had documented them. Therefore, it was necessary to appoint experts to represent the Portuguese government. Contrary to the German intention of minimizing costs and efforts and to solving most of the claims diplomatically, Portugal insisted that the entirety of its claims would be presented to the arbitrator, who would then forward them to the German envoy in Bern for a response from the German government and finally decide on the entirety of the case.[85]

While the Portuguese reparation commission concluded its calculations of the § 4-claims from Germany, the Germans were still not aware of the nature and the cause of these claims. Germany's Minister in Lisbon (the legation reopened in July 1920),[86] Dr. Ernst Voretzsch (1868–1965), however hinted to the probable basis of the claims: the costs for the "Angola expedition" in 1914/15. Indeed, the *Imprensa de Lisboa* reported not only about the newly appointed Luso-German MAT (Art. 304 TV), but also mentioned the "German incursions in Naulila and Cuangar" and the Portuguese claims for damages in this respect, ("direct and indirect in goods

84 PA R 52528, AA to DG Bern, 10.12.20; 10.1.21; DG Bern to AA, 17.12.20
85 PA R 52528, Guex, minutes of meeting, 21.1.21; AA to DG Bern, 26.2.21.
86 AHD 3p ar 25 m 2, CdR to MNE, 26.4.21; PA Lissabon 176 (Vorkrfrdg.), DGL, 13.7.20.

or persons, for the state or for individuals") amounting to 1.9 billion Escudos ("at current exchange rate 11 billion Marks"). Voretzsch considered that after the disappointing outcome at Versailles, Bernardino Machado's government would aim at keeping the question of reparations in the foreground for two reasons: first, Machado's "Entente friendly policy" during the war would become plausible to public opinion if Germany pays large reparations; second, the money obtained from Germany could enable the government to postpone the unpopular but urgently needed tax reform.[87]

Even though they were unable to attend the first meeting in Bern, the Portuguese government in the meantime appointed two representatives: Dr. Barbosa de Magalhães, Professor of Law in Lisbon, and Captain Manuel da Costa Dias. Arbitrator de Meuron appointed a secretary for the arbitration: Dr. Robert Guex (1881–1948), Professor of Law, affiliated to the Federal Court in Lausanne (*Greffier*) and Secretary General of the Franco-German MAT.[88] The German Foreign Office, in 1921 headed by Friedrich Rosen, who knew the case well from his service in Lisbon, involved the Colonial Department of the Ministry of Reconstruction early on to procure evidence and prepare potential responses to Portuguese colonial claims. However, the German diplomats still hoped to solve the reparation issue diplomatically and to avoid arbitration as far as possible. The Portuguese government was asked by the German Minister in Lisbon to provide all their claims to Berlin first to discuss the matter and to refer to de Meuron only those cases that could not be solved diplomatically. Similar notes were sent to de Meuron. However, these attempts failed soon.[89] The parties could not even agree on the formal questions of German liability for indirect damages, the inclusion of "natives" (as Portuguese nationals) into the reparation provisions of Art. 231 TV, the definition of pension, or the categories of damages.[90]

De Meuron invited the parties to a second meeting in Lausanne on April 18, 1921 on procedural issues and to determine the delay within Portugal would have to provide him with its claims. Against Germany he decided that *all* claims would have to be presented to him, since Portugal could not be forced to provide its claims first to the German government, when it intended to refer them to an arbitrator under the Treaty of Ver-

87 PA R 52528, DGL to AA, 7./8.3.; 16.3.21; *Imprensa de Lisboa*, 7.3.21.
88 PA R 52528, DG Bern to AA, 17.1.21.
89 PA R 52528, AA to DGL; to RMW, 14.4.21; 22.4.21; DG Bern to AA, 15.4.21.
90 BAB R 3301/2284: 68, Tlgr AA to RMW, 15.3.21 on Portuguese response.

sailles.[91] In Lausanne, Portugal was represented by Professor Magalhães and Captain Dias, whereas Germany had still not appointed its expert representatives; so, again, councilor Dr. Köhler was in charge. In the meeting it was clarified that the Portuguese representatives acted legitimately on behalf of those Portuguese nationals (as their mandataries) who had suffered damages. It was not intended by the Portuguese government that individuals would turn to the arbitrator. A dispute ensued between the representatives whether the arbitrator would have to decide on all three categories of claims mentioned in § 4 (so the Portuguese argued) or only on the last category (neutrality-damages as argued by the Germans). Magalhães disputed that during the first meeting an agreement on this question had been reached. Further, the Germans challenged the Portuguese assumption that the arbitrator under § 4 would have to decide only on the *amounts* due for the claimed damages, but argued that he would have to decide first on the *merits* of the Portuguese claims (had there been an "act committed"?) before any amounts could be assessed. De Meuron therefore concluded that it was his task to determine this question and asked the parties to provide him with their written statements on the arbitrator's competence until May 31, 1921. De Meuron also set forth the proceeding of the arbitration (similar to those of the MATs): a first written part for which the Portuguese would have to provide their claims in a memorandum until October 1, 1921. He would then grant the Germans a similar period to prepare a counter-memorandum; followed by a Portuguese replique and a German duplique. After this, a second, oral part with testimonies and pleadings would be scheduled. The German representative was concerned that the delay for the German responses would be sufficient, since the procurement of evidence would be difficult whereas Portugal had already many years to prepare all claims. De Meuron asked the parties to provide all their memoranda and documents in three copies each in the French language. A set of rules of procedure would not be necessary for the written part of the arbitration. He pointed out that the parties were free to solve claims diplomatically without his involvement. The question of cost bearing would be decided by him later.[92]

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91 PA R 52528, de Meuron to DG Bern, 16.3.21; DG Bern to AA, 8.4.21; 23.4.21.

92 PA R 52528, Guex, minutes of meeting, 18.4.21; Ordonance de Meuron, 26.4.21. Though § 4 did not stipulate the language to be used during the procedure, given that de Meuron was a French native speaker, French was, as a matter of fact, the language of the arbitration. This limited the number of candidats for the position of national representative, as the oral pro-

The Portuguese and the German Minister provided the statements of their governments on the competences of the arbitrator in due time.[93] De Meuron concurred with the German point of view and decided on August 11, 1921 that he had to decide on the merits and the amounts of the claims and that his competence was limited to arbitrate on Portuguese claims for neutrality damages. He justified his decision with reference to the context of § 4 and its history. De Meuron, however, also emphasized that the Portuguese had stated in any case that they would claim only damages for German acts committed before Portugal entered into the war in March 1916.[94]

3.2.3 Instead of Prosecution and Defense – the National Representatives

The procedures of interstate arbitration bore semblances to domestic court cases in certain respects, but differed greatly in others. Most importantly, the arbitrator was confronted directly with both parties: there was no prosecutor bringing the case for Portugal, and the German government responded to all claims not by a defense counsel in the stricter sense of the word. Both parties instead appointed national representatives who presented their governments' cases to arbitrator de Meuron.

Knowing billions at stake, the Portuguese government was quick to engage one of its most brilliant lawyers to represent Portuguese interests in the arbitration: José Maria Vilhena Barbosa de Magalhães (1879–1959). In December 1914 the professor of law had been appointed to be a remarkably young Minister of Justice for the left-leaning Democrats. However, the cabinet under Vitor de Azevedo Coutinho (1871–1955), although embraced by Afonso Costa, was "dubbed [by the opposition] *les miser-*

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cedings required (almost) the eloquence of a native speaker. However, while in other proceedings the Germans deplored the difficulties that arose out of the fact that the MAT's language was determined by the claimant (mostly French or English), in the Luso-German arbitration no-one required the Germans to speak Portuguese. Cf. *Isay* 1923: 424; 428; 437.

93 PA R 52528, Magalhães, memorandum on § 4, 21.5.21; Müller, memorandum, 27.5.21.

94 PA R 52528, de Meuron to DG Bern, 11.8.21. This procedure to establish the arbitrator's competences differed from earlier arbitrations. Interstate arbitration had no generally accepted rules of procedure. It was common to detail such rules in the arbitration agreement (*compromis*) between both parties. The US-British Jay-Treaty of 1794, often used as an example, defined the task of the mixed commission to 'decide the claims in question according to the merits of the several cases, and to justice, equity and the law of nations.' *Isay* 1923: 417f; cf. *Lingens* 2011.

ables … and offered little hope of stability." Magalhães, who was described by Costa as "one of the republic's most dedicated servants and most distinguished jurists" stayed in office for merely four weeks. "In late 1914 parliamentary obstructionism became an obsessive art." Accidentally, his appointment came just a few days after the battle of Naulila.[95]

There was a long tradition in Portugal of "intimate links between the professoriate and the Portuguese political elite, something which gave rise to the term *catedratiocracia*"[96] "Given Portugal's small academic elite, to reach professorial status was to risk … being called to government." In 1917, the professor returned to politics as Minister of Education and Minister of the Interior in Afonso Costa's last government. Magalhães was an offshoot of the small Portuguese middle-class from where the republic recruited its cadres. The American Minister characterized this political class with little sympathy:

> "They have superb orators of the tragic, bombastic style capable of swaying and leading the mob; but as administrators they are not successful". He continued to characterize the Republican Party members: "They are positivists in philosophy, illuminati, and anti-clerical … They look to France for inspiration. For them the ideal is French republicanism. They have had no political training, especially, in matters of public administration and finance. Journalistic opposition has taught them practically all they know about politics. They have intrigued in the *Cortes*, written bitter seditious articles, and frequently gone to prison. The rest was theory."[97]

Being a confident of the republican strongman Afonso Costa, Magalhães was invited in 1919 to act as financial advisor to the Portuguese delegation at the Peace Conference in Paris. Here, he became acquainted with the legal technicalities of the reparation cases brought against Germany. Due to the constant postponement of the ratification of the Treaty of Versailles, he returned to Lisbon in March 1920 where he was tasked with representing Portugal in the Luso-German arbitration according to the Treaty.

In this, he was assisted by Captain Manuel da Costa Dias (1883–1930). The former Member of Parliament had more than two years of first hand experience in the conquest of southern Angola and was thus an excellent complement to the lawyer Magalhães. From 1910 to 1912, Dias was in the

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95 *Meneses* 2010: 44; *Wheeler* 1978: 107/9; Diário da Câmara dos Deputados, 22.12.14: 16; *Ilustração Portuguesa*, 2.ª série, n.º 461, 21.12.1914: 773 showing portraits of ministers.

96 *Gallagher* 1979: 397; under A. Salazar at times 'a quarter of his ministerial helpers [came] from one single university faculty, that of Law in Coimbra'; cf. *Lewis* 1978: 646.

97 *Meneses* 2009: 32; NARA RG 84, Lisbon, v. 157: 800 USML, 12.2.16; *Wheeler* 1978: 17.

staff of João de Almeida when the latter undertook to occupy the area between Kunene River and Kavango River. Subsequently, he published on the "colonization of the Planalto". In March 1915 he returned with General Pereira de Eça to Moçâmedes and was in charge of administrative questions. In August 1915, he belonged to the columns that crossed the Kunene River and was tasked with the re-occupation of the Cuamato area. Following the battle of Mongua, Dias joined de Eça in N'giva and returned to Lisbon in November. From 1917 to 1919 he was member of the Portuguese Expeditionary Corps in Flanders. Consequently, he was appointed Professor at the War College and became member of the Portuguese reparation commission. During Magalhães' term as foreign minister, he served as his chief of cabinet.[98]

The "almost frantic" ministerial turnover in Lisbon (45 governments in sixteen years) did not affect Magalhães' position as the "devoted representative of the interests of our country" (*Diário de Notiçias*) throughout the arbitration procedure. It proved to be an invaluable asset for the Portuguese administration that the arbitration procedure was run not by a ministry but by Magalhães as an "independent" lawyer. He stayed in charge of the Luso-German arbitration even while he served as Foreign Minister (Feb. 6 to Nov. 30, 1922). The average cabinet duration was four months, some lasted only for days.[99] The State President found it increasingly difficult to find politicians who accepted Premiership. "[O]ften there was a hiatus of at least several days or a week or two between the resignation of one ministry and the finding of a new premier. During the hiatus, effective governance was virtually impossible." Due to the permanent parliamentary crisis the "ministers were beginning to lack initiative and were proving incapable of handling the day-to-day business of their portfolios." Correspondence addressed to the colonial minister, for example, took at times seven years to be "acknowledged".[100]

This "administrative chaos" in Portugal during and after the World War hampered the efforts to obtain redress from Germany. Before parliament the former head of the Portuguese *Comissão executiva da conferencia da*

98 *Meneses* 2010: 112; 137; PA R 52528, DG Bern to AA, 17.1.21; cf. *Ramos* 2001: 415f.; *Dias* 1913; on Tenente-coronel Manuel da Costa Dias cf. http://epsservicos1gg.com/o-projeto/investigacao/personalidades/personalidades-do-sam.

99 *Tavares de Al./S.* 2006: 124; *Diário de Notiçias* 18.8.28; cf. *Madureira* 2010: 648; 651.

100 *Wheeler* 1978: 88, from 1910–20 there were 366 cabinet changes. The Foreign Ministry's head changed 41 times; the Ministry of Colonies changed 33 times, the Prime Minister 27 times. NARA RG 84, Lisbon, v. 172: 800.2, USML to SoS, 2.4.20; *Smith* 1974: 657.

paz in Paris, Vitorino Guimarães (1876–1957) estimated that all claims amounted to two billion Escudos, but complained about the difficulties to obtain the justifying documents. These were necessary to substantiate each claim. No proper institutions seemed to be in place to collect the data about war damages and related costs like pensions. In the resulting debate on these difficulties, Foreign Minister Domingos Pereira (1882–1956) promised to sufficiently prove to the reparation commission Portugal's demands. With respect to the reparations, Prime Minister Machado boasted that Portugal had "absolutely nothing to lose."[101]

When the Luso-German arbitration was initiated, Portugal's political situation was, as *The Times* put it, a "vicious water swirl round; political disintegration, financial chaos."[102] The situation in Germany was barely better. Intellectuals begun their "discursive assault upon the Weimar Republic", and in both republics, assassins targeted the highest state representatives. In Portugal, Prime Minister Antonio J. Granjo was shot in 1921 by "revolutionaries". In 1922, Germany's Foreign Minister Walther Rathenau was murdered by right wing extremists. From 1919 to 1923 Germany experienced ongoing right wing and left wing (military) attacks on the republican government in Berlin that put into question the very existence of the state.[103] During the war years and the revolution, the almost general perception of lawlessness, demoralization, "and a sense of inevitability" was aggravated by the breakdown of the administration. In "[public] offices, previously bulwarks of conscientiousness in the German lands, bribery had become a general practice."[104] This political context needs to be taken into consideration since it explains in part the despair by which the parties sought the payment of damages – or the avoidance of it.

The German Foreign Office, staying in charge of the arbitration procedure's administration throughout its duration,[105] was not immune from these ups and downs. Until 1922, the departments were regularly restructured according to a regional system plus departments for legal, personnel, and cultural affairs. The organizational reforms (1918–20) of Director Edmund Schüler (1873–1952) remained incomplete and resulted in few changes in personnel. Regardless of Foreign Minister Brockdorff-Rantzau

101 *Labourdette* 2000: 559f.; BAB R 1001/6634: 13, *Imprensa da Lisboa*, 12.3.
102 NARA RG 84, Lisbon, v. 179: 800, *The Times*, 30.12.21: 5790.
103 *McElligott* 2014: 1; cf. *Wehler* 2003: 397 on 'civil-war-like crises'; *Barth* 2003.
104 James B. 'Memoiren eines deutschen Juden und Sozialisten', quot. in *Fulbrook* 2011: 42.
105 Cf. *Doß* 1977: 217 FO stayed in charge of *all* foreign affairs; *Lauren* 1976.

Ill. 33 José Maria Vilhena Barbosa de Magalhães

Ill. 34 Manuel da Costa Dias

Ill. 35 Anton Meyer-Gerhard, 1915

Ill. 36 Edmund Brückner, 1912

claim that "new men will be necessary" after the war, most diplomats after 1918 had served under the Imperial administration. The aristocratic-conservative attitude dominated for years to come. A "sense of independence" from domestic affairs and parliamentarians remained strong. However –

despite an indisputable continuity –, the structure of the Foreign Office changed after 1919. The "two-class-system" of diplomatic and consular careers came to an end. Thus, for its foreign policy, the new republic had a "loyal and flexible instrument at hand" which understood how "to work efficiently".[106] In general, commercial and legal affairs obtained a more prominent role. New challenges posed by the League of Nations, international tribunals and international law resulted in new principles and practices of foreign policy.[107]

Legal affairs between states had been massively complicated in the course of the war and its aftermath due to the peace treaties in 1919. Most of all, the reparation questions and the details of payment schedules occasioned a new quality of international entanglement. The distinction between private and public international law was less clear than ever. The legal problems of the Treaty of Versailles were innumerous and German government lawyers were slow to appreciate the difficulties that arose out of the fact that the Treaty's terminology was based on concepts of French and English law. The first German attempts to win cases before the MATs proved "practically inadequate". The Treaty could "not be mastered with the eyes of a German lawyer". They were hindered in the preparation of their defense cases, as they did not fully comprehend certain individual provisions nor did they have available the protocols and materials from the Paris Peace Conference that would have made intelligible the rationale of complex provisions. In 1923 H. Isay was thus "happy" to diagnose that "in the meantime the academic familiarization with the questions created by the [Treaty] has begun." However, he still deemed the current stage of research (*Sonderuntersuchungen*) "insufficient".[108]

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106 *Doß* 1977: 147f.;152f.;166; continuity 188; 214; structure 222; 311; cf. *Conze et.al.* 2010: 31; *Jacobsen* 1968: 21f.; *Krüger* 1985: 13; *Hildebrand* 1995: 416; *Döscher* 1987: 21.

107 *Kraus* 2013: 87; *Döscher* 1987: 35; *Krüger* 1985:10; *Schöttler* 2012: 369; *Müller* 2014:75.

108 *Isay* 1923: iii; 425; cf. Strupp 1923: 665; *Jacob* 1930: 139; *Nörr* 1988: 102; *Basedow* 2001: 4f. In 1926 the Institute for Foreign and International Private Law was created for several reasons. One was the unenviable position in which German jurists found themselves under part X TV, which regulated economic relationships between Germany and its citizens vis-à-vis victor and associate states and their citizens. 'Since the German translation was not authentic, the solution to legal questions concerning contracts, debts, property rights, unfair competition, shipping, intellectual property, judgements, prescription, and social insurance had to be found in French and English legal concepts (such as *dette*, debt), interpretation methods, and legal institutions and traditions (for instance, *tribunal*, court).' *Clark* 2001: 42 ref. to E. Rabel and H. Isay; *Jacob* 1930: 146; 139: 'Ce n'est que depuis 1925 que les études du droit international se developpent avec plus de vigueur en Allemagne'.

As a result, the workload that was put on the national administrations and in particular on the Foreign Office's legal department grew immensely after 1918. Already in 1921, the German Foreign Office published a memorandum lauding itself for the measures undertaken in executing each of the articles of the Treaty. On Articles 297 and 298 alone, dealing with German property in former enemy territory, seven decrees were enacted. The Foreign Office followed a bifurcated approach: On the one hand, "[i]n Weimar Germany, revision of the Treaty of Versailles was the chief aim of foreign policy". The "guilt office" (*Schuldreferat*) under the future Foreign Secretary Bernhard W. von Bülow (1885–1936) was set-up to "build a legal case disproving Germany's 'war guilt'" (Article 231) and publish these arguments against the Treaty in Germany and abroad. An "innocence campaign especially targeted the United States and American historians." "It was remarkably successful". On the other hand, German officials were working on a daily basis with all provisions of the Treaty. Former Colonial Secretary Wilhelm Solf, who had become ambassador in Tokyo in 1920, expressed it most adamantly: "Whether or not the Versailles Treaty was good or bad, necessary or unnecessary, it is law. We have to deliberate and behave within the parameters of these laws, even if it causes us undue hardship".[109] From 1921 (the London Ultimatum) to 1923, the German government attempted a "policy of fulfilment", ordering its officials to execute the Treaty with the least possible 'damage' to Germany, thereby aiming to "expose the impossible and unjust nature of the [Treaty] terms". The German Foreign Office, previously a bulwark of sovereignty-centered reasoning about international law that opposed any 'infringement' of the nation's sovereignty, recognized the political necessity to offset Germany's military weakening by a greater degree of obligations under international law that would bind – to Germany's advantage – the victorious governments. In 1921, the Legal Department was renamed "Legal Affairs and Peace Treaty" (*Abteilung VIII*) to reflect the relevance of the legal provisions agreed at in Versailles. It was headed in 1919/20 by Dr. Ernst von Simson (1876–1941) who became Secretary of State and was replaced in 1920 by Dr. Otto Göppert (1872–1943), who had worked in Paris in the Peace Delegation. Göppert, who was later appointed "Commissioner for the MAT" (1923–31), and the deputy-head of the legal de-

109 PA Lissabon 176 (Friedensvertrag), Die Erfüllung des Vertrages von Versailles durch Deutschland bis zum 1.4.1921; *Hull* 2014; 8;11; Solf in *Hempenstall/Mochida* 2005: 199.

partment, Dr. Georg Martius (1884–1951), in charge of international law, would stay intimately connected to the Luso-German arbitration for years to come.[110]

Next to the legal department, the remainder of the German colonial administration – first as part of the Ministry of Reconstruction, than re-integrated as department into the Foreign Office – became involved in the Luso-German arbitration when it became evident that mostly the factual matters having taken place in Africa would dominate the dispute. The director of the Colonial Department (1920–1924) in the Ministry of Reconstruction, Dr. Anton Meyer-Gerhard (b. 1868) had been head of the subdivision for GSWA (*Referat A3*) in the old Imperial Colonial Office and was in charge also of all affairs relating to Angola and South Africa. He oversaw Dr. Julius Ruppel (1879–1949), who administered the drafting of the German memoranda as legal specialist and would become the German commissioner at the reparation commission in Paris. Also Meyer-Gerhard's successor, the head of the Foreign Office's Colonial Department, Dr. Edmund Brückner (1871–1935), had extensive colonial experience. In 1911–12, he was Togo's Governor. In 1927, Ruppel, himself a former colonial official (stationed in Cameroon) was appointed Germany's first representative in the Permanent Mandate Commission, but also previously he was intimately connected to all questions of Germans and their properties in the former colonies. It was left to an ex-military administrator from GSWA, Hugo Franz, from the Ministry of Reconstruction to collect all data and draft the legal memoranda. They all would, "from beginning to end, devote their inexhaustible energies to avoiding or reducing [Germany's] payments."[111] Germany's representatives during the arbitration and all those working towards its preparation were civil servants. No money was spent on outside legal consulting. It was one of the major differences to the Portuguese strategy that for many years of the arbitration changing representatives would be assigned *ad hoc* to take over the case for Germany.

110 *Kolb* 2007: 193; *McElligott* 2014: 43; cf. *Schifferdecker* 1931; *Kraus* 2013: 95; *Neitzert* 2012: 443f.; *Stevenson* 2004: 434; *Krüger* 1985: 15; *Doß* 1977: 225f.; 151, Göppert participated at the Hague Conf. (1907), the London Conference on the Laws of the Sea (1908/9) and was involved in reforming AA staff's training; cf. *Göppert* 1938.

111 *Marks* 1978: 255; cf. *Eberhardt* 2007: 134 on the Mandate Commission; 104; *Ruppel* 1912.

3.3 Portuguese Claims and German Responses. Four Memoranda

Arbitrator de Meuron gave the Portuguese representatives until October 1921 to provide him with their memorandum on all claims. Upon request, he granted an extension until December 1.[112] In the meantime, the German Foreign Office, concerned about yet another arbitration whose (perhaps catastrophic financial) result could not be predicted, still hoped to avoid the arbitration at all and tried to solve Portugal's claims diplomatically. Again, all attempts were in vain.[113] On December 1, 1921, de Meuron received three copies of the "Memorandum on the Portuguese reclamations by the representative of the Portuguese Republic". He provided one copy to the German Legation in Bern from where it was sent to the Foreign Office in Berlin.

The Portuguese documentation consisted of over one thousand pages. The memorandum itself had 106 pages and attached to it were 14 *dossiers* with around 400 claims, and justifying reports, maps and photographs. In July 1922 the German government, acting under extreme pressure to find witnesses and to receive all their reports and documents in time, responded to these claims with its own "Memorandum concerning the Portuguese reclamations" (101 p.; 29 Annexes of 226 p.); a Portuguese "replique" followed (190 p.) and in March 1923 a German "duplique" (135 p.).[114]

The following sub-chapters will not merely follow the trail of twists and turns of evidence and counter-evidence in relation to the Luso-German dispute but rather, by showing international law in the making, they will focus on a number of argumentative patterns that were asserted and reasserted by both parties. Thereby, different layers of historical contexts can be identified that shaped the way the parties presented their arguments, hoping to convince arbitrator de Meuron. However, due to space limitations, such a synthesis requires the historian to make choices and select a limited number of themes to be analyzed. While it might be a legal historian's ideal to understand "the applicable history and law … as fully as possible",[115] choices lead to omissions, inevitable as they are – for the

112 PA R 52528, DG Bern to AA, 7.9.21.

113 PA R 52528, AA, remark Frölich, 7.11.21. When the arbitration had already begun, former Foreign Minister Freire d'Andrade went to Berlin as special envoy to discuss the outstanding issues. Cf. NARA RG 84, Lisbon, v. 179: 710, USCG to USC Gen. London, 13.12.21.

114 BAB R 1001/6634: 17, AA to RMW, 03.01.22; R 1001/6635, État recapitulatif, 1922 .

115 *Berat* 1990: ix.

memoranda, the staggering number of annexes and testimonies add up to several thousand pages alone.

The subject of the arbitration procedure, German payments for (war) damages, was highly emotional and politicians had to justify the results in front of their constituencies. As historian David Felix has pointed out: "There are no innocents or villains in this story [of reparation negotiations and payments 1919–32]…. Both the Germans and the Allies were doing what had to be done." Germany, for its part, "saw no reason to pay and from start to finish deemed reparations a gratuitous insult." It seems reasonable to assume that while receiver countries hoped for more, "Germany tried to get out of reparations, but … this [is] neither very surprising nor very shocking."[116] This chapter thus puts different versions up against each other. The authors of the memoranda wrote on the subject of the damages, the "Naulila incident", the battle, and the "native rebellion" from the standpoint of claimants and defendants purely at the service of their nation's cause.

US Senator Hiram Johnson (1866–1945) is said to have argued in 1916: "The first casualty when war comes is truth." But despite claims to the opposite, legal procedures are not necessarily about "the truth", especially for the disputing parties, who may have reason to hide certain facts and exaggerate others. However, it is not the foremost aim here to assess the 'validity' of each side's claims, but to put them into historical perspective; thereby providing insights into the motives of each party to bring forward a certain argument, into their colonial past, as well as into the changing nature of international law.

3.3.1 Claims for Damages, Amounts, and Applicable Law

Portugal based its claims for damages against Germany on three different occurrences before Portugal "entered into the war": (1) attacks on Portuguese border posts in Angola and Mozambique; (2) requisitions by German authorities of property of Portuguese nationals in Belgium; (3) sinking of Portuguese vessels (among them the *Cysne*).

Dossiers 1 to 11 of the Portuguese memorandum of 1921 contained the claims of the Portuguese state, amounting to 3,073,773,090 GM. The

116 *Felix* 1971: 178; *Marks* 1978: 255; 1972: 361.

damages claimed were mainly caused by the "fighting and the native rebellions" in Angola (to a lesser extent in Mozambique). Even though § 4 spoke of the damages suffered by "nationals/*resortissants*", Lisbon was not shy to include into the calculation of damages military expenses, comprising the campaigns by Lt.-Colonel Roçadas and General de Eça, or the costs for the upkeep of the German prisoners of war (121,482 GM). Portugal also claimed payments for the loss of revenues, since 68,193 Africans were used as carriers (and could thus not work elsewhere) and for 86,219 Africans who starved to death or died due to other reasons during the "rebellion". The Portuguese calculated reparations of £ 1,000 for each of these 154,412 women and men according to no. 5 of annex 1 to Art. 244 TV. Magalhães emphasized that "indirect damages" were not included in these calculations. Nevertheless, material losses to the Portuguese state, such as non-payment of taxes were claimed. Equally, he demanded pension payments for surviving members of the family of those perished during the war.

Dossiers 12 to 14 amounting to 43,386,171 GM contained the claims of Portuguese nationals (about 400 claims) from the colonies deriving from material damages and lost profits, assumed to be fixed at 30% p.a. Pointing to the invasion of its territories, Portugal claimed, in addition, "2 billion gold mark for infringement of Portuguese sovereignty and international law". The damages claimed totaled thus according to German calculations at "around 3,125 billion GM" plus the 2 billion GM. Especially the latter claims seemed to be based on the expectation of direct payments from Germany, irrespective of the fact that the provisions of § 4 explicitly did *not* refer to such direct payments, but only mentioned the liquidation of German property. In § 4, "as in so many other aspects of reparations, appearance and reality diverged."[117]

Right on the memorandum's first page, Magalhães pointed to Art. 231 TV as having "established the responsibility of Germany … for all loss and damages of Allied Governments and their citizens as a consequence of the war." Thus, he took for granted that the Treaty had "recognized" the (legal) "responsibility to indemnify" and that it was only left to the arbitrator under § 4 to establish the amounts in question. Accordingly, and de-

117 BAB R 1001/6634: 41, excerpt Dossier 11, no. 27 Port. Mémoire justificatif, ~ 3/1922; *Isay* 1923: 198f. 'Ansprüche gehen ausdrücklich nicht auf Zahlung durch Deutschland, sondern nur auf Befriedigung aus dem Erlös der Liquidation des deutschen Vermögens'; *Marks* 1978: 232.

spite de Meuron's award of August 1921 that he would decide on the amounts *and* the merits of the claims, the cover page of the memorandum bore the title *Arbitral Commission nominated for the fixation of the amount [fixação de montante] of damages before the declaration of war*. As maintained by Magalhães, these claims for damages were based on international law *and*, pointing to "a lack of applicable international legislation", equity *and* by analogous application of certain Articles of the Treaty of Versailles. To give authority to this statement, Magalhães, in one of the few allusions to canonical texts of international law, referred to the treatises of A. Mérignac and Dionisio Anzilotti. Finally he demanded that Germany, having caused the damage, should bear all costs of evaluating the losses and of the arbitration.[118]

For contemporary politicians and lawyers there was no want of precedents for indemnity payments after war. Whereas the Hague Conventions of 1899 and 1907 (arts. 3; 47-56) stipulated only an obligation to compensate individuals who had suffered at the hands of invading armies, "punitive levies" had been imposed by Imperial Germany on France in 1871 (5 billion francs) and by Imperial Germany on Bolshevik Russia in 1918 (6 billion GM). As we have seen, at Versailles the questions of Germany's reparation liability became a "divisive issue". Portuguese politicians were among those who demanded full reparations from the Germans amounting to the restitution of *all* war costs.[119] "Sums as high as 800 billion gold marks were mentioned." But no explicit amount was stipulated in the Treaty of Versailles. While the Luso-German arbitration was in its early stages, in April 1921, the final amount of German "total indebtedness of 132 billion [GM]" (payable in annuities) was fixed; apparently the "lowest figure which was politically feasible" for French and British politicians. A sum, the German parliament accepted on May 10 after an Allied ultimatum. Over the next decade, several payment schedules regarding the annuities were arranged and broke down within short periods of time.[120]

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118 PA R 52529: 4;6;105, Magalhães: Mémoire justificatif des reclamations portugaises, 1921 (Mérignac: Traité de Droit Public Internationale: 527; Mérignac: Traité d'arbitrage: 294; Anzilotti: Corso di Diritto Internazionale: 110); BAB R 1001/6634: 17, AA to RMW, 03.01.22; R 1001/6635, État recapitulatif, 1922. Minor sums refered to acts committed by German authorities against Portuguese in occupied Belgium (~3.9 million GM) and at sea (~3.1 million GM).

119 Cf. *Kent* 1991: 17-40; *Gomes* 2010: 3; 7; *Barnich* 1923: 9; *Bergmann* 1927.

120 However, 'while maintaining the fiction of a higher figure [132 billion] for the sake of public opinion in receiver countries', most of the debt (82 billion) was deliberately 'consigned

Given Moniz's claims of 1919 and Costa's memoranda of May and June 1920 demanding even higher sums (8,641,159,994 GM), the 5.1 billion GM claimed in Magalhães' memorandum and the arguments to back them up did not come as a surprise. Also, the first German responses compiled by former colonial officials (Governor of GEA Schnee [1871–1949] and financial councilor Kastl [1878–1969] from GSWA, who had ordered Schultze-Jena to go to Erickson Drift), rejecting Costa's claims as "ridiculous" and "unjustified", had already been received in 1921 by the Ministry of Reconstruction and formed the basis of the German counter-memorandum.[121]

While Magalhães' memorandum with its hundreds of claims was being verified by German officials for its correctness (or legal flaws), news arrived from Lisbon that the former Minister of Trade and delegate to the Portuguese reparation commission in Paris, Velhinho Correia (1882–1943), had admitted that fraud was rampant among individual claimants. Claims amounting to fantastic sums were raised by colonial entrepreneurs who had allegedly lost business or the opportunity to do so and were thus asking damages from Germany. According to Correia, the Portuguese commission in most cases willingly accepted these claims without looking into the details of the fraudulent lists of damages. *Diario de Noticias* quoted numerous examples of such exaggerated colonial claims. The German press spoke of "reparation scandals" in Portugal.[122] The officials of the Ministry of Reconstruction in charge of drafting the German response to the Portuguese memorandum began to assemble examples for "excessive" claims that were raised by government entities or individuals. Councilor Franz pointed out that Germany "shall be held responsible even for damages that were due to third parties or own neglect." He assumed that these claims were based on the "conviction *le boche payera tout*." He recommended raising the awareness of the public for a number of those claims

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to never-never land' through the opaque formulations of the London Schedule of Payment (debts were divided into A, B, and C Bonds; C Bonds [82 bn] 'were only fiction' [Marks 1972: 362]). Marks wondered 'in what fashion [the Germans] celebrated…when they received the ultimatum of May 5.' Others have pointed out that also the remaining 50 billion gold marks were 'a terribly damaging problem in the German economy.' *Felix* 1971: 178/3; *Marks* 1972: 360; 1969: 357; 359; cf. *Hershey* 1921: 412; *Ferguson* 1998: 411f.; *MacMillan* 2003: 180; *Gomes* 2010: 70f.

121 BAB R 3301/2284: 13, Costa: Notes compl., Paris, 29.6.20 [£432,057,994]; 41; 46.

122 BAB R 3301/2284: 101f transl. *Diário de Notíçias*, 8.12.21; 100, *Der Tag*, 12.3.22.

he considered particularly "scandalous"; this might be advantageous "for the negotiations in Lausanne".[123]

Among those who had high expectation about future German reparations was also Norton de Matos, who had been appointed in the meantime as High Commissioner of Angola, being allegedly more independent than he was as Governor General (1912–1915). In September 1921 he sent his request for Angola's share in the German reparation deliveries to the Colonial Ministry. The "Caligula of Africa", as his critics called him, hoped most of all for the provision of railway materials: thousands of kilometers of rails, 70 locomotives and 1,000 wagons.[124] Such high demands for reparations in kind were disputed also within Portugal. It was said that officials in Lisbon's colonial ministry were "smiling" about "Mr. Norton de Matos' wish-list".[125] The *Journal de Comercio* considered the list as a "deliberate looting of Germany".[126]

Arbitrator de Meuron was also unsatisfied with the way the Portuguese government had assembled and listed the individual claims. He deplored that the amounts were not indicated "in francs and centimes for each of the claimants", that details for each claim were missing, and that he was not given a total amount. He thus requested from the Portuguese party to provide him with a general overview, "indicating for each claim the name of the claimant and the amount claimed. When he received the overview in March 1922, the Portuguese government had reduced its claims for damages to 2,859,089,911 GM (plus 2 billion GM).[127]

The German counter-memorandum of July 1922 stated that such "enormous amounts" based on claims from the colonies were completely "out of the question". The Germans tried to argue that Portugal's "fantastic" claim of around 5 billion GM was out of proportion for a nation of 5.96 million inhabitants: Belgium, the theatre of war for more than 4 years, claimed 11,5 billion GM, and Serbia, heavily impaired by the war, claimed 6,8 billion GM. In comparison to the damaged suffered by these nations, the damages in the Portuguese colonies before Portugal joined the war in Europe 1916 were characterized as "insignificant" (Kastl assessed

123 BAB R 3301/2284: 135f, RMW (Franz) to AA, 12.5.22; 147, remark Franz, 29.4.22.
124 NARA RG 84, Lisbon, v. 168: 800, USML to SoS, 11.8.19, transl. *Diário de Notíçias*, 7.7.19; *Leal* 1924.
125 PA–188 (Schiedsgericht Vol.I), DGL to AA, 29.9.21; on Norton *Livermore* 1967: 329.
126 PA–188 (Schiedsgericht Vol.I), DGL to AA, 13.12.21.
127 BAB R 3301/2284: 141, AA to RMW, 30.3.22; de Meuron to DG Bern 6.3.22.

the entire property damage [*Sachschaden*] in Angola due to the war at "under £1,000").[128]

The Germans also pointed out that the amount of 2,859,088,911 GM stipulated in the latest Portuguese calculation did not square with the sum of all dossiers of the Portuguese memorandum. Furthermore, the Portuguese claims were stipulated in the national currency Escudos and then converted into gold marks at different exchange rates between 1:4.44 and 1:4.57. However, as the German memorandum stated, one Escudo was no longer worth around 4.5 GM, an approximate value before the war.[129] Further, the gold mark was not a means of payment recognized in all countries but rather a means of calculation for the contracting parties of the Treaty of Versailles. It was meant to administer the *immediate* German payments of "reparations" to the Allies specifically foreseen in *this* treaty (Article 262) and could therefore not be applied to potential payment obligations resulting from "*international law* in general" as in § 4. It was, according to the Germans, common practice between states to regulate the payment of damages in the currency of the debtor state. Since there was no legal reason to deviate from this practice, the amounts due – to be established by the arbitrator – should be paid in Germany's currency, *en marcs papiers*. Considering the galloping inflation and the deplorable state of the German budget, this alternative seemed most attractive to the German councilors. However, the Portuguese replique rejected it emphatically: Magalhães argued that Germany profited from the inflation, and uttered the accusation, similar to other contemporaries, that German politicians had caused the inflation intentionally. Indeed, according to modern research, "it was impossible not to conclude that the German national economy had profited from the inflation and hyper-inflation by liquidating most of its internal and non-reparation foreign-debt." On the other hand, the "inflationary reconstruction" came to an "end in the fall of 1922, and 1923 was disastrous, the index of industrial production falling from 70 to 46 in 1923". It was thus no surprise that the German duplique of March

128 BAB R 1001/6635: 38f., Mémoire du Gouvernement Allemand concernant les réclamations portugaises, 7/1922 (p. 3); BAB R 3301/2284: 44, Kastl to Litter, n.d. [~2/1921] 'kann … noch nicht £1000 betragen'.

129 GM was an abstraction based on the US$, 7/14:1$=4M; 5/21: 1$=60M *Felix* 1971: 173.

1923 rejected the claim of German profiteering from the inflation with equal zeal.[130]

The demand of two billion gold marks for the alleged violation of international law was only dealt with in passing by the German memorandum since according to its reasoning there was no violation of international law – except for the German attack on the Portuguese post Maziua in Mozambique for which reparations had been offered in 1914. Thus, the Germans wondered why Germany should be held liable to pay for troops being sent to southern Angola in 1914–15 when the Portuguese argued with the necessity to protect Angola's border. "The right to protect one's borders goes along with the obligation to bear the costs for such undertaking." Contrary to the Portuguese who wanted the Germans to pay for all arbitration fees, the Germans suggested that the arbitrator should decide on the cost bearing.

Also in their reading of § 4 and its application the Germans were (still) completely at odds with Magalhães. The discussion of one year before was repeated on an advanced legal level. The Germans underlined that the objective of this regulation was to merely designate reclamations of German properties within the territory of any Allied power – or the net proceeds of their liquidation. As a special provision, § 4 provided for amounts that may be charged "with payments of claims growing out of acts committed by … any German authority since July 31, 1914, and before that Allied or Associated Power entered into the war." The arbitrator "may assess" the amounts of such claims. An indication as to whether or how the claims can be considered as valid was provided neither by § 4 nor by any other disposition of the Treaty of Versailles. A neutral state's rights to reparation payments from a warring state should thus be defined according to "the principles of international law". For the assessment of its damages, Portugal, as a neutral state, according to the German point of view, did not deserve to be put in a legal position more advantageous than any other neutral state.

The Portuguese statement that the rules of international law are insufficient with regard to the disputed claims and should therefore be complemented by the arbitrator according to the "principles of equity" and analogies was categorically refuted: During an international arbitration proce-

130 *Feldman* 1997: 838, 1913 = 98; 1928 = 100; cf. *Köppen* 2014: 368; *Balderston* 2002; *Feldman et.al.* 1982; BAB R 1001/6636: 15-84, Duplique du Gvt Allemand, 3/23 (p. 11f.)

dure only the rules of international law – customary and treaty law – could be applied, if not otherwise agreed in advance by both parties.[131] The German lawyers demanded the strict application of international law as they were convinced that according to its principles the Portuguese claims would prove to be mostly unjustified. They demanded that each act of the German authorities must be examined to be contrary to international law and that finally the contravening act must be causal for the claimed damage. In the dossiers the Portuguese had, according to the Germans, not adhered to these basic preconditions, e.g., the private claim for damages of a woman who fell into the hands of "the revolting natives" and was forced to become the chief's "mistress". An act not contrary to international law could not create a state's obligation to pay damages, except when international law specifically prescribes such payments. Even though Magalhães had stated that according to international law payments were due only for direct and not for indirect damages, he had not adhered to this principle, so the Germans argued. The "loss of business opportunity" or the refutation of "revolting natives" to pay taxes, for example, could – even if one assumes a causal relation between the "rebellion" and the frontier incidents in 1914 – barely be called direct damages. The Portuguese claimants, however, seemed to assume that the German participation in the war in itself qualified for the definition under § 4 of "acts committed by the German Government".

The German memorandum emphasized that § 4 regulates only the charging of German goods within Allied and Associated territory and enumerates the categories of claims in this regard. No regulation of the manner of payment had been included in this section. The arbitration award thus was to stipulate only the amount due for those claims and should not anticipate the execution of payments. The Germans also stressed that in the "system of the Treaty of Versailles" the German payments to the reparation commission have priority in order to pay for the debts caused by the Allied reparation claims. These reparation payments, however, would completely exhaust Germany's payment capacity.[132] In the Portuguese

131 However, in 1914, in the Luso-Dutch Arbitration Award (*Timor Case*), arbitrator C.E. Lardy considered facts also from 'the point of equity, which is important not to lose sight of in international relations', RIAA XI: 490-517 (508).

132 BAB R 1001/6635: 41; 44, Mémoire du Gouvernement Allemand, 7/1922. Besides the arbitration, Portugal participated in the reparation payments and deliveries as agreed in follow-up conferences. For example, in 1921 the Portuguese delegation in Paris requested the delivery of agricultural machines from Germany (PA Lissabon 188, DGL to AA; *Diário de*

replique and in the German duplique both parties insisted on their points of view.

3.3.2 "History" as a Legal Argument – a Portuguese Claim

The Portuguese *Whitebook* presented in February 1919 to Foreign Secretary Arthur Balfour did not shy away from making reference to the rhetoric of "Portugal's glorious (overseas) past" when it argued that with sufficient reparation payments from Germany, Portugal would be enabled to fulfill its "colonial mission". Egas Moniz' delegation pointed to the "beautiful republic of Brazil, the blossoming Portuguese colonies in the United States (California and Massachusetts), and the colonies São Thomé and Principé and Zambesi" to prove the "civilizational" achievements of Portugal around the world.[133]

When he included historical arguments in the legal dispute, Magalhães, in his memoranda of 1921 and 1923, chose a strategy different from this grand imperial narrative. As a member of the Portuguese delegation in Paris he must have become aware of the reputation of Portugal's colonies as "the worst administered territories in Africa."[134] He thus focused not on Portuguese, but on German history. When the arbitration case was in a way a continuation of the war by other means, then 'history' – not law – became its foremost weapon. This, however, meant that "the past" was seen through the necessities of "the present" in order to support an argument and win the case; similar to Portugal's previous arbitration cases in which historical claims played a paramount role. "[M]ethodological concerns" for dealing with the past could not be expected. In the inter-war era,

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Notíçias, 19.5.21). After the conference at Spa, Afonso Costa listed the 'economic gains' obtained and to be expected from the war: next to German Navy ships and the liquidations acc. to § 4 (in the future), '0.75% of half the amount paid by the Germans and another [0,]75% of what is paid by other enemies.' (quot. NARA RG 84, Lisbon, v. 175:800, USML to SoS, 16.4.21) However, all this 'fell far short of what Costa had announced previously he was willing to countenance as a minimum [first he claimed 8%, then 2,5%].' In the end, 'very little money ever materialized' (*Meneses* 2010: 136;140;143). The German Minister in Lisbon assumed that Portugal received in 1922 and 1923 reparations of ~ £500,000 p.a. (BAB R 3301/2284: 177, AA to RMW, 20.3.23); *Santos* 1978: 242f.

133 BAB R 1001/6634: 26, Port. Memo, 17.2.19: 296; cf. *Jerónimo* 2009; *Silva* 2007: 411.

134 *Smith* 1974: 658.

this was certainly a permissible strategy, since, "[f]rom the outset, [international law's] self-understanding was historically informed."[135]

When he put German history on trial, Magalhães used a two-part approach in this section of the memorandum. First, he laid out Germany's quest for world hegemony, and second, he explained in great detail sinister motives and German acts in preparation of the annexation of Angola from 1898 to 1918. The German councilors considered this strategy rather disturbing. In their counter-memorandum they explicitly pointed out that more than 40 pages (out of 106) of the memorandum were reserved for such "violent and injurious attacks" that had but one goal: to create an "unfavorable impression of Germany" (a claim, the Portuguese replique denied).

Detailing the alleged plans of German world hegemony before 1914, Magalhães started with a bold statement: the war did not come as a "surprise" to those who "had followed European politics since 1870" and who knew the "German aspirations" to rule the world. He backed up this argument with a plethora of names not only of politicians, but also of "poets, philosophers, and scientists" who had "nurtured in the Germans the belief in their own superiority (Goethe, Schiller, Humboldt, Giesebrecht, Chamberlain and many others)", and who had created "a cult of force… (Karl Marx, Wagner, Arndt, Hegel, Nietzsche etc.)". Magalhães' historico-philosophical commencement of his memorandum resonated with a discourse throughout Europe during the war. The Portuguese (academic) elite made use of it already at the beginning of the war in the above-mentioned "protest" written after the destruction of Reims. Teófilo Braga, a professor (in modern literature)-turned-politician, and his followers argued:

> "Germany is a typical example of moral madness, characterized by its megalomania and its criminal tendencies, aggravated by its irrepressible lack of scruples. Tacitus noted that the Germans attacked without reason. … And, as if the atavistic impulses that make Germany a permanent international threat are not enough, there are some philosophers who proclaim the immoral doctrine that success is the law: some of these scholars, through schooling, have promoted the selfish principle that the entire world should be subordinated to this nefarious empire; many of its politicians advocate the corrosive motto 'Might is Right', while many of its military writers hold the view, without the

135 Cf. *Jones* 1990: 79 who analyzed similar strategies of using the past in colonial Africa. On lawyers dealing with the past *Galindo* 2012: 101; *Koskenniemi* 2004: 61; cf. *RIAA* XI: 590.

> least foundation, that their reason for being i[s] the complete annihilation of enemy states."[136]

Also elsewhere the question was raised whether German idealism as the leading philosophical movement in Germany would consider "atrocities and rigor necessary in order to get on (*um vorwärts zu kommen*) or would be ethically justified". Professor of International Law Franz von Liszt (1851–1919), when faced with this question by the *Svenska Dagbladet*, resolutely responded that German idealism would not justify atrocities and rigor, "except in case of self-defense". Indeed, most Germans "were convinced they were waging a war of defense", as Foreign Minister Brockdorff-Rantzau in May 1919 tried in vain to explain to the Allied delegates assembled at Versailles.[137]

Philosophical and historical justifications of German aggressive warfare were looked for by European commentators most of all in the writings of historian Heinrich von Treitschke (1834–1896) and his disciples. Émile Hinzelin in his *1914, Histoire Illustrée de la Guerre du Droit*, written during the war, pointed to a long line of continuity from Treitschke's justifications of the war in 1870 or the aggressive attitude of Chancellor Bismarck to the current conflict. According to Hinzelin and many other French and British authors, Treitschke personified the German conviction that war would permit everything; he had established *a code de la barbarie mystique*. Magalhães could take up this line of thought about the origins of German aggressions when he, like others before him, underlined the relevance of General Friedrich von Bernhardi's *Deutschland und der Nächste Krieg* (1912) for the German public opinion and an alleged consensus among German military thinkers that "war as an act of violence" could have no limits.[138] In Magalhães' memoranda, but also later during testimonies, allusions were made to the aggressive tone that permeated speeches of the *Kaiser* or politicians and German literature. The Luso-German arbitration is yet another example that Bernhardi's "writings have played such an uncommon prominent role in the war guilt debate". Bernhardi's book

136 O protesto de Portugal contra os vandalismos alemães, entregue aos senhores ministros da Bélgica e da França em 4 de Outubro de 1914, Lisboa 1914, transl. www.cphrc.org/index.php/ documents/firstrepublic/463-1914-10-04-german-vandals [14.10.2014].

137 Liszt in *Fetscher* 2003: 242; Brockd. in *McElligott* 2014: 41; *Scott* 1920: 43; *Hull* 2014: 9f.

138 Quot. in *Fetscher* 2003: 246; cf. *Fischer* 1967: 31; *Gerhards* 2013: 140-69; 270.

> *Germany and the Next War* "became a best seller and a political disaster. … no other book ever did so much harm to the reputation of the German General Staff. The fact that it was written in a purely private capacity by an outsider not in the General Staff's good grace was completely ignored. It was cited on countless occasions as proof that the German General Staff was systematically fostering war, with the aim of making Germany the principal power in the world."[139]

Regarding Germany's quest for colonial hegemony since 1884, Magalhães tried to show how Portugal became a "victim" of the "late-comer". The "traditional fears among [Portugal's] educated groups" ("at times bordering on mania") were present in one way or another throughout his memoranda: loss of the African colonies and loss of Portugal's independence. According to Magalhães, Germany's colonial expansion was inextricably linked to aggression against Portuguese colonial possession. The history of GSWA served as an apposite example which Magalhães quoted directly from the bestseller *A expansão alemã – causas determinantes da guerra de 1914–1918* (1919) by General José Morais Sarmento (1843–1930). He concentrated his narration on Africa:[140] what had been a small harbor post (*Faktorei*) in Angra Pequeña (Lüderitzbucht) developed within two years into a huge colony that infringed upon Portuguese sovereignty north of Cape Frio, Angola's southern border until 1886. After the defeat of the Afrikaaner republics in 1902 the dream of a Germanic Southern Africa and aspirations for a link between GSWA and Transvaal vanished. However, an even greater scheme was soon ventured about: a link between GSWA and GEA by annexing Portuguese Angola and Belgian Congo. Smaller nations became the "preferred victims of an insatiable [German] hunger" for colonial expansion. Germany's disrespect for Portugal became evident in the Anglo-German conventions of 1898 and 1913 on the partition of Portugal's colonies (Magalhães was eager to state that Britain was "forced" into these treaties). This policy was accompanied by a German propaganda campaign amongst "the natives of Angola" against Portugal's sovereignty as well as by economic, scientific, and missionary penetration of this colony and by propaganda against the Portuguese colonial administration in European journals. Magalhães cited ample material from German publications demanding the execution of the Anglo-German convention of 1898 and declaring that Portugal, "a nation of mulattoes" and "a

139 *Ritter* 1970: 112; cf. *Hull* 2008: 370 on contemporary critics of German military ideology.
140 *Wheeler* 1978: 18; 177 on Sarmento.

decomposing state", had lost "her historical rights" to colonize. The announcements of Heinrich Ziegler's *Angola Bund* about Angola (the harbor of Tiger Bay in particular) as a "necessary compliment" to GSWA served equally as evidence of "Germany's appetite"[141] and its justification by a "might makes right" philosophy: "from exploration to annexation". The quintessence of all these announcement was, according to Magalhães, "force and nothing but force as *suprema ratio*". The Portuguese replique quoted extensively from João de Almeida's *Sul d'Angola* (1912) relating border infringements from GSWA. The explorations of southern Angola by the Study Commission led by Schubert and Vageler were in Magalhães's analysis nothing but military reconnaissance tours. Germany's economic and scientific undertakings in Angola in 1913 and 1914, most of all the railway schemes were meant to support the annexation. When neutral Belgium was invaded in August 1914, Portugal was thus forced to send troops to Angola and Mozambique to defend its neutrality and integrity. Consequently, Portugal was entitled to repayment of all costs for these expeditions, whose necessity was proven by the German incursions since August, before Portugal's troops arrived.

Overall, a "weakened Germany aimed to use history to discredit the legal underpinnings of the [T]reaty [of Versailles] by attacking the 'war guilt'." However, the German memorandum did not attribute great importance to history in general. In constructing a counter-narrative to Magalhães' historical argumentation, the German councilors focused their response mostly on "the facts" of what had happened in southern Angola in 1914. Here they went into great detail, whereas they intended to refute Germany's alleged plans for world hegemony before the war by merely pointing to the recent publications of diplomatic documents of the *Reich*. This, they argued, demonstrated Germany's willingness to transparently prove the "truth" about the underlying aims of its policies.[142]

The German lawyers called it an *idée absurde* to think that Germany, in the moment when she was faced with Europe's "most formidable" powers,

141 The story of Ziegler's *Angola Bund* had become widely reported in Allied newspapers across the globe, e.g. *Evening Post* (New Zealand), XCI/53, 3.3.1916: 7 'Portugal's Treaties'.

142 *Hull* 2014: 9; *Kraus* 2013: 95; *Schöllgen* 2010: 11. In 1920, the Main Archives of the Foreign Office were founded in order to organize and 'publish as soon as possible' the files of the FO from before the outbreak of the war. These publications, it was hoped, would show the 'truth' about Imperial Germany's foreign policy. In 'record time' almost 16.000 documents (1871–1914) were printed in 54 volumes until 1927; cf. *Stevenson* 2004: 434.

would have attacked Portugal's colonies, although GSWA and GEA were themselves threatened by a superior British army and although Germany had never prepared for war in the colonies. According to the counter-memorandum the true motive for the sending of Portuguese forces was not the concern of German troops attacking Angola and Mozambique; rather to the contrary, the Portuguese forces were sent to be able to launch an attack on the German colonies. The Germans, as we will see, put particular emphasis on their claim that Portugal was never, in fact, neutral and all decisions to send troops to the colonies were made in Lisbon already before the border incidents. As to the assertions of plans for an economic penetration of the Portuguese colonies by Germany, the counter-memorandum argued that those activities had been welcomed by and were agreed on beforehand with Portugal's authorities. Schubert's mission was received in Lisbon by Prime Minister Machado and was under the "special protection of the Portuguese government". Two high-ranking Portuguese officers had been part of the expedition, who ensured that nothing was done against Portuguese interests. Undertakings such as railway construction in the south to open up Angola's "most important and most fertile parts" were most of all in Portugal's interest. Moreover, considering these rather historical questions, the Germans asked how the alleged political aim of annexation could form the basis for a legal obligation to pay the expenses of Portuguese forces being sent to Angola and Mozambique at the beginning of the World War.

However, arguments grounded in the past have been "omnipresent in international lawyer's discourse, in the making of their doctrine or in their statements before international courts." After all, history for the Portuguese or the German party remained "a mere tool in order to prove an argument or the existence of a certain state of affairs."[143] The Portuguese party aimed at presenting the dispute with Germany as a major international question (as part of reparation payments) that had deep historical components. The sociologism still dominating Portuguese legal thought around 1920 put a premium on the understanding of the historical evolution of legal problems or concepts. Methodologically, such evolution was laid out – as legal historian António Hespanha has described it – in an "impressionistic and literary" manner with multiple references to extra-ju-

143 *Galindo* 2012: 87 quot. *Craven* 2007: 6 and Gordon 1996: 124.

ridical factors and not always bound by "the empire of the document".[144] Magalhães's memoranda are an apposite example of this broad understanding of legal reasoning that put the exegesis of precise norms not at the forefront of a lawyer's tasks.

3.3.3 Just War, Right of Self-Defense, Reprisals, and Anticipatory Attack

Political theory had developed over centuries a European "just war tradition" that required the fulfillment of several conditions for the legitimate resort to force: among them were just cause, right intention, proper authority and public declaration, last resort, probability of success, and, disputably, proportionality. These "traditional norms"[145] were, in one way or another, addressed in each of the memoranda. Both parties attempted to prove to arbitrator de Meuron that the "enemy" had launched in 1914 (or was about to launch) an aggression against the colonial borders; thus, self-defense was necessary and legitimate and gave a just cause to one's own resort to force.

The law of *bellum iustum* in a colonial context was usually referring to the legal titles justifying the conquest of "heathens" and their land. There was a "specific colonial international law". The Spanish naturalists had "provided highly convenient ideologies for the empire-builders of the sixteenth century"[146] And also later on, "[w]henever a chief decided to resist, the [Portuguese] intruders would find an excuse for declaring 'just war' against him".[147] When, however, European forces fought against each other in the colonies, the principles of the *droit public de l'Europe* were applicable. In the nineteenth century, with the fading of the 'just war' doctrine, this included the sovereign right to make war at will and to acquire title to territory by conquest. It was a heritage of the nineteenth-century that "the resort to force became unregulated and a sovereign right of States."[148] However, considering "international morality" resort to force

144 *Hespanha* 1981: 427f. but see his caveat at 434 'un profond respect…devant le droit positive.' Since 1914, Magalhães headed the Faculty of Social Sciences *and* Law at Lisbon University; on 'international legal method' *Kennedy* 1997: 131-4.

145 *Orend* 2000: 525f.; *Butler* 2003: 232.

146 *Grewe* 1982: 453 'besonderes KolonialvölkR'; *Schwarzenb.* 1962: 53; *Korman* 1996: 49.

147 *Viotti da Costa* 1985: 54 'The Portuguese could always find a theological justification'; 56.

148 *Gardam* 2004: 29; cf. *Becker Lorca* 2010: 495f.

needed to be justified and self-defense was probably the most legitimate reason of all.[149]

§ 4 spoke of "acts committed" by the German authorities as the legal basis of Germany's liability, and the Portuguese memorandum's foremost argumentative goal was thus to prove that such illegal acts had been committed when Germany resorted to force. The German motives were laid out in Magalhães historical exposé describing German acts that aimed at the annexation of Angola. Aggressions against Portugal's sovereignty gave it the right of self-defense. In the analysis of Magalhães, Portugal's defense measures were acts of resistance to the Germans. Self-respect, national pride, and love for independence formed the baseline of this argument.

The Germans, on the other hand, argued that the Portuguese had not made a public declaration of war (calling themselves "neutral") although the positive stance towards and active support of British war efforts was unmistakable. Thus, German motives to resort to force were dictated by military necessity to defend GSWA against an enemy approaching from the north. This was all the more legitimate as it fell under the definition of a lawful reprisal. A large part of all four memoranda and the attached reports of witnesses were thus concerned with the events leading to the death of three Germans in Naulila and the battle in December 1914.

The Portuguese memorandum and the replique claimed that the troops from Portugal that had landed in September and October 1914 in southern Angola were tasked with the protection of the border against German attacks *and* with subduing the unruly "natives". In response, the German councilors admitted that Portugal had an "undeniable right" to protect its borders and to prevent the "natives" to rebel; but they wondered – as said before – why Germany should bear the costs for this. Furthermore, it would not have been to the detriment of Portugal's *dignité* if Governor Seitz had been informed about the troop movement near GSWA's border and its claimed rationale; especially since Governor General Norton de Matos had shortly before agreed to abstain from a campaign against the Kwanjama on request of Governor Seitz. The latter had even offered to Portugal German assistance against King Mandume at a later point in time. The Portuguese replique justified Norton de Matos' silence in 1914 with the assertion that Germany had instigated "the natives" against Portu-

149 *Korman* 1996: 61 on 'international morality' and connections to 'civilization' discourses.

gal and he therefore did not want to inform the Germans of the countermeasures. The Germans called this an "unproven claim" and deemed Governor Seitz justified in his conclusion in October 1914 that the troops marching towards the border of GSWA were not targeting the Kwanyama. This conclusion, the Germans underlined, was also drawn by the Angolan press: the *Benguela Post* of October 1914 claimed the troops are destined to "assist England" and to "attack Damaraland [GSWA]". The Portuguese replique called this article the result of journalistic "fantasy" beyond the government's responsibility. The German duplique insisted with a view to the military situation in GSWA that the "indiscretion" of the *Benguela Post* was a realistic expression of convictions held in Angola. Since GSWA was under attack from an overwhelming British force coming from the south and the east and having the sea to the west, the only way to retreat was towards the north and, irrespective of its neutrality, "Portugal had to close the hole in the north." The Portuguese troops were thus not necessarily meant to "conquer" GSWA but to create a threat in the back of the German troops being in a precarious situation due to the British. This conclusion is supported, the Germans wrote, by the declaration of the state of emergency for southern Angola on September 12, 1914 that was targeting Germans and Afrikaaners with the prohibition of commercial transports but had barely any influence on the Kwanyama. Magalhães coolly justified this measure as a legal prerequisite for the requisition of food and means of transport for the recently arrived troops.

The Portuguese memorandum labeled Schultze-Jena's convoy as an "armed detachment … invading Portuguese territory", allegedly in search of a German deserter; resulting in "yet another violation of [Portugal's] sovereignty". The Germans had aimed at illegally transporting goods from Angola to GSWA and used the occasion for military reconnaissance. Quoting extensively from Roçada's report, Magalhães highlighted that in Fort Naulila Schultze-Jena had threatened the unarmed Sereno with his gun and therefore the latter acted legitimately in self-defense when he ordered his men to shoot. The German lawyers refuted the claims that Sereno was justified and that the German expedition to the Kunene constituted a violation of international law. They considered the incident and the battle of Naulila to be "cause and effect." The Portuguese critique that the German group at the border was too large and armed for not being understood as a threat, was countered with the argument that it was out of question to cross "tribal areas" for 300 kilometers alone and unarmed. Further, an official mission would require a certain apparatus to make its

importance apparent. The repeated claim, Schultze-Jena had crossed into Portuguese territory was rebutted by stating he had done so upon the explicit invitation of a Portuguese officer. The German camp at Erickson Drift was, according to German maps, on German territory. After Schultze-Jena's death, Governor Seitz had repeatedly tried to inform his counterpart in Luanda, about the incident in Naulila by sending messages to all surrounding wireless stations, without, however, receiving any response. According to the German memorandum, Seitz concluded that the Portuguese "astonishing" silence could be understood as an approval of Sereno's act and that there is a state of war between Portugal and Germany, of which he could not be informed since connections to Germany were cut off. The authorities in GSWA therefore were entitled by international law to seek justice on their own when they ordered the destruction of the Kavango fortresses and, shortly later, Fort Naulila.

Referring to Lassa Oppenheim (International Law, 3rd ed, Vol.II, p. 44) the counter-memorandum defined reprisals as acts, in themselves contrary to international law, committed by one state against another state which are exceptionally permitted since the state committing the reprisal is seeking satisfaction for a previous act by the other state that was itself contrary to international law. Reprisals may include military force, as the Germans stressed, naming three examples of international practice: the sending of a warship to Venezuela by the Dutch Government as reprisal for the expulsion of the Dutch Minister (1908); the British military occupation of customs offices in Nicaragua (1895); and the French seizure of Ottoman customs office in Mitilini (1901) following unlawful acts of the Ottoman authorities against French nationals. As reprisals require a previous act violating international law, the Germans emphasized that it is the key question whether the Portuguese shooting of the Germans was a lawful act or whether it was contrary to international law and would therefore legitimize the subsequent German reprisal. Since reprisals are permitted by international law, no damages could be claimed from Germany.[150] Already in the German declaration of war to Portugal on March 9, 1916, the German government characterized the "measures" undertaken following the Naulila incident as "retaliation".[151] The Germans also claimed that the Portuguese expected a reprisal after the incident in Naulila, as the Por-

150 BAB R 1001/6635: 64f., Memo Al., 7/22; cf. *Gaurier* 2014: 698; *Kalshoven* 2005: 4; 33.
151 NARA RG 84, Lisbon, v. 156:700, USML to SoS, 13.3.16; Congresso Sess. 9, 10.3.16: 51.

tuguese memorandum itself implied. It would have been therefore up to the Portuguese to approach Governor Seitz to rectify the situation diplomatically; even more so, since he had informed Norton de Matos via wireless message about the Naulila incident and the latter had received this message.

The Portuguese replique attempted to make clear that there was no legal basis for any "reprisals" since all prerequisites were missing: First, there was no prior violation of international law by the other state since Sereno did not breach international law but acted in self-defense. Second, there was no serious attempt to find an amicable solution. And third, asserting that Governor Seitz was not entitled to order a reprisal, there was no proper authority and no order for the reprisal by the state's government. And neither was the "massacre of Cuangar" a reprisal but vengeance for the Naulila incident. It was also not a surprise coup, since there was no previous declaration of war, but a treacherous raid.

However; there was no authoritative definition of "reprisal" under international law. The governmental conferences of 1874 (Brussels), 1899 and 1907 (The Hague) "refrained from … openly dealing with reprisals." Germany in particular had ensured that "reprisal was … not to be curbed by positive law." Rather, German jurists aimed at leaving the regulation of reprisals to "military usages". This "suggests how strongly Imperial Germany associated reprisal with punishment, rather than as a way to return a[n offending] state to following law." Given this state of affairs, the law professor T.J. Lawrence admitted in 1915 that reprisal "is used in a bewildering variety of senses". In fact, reprisals were an undeniable "reality" in state intercourse and they "constituted a recognized institution of international law". Thus, the parties in the 1920s were free to continue their debate on the characteristics of legitimate reprisals under international law.[152]

The German councilors insisted in their duplique that the battle of Naulila should be considered a lawful reprisal against previous Portuguese violations of international law. The order to resort to force was given by the Governor, the bearer of the public order in GSWA and representative of the Emperor. At the time he had no direct contact with his superiors in Berlin and was entitled to proceed with the reprisal according to interna-

152 *Kalshoven* 2005: 66f.; *Hull* 2014: 65; 276-8; 2010 357; T. Lawrence quot. in: *Darcy* 2015: 881; on the (disputed) relation b/w reprisal, punishment and revenge *ibd*: 882; *Tucker* 1972.

tional law. While Magalhães emphasized that the "massacre of Cuangar" was not causally linked to the Naulila-incident but was carefully planned before, the Germans argued that the measures taken against Cuangar and the other Kavango fortresses proved to be insufficient to obtain "satisfaction" from Portugal and to release Jensen and Kimmel from captivity. They refuted that on October 29, 1914 the order to attack fort Naulila was given together with the order to attack the Portuguese forts along the lower Okavango River, when it was not yet clear whether the Portuguese would release Kimmel and Jensen. The Germans argued that colonial geography makes it commonsensical that when Ostermann had received the order on October 29, it must have been given in Windhoek days earlier, since from the town of Grootfontein to Ostermann's station Kuring Kuru only a courier could convey the message. The preparations for Franke's expedition, however, took several weeks and could have been ceased immediately in case the actions against the Portuguese forts along the Okavango River would have led to the Portuguese reactions desired by the Germans. The German duplique stressed that Major Franke's action in Naulila was necessary since the Portuguese, in December 1914, were *still* in breach of international law (holding Kimmel and Jensen captive). The acts of German self-help along the Okavango River had proved to be insufficient.

The decision to send Franke's expedition was based, according to the German lawyers, on Governor Seitz' conviction – given the Portuguese conduct and news from Angola – that Portugal and Germany were at war. Seven 'facts' spoke for Seitz' conviction: (1) the incident in Naulila; (2) the subsequent silence of the Governor General of Angola (neither a complaint about an alleged violation of Portuguese territory nor an apology for the shootings); (3) the incursions of Portuguese patrols into German territory; (4) reports from Angola (by du Plessis, whom the Portuguese considered a German spy) that the Afrikaaners were ordered to either hand in their weapons or fight against the Germans; (5) the refusal to permit postal shipments from and to GSWA via Angola, eventhough this would have been permissible for a neutral state; (6) the arrival of troops from Portugal in Moçâmedes *before* the incident; (7) these troops were currently marching towards GSWA. His colony was cut off from any connection to Europe, and Seitz believed – as he stated in his attached report – that he just could not be informed about the war with Portugal from Berlin. The German councilors thus implied – and attached German reports stated this openly – that the Portuguese had caused the German governor's error and

did nothing to rectify the wrong impression about the alleged state of war. The silence of the administration in Luanda seemed to support Seitz' wrong impression. The consequences of this silence (the forceful "reprisals"), should therefore not give the Portuguese government a *pretexte* for reparation claims.

The Portuguese replique stated that there were no wireless stations in place in Angola and that the government in Lisbon would have to deal with the difficult situations and not the administration in Luanda. Pointing to the wireless equipment aboard the ships anchoring in Luanda's harbor, the Germans responded that had there been good will on the Portuguese side, the Naulila incident could have quickly solved amicably between the two colonial governments.

Given the possibility of contact between Luanda and Windhoek, the German memorandum argued that Seitz did not resort easily to war. Once the decision to dispatch a regiment to Naulila was reached, it took Franke's soldiers seven weeks to reach the Kunene, and negotiations could have been opened by Portuguese anytime. Thus, the sending of troops did not amount to aggression *per se* but was still a mere *threat* and the Portuguese were free to choose how to react – to ask for an apology or to fight. On the other hand, the German memorandum argued, in light of the eminent threat of a Luso-British pincer movement from South and North, the Governor of GSWA had to take swift preventive military action to ward of incursions quickly before all would have been lost. The German memorandum urged the arbitrator to take into consideration the wartime situation and the overwhelming nature of the British attack. GSWA had to be defended.

What the Germans tried to describe here – as a sort of subsidiary argument – can be referred to, in modern vernacular, as anticipatory attack – an attack thus irrespective of prior wrongs (as requirement for lawful reprisal) or the state of war (that would make superfluous the need to justify the resort to force). For centuries, questions of "prevention" and "preemption" have been discussed by just war theorists with inconclusive results; according to current international law, an anticipatory attack must be aimed at an imminent danger; it must be a threat which is concrete, not merely abstract. Three elements have been outlined that justify an anticipatory attack: First, there must be "a manifest intent to injure" (for example by recent threats). Second, "a degree of active preparation that makes the intent a positive danger" must be apparent (for example build-up of offensive forces along the border). Third, the situation must be one "in

which waiting, or doing anything other than fighting, greatly magnifies the risk [of being attacked]."[153] According to these criteria, the attack on Naulila may well have qualified for the justifying adjective "anticipatory", if the assumptions of Seitz and Heydebreck were taken into consideration. Recent historiography also states the "*strafexpedition* [against Naulila] represents a good example of active defense on the part of the Germans."[154]

3.3.4 Proportionality and Necessity of Military Reprisals

When mentioning the term "reprisal" the German memorandum included a conception of what must be considered a "lawful" reprisal, which they themselves referred to as "proportionality". When discussing the battle of Naulila, the Germans rhetorically asked whether the alleged violation of international law committed by Sereno had been compensated or "repaired" by the subsequent German destructions of the Portuguese Kavango forts. The German memorandum postulated: "For that party which takes reprisals, doing nothing other than responding to an act contrary to international law by another act, it is evident that the harm caused by the latter act must be proportional to the harm caused by the former." The Germans even stated: one could think that the death of three German officers in Naulila and the loss of equipment may be "compensated by the death of nine Portuguese, eleven natives" and the destruction of the forts. This sounded like an echo of Lt.-Colonel Roçadas, who was said to have stated his surprise about the German attack on Naulila, since he believed that after the destruction of the Kavango forts both sides had "offset" their losses. However, the German memorandum argued that this was not the case: The Portuguese had acted in "bad faith", dishonored the inviolability of an envoy on official mission and illegally captured Jensen and Kimmel. By doing so, the Portuguese had violated the "national honor of Germany" and therefore the actions of Constable Ostermann could not be considered a "sufficient" reprisal. His platoon was too small to obtain the required "satisfaction" and the prisoners taken in Naulila were not released by the Portuguese. The Governor of GSWA had thus to resort to stronger mea-

153 *Orend* 2000: 539 cf. *Hull* 2014: 318; *Walzer* 1991: 74; *Reichberg* 2007: 5; 32; *Rodin* 2002; *Mitchell* 2001: 157; *Gazzini* 2005: 149.

154 *Cann* 2001: 162; cf. *Kelly* 2003: 22; on 'guerre conditionelle'cf. *Séfériadès* 1935: 163.

sures and the actions of Major Franke were a continuation of the German reprisal that begun in Fort Cuangar in the legitimate attempt to end the violation of international law by Portugal.[155]

When speaking about "proportionality", German councilors used a term that formed one of the tenets of contemporary German (administrative) law, with a pedigree, however, that reached back to the origins of any notions of justice. Proportionality, as Aharon Barak explains, "is an embodiment of the notion of justice and can therefore be found in the image of Lady Justice holding scales." The requirement that punishment be proportional to the offense is an ancient one:

> "'an eye for an eye' was considered a measured response. In the Jewish religious sources we find the Golden Rule which says: 'That which is hateful to you, do not do to your fellow'. … The classical Greek notions of corrective justice (*iustitia vindicativa*) and distributive justice (*iustitia distributiva*) have also contributed to the development of proportionality as a rational concept. Early Roman law recognized the notion as well. …During the Middle Ages, the international law doctrine of 'Just War' made use of the term [proportionality]. According to the doctrine, there was a need to balance the overall utility of the war with the damage it may inflict."[156]

Also in contemporary international law the principle of proportionality had found its expression, even though it was never undisputed. The *Caroline Case* (1842), dealing with a military border incident between the US and British Canada, led to correspondence between American and British representatives that established formulations of necessity and proportionality still representing the "position under the United Nations Charter system". The American Secretary of State Daniel Webster (1782–1852) elaborated on the necessity of self-defense by requiring the British government to show a "necessity of self-defense, instant, overwhelming, leaving no

155 BAB R 1001/6635: 69, Memo Allem., 7/22 'le mal causé par le second de ces actes doit être proportionné au mal causé par le premier.'; cf. *Hull* 2014: 278; 288 'The Great War was disfigured by wave after wave of violent reprisals exercised with lethal stubbornness, particularly against prisoners of war.'; German officials already then debated about the 'use and proportion' of reprisals. The Germans explicitely resorted to measures of reprisals not only by acts of war. The Government-Gazette of 1915 published an addendum to the Prize-Order of 1909 and justified this as 'reprisal against England's' acts contrary to the London Declaration on the Laws of the Sea (26.2.1909): 'In Vergeltung der von England … abweichend von der Londoner Erklärung über das Seekriegsrecht vom 16.2. 1909 getroffenen Bestimmungen' wurde Grubenholz (Nr. 20 VO) zur 'absoluten Konterbande' erklärt (PA R 52535, Ax RGBl 1915, Nr. 49, VO betr. Abänderung der PrisenO 30.9.09).

156 *Barak* 2012: 175; 177; cf. *Nolte* 2010: 245; *Gardam* 2004: 32-8; *Butler* 2003: 232.

choice of means, and no moment for deliberation." Webster continued by stipulating the requirements of proportionality: "It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment … did nothing unreasonable or excessive; since the act justified by that necessity of self-defense, must be limited by that necessity, and kept clearly within it."[157] However, as Judith Gardam stresses, with the wording found in the *Caroline* correspondence "the idea that the use of force must be both necessary and proportionate was by no means from then on established in the practice of states." Up to the First World War there were "no developed customary rules that limited the situations in which states could resort to force." Lassa Oppenheim, for example, whose *International Law* was quoted in the German memorandum for a definition of "reprisal", "deals with the necessity aspect of the *Caroline Incident* but does not mention proportionality."[158]

The concept of reprisals as a European legal institution developed to address denials of justice abroad. By the nineteenth century it was the case that "all reprisals are public reprisals taken by the State itself and any international wrong done to the State or its nationals is a just cause for reprisals." Doctrinal aspects developed over time to define legitimate reprisals, including the requirement "that the reprisal taker had previously attempted to obtain redress from the wrongdoer."[159] Thus, "one of the requirements of legitimate reprisals was that they be necessary in light of the failure of other methods to achieve satisfaction. Whether or not legitimate reprisals also had to be proportionate was a matter on which views differed." In the second half of the nineteenth century reprisals as state practice of a coercive nature "were of considerable significance", as the three cases referred to in the German memorandum show.[160]

It has been stated that historians of public international law should give "more regard … to internal divisions in the discipline, the way particular concepts or doctrines reflect national, cultural or political differences."[161] The contrasting treatment of the issue of proportionality in the competing Portuguese and German memoranda may give an example of such divisions in the discipline. The German lawyers did not adhere to the notion

157 Quot. *Gardam* 2004: 41; cf. *Somek* 2014: 110; *Vranes* 2009: 9; *Reichberg* 2007: 32 FN 88.
158 *Gardam* 2004: 42f. ref. *Oppenheim* 1906: 177-81; cf. *Kalshoven* 2005: 67; *Kelly* 2003: 25.
159 *Carter/Trimble/Bradley* 2003: 971 quoting H. Waldock 1952.
160 *Gardam* 2004: 31;46; cf. *Carnahan* 1998: 228; *Hull* 2014: 67-72; 2010: 353f. on necessity.
161 *Kosekenniemi* 2004: 65.

that military actions would have to accept any kind of quantifiable limits (number of attacks, number of deaths or damages) in order to be permissible. In their understanding, "the state" was free to defend its sovereignty and honor, most of all during a war, be it formally declared or not. The Germans, when explicitly invoking the principle of proportionality and arguing that it was upheld during the attacks on Cuangar and Naulila, assumed two tenets to be self-explanatory: First, the context of the World War (the conceived threat of a Luso-British pincer movement) warranted acts of war (a sovereign state right) as an urgent necessity after attempts to contact the Governor General were turned down by the latter. "[M]ilitary necessity is sometimes characterized as the source of the requirement that warfare be proportionate."[162] And second, a punitive element of the attack was a legitimate part of the reprisal. The punitive, retaliatory aspect was highlighted repeatedly by Germans during the war. Even the German Minister in Lisbon, Dr. Rosen, spoke in 1915 of a "punitive expedition [that was] sent [to Naulila] to chastise the aggressors". The settlers in GSWA and the *Schutztruppe* used harsher terms and demanded "revenge" for the "murder of Naulila"[163]

Revenge and punishment, however, are supposed to be severe to be effective, as they are meant to lead to an intended result (apology, reparations etc. – here, punishment was considered a means to an end). The destruction of the Kavango forts achieved nothing in this respect. For the German councilors, a proportionate reprisal thus did not mean "an eye for an eye"; their guiding principle was "'tit for tat' instead of 'tat for tat'." And similar to the contemporary debates about the "Belgian atrocities", "[t]here is every reason to believe that Imperial Germany thought its actions legal, permissible, or at least excusable". The Germans "were affronted by charges of lawlessness", feeling dishonored by "being judged criminally. Yet", as historian Isabel V. Hull has stated recently, "Germany's legal counterarguments, its justifications and rationales, were often strikingly narrow and technical; they were somehow sharply lawyerly

162 *Gardam* 2004: 7 'One of its earliest formulations is contained in Article 13 of the Lieber Code, drawn up in 1863 during the Americ. Civil War: "Military necessity … consists of the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war".'; cf. *Hull* 2014: 27; 276; *Neff* 2010: 64; *Carnahan* 1998: 215.

163 NARA RG 84, Lisbon, v. 152: 700, DGL to USML Birch, 22.6.15; *Suchier* 1918: 25; 63.

without partaking in the gravity or principled sweep characteristic of law."[164]

It was exactly this "unique" understanding of the relation between international law and military necessity that caused so much anger among the Allies during the war. The "most renowned international lawyer of the day, France's Louis Renault" defined in 1917 as one of the "goal[s] of the present war … the destruction of the German theory that necessity justifies the violation of all the laws of war." The councilors of the Berlin Foreign Office were well aware of this resentment to the "latitudinarian views [on military necessity] current in Germany", but they continued also after the war to use this "uniquely robust doctrine" in their legal argumentation.[165] It was to be seen whether they would convince arbitrator de Meuron or whether he considered the German reprisal excessive.

3.3.5 Violence, Non-Combatant Immunity, and War Crimes

"After the war came the reckoning." Considering the horrifying atrocities committed during the war and the demand to hold the perpetrators accountable, the question of postwar (punitive) justice was an international issue (during and) after the World War I. In Constantinople, a military tribunal was charged in December 1918 with investigating and prosecuting politicians and military leaders involved in the Armenian genocide. In the Treaty of Versailles, the German Government "recognize[d] the right of the Allied … Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war" (Article 228). In 1919 and 1920, Germans accused of such deeds were awaiting their trial in Britain, France, and Belgium. "Reflecting the hold of international law on definitions of 'atrociousness', the Allies were determined to charge the enemy legally for its transgressions."[166] However, the extradition of alleged German war criminals did not take place. While the Allies had originally intended to try 896 individuals, the German government convinced the Allies that the Supreme Court (*Reichsgericht*) in Leipzig

164 *Häußler/Trotha* 2012: 63 consider it characteristic for retaliations (*Vergeltungsmaßnahmen*) that they are stronger than the original attack; *Hull* 2014: 58; 331; cf. *Stephan* 1998.

165 *Hull* 2014: 329; 1f. quot. Renault 1917; ix; 25; on German debates *Toppe* 2007.

166 *Horne* 2014: 582; cf. *Dadrian/Akçam* 2011; *Felman* 2002: 16; *Hull* 2014: 312f.; *Ziemann* 2013: 56; *Horne /Kramer* 2001; *Kramer* 2007; 1993; *Scott* 1920: 150.

would indict the men for war crimes. From 1921 to 1927 ten verdicts were published (four acquittals and six indictments), all other cases were dropped.[167]

This context stood in the background when both parties to the Luso-German arbitration related the fate of their soldiers in the African theater of war. In addition, the *situation coloniale* had a major imprint not only on the way battles were fought, but also in the way lawyers talked about military engagements in the colonies.

Death was a constant element of colonialism. It figured high among the *dramatis personæ* in the power games of European imperialists. The recognition of an intimate link between colonialism and violence has developed into a historiographic tenet over the last decades. A treatise on colonial questions could barely be imagined without mentioning the violence of settlers and soldiers.[168] Contemporaries were aware of this connection too. Some deplored it, others took it for granted and did not attempt to pussyfoot around. In Portugal and in Germany, as elsewhere in Europe, based on "white race superiority, the premise asserting that the conquest and exploitation of African territories and people were totally legitimate was widely accepted." In the age of empire, "international lawyers shared a sense of the inevitability of the modernizing process".[169] However, after July 1914 brutalities committed by the European "enemy" in the colonies suddenly became a source of condemnation. Relations between the enemies were poisoned by reciprocal accusations of atrocities committed in Africa. In October 1914, the British started to interview Africans in Cameroon and to collect "reports" and "evidence", "all indicating that cruelty … has been shown to the native inhabitants by the Germans". Evidence was forwarded to London of the use of "expanding bullets" "which is contrary to the provisions of the Hague Convention."[170] In August 1914, when the cruelties committed by Germans in Belgium had begun to make headlines, Germans in Togo were accused of using dum-dum bullets and arming Africans they would not control. Germans responded with similar charges of barbaric acts committed by French troops. When France and Britain started to employ troops from Africa, India, and

167 PA Lissabon 176, Millerand to Lersner; Note, 3.2.20; At. Gen. to MoJ, 21.5.20; *Scott* 1920: 159: *Bass* 2000; *Hankel* 2003; *Wiggenhorn* 2005; *Gomes* 2010:33; *Kraus* 2013: 38.

168 *Pélissier* 1979: 9; cf. *Osterhammel* 2011: 531f; 697-701; *Simo* 2005: 110.

169 *Corrado* 2008: 66; *Koskenniemi* 2001: 109; cf. *Hull* 2005: 332.

170 TNA FO 371/1883: 459, General Dobell to CO, L. Harcourt, 28.10.14.

Indochina in Europe, both were condemned by German propaganda "for betraying the white race". Throughout the war, the conscription of the "colored mob" (*farbiges Gesindel*) remained in the focus of the German propaganda.[171] According to historian Marc Michel, of all the grievances the heaviest burden also for the future was the claim of having humiliated the "white" adversary by exposing "white" prisoners of war to the "brutalities and mockeries" of "black" guards.[172]

The Luso-German arbitration was about the payment of damages, not about war crimes and criminals. No soldiers faced the threat of being imprisoned for crimes he had committed in southern Angola. The legal procedure left no room for the analysis of individual suffering during and after the acts of war. Especially from the Portuguese side almost only high-ranking officials were invited to write reports to be attached to Magalhães' memoranda and to speak during the testimonies. Violence was seen here as having caused financial damages and as an infringement of national honor. "[Only i]n the wake of Nuremberg [1945/6], the law was challenged to address the causes and consequences of historical traumas."[173] But still, the former war enemies accused each other of war crimes.

Magalhães referred to German atrocities in Europe, thereby creating an argumentative link to the debate in Europe during the war about German disrespect for international law and barbarism and thus making more credible the brutalities in Africa. He accused the Germans of having indiscriminately shot civilians during the "massacre of Cuangar" (including a trader and his son). However, the legal concept that "there should be a distinction between civilians and combatants in armed conflict… was [still] of a very general nature". Before the World War "there was as yet no suggestion of any legal requirements to protect civilians from the impact of armed conflict, although contemporary commentators talked … of the ille-

171 *Klotz* 2005: 139; cf. *Koller* 2001; 2002; *Hull* 2014: 53; *Close* 1916 POW in GSWA.

172 *Michel* 2004: 927. Asked by a journalist about German intentions to 'force German *Kultur* upon the world' novelist Thomas Mann responded in late 1914 with a drawing of a 'Senegal negro guarding German POWs … gurgling "One should butcher them. They are barbarians".' This discourse of shame would be reiterated on a national scale in Germany, when Africans were among the French troops occupying the Rhineland in 1921 causing the campaign against the 'Black Horror on the Rhine' (*schwarze Schmach*). Th. Mann: An die Redaktion des *Svenska Dagbladet*, in *Fetscher* 2003: 241; cf. *Ciarlo* 2011: 317: *Kolb* 2011: 97; *Poley* 2005: 163f.

173 *Felman* 2002: 1; on the question of soldiers' testimony of war *Hewitson* 2010.

gitimacy of wanton and disproportionate warfare."[174] German ruthlessness was further underlined by claiming the use of dum-dum bullets during the raid and the killing of wounded soldiers point blank.[175] "Natives" were allegedly instigated by the Germans and supported them brutally against the Portuguese.

The German councilors expressed their regret about the 22 men killed in Cuangar, but rejected the Portuguese characterization of a "massacre". They insisted that the Portuguese soldiers were not treacherously murdered but died in open combat. Portuguese soldiers were shot dead, as the German memorandum insisted, with their guns in hand. "Surprise" constitutes a legitimate element of military attacks. The heavy Portuguese losses were, according to the Germans, due to the "incoherence of the Portuguese defense". The Portuguese soldiers were allegedly not prepared to defend the fort, but instead of surrendering to the German attackers, they attempted on an individual basis to take up their arms.

Further, the German memoranda provided a *tu quoque* response – a rather weak response to an accusation, since it can never refute the accusation. The German councilors tried to point out that the Portuguese had violated the laws of war in multiple ways. They sought to show first that the "murder" of the "envoy on official mission" Schultze-Jena and his party was a manifest violation of international law, and that during the battle of Naulila the German soldiers were, contrary to what had been maintained by Magalhães, far outnumbered by the Portuguese. The latter had equipped Africans with guns to be used against German attackers. The Portuguese accusations of German war crimes were countered by clarifying that indeed seven Africans were hanged after the battle since they had allegedly continued to shoot at the Germans after the Portuguese had surrendered. When they were caught, these men were not wearing any uniforms or other signs of their Portuguese affiliation. They were "men of neighboring tribes" equipped by the Portuguese with guns to enlarge their

174 *Gardam* 2004: 29; 53; cf. *Gallo* 2013: 259; *Cramer* 1991: 85f.; *Hull* 2005: 320.

175 Cpt. Trainer's letter to Roçadas of December 18, 1914 demanded to commence negotiations immediately and threatened that all Africans carrying weapons would be hanged; Europeans carrying dum-dum bullets would be shot (*Varão* 1934: 59f.). Portugal had *not* signed the Hague declaration of 1899 on the prohibition of dum-dum bullets, together with Great Britain and the United States. 'The Germans during the First World War repeatedly raised the accusation that the British Army was using Dumdum bullets … the accusation could never be proven.' *Gross* Art. ‚Dumdum Bullets' in *Hirschfeld et.al.* 2012: 481; cf. Hull 2014: 281; *Koller* 2001: 103; *Walter* 2014: 156.

firepower. The German councilors pointed out that this Portuguese strategy of involving civilians violated the laws of war as agreed to also by Portugal in the Hague, stipulating that militias would have to bear signs of their affiliation and would have to observe the laws of war. The German troops were, so the German councilors, entitled to punish the men who had violated international law. Magalhães, on the other hand, argued factually by asserting that all Africans hanged by the Germans after a court-martial were neither loin-cloth wearing warriors nor in breach of international law, but regular Mozambican soldiers in uniform who had faithfully fulfilled their duty when they shot at German soldiers from the trees.

Another German accusation against Portuguese troops in Naulila was the abuse of the white flag that the Germans understood as a sign of surrender; whereas the Portuguese continued to shoot at them. Later, during the testimonies in Lisbon, General Roçadas stated that he had not given the order to hoist a white flag, since he had no intention to surrender. He had given an order to retreat. Major Aragão, however, explained that the white flag hoisted (a handkerchief) concerned only the 90 men under Lieutenant Marques who had been surrounded by Germans.

Both parties argued that "the enemy" had not adhered to the military rules of de-escalation after the cessation of hostilities. The Germans claimed that Portuguese soldiers had continued to fire after the white flag was shown and auxiliary troops had shot after their officers had already capitulated. The Portuguese, in contrast, accused the Germans of having targeted medical services and to have beaten Portuguese soldiers after the storming of the fort. Brutalities of soldiers were justified by both parties with reference to the threat posed by the foe. In the heat of the battle the soldiers had done their duty by defending themselves and advancing against the enemy. They were depicted as victims of the other side – an argumentative strategy that grew into an outright "victim myth". The hierarchical command structure of the military excluded any personal responsibility.[176]

176 Cf. *Kühne/Ziemann* 2000: 27f. 'the victim myth transforms … aggression in defense'.

3.3.6 Portugal's Neutrality – a German Claim

International law stood as the "basis" of the Treaty of Versailles and of "each individual article". Considering the ongoing arbitration procedures initiated by the Treaty, the lawyer H. Isay reasoned in 1923 that it has become "obvious that international law is Germany's most powerful pillar and weapon in the battle for reconstruction. …Today, faith in Germany's continuity as a state… can be based only on the faith in the power of international law."[177] § 4 was thus first and foremost to be read in light of the doctrines of international law and this included the definition of the period of its own competence: "since July 31, 1914, and before that Allied or Associated Power entered into the war." The framers of § 4 did not use the term *neutralité*; nevertheless, this is what this section was all about: claims for damages during neutrality (*Neutralitätsschäden*). The Portuguese were thus eager to underline that they did not "enter into the war", but stayed neutral until Germany's declaration of war on March 9, 1916.

As we have seen, already in 1915 Foreign Minister "Soares [was aware of] the breaches of neutrality committed by Portugal in virtue of her alliance with Great Britain" and "His Majesty's Government fully recognised these facts". But in 1920, Afonso Costa during a financial conference in Brussels lashed out at the German delegates, accusing "Germany of having caused the country's deficits and expenses, which so burden its present situation, through its treacherous attacks against the Portuguese in Africa before any declaration of war."[178] The German memoranda, on the other hand, maintained that the Portuguese government was since 1914 constantly in breach of neutrality.

Before the outbreak of the World War, the term "neutrality" had already acquired a status in international law doctrine that few other terms would ever reach. Rights and duties of states declaring their "neutrality" during a war were codified in international treaties (1907 The Hague; 1909 London), the elaboration of which had developed into an important

177 *Isay* 1923: iii, VölkR als 'Grundlage…des VV als Ganze[m und] seiner Einzelbestimmungen'. The *German-American Mixed Claims Commission* agreed to base its decision on 'general principles of law recognized by civilized nations, and, subsidiarily, on Rules of Law common to the US and Germany established by either statutes or judicial decisions.' As in previous and later memoranda in interstate disputes (*Bothe* 1976: 292; 283), arguments based on comparative legal analysis of municipal legal systems were made by the Portuguese and German representatives.

178 AHD 3p ar.7m48, BML to MNE, 27.10.15; *Dia.de Notíç.*, 18.10.20 in *Meneses* 2010: 138.

field among academics of international law. During and after the war "neutrality" had become a key term in the (legal) disputes, since the war "begun with an international crime: Germany's violation of Belgian neutrality." The Allies, on the other hand, had occupied the German colonies.[179]

The neutrality of European overseas possession has been a disputed legal (and military) question that dates back at least to the seventeenth century. European powers repeatedly signed treaties that were supposed to ensure that wars in Europe did not spill over to the Americas, Asia, or Africa. However, European armies attacked each other outside the European theater of wars throughout the seventeenth and eighteenth century, the Dutch "occupation" of Angola in 1641 during the Thirty Years' War being an example. With the onset of the scramble of Africa, the members of the Berlin Congo Conference (1885) were aware of the risk of future (European) wars in Africa. However, they could not agree on a formally guaranteed neutrality of the Congo basin (that excluded GSWA). Especially France and Portugal were concerned about this limitation of state sovereignty (to wage war). The resulting Article 11 stipulated "that the territories … may be, with the common consent of this Power and of the other party or parties belligerent, placed for the duration of the war under the regime of neutrality and considered as belonging to a non-belligerent State". Thus, the powers were entitled but not obliged to jointly declare as "neutral" their territories in the Congo basin.[180]

At the beginning of the war, the authorities of Belgian Congo expressed their "desire … that Congo maintain its neutrality during the present conflict in Europe". However, the "French government denies absolutely to the Germans the advantage of the General Act of Berlin, 1885." In early August, French troops blockaded those parts of the Congo River that had been ceded in 1912 to German Cameroon and seized several German border posts. German troops tried to occupy French and Belgian territory in the upper Congo region.[181] The British government also decided that it was "not practical politics to treat any of the German possessions in Africa

179 *Hull* 2014: 16; cf. *Neff* 2000; *Delaunay* 2004: 858; *Poincaré* 1929: 529; *Gaurier* 2014: 855 on 'les limites des règles applicables à la neutralité et leurs lacunes'.

180 *Fisch* 1984: 99; cf. *Walter* 2014: 107; *Bührer* 2011: 359; Klöckner in: *Kolonialkriegerbund* 1924: 58; *Reeves* 1909: 115: 'The neutralization [of the Congo basin] was not compulsory or imposed upon the territories within the zone, but it was voluntary'.

181 NARA RG 84, Boma, v. 18, 718, USC Boma to SoS, 8.8.; 820, 14.8.; 16.9.14.

as neutral." In September 1914 the Germans requested the neutralization of African colonies, but considering the already ongoing campaigns the Allies turned down this suggestion. At this point in time the neutrality of Portugal was already questioned by the administration in Windhoek. As we have seen, the Portuguese government affirmed on August 7 in parliament that Portugal continues to observe its obligations from the alliance with Great Britain. A formal declaration of neutrality was never given and during the war the British acknowledged that "Portugal ha[d] invariably shown from the outbreak of hostilities complete devotion to her ancient ally."[182]

While the Portuguese memoranda maintained that Governor Seitz knew from wireless messages that Portugal was neutral, the German councilors, referring to the annexed report of the former head of Windhoek's wireless station, argued that there had been no contact with Berlin any longer since the destruction of the stations Daressalam in GEA (August 8) and Kamina in Togo (August 27). The Windhoek station was not designed to directly contact the station Nauen near Berlin. On August 9, 1914 Windhoek received via Kamina the message: "Until now we are not at war with Portugal." However, given the news about troop movement towards the border with GSWA and alleged incursions, this may have changed. It was one of the objectives of Schultze-Jena's mission to clarify Portugal's neutrality.

In the same vein, the German memorandum rejected Magalhães' characterization of Schultze-Jena as smuggler (*contrebandier*). Instead, the official had intended to ask for a Portuguese permission to purchase the goods from Angola. Irrespective of an alleged prohibition of exports from Angola (of which Schultze-Jena was not aware), the German councilors were eager to stress that such procurement in a neutral state would have been in line with the provision of the V. Hague-Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. Furthermore, the German memorandum continued, Article 32 of the Annex to the IV. Hague-Convention respecting the Laws and Customs of War on Land (1907), guarantees to the parlementaire inviolability. Al-

182 *Samson* 2006: 633f.; 2013: 30; AHD 3p ar.7 m 48, BML to MNE, 17.2.16; *Teixeira* 1998: 187-210 on Portugal's 'ambiguous' neutrality. Portugal's neutrality had also in previous situations favored GB. The support granted to the British in Mozambique during the South African War 1900-02 was not only pivotal against war efforts of the Afrikaaner. By permitting British troops to pass its territories, Lisbon aimed at strengthening the ties with London in order to obtain 'the guarantee of the integrity of Portugal's African empire.' *Pélissier* 2000: 575 quot. Costa, F.: Portugal e a Guerra Anglo-Boer, Lisbon 1998: 6.

though the two countries were not at war and Portugal was allegedly neutral in 1914, the rules concerning parlementaires would have to be applied analogously. The fact that Schultze-Jena, being on a special mission as representative of the Governor of GSWA, did not wave a white flag could not count against him being an envoy since he was entering Portuguese territory upon Sereno's invitation. Furthermore, the telegrams sent to and from the district officer of Humbe about negotiations with Schultze-Jena, as quoted in the Portuguese memorandum, indicated according to the German councilors that Schultze-Jena was considered an envoy. The Portuguese memorandum stipulated itself motives for the Germans coming to the Kunene River: negotiating with the head of district in Lubango, receiving news/telegrams about the war in Europe, and asking permission to purchase foodstuff. Those motives were, according to the German memorandum, in line with Articles 7 and 8 of the V. Hague-Convention: "A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army". Nor was there an obligation to prevent them to use telegraphs. Portugal, as a neutral state, was entitled to permit the food deliveries or the usage of telegraphs; and the question of such permission or refusal was to be negotiated between Schultze-Jena and a Portuguese official.

The German councilors followed a twofold, at times contradictory, approach, accusing Portugal of breach of the laws of neutrality and at the same time, explaining that Portugal had, in fact, never been neutral. While Magalhães was eager to reduce this discussion to its formal aspects, emphasizing Portugal's neutrality in 1914 (the formal basis of any claims under § 4) by pointing out that neither side had issued a declaration of war, the German memorandum presented the arbitrator with a rationalization of Portugal's motives for the decision not to enter into the war. Allegedly, the Portuguese merely waited for a favorable moment. In a report attached to the memorandum, one witness pointed out that neither after the destruction of Cuangar nor after the battle of Naulila, Portugal declared war on Germany. He therefore assumed that Portugal felt "guilty".[183] The true attitude of Portugal towards Germany, according to German perception, would become clear when reading the Portuguese *Whitebook* presented at Versailles in 1919, excerpts of which were attached to the German memo-

183 BAB R 1001/6634: 93, Report A. Schubert, Ax 1 Memo All., 23.5.22 'fühlt sich schuldig'.

randum. There, Portuguese Ministers were quoted as having repeatedly confirmed the alliance with Great Britain; even negotiations about the delivery of guns to France in September 1914 were mentioned as well as the permissions given to British ships to use Portuguese harbors or British troops to cross Portuguese (colonial) territories. Therefore, the German councilors assumed that a close reading of the *Whitebook* allows but for one conclusion: that Portugal had, from the beginning of the hostilities, aimed at supporting Great Britain and that Portugal was eager to immediately enter the war on the British side. The Portuguese neutrality should thus be considered a pretext to support Allied war efforts. This impression was allegedly confirmed by Egas Moniz' *Um ano de Politica*. He stated in his book that "Portugal had never been a neutral state. We had always been on the side of England and never declared our neutrality."[184] A translation of the relevant pages of this book was annexed to the German memorandum of 1922.

Given the Portuguese additional claim of 2 billion GM for Germany's infringement of international law and violation of Portuguese sovereignty the German duplique of 1923 left it to the arbiter to "examine" the Portuguese attitude towards Germany before the formal state of war was declared in 1916, an attitude that was in contradiction with the stated "neutrality". Only in consideration of this (adversarial) attitude the subsequent Germans measures, called an "infringement of sovereignty", could be understood.

This dispute underlines what Jan H. Verzijl later stated about the term "neutral": It "is in fact itself a neutral term in the sense that it lacks, even in the legal field, a well-defined meaning and has many connotations." From a political perspective the issue was considered less ambiguous – at least from a British perspective: a certain sense of gratitude for Portugal's handling of its neutrality was perceptible. Still in 1927, the British Foreign Office was well aware of the importance of Portugal's 'specific' neutrality to Britain: Had the Portuguese "been neutral in the sense that the Sweds were neutral" the situation in 1914 would have been "more dangerous and difficult" and this "might indeed have cost Britain the war."[185]

184 BAB R 1001/6634: 24, excerpt (German transl.) Moniz: Um ano de politica, 1919: 257f.
185 *Verzijl* 1979: 12; *Stone* 1975: 733.

3.3.7 Discourses of Honor and Dishonor

On March 9, 1916, after German ships anchoring in Portuguese ports were requisitioned (on British request), Germany declared war on Portugal. Next to the requisitions, several instances of "violations of neutrality" by Portugal were mentioned in the declaration of war: Passage of British troops across Mozambique were tolerated four times; while "British war ships were permitted to remain for a long period in Portuguese ports", German ships could not even load coal in Portuguese harbors; Portuguese weapons were delivered to the British, who could also "use Madeira as a naval station". "Besides this, expeditions were sent to Africa with the openly avowed purpose to fight against Germany."[186] Portugal's Foreign Minister Augusto Soares "emphatically repudiate[d] the accusation" that Portugal would be in breach of neutrality: "no one in this matter should suspect us of dissimulation or treachery, incompatible with our honor."[187]

Such rhetoric of "honor" permeated the argumentation also during the arbitration procedure. The notion of "honor" – even though its meaning was never spelled out – to be upheld and defended under any circumstances was considered a key motive for the fighting in Southern Angola.

Capitão mor Varão, for example, was of the opinion that *Alferes* Sereno had acted in Fort Naulila like an "energetic officer, virtuous and diligent", *et un homme d'honneur*.[188] Conversely, the "enemy" was accused of having acted dishonorably. Magalhães' narration of the German attack of Fort Cuangar emphasized German malintentions by recounting that allegedly the commanders of Cuangar and Kuring Kuru, after the outbreak of the war, concluded a gentlemen's agreement to inform each other in advance in case they would have to "fulfill their military duty", i.e. to attack their neighbor. Since Commander Durão had trust in Constable Ostermann, no security measures were undertaken. Ostermann, however, violated his word of honor, attacked the fort treacherously and massacred soldiers and

186 NARA RG 84, Lisbon, v. 156: 700, USML to SoS, 13.3.16 German declaration of war; AHD 3p ar.7 m 48, BML to MNE, 1.3.16; MNE to DGL, 3.3.16 So dependend were the Portuguese on the British that before the Germans declared war on Portugal the British Legation in Lisbon drafted for the Portuguese Foreign Ministry the justification for the seizure of ships, which the Portuguese translated and sent to the German Legation; *Wheeler* 1978: 128.

187 NARA RG 84, Lisbon, v. 156: 700, USML to SoS, 13.3.16; Congr., Sessão 9, 10.3.16: 53.

188 BAB R 1001/6641: 12, extra-file: 37f., statement Antonio F. Varão, 11.11.21; Ministry of War, register Sub-Lt. M.A. Sereno, 3.7.25.

civilians. The German councilors responded that – in case such agreement did exist – it would have lost its value for a German official learning about the murder of German officers in Naulila. Furthermore, an agreement between subalterns such as Ostermann and Durão would not create obligations between states.

Also other "scenes" of the border war put competing narratives of (dis)honorable behavior up against each other. The same occurrence could occasion two different grievances leading to many questions not only in the memoranda, but also during the testimonies. After the capture of Fort Naulila, Captain Trainer was outraged by the abusive (as he saw it) hoisting of the white flag ordered by Lieutenant Marques even though the shooting continued. When the latter surrendered with his men they were rounded-up by Germans and Marques was said have pleaded to Trainer: "It is not the fault of these men [that the others continue to fire], shoot me but not my men." Trainer did not understand Portuguese. He believed Marques insulted him and threw his field glasses (or hat) at him, thus violating the officer's honor in front of his subordinates. Over the years, several accounts of this incident were collected:[189] According to the account of Marques, this incident occurred after Trainer had asked him about the numbers and equipment of the Portuguese troops. When he responded that he had no obligation to answer, Trainer punched with his field glasses at Marques' chest.[190] Private Bertling, who witnessed the scene, described it four days later in his diary. He noted that Portuguese soldiers went to their knees and begged for their lives when they saw how Trainer had ordered to hang the first African. Then, a Portuguese officer, fell on his knees, his hat in his hands, begging Trainer for the lives of his men. "Trainer pushed him aside and threw his hat in [Marques'] face."[191] In 1929 the question whether Trainer treated his prisoners dishonorably was still ventured about, and Trainer tried to argue that it were the Portuguese themselves who acted shamefully: "There was no brutal attack, merely the shaking off troops bare of any discipline or honor."[192]

189 BAB R 1001/6638: 126f., questions Franke, 15.1.25; 262, testimony Aragão 6/24.

190 BAB R 1001/6638: 128, questions Trainer, 14.1.25; 173, testimony Marques 6/24.

191 NAN A.424, War Diary Bertling, 22.12.14.

192 BAB R 1001/6641: 224 (28), Mj Trainer: Zur portugiesischen Denkschrift, 9.2.29 'sondern lediglich das Abschütteln einer von jeder Disziplin und Ehre entblößten Truppe '. The treatment of POW was a sensitive issue after the war. During WWI, Germany had captured ~ 2.5 million soldiers and civilians, most of them were put to work in part under horrendous circumstances. Treatment and death rates of POWs and deportees was the issue of protract-

Next to the comportment of soldiers on the battlefield, another question loomed large throughout the arbitration: the nation's honor. In this sense, the German councilors were faced with the question whether the "violation of the individual honor of nationals by non-nationals … [was] a violation of national honor. Ultimately, the question [arose] how the medium of national honor should codify [*normieren*] individual conduct."[193] While the Portuguese depicted Sereno as *un homme d'honneur*, the Germans found that by dishonoring the inviolability of an envoy on official mission and illegally capturing two Germans, the Portuguese had violated the "national honor of Germany"[194]

It seemed a matter of course that not only individuals, but also "the State" possessed honor; its defense was considered legitimate, if necessary even by force. In one of Friedrich Schiller's most popular theater plays, arguments in this vein were uttered: "Base, indeed, the nation that for its honor ventures not its all."[195] Also historian Heinrich von Treitschke demanded the defense of the state's honor at all costs:

> "Any insult offered, even if only outwardly, to the honour of a State, casts doubt upon the nature of the State. We mistake the moral laws of politics if we reproach any State with having an over-sensitive sense of honour, for this instinct must be highly developed in each one of them if it is to be true to its own essence. The State is no violet, to bloom unseen; its power should stand proudly, for all the world to see, and it cannot allow even the symbol of it to be contested. If the flag is insulted, the state must claim reparation; should this not be forthcoming, war must follow, however small the occasion may seem; for the State has never any choice but to maintain the respect in which it is held among its fellows."[196]

It would be too far fetched to argue that the order of Governor Seitz to attack Cuangar and Naulila was 'predetermined' by this notion of the rela-

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ed disputes after the war and the German government issued lengthy reports about prisoners. Germany had captured 6,836 [or 7,740] Portuguese soldiers (mostly in France) of whom 163 deceased during captivity. The soldiers were repatriated in 1919. Cf. *Spoerer* 2006: 127f.; *Oeter* 1999; *Speed* 1990.

193 *Koller* 2003: 95, ob die 'Verletzung der individuellen Ehre von Nationsangehörigen durch Nichtnationsangehörige…die nationale Ehre verletzte. Letztlich geht es also auch um die Frage, wie das Medium der Nationalehre individuelles Verhalten normieren sollte.' Cf. *Best* 1981; *Kolb* 2011:71 on Foreign Minister Brockdorff-Rantzau: 'Ehre und Würde waren die Fixpunkte seines Weltbildes; an ihnen orientierte sich sein außenpolitisches Agieren.'

194 PA R 52535, Mémoire du Gouvernement Allemand concernant les réclamations portugais.

195 Earl Dunois: 'Nichtswürdig ist die Nation, die nicht alles freudig setzt an ihre Ehre.', in: Friedrich Schiller: The Maid of Orleans (I, 5), 1801; cf. *Kesper-B./Ludwig/Ortmann* 2011.

196 *Treitschke* 1916: 595, Cpt. 'International Law and International Intercourse', 'Sovereignty'.

tion between individual and national honor. There were other reasons for the attacks that were stressed by the German councilors. However, Treitschke' influence is undisputable and recent research underlines that the German military was locked into the dialectics of "honor" and "disgrace": "as defined by soldiers' honor, defenseless[ness] is similar to dishonorable[ness]".[197] And according to the sociologist Norbert Elias not only the German military but also parts of the *Bürgertum* had developed combative (*kriegerisch*) traditions that focused on foreign relations; a tradition expressed in conceptual symbols "like courage, obedience, honor, discipline, responsibility, and loyalty".[198] Furthermore, when the German councilors deemed it worth mentioning that the killing of Schultze-Jena and two other officers had violated the "national honor of Germany", they were aware that also previous disputes in public international law had been 'triggered' by the alleged violation of a (European) nation's honor, for example in Venezuela (1908) or Turkey (1901). Just as in municipal law, honor was thus a subject of legal relevance in foreign relations.

For both, Portugal and Germany, colonial possessions seemed a matter of national honor. Following the war, defeated Germany was considered by many in the Allied countries a "pariah" among the nations. As shown above, the assertion that Germans were "unfit to govern native races" and the taking over of all colonies by other powers was deemed by most Germans a grave offense against the nation's honor. After all, the possession of colonies had been declared by German politicians early on as a "matter of honorableness"[199] The German councilors thus, in their memoranda, also aimed to argue against the qualification of Germans as "unfit" colonial administrators.

Also Portugal's honor seemed tarnished. "Of all the effects on Portugal … which derived from participation in World War I … the most important was the question of 'the honor of the army'." The (poor) performance of the army in Africa and Flandres "became a myth, threaded with ethnic jokes about the Portuguese", whom a British source had described as "our noble but nimble allies". Magalhães's memoranda had to take into account

197 On Treitschke *Gerhards* 2013: 178f.; *Offer* 1995 asks 'Going to War 1914. A Matter of Honour?'; *Koller* 2003: 87; 90 quot. W. Sulzbacher 1929: 'Die Ehre der Nation' muss fähig sein, 'Angriffen mit Waffengewalt zu begegnen und imstande sein, angriffsweise vorzugehen'; 'im Sinne der Soldatenehre ist wehrlos gleich ehrlos.'; *Speitkamp* 2010: 149f.

198 Elias: Studien über die Deutschen, 1989: 235 'begriffl. Symbole', in *Koller* 2003: 92.

199 StS Marschall: 'Das ist eine Frage der Würde des deutschen Reiches', in *Koller* 2003: 116.

these discourses in Europe. He was eager to counter the narrations about fleeing Portuguese soldiers with images of heroism in Africa. Indeed, Portugal's "first republicans were anxious to earn the respect of civilized Europe."[200]

As the European concert of nations was considered acutely hierarchical, in military as well as in economic terms, European foreign politicians used thinly veiled warnings of the Portuguese fate to push their own colonial agenda, referring to former first class nations that were now relegated to the fourth rank.[201] Britain's Foreign Secretary Grey knew "it would be better that Portugal should at once sell her colonies." But he also knew that "Portugal won't part with her colonies … for when nations have gone downhill until they are at their last gasp, their pride remains undiminished if indeed it is not increased. It clings to them as Tacitus says the love of dissimulation to Tiberius at his last gasp."[202] Pointing to the ongoing (historiographic) debates about the explanations of Portugal's decline since the sixteenth century, the French Minister in Lisbon observed in 1911 that leading intellectuals had stylized *la question coloniale* to be a "question of life and death" for Portugal. The colonies "are for her [the Portuguese nation] most of all a remembrance of her former glories, the witnesses of the important role she has played for the discovery of Africa and the Indies. It is through the history of its colonial role that this people has become aware of its personality as a nation."[203] Given Portugal's lack of "energy" the Minister predicted the downfall of *o Império*. During his inaugural address in 1919, President António José de Almeida (1866–1929) pointed to such "defective elements saying our race is indolent". The President, however, emphasized that his compatriots had "always given proofs of vigor … throughout the world."[204] The "notion of the ultimate development of Angola and Mozambique" was part of the "official thinking" about the colonies. Yet, the defeat of the Portuguese army on the hands of the Germans in Angola and Mozambique and the discussions before and after the war on Portugal's "ability" to administer its colonies, were considered by many Portuguese politicians a grave humiliation of their nation's history

200 *Wheeler* 1978: 178; 261. This motive was familiar in Portuguese foreign policy. Already the abolition of the slavetrade was discussed (and finally executed) in Lisbon, 'because national honour was at stake'; cf. *Marques* 2006: 253; *Lourenço/Keese* 2011: 226.

201 Jules Ferry, 28.7.1885, in *Stengers* 1962: 484, nations 'descendues au ... quatrième rang'.

202 Grey to Goschen, 29.12.1911, in *Langhorn* 1974: 369; cf. *Sowash* 1948: 232 on Timor.

203 MAELC CPC/CP/NS/8, Portugal: 199, FML to MAE, 2.12.11; cf. *Wheeler* 1978: 6-16.

204 NARA RG 84, Lisbon, v. 168: 800.1, USML to SoS, 10.10.19, transl. inaugural speech.

and honor. "The weight of tradition soaked the colonial discourse in imperial mysticism".[205]

3.3.8 Foreign Influence and Missionaries

For decades already historians are haunted by the question how to determine the influence and 'relevance' of "the Empire" for the European metropolis and "national" politics. Depending on the sources and perspectives detrimental responses have been given. Bernhard Porter's *Absent Minded Imperialists* (2005) on the British case is a pertinent example. Apodictical verdicts have also been given about the German[206] or French public, for whom their colonial empires were, it is said, "of only trivial interest" before World War I.[207] The Portuguese case seems different. The public, most of all in Lisbon and Porto had, at least since the British Ultimatum of 1890, shown a profound interest in colonial affairs. This interest "waned" only after the 'pacification wars' had ended in the 1920s.[208] Modern research speaks of a "consensus" in Portuguese politics as to the preservation of *o Império*. Among the Portuguese elites the belief dominated that Portugal could not be herself without overseas possessions. These were considered a *conditio sine qua non* to maintain Portugal's independence (against Spain) and formed an integral part of the nation.[209]

Following the Dutch "occupation" of Angola (1641–1648), apprehensions never abated in Lisbon that some foreigners, with support from within, might take away again the colony.[210] During the nineteenth century, foreign consuls were repeatedly accused of having complotted with "natives" aiming to expel the Portuguese. Irrespective of Brazilian or British consuls denying such claims, in 1883 the Luandan journal *O Pharol do Povo* had asked for the first time "If we think about the independence of the province …?"[211] Given the Matabeleland-dispute, the Anglo-German conventions, and the discourses about Portugal's "incapable" colonialism, the fear of the loss of the colonies was inextricably linked to the concern

205 *Smith* 1974: 654; *Corrado* 2008: 22 adds 'and the Angolan case is no exception.'
206 Cf. *Blackbourn* 1998: 435; *Seemann* 2011; *Strandmann* 2009: 464; *Dedering* 1999a: 215.
207 *Andrew/Kanya-Forstner* 1978: 11; cf. *Cooper* 2002b: 16f.; *Jansen/Osterh.* 2013: 120f.
208 *Duffy* 1959: 246; but cf. *Smith* 1974: 653f.: 'Portuguese society [was] uninterested.'
209 *Labourd.* 2000: 531f; cf. *Meneses* 2010: 9; *Corrado* 2008: 25; *Wheeler* 1972: 176; 1978: 3.
210 *Hamilton* 1975: 3 on these fears in the 1970s; *Curto/Gervais* 2001: 6f. on French advances.
211 *Corrado* 2008: xv on the relevance of these voices for the founders of MPLA; 167; 174.

of foreign "secret agents" working to undermine Portugal's rule. This continuous concern found its way in (semi-) official historiography.[212] Portuguese politicians, the press and "many observers remained paranoically fearful of foreigners" and their pretensions on Portuguese colonies.[213]

Before, during, and after World War I, however, the claim that foreign "secret agents" stirred up discontent with the neighbors' colonial rule was not limited to the Portuguese. In 1904 the Germans accused the British and the Portuguese of having provided the Herero and Nama with guns.[214] On the other hand, following the disaster at Pembe Drift in 1904, rumors were rampant that "the Ovambo" with German support would form a league to expel the Portuguese from southern Angola.[215] Similar claims were laid against Germany in 1914 in British and French colonies.[216] Frederick Lugard (1858–1945), Governor General of Nigeria, complained about Turkish and German endeavors to incite the Muslim population of his colony with Arabic pamphlets against British rule.[217] Also, rumors that Germans would want to wrest colonial possessions from other nations were not limited to Portuguese possessions. In South Africa claims were made about German machinations with the Afrikaaners against British rule for which "the Germans are to get Bechuanaland and Gordonia."[218] "German commercial penetration" of South Africa seemed to constitute "a direct threat" to Britain's dominance in the region.[219] And the "Maritz Rebellion" in late 1914 allegedly proved right all concerns about "German intrigue".[220]

It is against this backdrop of (perceived) threats to Portugal's colonial Empire, its status, its historic achievements, and its economic development that the importance Magalhães assigned to the question of Germany's involvement in Angola becomes intelligible. In 1919, when the case against Germany was still being prepared in the chanceries of Lisbon, the *Diario de Notiçias* already assured its readers: "there can be no doubt

212 *GEPB* 1936, v. 2, Art. Angola: 663 'agentes provocadores'; cf. *Pélissier* 1993: 8.
213 *Smith* 1991: 502; cf. *Vasconcellos* 1926: 3f.
214 MAELC CPCOM/CP/NS/7, Portugal: 222b, French Ambassador Berlin to MAE, 7.4.04.
215 *Pélissier* 2004: 211; *Sousa* [n.d.~1935]: 7.
216 *Cana* 1915: 364; cf. *Dedering* 1999: 5f. on the Nama war and the British as 'scapegoats'.
217 TNA FO 371/1884: 530, GG Nigeria to CO, 6.11.14; cf. *Nasson* 2014: 447; *Hanisch* 2014: 13.
218 *Dedering* 2000: 50 (report, 26.1.06); 58 (Ferreira Raid, 1906); *Samson* 2013: 28.
219 *Van-Helten* 1978: 369, 'conflict between German and British commercial interests.'
220 TNA CO 633/83/11: 78, Report Judicial Commission of Inquiry, U.G. 46-'16, 12/1916.

that in May, June and July of 1914 her [Germany's] agents were preparing a raid with a view to occupying the territory lying between the south frontier of Angola and the railway line from Lobito".[221] In his case against Germany, Magalhães thus never ceased to write within the Portuguese tradition of accusing other powers to mingle with its colonial affairs.[222]

In addition to Germany's intended *penetration pacifique* of Angola by commercial ventures and "scientific" expeditions in support of an annexation (cf. 3.3.2), Magalhães put a special emphasis on the subversive role of German missionaries in Angola. Relations between foreign missionaries and Portuguese officials or traders in Angola were strained already for centuries. After the Revolution in 1910 Afonso Costa, the "personal symbol of the republic's anticlericalism", pushed through parliament anti-Catholic ("Jesuit") legislation that would "undermine the political consensus" for years.[223] Also in Angola (foreign) clergymen were expelled. And the concern of foreign missionaries denationalizing the "overseas provinces" would still haunt the officials of Salazar's *Estado Novo*.[224]

With the onset of formal colonialism, missionaries were never completely "outside the colonial state". They "paved the way for conquest … by offering comprehensive representation of the indigenous population."[225] In his memoranda, Magalhães uttered this accusation quite literally: The German missionaries had paved the way for German soldiers to conquer southern Angola by guiding them across Ovamboland, negotiating with the "native chiefs" and convincing the "natives" that German rule would be advantageous to them. King Mandume's action in late 1914, when he attacked Portuguese forts, confirmed all the Portuguese administration's previous conceptions of the destabilizing role of the Rhenish Mission in Ovamboland. Magalhães went into great detail when he described the menace the German missionaries posed in Ovamboland (N'giva, Omupanda, Matenda). And so did the annexed reports and the Portuguese witnesses during their testimonies, explaining how the German Protestant missionaries educated Mandume and taught him to disrespect the Portuguese administration.

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221 NARA RG 84, Lisbon, v. 168: 800, USML to SoS, 11.8.19, transl. *Diário de N*. 7.7.19.
222 Cf. *Henriques* 1995: 83 historiogr. 'function' of 'British interventions'; *Silva* 2007: 411.
223 *Wheeler* 1978: 69; *Madureira* 2010: 648; AGCSSp 3L1.11b6, Keiling (Huambo), 27.12.13.
224 Cf. *Dores* 2015: 95f.; *Birmingham* 2011: 170f; *Corrado* 2008: 24.
225 *Steinmetz* 2007: 598, on German missionaries in GSWA, Qingdao, and Samoa.

Such accusations of the Portuguese resident at Namakunde, for example, against the activities of the Rhenish Mission were eagerly rebutted by the German councilors. They highlighted that the "tireless work" of the missionaries, who had "renounced all the amenities of life and lived completely isolated from European civilization", was directed at the "natives". The councilors had requested the accused missionaries Wulfhorst, Hochstrate, Welsch and Tönjes to respond to these accusations and arbitrator de Meuron was referred to their annexed responses. With equal zeal the German memorandum refuted the Portuguese accusation that German missionaries had supported the German war efforts by arranging meetings between Franke and Mandume, with missionary Wulfhorst serving as interpreters.

3.3.9 Names, Citizenship, and "Races"

> "Deus fêz o negro e o branco. O português … fêz o mulato." [God made the black man and the white man. The Portuguese … made the mulatto]

This celebration of "Lusitanian miscegenation", attributed to novelist Eça de Queirós (1845–1900) and an often quoted bit of 'wisdom' ever since, expresses "Lusotropical patriotism" that (self-exoticizingly) wishes to set apart the social realities of Portugal's colonial empire from any other.[226]

Such an assumed difference between the Portuguese and the German colonial empire became a question of law after the war. Differing notions of "citizenship", "race", and "being an African" or "being a European" would have a significant influence on the amount of damages Portugal could claim from Germany. Thus the status of individual claimants led to disputes between the German and Portuguese representatives. In 1919/20, the delegation in Paris under Afonso Costa aimed at claiming damages for each and every person who had died as a consequence of the war. However, it "seemed" to Costa that some would "object to the inclusion of natives" into the calculation of damages. He thus went into great detail to elucidate that neither Portuguese laws nor the Treaty of Versailles would make a distinction between races, nor would this be admittable given the "humanitarian principles inspiring the Treaty", nor from an "economic point of view". He claimed that especially "natives living in villages …

226 G. Bessa Victor: 'Mistica do império' (1943) , transl. *Hamilton* 1975: 49; *Pélissier* 1993: 8.

had already acquired a certain degree of civilization, some are public officials, others participate in the exercise of public functions, others exercise a profession. All are, to use the common term, 'assimilated'." Costa also argued that the Portuguese state had a (financial) obligation to the "non-assimilated natives" who had lost their relatives during the war. Assuming 154,415 casualties in southern Angola, he admitted that the families of only 20 per cent of those passed away (30,882) had been identified. For these families he claimed pensions amounting to 20,000 GM or £1,000 per person, but he insisted that also for the remainder reparation payments would be necessary. Altogether, in 1920 Lisbon claimed damages for the families of "107,441 Europeans and natives who had acquired a certain degree of civilization" amounting to "2,148,817,777 GM"; and "199,929 other natives" whose heirs were unknown at the time amounting to "3,998,577,777 GM".[227]

These numbers were confusing and not well explained. During the negotiations in the Reparation Commission the Portuguese were 'reprimanded' by the British, French, and Belgians for including the number of Africans killed during the war in the calculation of damages owed by Germany. While the British charged the Portuguese for not having understood "the exact scope of the reparation provisions of the Treaty", Afonso Costa "denied that loss of life in the colonies, mostly of civilians, fell outside the scope of the reparations." With a certain sarcasm, considering Costa's apologetic stance towards General Pereira de Eca's policy in Angola 1915, historian Filipe Meneses notes that Costa "suddenly developed a sense of racial equality, arguing that what was good for Europeans was good for Africans as well: many families in Angola and Mozambique had been left without their breadwinner, and the Portuguese government had, he claimed, stepped in to make up the shortfall."[228]

The German officials who dealt with the Portuguese claims ventured on to ascertain the legal situation of Africans in the Portuguese Empire in order find ways to postpone, refuse, or reduce payments. One official suggested in 1921 to ask the Ministry of Justice for a report in this respect.[229] Next to the tenet that Germany would be liable only for direct, not for indirect damages, the principle that this liability would be limited to Allied governments and their "nationals" (Article 231 TV), thus excluding "na-

227 BAB R 3301/2284: 7f, Costa: Notes compl., 29.6.20; 13, 'Montant des dommages'
228 *Meneses* 2010: 130;132f. (Oliphant to Bradbury, 5.6.20).
229 BAB R 3301/2284: 49, Karpinski (Reichsentschädigungskommission) to RMW, 19.2.21.

tives", was to develop into one of the most often invoked German arguments during the arbitration. The Germans demanded that only "nationals" should be included into Portugal's list of claimants. One of the drafts bluntly spoke of "white" or "European" nationals, but this was crossed out by his superior.[230]

It seemed simply incomprehensible that non-Europeans also were listed in the Portuguese memoranda as victims entitled to compensation due to the destruction of their property. From a German perspective, they were thus put on the same legal level as "whites" in a double sense: First, being "white" is "bound up with [individual] ownership"[231]; second, only "whites" could have the legal standing of plaintiff in court (in particular against the state). The lists did not include a rubric of "race". However, a few names appeared "suspicious" to the German councilors. They doubted whether all claimants mentioned in dossier 14 were Portuguese citizens. The Portuguese replique clarified that these men were *hindustanis*, natives (*naturels*) of the Portuguese *Estado da India*, Goa, Damão, and Diu, living in Mozambique.[232] Evidently, also persons who would have been labeled "Africans" by the German colonial notion of "white" and "black" were among those of the list. However, they were *not* recognized as such by German lawyers since often the "name forms are typically Portuguese" and "their [Christian] names also suggest a certain level of acculturation" to the Portuguese colonial society.[233] According to the paternalistic standards set by German colonial law, Africans (*Eingeborene*/natives) had, similar to minors, no legal standing in court and were not entitled to any claim – "Natives were not able to speak legally". The practice of colonial law as applied by the German administration and the courts aimed at the complete exclusion of those considered African and entrusted them to their "traditional customs" as applied by the "native chiefs" and the German "native administration."[234]

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230 BAB R 3301/2284: 35, remark, ~2/1921; German officials took note of the decree of 19.11. 1920 stipulating legal equality in terms of civil rights between Europeans and 'assimilated' Africans. Ibd.: 32, decree No. 7151, 19.11.1920, *Diário do Governo* 1. No. 237, 22.11.20.

231 *Nuttall* 2001: 133 with regard to post-apartheid South Africa.

232 PA R 52530, Portg. replique, doss. 14, doc. 1-49; cf. BAB R 10001/6635, État recapitulative des reclamations, dossier 12 doc. 321, Muene Handengue, Chibia; doc. 323, Nambonde Iá Tuida, Caculovar; doc. 327, Odonga, Lubango; doc. 339, Circonscription Civile de Chibia (au nom d'indigènes); dossier 14, doc. 49 Sakoor Hajee Habib, Beira.

233 *Curto* 2002: 41; similar issues in *Birmingham* 1978: 531 regarding witchcraft.

234 On this 'ancient' tenet of colonial law *Nuzzo* 2011: 207f.; cf. *Schaper* 2012: 68-86

Both, Portuguese and German colonial societies were deeply racist societies. However, as historian Henri Brunschwig remarked forty years ago, prejudices based on color are not a "stable" but a "variable condition".[235] The Portuguese and the German policies towards "the native question" attest to this. During the Luso-German arbitration this "question" transpired in two sets of debates: First, with regard to the above-mentioned possibility to include "natives" into the list of "nationals" entitled to damages. And second, with regard to the involvement of Africans in the fighting in southern Angola. The Portuguese representative's stand was 'multifaceted': on the one hand Magalhães argued according to the principles set forth by Costa that both, "natives" and "Europeans" should be entitled to payment of damages; a claim categorically denied by the Germans. And simultaneously he joined the German defendants in accusing the other party of having made a "white man's war" "black".[236] The difficulty to define the difference between "black" and "white" individuals was not expressly laid out in the memoranda. It seemed the representatives assumed the other side knew what his counterpart was talking about; only over the course of the procedure it became clear that this was not the case.

In theory, both sides agreed to what the British Foreign Office had stipulated in 1911: a European war in Africa would "be of great detriment to the prestige of the white races."[237] Implying this notion of prestige, the Germans accused the Portuguese to have enlisted irregular African combatants to fight white soldiers during the battle of Naulila. The Portuguese, on the other hand, accused the Germans to have extended their war efforts by using, equipping, and instructing African "savages", so Mandume could rebel and face the Portuguese. In Magalhães' chronology, German "acts committed" contrary to international law continued well after the battle of Naulila and had begun long before. Germans were accused of having recruited Africans (Kandjimi "Auanga") for the "massacre of Cuangar", and Shihetekela in Naulila. And the war in Ovamboland in 1915 was represented in the Portuguese memoranda and annexes in simple terms that placed Portuguese forces in opposition to Mandume's *and* Ger-

235 *Brunschwig* 1974: 60 'Le préjugé de couleur est…une donnée variable'; *Corrado* 2008:51.

236 Cf. cpt 2.2.6; *Cornevin* 1969: 389 'The war was strictly a white man's affair'. Germans concurred in the notion of the war in *GSWA* as 'a white man's war', but accused the British of having employed 'colored forces' in the battle of Sandfontein cf.*Weck* 1919: 130; *Wallace* 2012: 212; *Koller* 2001: 103; this looked different in GEA, where thousands of Africans served for Germany cf. *Bührer* 2011: 401-77; *Michels* 2009.

237 Quoted in *Samson* 2006: 22.

man troops who allegedly acted as instructors and even took part in the battle of Mongua.

The dispute about the legal standing of non-Europeans triggered by a list of names made obvious the stance of German colonial thinking towards Portuguese policy. The Germans considered themselves to be the more "modern", more strict colonial administrators adhering to the "positivist view that uncivilized peoples were not legal entities" and had no concept of property and had no legal standing.[238] "The native" was supposed to be invisible, he had to have no name – and if so it was conferred upon him (as a kind of joke) by his master. The practice of first names and surnames to distinguish individuals beyond any doubt was supposed to be to the exclusive benefit of Europeans.[239] The usage of non-European names made individual claimants and their (Indian) background visible on the list; an inadmissible situation according to German understanding since configurations of citizenship and all the legal ramifications it entailed remained in Germany's colonial empire a "configuration of whiteness". However, individuals of Luso-African descent may have attached great importance to the surname of their grandfather from Portugal and bore complete Portuguese names. Thus, on the claimant list they remained undistinguishable from other Portuguese. A "European surname [may have] reflected at least one European ancestor in the past few generations, but in many other cases it reflected a patronage or godparent relationship, not a birth relationship."[240] German councilors would have liked to prevent them from "passing for white" and have them made "visible" by "exotic" names, but abstained from allegations about the 'pedigree' of claimants.

The Portuguese representative, on the other hand, could unhesitatingly present the claims of those individuals as indicated to him by the colonial administration and he did not bother to enquire their ethnic origin. "A strict application of a color bar was not only against Portuguese law and tradition, but would have been impractical in the face of the realities of colonial family structures."[241] At the time of the Luso-German arbitration, however, the "Race Relations in the Portuguese Colonial Empire" were changing profoundly. A short overview of these historical developments

238 *Anghie* 1999: 50.
239 *Zollmann* 2010: 105f.; 126
240 *Penvenne* 1996: 457.
241 *Newitt* 2007: 52 on the Afro-Portuguese elite and Portugal's *assimilado* policies.

in contrast with German policies will thus serve to explain and put into historical perspective the status of some of the Portuguese claimants.[242]

The long held "article of faith with many Portuguese that their country has never tolerated a color-bar" has long been deconstructed by at least three generations of historians.[243] Yet, prior to the twentieth century the "practice of miscegenation and cultural assimilation was surely the only means by which the Portuguese could respond to … such an adverse environment" as Angola.[244] Since the offspring of these colonial unions, called *mestiços*, proved useful for the upkeep of the Empire, their legal status, but also that of other Africans was strengthened by the liberal regime in Portugal after 1820, *as long* as they were considered assimilated to the Portuguese culture: "citizenship and equal rights [were conferred] on all individuals who were considered to be Portuguese, regardless of their ethnic background."[245] Thus, a tiny faction of Africans (less than 1%) became "certificate-bearing citizens … whom colonial authority acknowledged as 'civilized'"; that is assimilated, as distinct from the *indigenas* (natives).[246] As a result of this policy there were "virtually no legal restrictions … to access to jobs, education, or voting rights" for those later-on called *assimilados*.[247] A colonial bourgeoisie, an "indigenous middle social strata began to emerge". Most of all their command of the Portuguese language had become the reason as well as the measure of their privileged status.[248] As a result, "the mulatto population *grosso modo* identified itself ideologically, politically, and economically with the whites, together forming the preponderant element in urban Angolan society." In the middle of the nineteenth century, the extravagant luxury of the Euro-African elite's lifestyle, importing "furniture from Venice" and following "trends dictated by Paris or London", impressed not only foreign visitors.[249] Enjoying a "sentiment of exclusivity", they held and inherited private proper-

242 Even though any attempt to distinguish between two historically specific modes of colonialism runs the risk of constructing and setting apart two stick figures. Interestingly, there are barely any comparative studies on colonialism and racism. Cf. *Lindner* 2011: 300 FN.
243 *Boxer* 1963: 1; on Boxer cf. *Arenas* 2011: 9; Matos 213.
244 *Corrado* 2008: 3 'only chance of survival'; xvii; cf. *Newitt* 2005: 257; *Rodrigues* 2009: 34.
245 *Smith* 1991: 504; cf. *Silva* 2010; *Roberts* 1986: 497; on previous centuries *Boxer* 1963: 38f.
246 *Birmingham* 1991: 166; *Duffy* 1961: 295, 1950 ~30,000 *assimilados* among 4 million Africans.
247 *Wheeler* 1969a: 9; cf. *Corrado* 2008: 116 236 on terminology; *Steinmetz* 2008: 593.
248 *Hamilton*, 1991: 315; cf. (ironic) summary of *assimilação* policies in *Duffy* 1961: 294.
249 *Corrado* 2008: 5; 46f. on Dona Ana Joaqina dos Santos (*Ná Andêmbo*) from Luanda; 77.

ty, thus allowing for the accumulation of riches within one family. Some of the "great creole families of the nineteenth century" like the Van-Dúnem traced back their ancestors to the Dutch occupation during the 1640s and have "provided military leaders ever since."[250] They formed "a tiny fragment of Angolan urban society … [, were] reprovingly involved in the slave trade", and distanced themselves from low class Africans and slaves, distastefully referred to as *macacos* (monkeys – the hatred was mutual[251]) and living in the *musseques* (shantytowns).[252] Only few of the "old *assimilados*" were "racially classified as *mestizo* from having a distant white male ancestor,… the majority were black". They professed to the Catholic Church, lived in the "elegant residential areas of Luanda", "spoke Portuguese as their preferred or only language and punished their children for using Kimbundu vernacular."[253] Historian Patrick Chabal calls the Luanda Creole community "undoubtedly both singular to Angola and of protracted significance."[254]

Angola's bureaucracy required not only African interpreters, but also white collar workers such as customs officials, tax collectors, district administrators, scribes and clerks. The government in Luanda was willing to draw them from the local population to include them in the lower and middle ranks of the colonial state structure. No doubt, it was a "minefield that those who wanted to acquire *assimilado* status had to traverse" in the "slavocratic society" of Angola's capital.[255] Peculiar relations of patronage tied individuals to powerful patrons. Especially the "sophisticated, European-dressed African of Luanda in the post 1850 bureaucracy" had

250 *Birmingham* 1988: 94; *Dias* 1984: 64; cf. *Boxer* 1965; the Van-Dúnem family is still influential. Law professor Fernando José F. Dias Van-Dúnem was twice Prime Minister of Angola (1991-92; 1996-99); *Alencastro* 2007: 192-9; *Chabal* 2007: 5; *Hamilton* 1975: 154 'The Van-Dúnems of Luanda form the nucleus of an extended family whose roots go deep into Kimbundu tradition. This tradition had been sustained by a set of moral and cultural values that have given old African families a sense of pride and identity in a larger societal framework that generally denies the philosophical validity of an African tradition. The Van-Dúnems place a premium on formal, Western education, but, along with other extended African families, they reject the condescending categorization of assimilation.' Cf. *Pepetela*'s novel about the family: A gloriosa familia, 1998.

251 *Bontinck* 1969: 119, on the murder of Dom Nicolau, 'un *mundele-ndombo* (un blanc noir)'.

252 *Corrado* 2008: xiv; *Tams* 1845: 99 quoted in *Heintze* 2007: 378; cf. *Birmingham* 2011a.

253 *Birmingham* 1991: 166 on *Messiant* 1989; cf. *ibd.* 2011: 144; *Corrado* 2008: xx; 76.

254 *Chabal* 2007: 3f. 'The most salient pre-colonial historical consideration has rightly been the very special place occupied by the Luanda Creole community.'

255 *Newitt* 1996: 175; *Curto/Gervais* 2001: 37; cf. *Corrado* 2008: 6

formed his own traditions within the hierarchies of Angola's colonial society, so colorfully depicted by the prose of Oscar Ribas.[256] Politicians in Lisbon preferred to administer the colonies with the *assimilados* because of their "very low salaries".[257] At the beginning of the twentieth "century the bureaucracy contained many of the scions of the old creole families". However, their "economic and political marginalization" and the demise of their "oligarchies" had already begun, most of all due to the end of slavery and restrictions on foreign trade.[258] The "product" of "fierce autodidactism" and at times masonic inspired, some of the *filhos da terra* (sons of the land) still "rose to achieve significant managerial positions," but the relations with the administration were tense: "rather than stigmatize Western civilization, they denounced Portugal's failure to implant that civilization in Angola." Irrespective of the "colonial censorship being constantly on the watch", they published their own newspapers, some of them bilingual (Portuguese-Kimbundu), "thus giving proof of an acculturated elite's interest in preserving part of its African heritage." In these journals a "small vanguard of creole intellectuals" begun to develop an "Angolan" identity (giving rise to the terms *angolanidade* and *crioulidade*) and "protested against social injustices and claimed their own social emancipation."[259]

Evidently, life of the 'ideal' *assimilado* diverged dramatically from the realities of racism and corvée labor most Africans had to endure under Portuguese rule according to the official "indigenous code". Furthermore, discourses and policies changed. With more European immigration and increasing competition for jobs the "heyday of the *assimilados*' position in society" was over. Following the revolution in 1910 – hailed by most *filhos da terra* as the beginning of an era that would bring them equal opportunities – "began a long period of decline" for the "old creoles". Dashing all hopes, republican administrations set more 'lines of demarcation' between the "races". It started with the raising of formal educational requirements that could not be fulfilled by Angolans since except for the Semi-

256 *Wheeler* 1969a: 9; cf. *Pélissier*/*Wheeler* 1971: 94f.; *Hamilton* 1975: 47 on Ribas' *Uanga*.

257 *Clarence-Smith* 1979a: 168; *Vansina* 2005: 2 on district administration by (Luso-) Africans.

258 *Birmingham* 1988a: 6; *Dias* 1984: 61; *Corrado* 2008: 45.

259 *Corrado* 2008: 8f.; 167; 230; *Dias* 1984: 62; 81; *Wheeler* 1969a: 10f.; 1972a; already in 1882 Fontes Pereira complained that the 'Government of the metropole and their delegates … depriv[e the *filhos da terra*] of the exercise of the first public offices now filled by certain rats they send us from Portugal', transl. *ibd*.: 15; *Hamilton* 1975: 27f.; cf. *Dáskalos* 2008: 139f.

nary there were no secondary schools until 1919. Under Governor General Norton de Matos "racism became [formally] a criterion for preferment in the bureaucracy". He continued this policy in his second term as High Commissioner since 1921. Thus, Angolans were more and more excluded from public life.

Nevertheless, the "carpet-baggers of the Portuguese revolution" arriving after 1910 "in search of petty government employment … [who] drove out the old creole functionaries with loud racist self-justification", often married African women. "Marrying light has always been the racial ambition of social climbers in Luanda."[260] Some immigrants even accepted to be circumcised and to pay customary bride-wealth. Irrespective of any contradiction with their own history of becoming bureaucrats, they wanted to see "their brown children properly educated and integrated into the state sector of employment." These "new creoles" were mostly an urban phenomenon, but not limited to Luanda.[261]

Within a lifespan notions of "race" had changed: For members of the African bourgeoisie of the colonial centers like Luanda or Lourenço Marques, born before 1880 their life began "in a time and place where race, ethnicity and class were quite malleable categories, but during [their] lifetime they hardened and chafed"[262] In 1909 a disillusioned minor official and journalist, Pedro da Paixão Franco (1869–1911), born to an African family from Dondo, still dared to plead for Portuguese fraternity (*Todos somos portuguezes – somos irmãos*). But with the First World War the "gilded age of the creole community was definitely over." After 1920, "new statutes were given to natives, Europeans and the 'assimilated population', … legal discrimination got a more stable legal framework."[263] In the end, "racism characterized every dimension of the system". In response to the rise of the relevance of "whiteness" in Portuguese colonialism, the emergence of an "Angolan nationalism" became more and more visible; the official prohibitions of African (political) groups like the *Liga Angolana* in 1922 attested to this process considered a threat to colonial rule.[264]

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260 *Birmingham* 1988: 95; 2011: 157; *Wheeler* 1969a: 12f.; *Hamilton* 1975: 54; *Dias* 1984: 74; on education *Corrado* 2008: 121; on African coffee growers: this 'black enterprise' ended after the arrival of republican administrators *Birmingham* 1982: 344; *Heywood* 1987: 359f.

261 *Birmingham* 1988a: 6f.; 1994: 148; *Clarence-Smith* 1979: 179; *Penvenne* 1996: 445.

262 *Penvenne* 1996: 457; on 'identity crises' of Luso-African intellectuals *Hamilton* 1975: 20.

263 *Dias* 1984: 89; *Corrado* 2008: 15; 109; *Tavares/Silveira* 2006: 118; cf. *Dáskalos* 2008: 21.

264 *Cooper* 2002b: 139; *Gonçalves* 2005: 194; cf. *Newitt* 2007: 50-3; *Errante* 2003: 10f.

These complex webs of historical developments over three to four centuries and notions of otherness, hybridity, integration, and racial toleration, later blurred by Gilberto Freyre's euphemistic and 'mystical' concept of *lusotropicalismo* as justification of a perceived Portuguese 'exceptionalism',[265] were impervious for most German contemporaries.[266] In his first speech as Germany's Colonial Secretary, Bernhard Dernburg (1867–1937) claimed: "All colonizing nations of Europe are solidly united with regard to their policy towards natives."[267] However, things were more complicated than this. The "deeply entrenched … Lusitanian traditions … in Lusophone Africa"[268] conflicted with the (still rudimentary) strategies of clear cut race relations the German administration had begun to implement in the colonies based on an "empirical definition of race", namely physical, "racial characteristics" and descent. While in GSWA a few (church) marriages between German troopers and African women were concluded in the 1890s,[269] official "race" policy changed afterwards, following a "pan-European paradigm change" around 1900 that was based on a hierarchical concept of two separate biological "races" reflected in morphology, "black" and "white".[270]

Questions of German citizenship became inseparably tied to the "race" of individuals. After 1900 interracial marriages became not only controversial; in 1905 the administration in Windhoek stipulated anti-miscegenation laws. In GSWA, "questions of moral purity and sexual contamination, mixed with nationalist sentiment, surely drove some of the arguments that were put forward" to justify this restrictive policy. The way in which

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265 Cf. *Wheeler* 1969a: 16f.; *Bender* 1978: 4f; *Voigt* 2009: 14f referring to *Freyre* 1946; *Burke/Pallares-Burke* 2008; *Lourenço/Keese* 2011: 229.

266 *Torgal* 2009: 493 '[O] multirracialismo foi ... o grande mito da politica colonial ... portuguesa.' Perhaps nothing describes the differences between the Portuguese and German case more poignantly than the burial of João dos Santos Albasini, 'the leading journalist and critic of Portuguese colonial administration in Mozambique': 'the funeral [in 1922] was attended by an estimated 5,000 people. Among the mourners were Mozambique's acting head of state, every member of Mozambique's Legislative Council, João Belo (the future Minister of the Colonies), representatives of every local newspaper, all the local clergy, Albasini's cousin Queen Sibebe of the Maxaquene clan of the local Ronga-speaking people and her entire entourage.' High Commissioner Manuel de Brito Camacho 'considered Albasini both a close friend and an intellectual soulmate.' *Penvenne* 1996: 425; 448.

267 SBRT, 28.11.06, translated in *Methfessel* 2012: 58.

268 *Birmingham* 1988a: 2.

269 *Lindner* 2011: 330 on *Mischehen* in GSWA; *Haney-L.* 1994: 135; cf. *Hartmann* 2007: 39.

270 *Lindner* 2011: 309; 320; *Haney-López* 1994: 136 on the US; cf. *Blackbourn* 1998: 434f.

"whiteness" was (officially) constructed in the German colony comprised the notion of a complete discrimination from "blacks" that included not only the legal realm but also sexual relations. It goes without saying that German men in the colonies may have heard this (official) discourse and may have participated in it loudly, but acted (under the guise of employing "washing maids", for example) to the contrary – irrespective of their position as high-ranking colonial officials.[271] Even though GSWA's "mixed" population (*Mischlingsbevölkerung*) was constantly growing, German visitors of Angola noted with disdain that the population consisted "almost exclusively of negro bastards. Portuguese with negro hair and brown faces are a matter of course [*an der Tagesordnung*]."[272] In GSWA holding a government position and being married to a woman of African descent would have been unthinkable. The debates in court, within the colonial administration, and the wider public about the legal status ("German national" or "native") of the engineer Ludwig Baumann, a grandchild of the missionary Schmelen, who had *one* African great grand-mother, would have been considered with ridicule in Angola. The German settler community in GSWA "was determined to involve itself in constructing a localized German identity" and racial difference was considered the "central paradigm of the colonial order".[273] The distinction of colonizer and colonized was supposed to be self-evident in the German colonies. It was considered a necessary element in the appropriation of the colony as *Heimat*. Even though German officials never succeeded in legally defining "the native", a bifurcated legal system was established in the colonies that separated courts and legal provision applicable for "Africans" and "Europeans". Social, legal, and economic inequality was thereby legally determined.[274]

A man of African parentage taking "part in the city's intense café culture" was a matter of course in Lourenço Marques around 1910,[275] but would have been inconceivable in Windhoek or Dar-es-Salaam. Missionary attempts at religious conversion or schooling of African children did not change the official German policy that Africans should *not* be "assimi-

271 *Hartmann* 2007a: 80 Vice-Governor Tecklenburg and one councilor had fathered children.
272 *Reiner* 1924: 334 'P. mit Negerlocken'; cf. *Lindner* 2011: 327; *Walgenbach* 2005: 75; 183.
273 *Hartmann* 2007a: 81; *Kundrus* 2003: 273f.; *Botha* 2007: 11; cf. *Güttel* 2012: 140f.
274 *Jaeger* 2009: 488; *Hartmann* 2007a: 56-9; *Bowden* 2005: 17; *Schaper* 2012; *Sippel* 2001.
275 *Penvenne* 1996: 428 ref. to the journalist João dos Santos Albasini; cf. *Conrad* 2003: 188.

lated" into the German populace and *Kultur*.[276] Under German colonial law there were no *assimilados*. In GSWA it was "generally accepted … that purely economic arguments ought to be applied to the relationship between Europeans and Africans." The "native treatment" was described by Governor von Lindequist with the patriarchal formula *streng aber gerecht* (firmly but fairly).[277]

German colonial officials carefully watched the race relations in neighboring colonies and paid attention to 'native legislation' and the everyday-treatment of Africans. A "too liberal" and "too lenient" "native policy", as allegedly practiced in the Cape Colony, was rejected as "dangerous" and reflecting "a misguided 'emotional' humanitarianism".[278] Portuguese "permissiveness" was equally rejected. German visitors to Angola were disturbed when they had to share the First Class train coach "with mulattoes or Portuguese of doubtful origin."[279] Administrative and public discourses about "miscegenation" in Germany and its colonies often evolved around the alleged "decay" of the Latin colonies due to "the degradation of the European race in the former Spanish [or Portuguese] colonies". Processes of "acculturation", "creolization" (or how ever the "Africanization of Europeans" – as exemplified in the Portuguese colonies – was later-on called) were feared and rejected by German colonial officials.[280]

These differences in colonial histories help to explain why both parties to the arbitration were unwilling to acknowledge the other's point of view with regard to who should be entitled to lay claims for damages.

3.3.10 Proof beyond texts. Maps, Photographs, and Witnesses, 1924–1926

Afonso Costa, when detailing the Portuguese damages in 1920 to the Supreme Council in Paris, stressed the objectivity of the numbers he pre-

276 Cf. *Kundrus* 2003: 201-210; *Lindner* 2011: 60; *Walgenbach* 2005: 205; *Krause* 2007.
277 *Bley* 1996: 226; 241; *Stals* 1979: 93;
278 *Lindner* 2011: 59; *Dedering* 2006: 286.
279 NAN A.529 n.1: 6, O.Busch: Studienreise von Südwest nach Angola [~12/14]. In Angola, '[c]ompared to neighbouring colonial dominations, day-to-day relations reflected both a minor social distance between blacks and whites and the aptitude, even if relative, of the whites to adapt themselves to indigenous customs.' *Corrado* 2008: 68 on loathing *caffrealisation*.
280 *Güttel* 2012: 142 quot. V.-Gov. Tecklenburg, 1905; *Lindner* 2011: 62; *Hamilton* 1975:12.

sented by pointing out that they were "based on research" in government files and commercial diaries, "visits" on the spot by technical experts, "photographs, eyewitness accounts" and official statistics.[281] When the Luso-German arbitration began, also the parties attached maps and photographs to their memoranda to advance their arguments based on 'objective facts'.

Even though it would be impossible to assess what role these means played in the outcome of the arbitration, it is relevant to state that the parties deemed it advantageous for their cause to seek proof for their arguments "beyond texts". Maps were used for more than purposes of geographically situating places like Naulila or Cuangar for the arbitrator in Lausanne. The Portuguese drew maps that indicated by color the percentage of loss of lives in certain areas of southern Angola during the war. Other maps explained the difficulties of establishing the "neutral zone" between Angola and GSWA. Such maps linked with the Portuguese assertion that prior to 1914 Germany had never accepted the border with Angola and had constantly violated Portuguese sovereignty by sending military personnel, traders, or recruiters across the border. As a result, Kwanyama defying Portuguese pacification efforts were "inundated" with arms from GSWA.[282]

Most important of all the arguments the Portuguese made regarding the border and its geography was what they considered the "fact" that Schultze-Jena *did* camp on Portuguese territory in October 1914. The Portuguese replique thus advised that Schultze-Jena could have remained in territory being less disputed and argued that already in 1909 the Germans had faulty maps that indicated Portuguese territory as being German. The German duplique responded that the most important "fact" along the border was that a precise fixation of the border had *not* yet taken place. Nevertheless, the Germans stated that the camp was on the "German" side of Erickson Drift (that is, still inside the neutral zone). They argued that also the administrator Campos Palermo had reported that the Germans had not yet passed the border of Angola. However, it appears that the Germans did not put as much emphasis on that point as would have been possible, for example by describing in more detail the complications due to the course of the river: Erickson Drift was six miles upstream of the Kavale (or

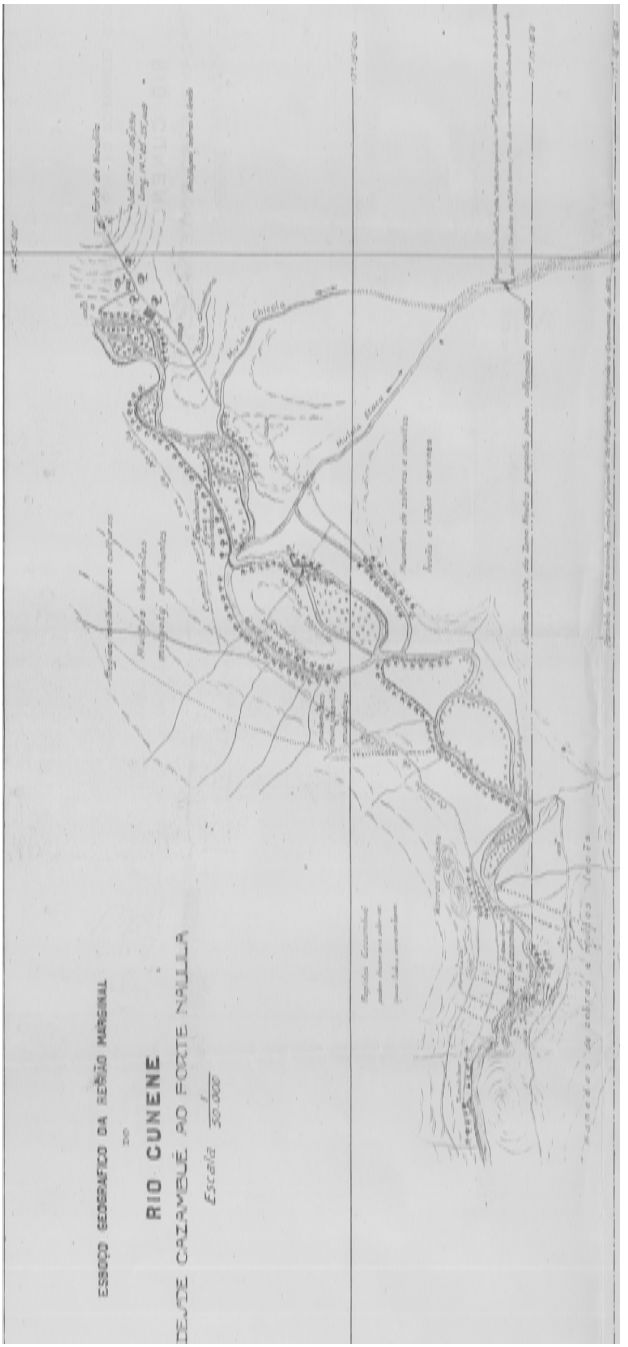
281 BAB R 3301/2284: 3, Costa: Notes complémentaires, Paris, 29.6.20.
282 Cf. e.g. *Casimiro* 1922: 60.

Cazembué) cataracts (the starting point for the northern ["German"] parallel delimiting the neutral zone). Yet the Kunene River formed a northwards stream bend between Erickson Drift and the Kavale rapids. According to German maps, but also according to one Portuguese map attached to the files of the arbitration, this northern parallel 're-touched' the river at Erickson Drift before it turned again northwards, thus leaving Erickson Drift's southern bank in the "neutral" (or German) zone and not on indisputably Portuguese territory.

Magalhães invested more energy in proving that Schultze-Jena's camp was on indisputably Angolan territory. Using to their advantage that the Germans could no longer reach the scene of dispute in Africa, the Portuguese summoned in August 1925 the witnesses Adelino Gonçalves and Pieter J. van der Kellen, who in 1914 accompanied the administrator of Humbe, Campos Palermo, to Erickson Drift, to identify the place of the German camp. Surveyors erected a "pyramid" on the location, determined its coordinates, took a photograph of it and sent it together with a map (also showing the northwards stream bend of the Kunene River) and a report to Lisbon to have them provided to the arbitrator.[283]

And not just (incriminating) locations were photographed by the Portuguese. The administrator of Namakunde attached to his report two photographs of commander Franke and missionary Wulfhorst in Ovamboland to underline their close cooperation. However, his claim that Franke had made a reconnaissance tour to the Kunene with the support of the Rhenish Mission before the battle of Naulila was rejected by the German councilors. They pointed to Franke's explanation that before the battle he had been the last time to Ovamboland in 1908 when also these pictures were taken.

283 BAB R 1001/6636, Duplique 1923: 35; 84-7; R 1001/6641: 12, extra-file: 49f. Proces-verbal de l'identification, 10.8.25; even a South African map of Ovamboland (1915) showed that the Kunene River at Erickson Drift 're-touched' the northern parallel, NAN A.450 Hahn Collection.



Map 5 "Rio Cunene desde Cazembué ao Forte Naulila", ca. 1920

From these disputes about very specific occurrences in the colonies the relevance of (eye) witnesses can be discerned. The Portuguese memorandum contained a list of seven "witnesses" and Portugal reserved its right to forward additional documents and to name additional witnesses in the course of the arbitration.[284] The German memorandum named twelve witnesses and reserved equal rights.

After the German duplique had been received in May 1923, de Meuron considered it to be fruitless to continue with the exchange of memoranda. He therefore ordered the parties to provide him with a definitive list of witnesses until August 1, 1923.[285] Magalhães presented a list of thirteen witnesses, four of whom lived in Angola.[286] Also the German Colonial Department updated the list. The Germans first considered only Carl Jensen to be a necessary witness for Germany from Africa. He had returned to his farm near Outjo; but later, also German missionaries from Ovamboland were nominated to give their testimony.[287] All witnesses were nationals of the party in whose favor they were expected to speak (except the Dane Jensen). However, Germany's financial chaos in 1922 caused the former soldier Georg Kimmel to seek his fortune by what some might have called treason. He approached the Portuguese Legation in Berlin and proposed to make "revelations" about the Naulila incident – if "recompensated". It is unknown whether Magalhães, who was then Foreign Minister, accepted Kimmel's offer (after all, he did not witness the Naulila incident, but arrived one hour after the shooting; the Minister re-

284 PA R 52529, Mémoire justificatif, 12/1921: 106: 1. Norton de Matos, 2. Alves Roçadas, 3. Maia Magalhães, 4. Vasconcelos e Sá, 5. Mascarenhas, 6. Pinto Basto, 7. Augusto Marques. In March 1922, an additional claim of a Portuguese citizen, formerly living in Belgium, was sent by the Portuguese government to de Meuron (PA R 52529, de Meuron to DG Bern, 20.3.22).

285 BAB R 1001/6637, AA to RMW, 9.7.23, attached: Ordonance of de Meuron of 3.7.23.

286 BAB R 1001/6637, AA to RMW 17.8.23 attached: list of witnesses, 24.7.23: 1. Admiral Alberto Ferreira Pinto Basto, 2. General José Mendes R. Norton de Matos, 3. General José A. Alves Roçadas, 4. Dr. Alexandre José B. de Vasconcelos e Sá, 5. Colonel Brevete Eduardo Marques, 6. Colonel Domingos Patacho, 7. Colonel Carlos Roma Machado de Faria e Maia, 8. Lieutenant Colonel Brevete Manuel F.A. Maia Magalhães, 9. Lieutenant Colonel Brevete José E. da Conceição Mascarenhas, 10. Capitane Roque d'Aguiar, 11. Lieutenant Alberto Pereira, 12. Sous Lieutenant Julio Santos, 13. Sergeant Americo Inacio da Rocha.

287 BAB R 1001/6637, AA to RMW, 9.7.23; RMW to AA, 19.7.23 attached: German witnesses of colonial damages: 1. Generalmajor a.D. Viktor Franke, 2. Gouverneur a.D. Dr. Theodor Seitz, 3. Major a.D. Trainer, 4. Geh. Baurat Schubert, 5. Stabsarzt a.D. Weck, 6. Gouverneur z.D. Dr. Heinrich Schnee, 7. Farmer Carl Jensen, 8. Max H. Baericke, 9. Georg Kimmel, 10. Dr. Paul Vageler, 11. Ingenieur Eickhoff, 12. Oswald Ostermann.

minded his Legate to avoid any correspondence with Kimmel). In 1925, Kimmel gave his testimony in Berlin, speaking in favor of Germany about the plundering of the bodies of Schultze-Jena and Lösch and providing the arbiter with a sketch of Fort Naulila.[288]

The presentation of witnesses for one's own case was not only an analogy to domestic court cases and national rules of procedure. The period following World War I became an 'era of hearings' about past wrongdoings. Witnesses all over the world were heard before courts or other public bodies about alleged crimes of former enemies. In GSWA, British authorities began already during the war to collect accounts of (African) eyewitnesses and others about the brutality of German colonial administrators. The judge Bernhardo Botelho da Costa traveled to Mozambique and Southern Rhodesia to hear witnesses about potential abuses and violence in the Portuguese colony. Given his task, it was considered a matter of course that he would also hear Africans. In his final report he laid out at great length the challenges related to African witnesses given that their "mentality [is] different from ours" and notions of truth and narration would vary.[289]

During the Luso-German arbitration, none of the parties ventured the idea of calling African witnesses to give their testimony, although the German "police servants Andreas and August" were eyewitnesses of the Naulila incident and had escaped Portuguese custody. August was, however, quoted in the German memorandum as having witnessed Portuguese border infringement after the Naulila incident when a patrol allegedly entered 15 km into German territory. August even claimed that Sereno personally shot jointly with his men when the Germans were about to leave Fort Naulila, thus rejecting Portuguese accounts that Sereno was unarmed during his dispute with Schultze-Jena.[290] Also the Portuguese memorandum mentioned African witnesses when discussing the damages in Angola.[291]

The fact that, apart from these few hints, any African voices would be made legally unreadable in the arbitration was not explicitly discussed.

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288 AHD 3p ar.7 m 48, MNE to PLB, 25.7.22; BAB R 1001/6638: 122, questionaire Kimmel, 13.1.25.

289 *Gewald/Silvester* 2003; *Hespanha* 2010: 185.

290 BAB R 1001/6634: 148f., Vageler to RMW (10.11.21), Annex 10 to Memo Allemand, 23.5.22; p. 154, Vageler to KGW (~11/1914), Annex 11 to Memo Allemand, 23.5.22;

291 PA R 52529, Memo Portug., 12/1921: 45 FN 1, Chipuampanda, Chitabarera (dossier 5).

There was apparently a consensus that Africans were unreliable and untrustworthy witnesses, not apposite to give testimony before a court or arbitral body. This line of argument was used already by Germany during the Anglo-German *Walvisbay Border Arbitration* (1909). The British had argued that Africans ("Hottentotts") were present during the ceremony of annexation in 1878 and could give testimony as to the extension of the British land claim. The Germans responded by attacking the credibility of "the native" witnesses. They pointed to "the natives' natural inclination" to lie and reasoned that their "joy" during the annexation ceremony was due to "Cape brandy".[292] Also judge da Costa's doubts about alleged African narration structures and notions of truth pointed to such reservations.

Arbitrator de Meuron had no objections to the lists of witnesses. He invited the parties for a meeting in his office in Lausanne (September 17, 1923) on the planned testimonies.[293] This technical consultation between the arbitrator, Magalhães, B. Ferreira, Portugal's Minister in Bern, and Dr. Ruppel set the conditions for the testimonies. De Meuron expected both governments to arrange for the institutional back-up of the testimonies (rooms, interpreters, stenographers). He emphasized the necessity to define precisely the questions to be put to those witnesses he would not be able to interrogate himself. Turning seventy soon, he had no intention to visit Angola or Southwest Africa. Magalhães suggested that the witnesses living in Angola should be interrogated by local courts. De Meuron demanded precise information about Angolan courts and all questionnaires put to those witnesses. The Germans would be given a chance to comment on the questions before they would be sent to Angola. Ruppel requested the interrogation of the German witnesses to take place in Berlin, including the "main witness" Carl Jensen, who lived in Southwest Africa. The German government was willing to bear the costs for his journey to Berlin. Ruppel emphasized the German desire to accelerate the arbitration procedure, considering the general interest of the German government to identify its foreign obligations; but, as he found, the Portuguese reacted "with reserve". He also pointed out to the Portuguese that they had nominated only high-ranking officials as witnesses who were not present during the Naulila incident and invited them to present to the arbitrator the

292 *Fisch* 1984: 425; 427; cf. RIAA XI: 267-308.

293 BAB R 1001/6637, AA to RMW 17.8.23 (attached: Ordonance of de Meuron, 6.8.23).

surviving Portuguese eyewitnesses of the incident. Also, de Meuron underlined the importance of the clarification of what had happened in the fort. Magalhães responded that there were two surviving Portuguese witnesses; both lived in "Angola and it would be difficult" to bring them to Europe.[294] However, already in October, the Portuguese were able to present to de Meuron, four new witnesses, two of whom were said to be eye-witnesses of the Naulila incident and now lived in Portugal.[295]

The Germans were not so fortunate. It took the Colonial Department, the Consulate-General in Cape Town, and most of all Germany's representative in Windhoek Dr. Franz (not to be mixed with Mr. Franz who drafted the German memoranda in Berlin) five months to convince Jensen to return to Europe. The frustrated and ruined farmer pressured the officials not only to reward him with an *Eisernes Kreuz* first class. He also demanded "reparations" for his captivity and economic loss during the war. He received altogether around 3,000 GM for his willingness to testify before arbitrator de Meuron.[296] Much to the chagrin of the Finance Ministry, the German Foreign Office and the Colonial Department were willing to pay this staggering amount since they considered ex-Governor Theodor Seitz and Carl Jensen the most important witnesses.[297]

In the meantime, de Meuron invited the parties to attend the first testimonies in Lisbon on June 2, 1924. Also Jensen was expected to make his appearance in Portugal. De Meuron agreed to have the witnesses living in Angola (High Commissioner Norton de Matos, Lieutenant Alberto Pereira, Sub-Lieutenant Julio Santos and Sergeant Americo I. da Rocha) interrogated by the President of the Court of Appeal in Luanda.[298] After he received Magalhães' questionnaire, councilor Franz, the colonial 'expert' from GSWA, drafted the German counter-questions to be put to the Portuguese witnesses in Lisbon and in Luanda. Franz tried to identify the witnesses according to the Portuguese and German memoranda and was look-

294 BAB R 1001/6637, Ruppel: Aufzeichnung Termin vor dem Schiedsrichter, 22.9.23.
295 BAB R 1001/6637: 49, Ordonnance de Meuron, 26.2.24; cf. *Hewitson* 2010: 318f.
296 BAB R 1001/6637: 94, RMW to Dr, Ruppel, 12.4.24; p.111, Note on meeting, 6.5.24; p. 112, AA to C. Jensen; AA to DKG, 6.5.24; p. 120, Dr. Franz to RMW, 16.4.24; p.140, DKG to AA, note Franz, 23.5.24; p.155f., calculation expenses19.6.24.
297 PA R 52531, remark Martius to Frohwein, 12.9.23.
298 BAB R 1001/6637: 49-51, Ordonnance de Meuron, 26.2.24.

ing for inconsistencies in the reports made by these witnesses, as they were annexed to the Portuguese memorandum of 1921.[299]

"Questionnaires have a long and complex history", not only as juridical tool, but also for ethnographic and even diplomatic purposes. Questionnaires seemed the perfect means to ensure objectivity and fact-based procedures. "No more narrative at all".[300] However, both parties framed their questions in a way to provoke responses that favored their stance. To counter these attempts, both representatives struggled to change the arbitrator's perspective on the case by counter-questions. It was the task of the representatives to assess the (probable) biases of the responses to questionnaires and the trustworthiness of each of the witnesses and their testimonies *before* his (there were only men) appearance before arbitrator de Meuron.

It is also relevant to point out that statements by (eye) witnesses in court (or before an arbitral body) are not identical with what historians today call "oral history". The setting differs profoundly between interview and court hearing, and the same is true for the results of the words spoken in court or during an oral history interview. On the other hand, both kinds of evidence are formed in a similar process, first, by word of mouth and then by transcription. Historians using oral evidence from court (or arbitration) proceedings can refer to the insights gained by historians using oral history evidence. This concerns most of all the limits of this source to shed light on events in the past: "Historians using oral evidence now know enough about memory to avoid the naïve assumption that it is a 'verbalized reflection of personal truth and social reality'."[301] Furthermore, it is important to understand that "testimonies, as the first-hand experience of informants, often draw on traditional historical perceptions". The oral discourses were formed and mediated not only by the memories and intentions of the witnesses, but also by the questions raised and the process of transcription and translation into French.[302] In this form they found their way first to the desks of the arbitrator and the party representatives and then into the archives. In Lisbon, the Portuguese administration provided

299 BAB R 1001/6637: 108, AA to REA, 3.5.24; p.94, RMW to Dr. Ruppel, 12.4.24; p.131, REA to AA, 19.5.24; p. 133-137, remarks Franz, 23.5.24

300 *Vansina* 1987: 435.

301 *Hayes* 1993: 106 'The dimensions of implicit world views in oral history are much larger than the academic research agendas which tap their riches.'

302 *Hamilton* 1987: 68 in *Hayes* 1993: 108; cf. *Koskenniemi* 2014: 128 on 'opaque' intentions.

stenographers for the statements of their witnesses and translated them thereafter into French. Since the German councilor Ruppel assumed Jensen's Portuguese to be rather "limited", a German-Portuguese translator was also necessary in Lisbon, as Jensen gave his testimony in German.[303]

The first out of altogether seven hearings of witnesses over the next two years took place from June 3 to June 11, 1924 in Lisbon's Supreme Court building. Professor Magalhães and his colonial councilor, Captain Manuel da Costa Dias commenced interrogating their witnesses. Also the Portuguese Minister in Bern, Dr. Bartolomeu Ferreira, was present. After the statement of each witness, the German representatives (the new head of the Foreign Office's Colonial Department, Edmund Brückner, who deputized for Ruppel being unable to leave his post in Paris,[304] and councilor Hugo Franz) were given the opportunity to ask their questions. In Lisbon the arbitrator emphasized his neutrality by living "in a withdrawn way". He wanted to follow an invitation of the German Legation only in case also the Portuguese representatives would attend the function. He finally cancelled it due to his "overstrain".[305] Of the 14 witnesses invited, 13 were present. Even though the arbitration was not a court procedure in a formal sense, the arbitrator functioned similar to a judge during the testimonies, authoritatively instructing the witnesses to restrict themselves to courtroom protocol and only to answer the questions posed by him or the party representatives.[306]

The arbitration became a stage for the expression of anger by the Portuguese witnesses and their claim to justice for Portugal. The testimony of General Alves Roçadas and several other high-ranking officials brought little surprise for either side. They quoted German authors as proof of Germany's quest for world hegemony, confirmed that Germans had constantly violated Angola's southern border and had supported King Mandume and others with guns and military instructions. Among the witnesses was also Lt.-Colonel Manuel Maia Magalhães (1881–1932), the brother of Portugal's representative. He had not taken part in the battle of Naulila,[307]

303 BAB R 1001/6637: 94, RMW to Ruppel, 12.4.24; p.95f., Ruppel to Martius, 19.4.24; p.98, de Meuron to Ruppel, 16.4.24; p.100, AA to ORR Franz, 28.4.24.
304 PA R 52531, Telgr. Ruppel to AA, 24.5.24; power of attorney Brückner, 25.5.24.
305 PA R 52531, remark Martius, 23.6.24.
306 BAB R 1001/6638: 143, Compte-rendu des séances de l'arbitrage, Lisbon 3.-7.; 9.6.24.
307 AHM/Div/2/2/21/16: 42, Pessoal que nelas tomaram parte [de Naulila].

but was a member of the chief-of-staff of Roçadas and de Eça. After having referred to Friedrich von Bernhardi's *Vom heutigen Kriege* (1912), he explained the German "conspiracy" in Angola by "agents" such as Eisenlohr, Schöß, Vageler's study commission and missionaries. Maia Magalhães then described the Naulila incident as if he had been an eye-witness; justifying his good command of the particulars with the explanations Sereno had given to him in 1914.[308] Portugal's witnesses firmly rejected any wrongdoing on the Portuguese side like employment of irregular troops during the battle of Naulila.

The two eye-witnesses of the Naulila incident were asked to relate their accounts of what had happened ten years previously. Carl Jensen remembered that when Schultze-Jena had learnt that *Capitão mor* Varão was not in the fort, he wanted to leave. Sereno tried to convince him to stay but Schultze-Jena rode his horse towards the gate. When he reached the buildings next to the gate he noted that soldiers were pointing their guns at him. He attempted to take his own gun but was shot before he could do so.[309] Sergeant Gentil, the commander of the fort, was not present at this very moment, since Sereno had sent him to his office; but when Gentil heard gun shots and ran towards the noise, he saw Schultze-Jena lying dead on the ground. Gentil was told by his soldiers that the latter had shown a threatening attitude and had therefore been shot. Gentil denied that Sereno had ordered him to falsify a letter presumably from the *Capitão mor*. When arbitrator de Meuron wanted to know whether Jensen, in Gentil's opinion, spoke Portuguese, Gentil responded that Jensen spoke very poor Portuguese.[310]

After more than one week, the first hearing of witnesses was closed on June 11, 1924. According to the German Minister Voretzsch, Brückner and Franz were not contented with the hearing. They immediately requested to hear in Berlin the former High Commissioner of Angola, General Norton de Matos, who had just been appointed Ambassador to London and could not come to Lisbon. And they reserved the right to request the hearing of the missionaries Wulfhorst and Hochstrate in the former German colony by a British court.[311] Brückner's and Franz' impression was that the Portuguese had prepared their witnesses very well for the hearing

308 BAB R 1001/6638: 143, extra-file: 197ff. testimony Magalhães, 7.6.24.
309 BAB R 1001/6638: 139, summary testimony Jensen, 7.6.24; cf. *Santos* 1978: 222-4.
310 BAB R 1001/6638: 143, extra-file: 297ff. testimony Gentil, 9.6.24.
311 BAB R 1001/6637: 171-190, Franz: report on hearing, 3-11.6.1924, 28.6.24.

and may have "instructed exactly" each testimony, as their structure followed the line of argument of Magalhães' memoranda. The German representatives, on the other hand, had agreed not to meet with Jensen after his arrival in Hamburg on May 10, and not to instruct him about his testimony. The deputy-head of the Foreign Office's legal department, Georg Martius, decided that Jensen should not be allowed to see the files with his previous statements. Even though nothing in this regard had been discussed with the arbitrator, Martius – making an analogy to German rules of procedure – was concerned that this could be interpreted "as influencing of witnesses".[312]

Brückner and Franz identified two Portuguese main arguments: the alleged German intention to annex the Portuguese colonies and the German instigations of "natives" against Portuguese rule.[313] And indeed, the recurring emphasis given by the witnesses to the anti-Portuguese propaganda of Germans was striking; even a German "doctor Strauwald" (possibly the farmer [S]Trauwald) treating Africans was claimed to have served German interests.[314] Upon their return to Berlin, Brückner and Franz confirmed their disappointment about the hearing. Brückner deemed it improbable that de Meuron would accept Franke's expedition to qualify as legitimate defense (*berechtigte Abwehrmaßnahme*). Based on the Portuguese witnesses' accounts it seemed possible that the transgression of Angola's border by Schultze-Jena's expedition could be considered a fact by de Meuron and, even worse, that it was executed with intent. However, Brückner, who had been received in Lisbon by the Foreign Minister, neither deemed an offer for a diplomatic compromise to be more successful. Voretzsch assumed that any German offer under 100 Million GM would be futile.[315]

There would be no compromise also in the future. The arbitration continued unabated. Testimonies of further witnesses took place in Berlin

312 BAB R 1001/6637: 94, RMW to Dr. Ruppel, 12.4.24; p.111, Note on meeting, 6.5.24; p. 112, AA to C. Jensen; AA to DKG, 6.5.24; p. 120, Dr. Franz to RMW, 16.4.24; p.140.

313 BAB R 1001/6637: 191, Voretzsch to AA, 13.6.24.

314 BAB R 1001/6638: 140, summary testimony Marques, 7.6.24; no 'doctor' of such name is known to the files. However, a bankrupt Farmer, Richard Strauwald, had left in late 1913 his Farm in order to go to Ovamboland; 'he expressed his intention to go to Angola'; NAN ZBU 1891 U V c 11 Farm Choantsas (R. Strauwald): 56, BA Grootfontein to KGW, 17.1.14; NAN ZBU 1010 J XIII b 4: 204f., Zawada to KGW, 2.12.09 mentions the 'Tsumeb trader Strauwald'.

315 PA R 52531, remark Martius, 23.6.24.

(January 1925), again in Lisbon (before a Portuguese judge on behalf of de Meuron, April 1925), in Angola (before Portuguese judges on behalf of de Meuron in Silva Porto [Bié] and Benguela, July 1925), in Frankfurt (October 1925), in Southwest Africa (before South African magistrates on behalf of de Meuron in Windhoek and Swakopmund, May 1926), and finally also Ambassador Norton de Matos gave his testimony in Paris (May 1926).

The German witnesses, most of all Governor Seitz and General Franke spoke about the military necessity to attack Naulila, their conviction that Germany was at war with Portugal, and the impossibility to receive information from Germany. The Portuguese soldiers in Angola who had survived the attack on Fort Cuangar recounted German brutalities. Dr. Vageler denied allegations that his study commission fulfilled military purposes or was engaged in illegal activities. The German missionaries in SWA rejected claims that they had treated King Mandume "like a white monarch". And Norton de Matos responded eagerly to the questions of his minister colleague of 1917 in the government of Afonso Costa, Magalhães, about the German "infiltration of Angola". The Ambassador was well prepared and read a philippic with numerous facts to prove his claims.[316]

In the end, arbitrator de Meuron and his secretary Guex had listened to similar explanation of 'facts' time and again from the witnesses of one party with minor variations. These 'facts' were then emphatically denied and explained from a different perspective by witnesses from the other party. The French transcriptions of the testimonies added up to several hundred pages. Arbitrator de Meuron was left with the task to add them to the four memoranda and form his opinion on matters of facts and of law.

3.4 Colonial Border Agreements, Pleadings, New Arbitrators, 1926

In 1926, it became evident to the German councilors that the case was not going well for Berlin. Not only had the testimonies not brought forward the intended predominance of facts in favor of Germany. Also on the colonial ground, facts turned against German arguments and interests. In June 1926, shortly after the military coup of May 28 in Lisbon against "Euro-

316 BAB R 1001/6640: 111, extra-file: 3-37, testimony of General Norton de Matos, 5.5.26.

pe's most unruly parliamentary system" (45 governments in 16 years) and the resulting end of the republic, agreements were signed between the Portuguese Government and the Government of the Union of South Africa. This *rapprochement* reduced years of mistrust between the parties and Portuguese concerns about its sovereignty in southern Africa.[317] Already at Versailles, the Portuguese urged the British to finally regulate the question of Angola's southern border and thus the question became a matter of high politics.[318] The Portuguese elite was still concerned about the possibility of losing the colonies and "such fears reached a zenith during the years 1922–28".[319] The *Estado Novo*, soon to be established by António Salazar, was just as committed to the Empire as was the republic.[320]

The agreements concerned the delineation of the borderline between Angola and the Mandated Territory of Southwest Africa (June 22, 1926) and the use of the Kunene waters for the purpose of power generation and irrigation (July 1, 1926). Both parties were not satisfied with the provisional agreement of 1915 declaring the disputed area a "neutral zone", jointly administered by Portuguese and British commissioners. A Luso-British commission met in July 1920 at the Ruacana Falls to initiate the delimitation of the boundary. The Portuguese were headed by Colonel Carlos R.M. de Faria e Maia, in 1914 member of the Luso-German "study commission". He took an extensive trip around southern Angola and documented in a photo album the commission's work and the reestablished Portuguese fortresses destroyed in 1914, among them Fort Naulila. The head of the South African commission, Surveyor-General Francis E. Kanthack, considered as "fairly clear" the definition of the precise spot through which the parallel of latitude from the Kunene to the Kavango should be drawn according to the Luso-German Treaty of 1886. He called

317 *Wheeler* 1978: 3; cf. *Roberts* 1986: 497 'It was the principal achievement of the Estado Novo that, after 1926, … diplomatic support was obtained from both Britain and South Africa … Both internally and externally, the Portuguese empire was more secure in the 1930s than at any time in the previous hundred years.'; *Ministério das Colonias* 1929: 3.

318 TNA FO 608/217: 1, Hardinge;34, Crowe to Read, 6.5.;39, Curzon to Balfour, 17.5.19.

319 *Wheeler* 1978: 188.

320 On this continuity *Arenas* 2003: 6 referring to V. Alexandre.

the German claim "ingenious" that the borderline must be drawn further upstream at the "Small Cataract" instead of the Ruacana Falls.[321]

In the following years it seemed that the Portuguese administratively incorporated the "neutral zone" into Angola. Only in 1926 South Africa's new Afrikaaner nationalist government under Barry Hertzog (1866–1942) was willing to accept Portuguese claims to the neutral zone. This was a determined move away from the "imperialist aspirations" of Jan Smuts (ousted in 1924). In turn Lisbon accepted Sout h African water rights and ratified the first treaty that the Union negotiated and signed "in its own right" without involvement of the British Foreign Office. "[P]rofoundly important" for the National Party's notion of South Africa's independence, the preamble asserted that the Union "possesses sovereignty over the territory of South West Africa" to which the Portuguese agreed despite the protestations of the League of Nations.[322] Thus, "South Africa, gradually emerging from British suzerainty, took great pride in its new role as a colonial power"[323] Demarcation started in 1931.[324]

The connection of these agreements with the Luso-German arbitration was palpable: The Portuguese delegation in Cape Town was headed by the former Prime Minister and Foreign Minister Augusto de Vasconcelos, who had dealt with the border issues already before the war. He was accompanied by Colonel de Faria e Maia, who knew the disputed areas from his tours in 1914 and 1920 and who had given his testimony on German border infringements in Lisbon in 1924.[325] The German Consul General Alfred Haug reported that Prime Minister Hertzog had explained to him that the Portuguese standpoint in the Angola boundary dispute was "well-founded". In 1927, Portugal concluded an equally successful treaty with the Belgians on the border with the Congo.[326] These successes of Portuguese foreign policy stood in contrast to the domestic affairs of Portugal

321 *Kanthack* 1921: 321; 334; *Faria e Maia* 1941; PT/CPF/CAF/0012, Missão da Delimitação da Fronteira Sul d'Angola, 58 photos [http://digitarq.cpf.dgarq.gov.pt/details?id=65446], 1920; cf. *Akweenda* 1997: 225; *Pélissier* 1977: 501; *Dias* 1991 on photography in Angola.

322 *Cooper* 1999:127 1928 Pretoria ceased flying the Union Jack in SWA; *Vigne* 1998: 300.

323 *Botha* 2007: 19; cf. *Akweenda* 1997: 228f.; *Ndongo* 1998: 291.

324 Art. 1; 2, BAB R 1001/6641: 12, extra-file: 43-7, French transl. of Luso-South African Border Agreement, 22.6.26; on the delimitation (23.9.28) *Brownlie/Burns* 1979: 1033-36.

325 Cf. *Kanthack* 1921: 335; *Faria e Maia* 1941.

326 BAB R 1001/6640: 131, German CG Pretoria to AA, 12.7.26; cf. *Vellut* 1980: 103.

where "public powers grind[ed] to a halt" and the political situation was characterized by "relentless instability and overall uncertainty".[327]

Considering that the facts turned against them, a more qualified legal support to the German Foreign Office and its Colonial Department was necessary than the former colonial official Hugo Franz could offer. During the last hearing in Paris, arbitrator de Meuron had indicated that he intended to have the final oral pleadings in autumn 1926. Again, it became obvious that the lawyer wanted to follow similar rules of procedures as in a domestic court cases.[328] While it was considered a matter of fact that Professor Magalhães would represent the case for Portugal, the Legal Department of the German Foreign Office started in May 1926 to search for a "personality" who could represent Germany in eloquent French.

The choice fell on the appellate court judge (*Oberlandesgerichtsrat*) Dr. Robert Marx (1883–1955) from Düsseldorf. He knew the task of representing Germany in cases based on the Treaty of Versailles. Since 1921, Marx was commissioned to the Franco-German MAT in Paris where he worked and lived with his family.[329] Fluent in French and English, Marx accepted the nomination. He commenced to work on the four memoranda during his summer holidays. Interestingly, the hundreds of pages of testimonies were considered of minor relevance for Marx' preparations.[330] Knowing billions at stake, Marx worked since August exclusively on this arbitration in Berlin.[331] Again, the Germans hoped the Portuguese would accept a diplomatic settlement to avoid the formal arbitration.[332] Already in February 1926, the Portuguese and the German delegation to the Reparation Commission in Paris agreed to limit the value of German deliveries in kind to Portugal. Such sense of compromise could be upheld.[333]

Arbitrator de Meuron was not a disguised "state attorney". He had to weight the facts as presented to him by the parties. He was not entitled to undertake his own inquiries. Thus, pleadings were his last chance to clarify questions of fact or law. In July 1926, de Meuron sent a clarifying

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327 *Madureira* 2010: 658; *Madureira* 2007: 82; cf. *Meneses* 2009: 32f.; 45.

328 PA Bern 1763, AA to DG Bern, 31.5.26; on this 'analogy' already *Lauterpacht* 1927.

329 LANRW Gerichte Rep. 244 Nr. 848: 196 Personalakte Robert Marx, MoJ to Marx, 19.9.1921; PA R 52531, Martius to Brückner, 14.5.26; remark Frohwein, 19.5.26.

330 BAB R 1001/6640: 121, Dr. Marx (*Deutscher Staatsvertreter beim deutsch-französischen Gemischten Schiedsgerichtshof*) to Göppert, 17.6.26; p.138, remarks.

331 BAB R 1001/6641: 31, remark Frohwein to Martius, ~10.8.26.

332 PA R 52532, Martius to Göppert, Brückner, Franz, 4.9.26; Martius to Frohwein, 14.9.26.

333 AHD 3p ar 25 m 1-Reparações, Proc.1, Port. Delegation to Reparation Com., 4.5.26.

memorandum to both parties regarding the pleadings in Lausanne on September 20, 1926. He considered the damages in the colonies the "most important" part of the case, as compared to Portuguese damages in Belgium and at sea. Before the indemnity for damages could be assessed, the principles and the limits of Germany's responsibility had to be determined: for that end, 1) the Naulila incident had to be further clarified; and it needed to be decided 2) whether that incident was such as to justify the measures subsequently taken by Germany; and 3) whether Germany assumes responsibility for all of the harm ensuing from these measures, or if its responsibility is diminished by the fact that concomitant causes independent of its will might have contributed to augmenting such harm.[334]

The hearing in Lausanne took place in the auditorium of the University (*Palais du Rumine*) and was headed by arbitrator de Meuron and the Professor of law Dr. Guex, who had supported de Meuron already for years. Despite the important political changes that took place in Portugal and the intense struggles within the administration, Professor Magalhães and Major Costa Dias were still Portugal's representatives. Judge Marx and Councilor Franz represented Germany. Anyone was admitted to hear the representatives in Lausanne; sessions lasted from 9-12 a.m. and from 3-5 p.m.[335]

Following a short introduction by de Meuron, Professor Magalhães was the first speaker on Monday morning, September 20. As was to be expected, he commenced his pleading, which lasted for almost ten hours, with a historical overview of the political situation at the eve of the war. He underlined that German greed (*convoitise*) with regard to the Portuguese colonies was no secret. Magalhães reiterated the Portuguese version of the Naulila incident and put great emphasis on the "fact" that the Germans had camped not in the contested "neutral zone" but on undisputable Portuguese territory. He referred to the new border agreement with South Africa of June 1926, recognizing the Portuguese definition of the border to commence at the Ruacana-Falls. This agreement served him as prove that Portugal has always been right when it claimed that Schultze-Jena had camped in Angola.[336] As to the German justification of the destruction of forts, Magalhães reminded the audience that according to international law measures of reprisals would have to be equitable. The destruction of the

334 BAB R 1001/6640: 130, de Meuron to DG Bern, 19.7.26; transl. *Heinze/Fitzm*.1998: 1267.
335 PA R 52532, Telgr. Bülow (Genf) to Martius, 18.9.26; remark Martius, 28.9.26.
336 BAB R 1001/6641: 12, extra-file: 15, statement Contre-Admiral Gago Coutinho, ~2/1926.

forts along the Okavango River would have "sufficed". When Governor Seitz ordered the attack on Fort Naulila, he did not consider it a reprisal but an act of war, which was contrary to international law. Finally, Magalhães restated that the "native rebellion" was caused by German propaganda from German agents and missionaries, who had also delivered modern guns to Africans. He concluded that Germany would be liable for all consequences caused by the "native rebellion".

Magalhães' pleading was as ardent as Marx' was sober – a legal duel with uncertain outcome. Marx commenced with a statement from a purely legal perspective. He reiterated that § 4 of the Annex to Article 298 TV did not establish new obligations but regulated the usage of German property in allied territory for damages committed by German authorities during the neutrality of the respective allied power. Referring to a number of precedents, he emphasized that under this clause the arbitrator would have competence only to decide on the merits and the amount due, but that it is not his task to decide on the mode of payment (the execution). In line with public international law, only states would have a claim against another state and not individual citizens.[337] Only the next day, September 22, 1926, Marx included the factual situation on the colonial ground in his pleading, which lasted for around three hours. He reasoned that the witnesses had not clarified whether Schultze-Jena had camped on Portuguese, German or neutral territory. German intention to procure foodstuff in Angola would have been perfectly in line with the rights and duties of neutral states according to international law (Art. 7; 8, V. Hague Convention). Marx spoke of an illegal order by the *Capitão mor* of Cuamato to arrest and disarm the Germans, which was taken to the extreme by Lieutenant Sereno who had tricked the Germans to get them into the fort. The authorities in GSWA, without information from Berlin and after several attempts to contact the Angolan authorities via the wireless station, were entitled to take "reprisal" measures against the Portuguese forts. The attack on Fort Naulila was necessary considering that the first measures proved futile to obtain the prisoners Jensen and Kimmel. The expedition of Commander Franke was also justified by necessity to protect the border of GSWA against Portuguese intrusions which seemed to be imminent. However, even if certain reprisal measures would be qualified as "excessive", such excess were compensated by the grave errors committed by the Por-

337 Cf. on the contemporary legal discussion *Petersson* 2009: 97-107.

tuguese. Marx concluded that German authorities had not "committed" acts in the sense of § 4 and therefore no German responsibility could be claimed. Furthermore, the "native revolt", on which most of the Portuguese claims for damages were based, could not be considered causally related to German acts. The "troubles" with Africans were already ongoing for years before 1915. Roçadas' retreat up to Gambos after the battle of Naulila was not caused or justified by any German military act. Finally, the famine and the resulting damages were not only caused by the war but also by the lack of rain. Marx agreed to the German payment of an indemnity for the incident in Mazuia, Mozambique, but asked de Meuron to reject the claims for damages in Angola.[338]

On Wednesday afternoon, Magalhães was given time to prepare his replique to the German statement. Apparently, he found Marx's division of the pleading in a legal and a factual part convincing. When Magalhães commenced his replique the next day, he divided the subject in the same manner. While he had barely touched on legal substance in the days before, Magalhães now changed his tactics visibly. He brought with him a stack of international law treatises, which he put on his desk to read quotations from them from time to time. Magalhães denied that Schultze-Jena was a "peace envoy", since there was no war. Germany would not have been entitled to "reprisals" since treatises of international law stated that according to the statutes of the League of Nations no such law of reprisal exists any longer. Provided such law had existed in 1914, its exercise would have been lawful only after a respite of several weeks after the original incident. Governor Seitz had violated this rule, when he ordered the attack on Fort Cuangar three days after the Naulila incident. Finally, Magalhães resorted to factual issues and quoted extensively from the testimonies. His replique took almost seven hours. Marx reported later that Magalhães prided himself with his ability as "politician, professor and lawyer" to speak for hours without efforts. On September 23, de Meuron invited all participants and their wives for a dinner party to his house.[339]

Dr. Marx, whose fluency in French impressed de Meuron, did not request a pause for his duplique to Magalhães, since the latter had not brought up new arguments. Marx contented himself with less than three hours on Friday afternoon. His duplique was driven by the political argu-

338 BAB R 1001/6641, Plaidoyer Marx, 20.9.; 12, file: 57f., conclusions Marx, 20.9.26.
339 BAB R 1001/6641: 4-11, report of H. Franz to AA, 18.10.26; cf. *Santos* 1978: 224-7.

mentation brought forward by the Portuguese, claiming that in 1914 Portugal had aimed at "no frictions with the Germans and strict neutrality". Marx however referred to the Portuguese *Whitebook* and wanted to prove that Portugal had never been neutral. Regarding Schultze-Jena's standing as "peace envoy" or not, Marx considered this an issue of denomination without legal substance; in any case he would have been entitled to enjoy protection as envoy. The final pleading of Marx was full of quotations from the testimonies. He preferred to quote Portuguese witnesses to underline his own standpoint. Marx reminded Magalhães that only the engineer Schubert had been taken to court in Angola because of his alleged German propaganda. However, the accused was acquitted for want of evidence. Thus, he considered as pointless the Portuguese claim about the German propaganda and its consequences. Under international law only direct damages would create an obligation to pay damages. Emphasizing that the Germans never pursued the Portuguese troops after their defeat in 1914, Marx argued by quoting the witness Maia Magalhães that the battle of Naulila was "simply a reprisal", which did not cause Africans to rise. Marx concluded by pointing to the "future" of Germany, loaded with the obligations of the Treaty of Versailles, which should not be further aggravated by the arbitration award.[340]

The pleadings anticipated most of the arguments which would finally find their way into the award. De Meuron and Guex never made any comments during the sessions and did not even ask a question after the oral proceedings were over. De Meuron merely remarked that he would send his decision to the envoys in Bern, but did not indicate when he would do so. Marx lauded the handling of the hearing by the arbitrator as being fair and neutral. Marx did not want to speculate on the outcome, but remarked that he was "optimistic", considering the "the manner in which de Meuron and Guex listened to our arguments" and a comment by R. Guex after his first "pleading, that he had rediscovered many lines of thinking in it that corresponded to his [Guex'] ideas in studying the process". [341]

Over the following year, both parties speculated that the award would be published soon. However, de Meuron struggled with the stenogram of Marx' pleadings that were wrongly recorded, so Marx had to revise the 120 pages.[342] In October 1927, Marx met the secretary of the arbitration,

340 PA R 52532, Marx, Paris to AA, 3.3.28, Plaidoyer du Dr. Marx: 120.
341 PA Bern 1763, Dr. Marx to Göppert, 24.9.26.
342 PA Bern 1763, de Meuron to Dr. Marx, 26.9.27; Dr. Marx to AA, 6.10.27.

Ill. 37 Robert Guex

Ill. 38 Robert Fazy

Professor Guex (who was himself arbitrator in several MATs) in Paris. He told Marx "in a very humorous manner about his persistent but heretofore fruitless attempts to convince Mr. de Meuron to hand down the arbitration award and [he] concluded with the observation, that in his opinion, a decision would be available until January 1, 1928".[343] In December 1927 de Meuron's request to meet the Portuguese and German ministers in Bern led to rumors that the award would be imminent. However, de Meuron suggested to nominate two additional arbitrators, thus deviating from § 4. Considering the significance of the irrevocable definite decision, the enormous amounts involved and the serious factual and legal problems of the case de Meuron wished the arbitration award to be the result of a collective work. He referred to analogous considerations of the Greek-German arbitration tribunal, which had also involved several arbitrators. De Meuron suggested nominating a Swiss federal judge and Professor Guex who had been involved in the case for years and knew all documents and proceedings.[344]

The Secretary of State of the Portuguese Foreign Ministry bluntly stated that he had no intention to reject de Meuron's suggestion, "whose reason apparently is rooted in the concern of the arbitrator to bear all responsibility himself."[345] Guex was accepted unanimously. Due to his French native language and his domicile in Lausanne, federal judge Robert Fazy (1872–

343 PA R 52532, Marx to Martius, 20.10.27.

1956), the president of the German-Romanian arbitration tribunal, was the favorite of de Meuron. Portugal's minister in Bern pointed to Fazy's "Latin mentality" and saw his appointment as "favorable to Portugal". Even though the Germans would have preferred a Germanophone judge (the President of the Federal Court Emil Kirchhofer (1871–1944), Schaffhausen) they conceded to Fazy in February 1928.[346]

4. The Award of 1928 (Merits)

While the Portuguese administration, and most of all the Finance Ministry, since April under the helm of Professor António Salazar, was hoping for the immense amounts it had claimed, [347] its German counterpart was faced in early 1928 with another pressing 'colonial issue': the reparation payments for the Germans expelled from the ex-colonies (and those expelled from Russia and Eastern Europe). Altogether 10,4 billion marks in "foreign damages" (*Auslandsschäden*) due to the war had been claimed, but the Ministry of Finance could allocate only 1,4 billion marks for payments to claimants who were waiting now for almost ten years. Given that pressure groups repeatedly linked the ongoing German reparation payments to the Allies to the outstanding amounts for "expropriated Germans", the issue was highly politicized. When the final bill on war damages (*Kriegsschädenschlussgesetz*) was discussed, hundreds of claimants expressed their anger in front of parliament. The Vice-President of the Reparations Office (*Reichsentschädigungsamt*), faced with more than 350,000 claims, was even attacked in his office by a farmer expelled from GEA.[348]

The obligation to pay additional billions could well have derailed the German budget (even though § 4 made no allusions to the execution of an award, as Marx had repeatedly stressed). Nervousness increased and Marx had thus any reason to send encouraging letters from Paris to the Foreign Office that – after having met Guex and Fazy during other arbitration tribunals – he had won the impression from private conversations that the

344 PA Bern 1763, pro-memoria de Meuron, 12.12.27; DG Bern to AA, 15.12.27.
345 PA R 52532, DGL to AA, 18.12.27.
346 PA Bern 1763, AA to DG Bern, 3.1.28; Portug. Minister Bern to Meuron, 12.1.28; AA to DG Bern, 26.1.28; R 52532, Marx to AA, 21.1.28; Fazy to DG Bern, 28.4.28; *Santos* 1978: 228f.; *Tscharner* 1956.
347 *Meneses* 2009: 46; 59; *Smith* 1974: 662 on Salazar's 'passion for balanced budgets'.
348 *Aas/Sippel* 1997: 153-5, verdict *Schöffengericht Berlin-Schönebg.* vs. Langkopp, 9.4.1929.

two agreed in essential parts with the German standpoint; especially with regard to the claimed damages due to the "native rebellion".[349] In early July de Meuron asked the parties for a payment of 10,000 Swiss Francs each,[350] upon receipt of which he sent to the Portuguese and German Ministers in Bern on August 1, 1928 the award of the arbitration tribunal. Dating July 31, 1928, the 34 pages were immediately forwarded to Lisbon and Berlin.

4.1 *Disproportion évidente* – Content of the Award

The question what makes jurists think what they think is always elusive – an awareness of matters of fact and matters of law will not suffice to explain a specific decision by arbitrators. Most importantly for historians, the arbitrators left no traceable sources about their reasoning other than the text of the award itself. The criterion of falsifiability of the evidence provided was certainly applied by the three arbitrators. Their award was heavily based on matters of fact while those claims that seemed implausible to them were excluded. Verifiable 'objectivity' was the goal of the arbitrators when analyzing the 'facts' in light of the law:

While Germany had argued that the attacks on the Portuguese fortresses were lawful reprisals, Portugal contended that the reprisals were unjustified and that Germany was responsible for all damage caused by the invasion. Portugal, in its memoranda and during the pleadings, had claimed two categories of damage. One related to the direct consequences of the German invasion of Portuguese colonial territory, like the killing or wounding of soldiers or of civilian population, and the destruction of property. The other related to the damage caused by the "African rebellion" in the territory evacuated by Portuguese forces which became the scene of pillage, and for the (re-)occupation of which it was necessary to send a costly expedition.

The award focused exclusively on the colonial damages and began with a discussion as to the law applicable. The arbitrators held that their award must be governed by general rules of international law as distinguished from any particular treaty provisions. The question was one of state responsibility, and as such must be determined by general international law.

349 PA R 52533, Marx, Paris to AA, 4.5.28; 25.5.28; 26.6.28; 26.7.28.
350 BAB R 1001/6641: 51, de Meuron to DG Bern, 7.7.28.

The designation of a purely neutral tribunal and the use in § 4 of the term "acts committed" – a term taken from the terminology of international law – showed that there was no intention to substitute a special *ius tractatus* for general international law. Pointing to two awards (*Chatterton* 1923; *Karmatzucas* 1924), the arbitrators decided that the fact that the Treaty of Versailles did not expressly lay down the rules of law to be applied by the arbitrator could be interpreted only as meaning that the arbitrator should apply international law. This being so, the law applicable by the arbitrators was that laid down in the first four paragraphs of Article 38 of the Statute of the Permanent Court of International Justice.[351] In case where there was no rule of international law applicable to the case the arbitrators filled the gap by applying "principles of equity". In doing so the arbitrators remained, they argued by referring to Heinrich Lammasch, within the "purview of international law applied by analogy, and taking its evolution into account."

De Meuron, Fazy, and Guex carefully reiterated the facts examined during the arbitration. However, seeing that the witnesses disagreed "on several points" they acknowledged that the "investigation did not yield a clear reconstruction". Therefore, "[i]n order to apportion responsibility, the arbitrators, after having considered the testimony in accordance with the customary rules governing allocation of the burden of proof, must then fill any gaps by accepting the most plausible presumptions".[352] Among the "facts" the arbitrators recognized as "established" was the Portuguese contention that "Erickson Drift [south of which Schultze-Jena had his camp], located to the north of the extreme limit of [the neutral] zone, was situated on Portuguese territory." (p. 1019f.) They found that the death of the three Germans on October 19, 1914 was due to a *déplorable* misunderstanding caused largely by the fact that the actors did not understand each other be-

351 Art. 38 StPCIJ: '1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59 judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.' Cf. *Kennedy* 1997: 120f.

352 RIAA II: 1011-35 (page numbers hereinafter in the text); transl. in: *Heinze/Fitzmaurice* 1998: 1272f.; *Fitzmaurice* 1932: 156f.; cf. *El Boudouhi* 2013: 148.

cause their interpreter was *incapable*[353]; and that the Portuguese officer who gave the order to fire believed himself to be in danger (p. 1024f.). They pointed out that in the following the colonial authorities did not communicate with each other, but acknowledged that the Germans sent uncoded radio-telegrams about the incident; a fact unknown to Angola's governor. Following this factual clarification the arbitrators defined the term *représailles*:

> "Reprisals are an act of self-redress (*Selbsthilfehandlung*) of the injured State, an act done in reply – after giving notice and not receiving satisfaction – to an act contrary to the law of nations by the offending State. Their effect is temporarily to suspend, in the relations between the two States, the observance of one or another rule of the law of nations. They are *limited* by humanitarian experience and by the rules of good faith applicable in relations between States. They would be unlawful if a prior act contrary to the law of nations had not furnished the cause for them. They seek to impose on the offending state reparation for the offence, the return to legality and the avoidance of new offences."[354]

Given this definition they found Germany responsible for the damage caused by the invasion for the following reasons:

(a) A necessary condition for the legitimate exercise of the right of reprisal is the prior violation of a rule of international law by the state against which the reprisal is directed. However, there was no such violation in the present case, given that the death of the three German officers was due to an accident caused by an unfortunate misunderstanding.[355] Neither could the internment of the two surviving Germans be regarded as an act contrary to international law. Portugal, as a neutral state, had the right to disarm and intern armed belligerents who crossed its frontier (giv-

353 Brückner, Ruppel, or Seitz had attributed utmost importance to Jensen's testimony (BAB R 1001/6634: 107, Seitz to Colonial Ministry, 21.10.19), but the arbitrators were not hesitant to 'express reservation, if not about the sincerity, than at least about the probative value of testimony of the translator Jensen, regarding the meaning of certain conversations that had taken place, or texts that had been written, in Portuguese. For it has been demonstrated by the testimony of numerous witnesses – German as well as Portuguese – that Jensen, whilst employed as a 'translator' for the German mission, knew little Portuguese and barely understood it.' (p. 1020)

354 RIAA II: 1026, cit. in: 1998 ICJ: 432 (731) WL 1797317 *Fisheries Jurisdiction* (Spain vs. Canada), 4.12.98 [transl. by the Registry]; cf. *Séfériadès* 1935: 139; *Waldock* 1952: 460.

355 *Grewe* 1988: 734 in his summary of *Naulilaa* errs when he states: 'Repressalien der deutschen Schutztruppe in [DSWA] aus Anlass der *völkerrechtswidrigen* Tötung einer Gruppe deutscher Beamter und Militärpersonen auf portugiesischem Hoheitsgebiet in Angola.' [emphasis added].

en that the arbitrators considered the German camp on Portuguese territory; the "fact that the [German] mission … was, at Erickson Drift, still on German territory, has never been established").

(b) Reprisals are illegal if they are not preceded by a request to remedy the alleged wrong. There is no justification for using force except in case of necessity. Germany did not deny this principle and pleaded that the German governor informed all German posts by wireless of the death of German officers, and this notice, which must have reached the Portuguese authorities, should have been sufficient warning. Germany also pleaded that Governor Seitz refrained from sending a party with a flag of truce because he feared that the members of the party might be put to death or imprisoned. However, the arbitrators did not regard these reasons as sufficient.

(c) Reprisals which are altogether out of proportion with the act which prompted them, are excessive and therefore illegal. This is so even if it is not admitted that international law requires that reprisals should be approximately of the same degree as the offence. The arbitrators, knowing that this argument was doctrinally the weakest, went into some detail in their discussion of the legal literature:

> "The most recent doctrine [of reprisals], notably the German doctrine … does not require that the reprisal be proportioned [*proportionée*] to the offence. On this point, authors, unanimous for some years, are now divided in opinion. The majority considers a certain proportion between offence and reprisal a necessary condition of the legitimacy of the latter. International law in process of formation as a result of the experience of the last war tends certainly to restrain the notion of legitimate reprisals and to prohibit their abuse [*l'excès*]."[356]

Germany never denied the requirement of proportionality, but even mentioned it in the 1922-memorandum. The arbitrators concluded that there was an obvious lack of proportionality (*disproportion évidente*) between the incident in Naulila and the six acts of reprisals which followed the incident.

All three requirements (prior illegality, prior demand, and proportionality) were explicitly addressed in the German memoranda of 1922 and 1923, but the arbitrators interpreted the facts differently than the German representatives. Also the other contentious claims (German camp on Portuguese or German territory; Portugal's siding with the Allies or neutrali-

356 RIAA II: 1026, transl. *Gardam* 2004: 47; cf. *Séfériadès* 1935: 141-7 ref. K. Strupp.

ty) were decided against Germany: The first was apparently a question of a few meters and the Portuguese had forwarded ample of evidence in their favor; the second would have involved a balancing of political assessments about Portugal's "loyalty" to Britain that could have derailed the entire arbitration under § 4 about "neutrality damages". Evidently, the arbitrators had not intention to do so and followed the formal argumentation of Portugal. As a result, German reprisals in Angola were illegal and unjustified in light of modern tendencies of international law.

After investigating the Portuguese contention that Germany was liable in damages on the additional ground that the uprising of Africans was fomented by German agents – a contention which the tribunal rejected as unfounded – the arbitrators considered the question whether and how far Germany was responsible for the *indirect* damages caused by the German invasion. They referred to the fact that the decision in the *Alabama* arbitration (1872), denying compensation for other than direct damage, was subjected to criticism, and that international tribunals frequently awarded damages for indirect losses. "It would not be equitable to allow the victim to suffer from losses which the author of the first illicit act foresaw and, perhaps, willed, for the mere reason that there were intermediate links in the chain connecting that act with the damage sustained." On the other hand, the arbitrators held that it was impossible to charge a state with the responsibility for damage connected with the initial act by a chain of exceptional circumstances which could not be foreseen. They referred to the decisions of the American-German Mixed Claims Commission (under the Treaty of Berlin, 1921), which refused to award damages for losses which, although causally connected with the initial event, were at the same time due also to other causes.

The arbitrators held that Germany was responsible for such damage as the German authorities as "author of the initial act … should have foreseen as a necessary consequence of its military operations."[357] For the arbitrators it was "natural" that the German invasion should produce unrest among the Africans and increase the opportunities for revolt, and Germany was, in so far, responsible. It would not be just to limit German responsibility to damage caused directly by the German troops themselves. But Germany was *not* responsible for the extension of the revolt, which was due to specific circumstances connected inside Angola. It was not im-

357 Transl. in *Eritrea-Ethiopia Claims Comm*., Decision No. 7, 27.7.07 (H. van Houtte).

material that Roçadas who ordered the retreat evacuated a rich area, although there was no pressure on the part of the German regiment, which after the battle of Naulila retired to GSWA. The arbitrators concluded that Germany could not be saddled with exclusive responsibility for the consequences of the Portuguese officer's decision.[358]

The award was decided only on the merits of the case; no amounts of "Goldmark" were mentioned. Germany was obliged to compensate to Portugal the direct damages caused to the forts, and to a limited extent Portugal was also entitled to compensation of its indirect damages. The award did not mention the Portuguese accusations about the alleged German intrigues before the war to annex Portuguese colonies and did not state that Schultze-Jena's expedition had an illicit purpose. In their "ordinance" to the parties delivered together with the award, de Meuron, Guex, and Fazy ordered Portugal to provide them within three month with a memorandum listing detailed and complete amounts of *direct* damages caused by German attacks on the Forts Mazuia, Cuangar, Bunja, Sambio, Dirico, Mucusso, and Naulila. For other claims for damages a limited supplementary and equitable indemnity would be fixed, considering the preponderance of causes beyond the responsibility of Germany. The Portuguese memorandum would be forwarded to Germany for a response within three months. Subsequently, a hearing on the amounts would be scheduled.[359]

As to the colonial setting of the case and the language used by the arbitrators with regard to the "rebellion" and King Mandume, who was described as *chef sanguinaire*, it seems noteworthy that the subduing of the "rebellion" was considered a necessity not to be questioned by the award. The distinction between "civilized and uncivilized states" was one of the "central features of positivism" in international law. The arbitrators explicated the principle of the proportionality of reprisals, and it was out of question that such limitation to the use of force would *not* apply because the fighting took place in the colonies. International law, in this respect, was truly universal – between Europeans. However, completely different standards were, legitimately in contemporary discourse, applied to the categories of "civilized and uncivilized" people and all recourse to war

358 RIAA II: 1031f.; *McNair/Lauterpacht* 1931: 274, No. 179; 466, No. 317; 526f., No. 360.
359 PA R 52533, ordonnance de Meuron, Guex, Fazy, 1.8.28; DG Bern to AA, 2.8.28.

against "natives" was considered by international lawyers a domestic affair, since only European (colonial) power could exercise sovereignty.[360]

4.2 Responses to the Award. The Amount of Portugal's Damages

In August 1928, both administrations began to assemble information on the value of the destroyed forts and their equipment. Also the legal implications of the award were assessed. Evidently, Professor Magalhães was not pleased with the finding that Portugal would be – more or less – only entitled to direct damages from Germany. The award's wording of a "limited equitable" indemnity did not leave room for much speculation that the billions Portugal demanded since 1919 would be forthcoming soon. In September, German representative Marx provided the Foreign Office's legal department with his estimation of the costs to be expected according to the award. He assessed Germany's "risk" to amount to around 18 Million GM (9 Million direct damages and maximum 9 Million "supplementary equitable indemnity" for indirect damages).[361] However, while Portugal's administration was busy finding proof for the smallest piece of equipment destroyed in 1914, the Germans began to contemplate about legal reasons why no money should be paid at all.

4.2.1 German Hopes – A Possibility of Non-Payment?

Ruppel, the former head of the German team on the Portuguese claims commented on the award: "I am not really delighted by the opinion the tribunal has about the incidents in Naulila." However, he assumed that the "indemnity" would not be "too high". Moreover, "we will not have to bear it in addition to the Dawes annuities."[362] Judge Marx made a similar argument. In October 1928 he explained why diplomatic negotiations with the Portuguese about an extra-judicial settlement (as recommended before)

360 *Anghie* 1999: 22; 7 'The violence of positivist language in relation to non-European peoples is hard to overlook. Positivists developed an elaborate vocabulary for denigrating these people'; cf. *Koskenniemi* 2001: 102f.; 128; *Bowden* 2005: 20; 23; *Becker Lorca* 2010: 487.

361 PA R 52533, Marx, Paris to AA, 12.9.28; AA to RFM, 27.9.28.

362 PA R 52533, Ruppel, Paris to Martius, 10.8.28. 'Im übrigen werden wir diese ja nicht gesondert neben den Dawes-Lasten zu tragen haben.'; cf. *Dawes* 1926.

would no longer be necessary. He based his change of mind on the latest award by arbitrator Robert Fazy in the Romanian-German arbitration *David Goldenberg vs. German Empire* (September 27, 1928) which did not mention

> "according to German request … the question of execution [*Erfüllung*]. Furthermore, he indirectly supports the German thesis that neutrality claims [§ 4] do not have a particular status vis-à-vis the reparation claims and do not form a reason for payment obligations beyond the Dawes-annuities, by explicitly stating that these are claims (*Ansprüche*) from state to state … there is no sentencing [*Verurteilung*] to payments, but merely the amount of damages has been determined."[363]

The German Finance Ministry's councilors, when provided with the award and Marx' estimate of 18 Million GM went even further and attacked the basis of most of Portugal's claims. They came back to basic considerations of § 4, of which all participants to the dispute had apparently lost sight: The award obliged Germany to pay damages for the destruction of forts and military equipment – property belonging without any doubts to the Portuguese state. However, referring to legal literature of standing (*Baruch* 1920; *Isay* 1923; *Fuchs* 1927), the Finance Ministry argued that § 4 limited the competence of the arbiter to damages of *nationals* of neutral states. It was thus considered a contradiction of the award that it obliged Germany to pay damages to the Portuguese *state* for the destruction of military equipment, and at the same time it determined the arbitrators' proper jurisdiction for "taking cognisance of indemnification claims brought by *nationals* of the allied powers against Germany" (p. 1016) Considering the wording of § 4 there could not be any obligation to pay damages to the Portuguese state. The councilors assumed that the larger part of the risk of 18 Million GM assessed by Marx would fall under the damages caused by Germany to Portuguese government property.[364]

However, the Foreign Office was – despite the Finance Ministry's insistence – hesitant to raise this objection to "state property" with the arbitrators. It did so for purely tactical reasons. Dr. Martius, deputy-head of the legal department, conceded that the Finance Ministry's understanding of § 4 was not unfounded. But he reminded Judge Marx that it was "impossible" to use this argument officially at this point in time at the end of

363 PA R 52533, Marx, Paris to AA, 16.10.28 'keine Verurteilung zur Zahlung'.

364 BAB R 1001/6641: 75, RFM to AA, 20.10.28; PA R 52534, RFM to AA, 21.2.29; *Fuchs* 1927: 259 *Kaufmann* 1923: 19.

the arbitration procedure. Considering that the new Portuguese memorandum, having reached the Germans in the meantime, did not always adhere to the prescriptions of the award of 1928 when those were in favor of Germany (only direct damages could be claimed), it was a German strategy to emphasize the "the legal force of the interim award". "[W]e would damage ourselves if we contest the interim judgment in a substantial point." Furthermore, Martius argued, it was likely that the factual assessment of Portugal's claims would make evident that the damages to the Portuguese state to be recognized by the arbitrators were minimal in comparison to the original demands. He authorized Marx to use the argument of the Finance Ministry only during the oral proceedings and in case the Portuguese representative would question the "legal force of the interim award"; then Marx could respond that also Germany had not raised a substantial objection against the award.[365]

4.2.2 The Portuguese Memorandum, October 1928

Magalhães' new memorandum on Portugal's "direct damages caused by German aggressions in Maziua, Cuangar, Sambio, Dirico, Mucusso and Naulila" and a "detailed list of damages" (171 pages) reached Berlin in November 1928.[366] The Portuguese demanded 1) 275,000 GM for the Maziua incident; 2) 4,025,000 GM for the destruction of Cuangar and the other forts along the Kavango River and 3) 22,700,000 GM for the destruction of Naulila; in total more than 27,000,000 GM for the colonial damages – thus three times higher than estimated by Marx. Magalhães stipulated the damages in US dollars and summarized his calculations in gold marks. The calculated damages were "extremely detailed" (listing values as low as "23 dollar cents"). Included in the final amount were interest rates of 5 per cent p.a., calculated from 1915 to 1921 and compound interests to the amount of 30 percent on account of loss of profits. Personal injuries (*reine Personenschäden*) in Maziua were assessed to amount to 192,000 GM; in Cuangar 2,466,000 GM ($20,000 for the trader Machado shot, $10,000 each for his wife and his son João [the German councilors remarked that the two were "natives"], and $4,500 for other African civilians killed in the raid); and in Naulila 7,706,000 GM

365 PA R 52534, AA to Marx, Paris, 5.3.29 'Rechtskraft des Zwischenurteils'; *Bruns* 1929a: 7.
366 BAB R 1001/6641: 96, AA to Marx, Paris, 29.11.28.

($40-45,000 for officers, among them Sereno [around 180,000 GM], $20,000 for sergeants, $10,000 for European and African soldiers killed in action).[367] Additionally, indemnities were claimed for the maltreatment of Portuguese prisoners of war in GSWA ($10,000 for lieutenants and $1,000 for rank-and-file). Around 100,000 GM were claimed for property of the "natives" destroyed during the raid of Ostermann; around 8,000,000 GM were demanded for claims of private individuals (also soldiers who lost private property) or companies. The remainder of 8,000,000 GM consisted of claims for damages to Portuguese government property (1,290,000 in Cuangar etc.; 6,750,000 in Naulila).[368]

Despite de Meuron's request to only list "direct damages", Magalhães maintained the claim of 2 billion GM for the infringement of Portuguese sovereignty and international law by Germany. He in fact criticized the distinction made in the award between direct and indirect damages. Irrespective of the arbitrators' demand for a "precise list" of damages, the Portuguese also forwarded a list of damages where the underlying documentation would not allow distinguishing between the German "aggression" and the "native rebellion" as immediate cause of the claimed damages. The Portuguese memorandum again demanded that Germany should bear all costs arising out of the arbitration.

4.2.3 The German Counter-Memorandum, March 1929

Germany was given a deadline until February 10, 1929 to provide the arbitrators with a counter-memorandum, which was extended until March 15.[369] Faced with the detailed Portuguese description of colonial damages, Judge Marx and the councilors from the Foreign Office again referred to 'colonial experts', most of all (again) Hugo Franz, Major Trainer (commander Franke's deputy during the battle of Naulila), and Constable Ostermann, who now worked as a tax administrator.[370] They were tasked with assessing the value of the property destroyed in southern Angola.[371]

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367 BAB R 1001/6643: 16, Annexe, liste detaillée des domages, ~10/28.
368 PA R 52533, Meuron to DG Bern, 6.11.28; Limmer, 22.11.28; on POW *Ziemann* 2013: 38.
369 PA R 52533, de Meuron to DG Bern, 30.1.29.
370 PA R 52533, Marx on the meeting in Berlin, 15.12.28.
371 BAB R 1001/6641: 100, III K to Legationskasse, 9.2.29; p.104, Eltester to Trainer, 28.1.29.

Trainer wrote a 40-page memorandum on the battle and why Germany was not to be held responsible for Portuguese damages, most of which were due to the disorderly retreat and the hatred of the Africans for Portuguese troops based on a history of repression. He considered the figures given in Magalhães' memorandum about the costs of building the forts and their equipment (including large numbers of cattle and horses) bloated.[372]

The counter-memorandum written by Marx included many of the arguments Trainer made. Marx commenced by emphasizing that the Portuguese did not adhere to the frame set by the award of 1928 when they calculated their colonial damages. Only direct damages were of relevance according to the award. But Marx claimed that the Portuguese memorandum still included indirect damages, since the Portuguese commission established to assess the damages had not made this distinction and its findings were nevertheless included. Marx disputed any causality between costs for military convoys, loss of oxen, or the deterioration of roads and German actions against the six forts along the Kavango River. Marx also disputed that Germany should bear the cost for damages caused by the "Auanga gang", since these Africans were not "German auxiliaries", as claimed by Magalhães. The Portuguese memorandum had again causally connected to German actions the retreat of Roçadas' troops from Naulila to Humbe and the ensuing destruction and rebellion. However, the arbitration award had clearly stated that Roçadas did not act under military pressure from the Germans. They had offered to fight the Africans in cooperation with the Portuguese. Therefore Roçadas had to bear the responsibility of leaving the area to "the natives". The award did mention a supplementary "equitable indemnity" to a "very limited extent" for those damages that followed from the "native rebellion" immediately after the battle of Naulila. This however would exclude – according to Marx – those indirect damages that resulted from the military expeditions by Roçadas and de Eça against the rebelling Kwanyama, which were planned long before the war and ordered in Lisbon in August 1914. Equally, the costs for transports, carriers and lost ox wagons of individual claimants would have to be rejected, as they were related to these military expeditions.

Marx dealt with Portugal's 2 billion GM claim for Germany's infringement of international law in an extra-chapter. This claim was not specifi-

372 BAB R 1001/6641: 107-149, Major Trainer: Zur portugiesischen Denkschrift, 9.2.29.

cally mentioned in the award of 1928, and Marx argued that for factual and legal reasons it would be unjustified. He underlined that the claim was not meant to be an indemnity but a punishment, nowhere mentioned in the arbitration award. According to international law there was no such thing as *indemnité pour des dommages vindicatifs* (exemplary, punitive damages). Marx quoted from the Mixed Claims Commission's *Lusitania* case (1923):

> "The industry of counsel has failed to point us to any money award by an international arbitral tribunal where exemplary, punitive, or vindictive damages have been assessed against one sovereign nation in favor of another presenting a claim in behalf of its nationals."[373]

In the *Lusitania* case, umpire Edwin B. Parker (1868–1929) underlined that the Treaty of Berlin between the United States and Germany, in its meaning of "Peace Treaty", would exclude the imposition of a penalty by one state to another state. And Marx, while admitting that Part VII of the Treaty of Versailles dealt with "penalties", used this argument to underline that also in the Luso-German arbitration in the context of a "Peace Treaty" there should not be any mentioning of "penalties" between the parties.

Marx also rejected the inclusion of a "lost profit" category and criticized the different classes of indemnities for military ranks mentioned by Magalhães for the loss of lives. All prisoners of war were according to Marx treated reasonably and according to the difficult circumstances in GSWA in 1915. He refused the payment of an "equitable indemnity" for them, but conceded that the arbitrators would have to decide on the issue. The hanging of seven "native franctireurs" was justified as in line with the laws of war. According to a calculation of Major Trainer, Marx also assessed the Portuguese list of damages and the value of the forts destroyed by German forces. The material loss in Fort Naulila (weapons, ammunition, animals – including two camels, 15 ox wagons, uniforms etc.) was estimated by him to amount to only 255,625 GM. Marx deemed the claimed damages for the destroyed military constructions "incomprehensible", considering that even the value of Fort Naulila – one of the larger forts – was estimated by (German) eyewitnesses to amount to only 8,000

373 *Lusitania Case* 1.11.1923, RIAA VII: 32-44 (40) Parker refered to Jackson Ralston: International Arbitral Law, 1910, § 369: 'While there is little doubt that in many cases the idea of punishment has influenced the amount of the award, yet we are not prepared to state that any commission has accepted the view that it possessed the power to grant anything save compensation.'

GM. Marx rejected reparations for losses in Fort Cuamato, Otoquero, and eleven other forts mentioned in the Portuguese memorandum, since German soldiers had never attacked them. All damages were due to the "rebellion". Marx also mentioned "the drought" and "the epidemics" in Southern Angola as causes for Portuguese loss unrelated to German actions. He thus asked the arbitrators to assess the "supplementary indemnity" for indirect damages at a lower level then the 27 Million GM demanded by Portugal for direct damages. To substitute the opinion on the limited military value of the Portuguese forts and the minor costs borne by the Portuguese state for their construction, the German memorandum had as annexes three photographs of Cuangar and Naulila and seven of the German police post Kuring Kuru.[374]

4.2.4 The Portuguese Replique and the German Duplique, April/June 1929

The 60-pages replique of Magalhães put great emphasis on the "native revolt" and insisted that the damages it caused were causally connected to German actions and therefore qualified as "direct damages". He stated that also the award of 1928 had argued that way. Magalhães argued, the attack on Fort Cuangar had determined the Portuguese authorities to send more troops and equipment to prevent further probable aggressions. The attacks on the forts were not necessarily executed by Germans but by their "allies, the Auanga gang (Kanjime)". The Portuguese retreat to Humbe was a military necessity to avoid total destruction and therefore the damages in the areas south of Humbe due to the "revolt" were an immediate consequence of the German aggression against Naulila. Trainer's offer to Roçadas to jointly subdue the "rebelling natives" was considered by Magalhães as not "sincere". By invading Angola, the Germans had not shown any sign of "solidarity" between Europeans in Africa. Instead, they had cooperated with the "natives". Magalhães conceded that the expenses of the military expedition of de Eça could not, according to the provisions of the arbitration award, be considered an immediate damage. He, however, insisted that the expedition of Roçadas of August 1914 had been made necessary not only by the Kwanyama but mainly by the war and the "attitude" of

374 PA R 52534, AA to Marx, Paris, 1.3.29; Mémoire du Gouvernement Allemand, ~1.3.29.

Germany against Portugal's colonies. These troops had to suffer the German aggression and the resulting damage was caused directly by Franke's troops.

The replique categorically denied any double-charging of claimed expenses as assumed in the German memorandum for claims of transport costs, loss of cattle and ox wagons. Magalhães explained that the Portuguese state had indemnified some claimants already and claimed these costs from Germany; whereas other private claimants had not yet received an indemnity, therefore their losses would be directly claimed from Germany.

The claim of 2 billion GM for the infringement of Portugal's sovereignty and international law was upheld. Magalhães rejected the German argumentation that 1) this claim would be a "sanction"; 2) the American-German Mixed Claims Commission had concluded that there is no German obligation to pay indemnities to the U.S. for "vindictive damages"; 3) such kind of indemnities would be unknown to international law; and 4) the claim could not be maintained in the context of § 4. The first objection was considered a mere technicality of denomination, since any reparation could be called a "sanction". The second objection was considered irrelevant since the American-German Mixed Claims Commission was based on the Treaty of Berlin which did not incorporate Part VII of the Treaty of Versailles on "penalties". The German counter-memorandum's argument was thus not applicable to the Luso-German arbitration. The third objection was considered erroneous since international law would recognize that reparations for damages must be complete. Finally, Magalhães maintained that § 4 did not exclude such claim but would admit it "in spirit and letter".

As to the calculation of the claimed indemnities for loss of lives, Magalhães justified the establishment of three groups, officers, non-commissioned officers and African and European rank-and-file as to be in line with Portuguese and International Law. He considered it reasonable to put European and African soldiers in one common group considering that the latter "possessed a certain degree of civilization which distinguishes them from uncultivated natives, and some of them were Christians". Europeans and Africans "cooperated in equal standing in the defense of the border." The "value attributed to each categories of killed military or civilians for which Germany has to pay an indemnity" was, according to Magalhães, rationally calculated in the annexed list. Also the indemnities claimed for the Portuguese prisoners would have to take into consideration the distinc-

tion between military grades, considering that the degree of humiliated honor and "moral prejudice" differed between officers and recruits.

Similar to previous statements, the Portuguese disputed that irregular African troops had been deployed or that a white flag had been hoisted. Therefore, the hanging of seven alleged *franctireurs* for indiscriminate shooting after the end of the fighting was considered contrary to the laws of war. The Africans were regular infantry soldiers.

Referring to the classic Lapradelle and Politis, Magalhães rejected the statement in the counter-memorandum that international arbitration would exclude an indemnity for (indirect) lost profits. The method of calculating the lost profit and the application of 5 percent interest was in line with international law and the practices of the Mixed Claims Commission as well as section 352 of the German Trade Code.[375]

Finally, Magalhães put in doubt the pictures annexed to the German memorandum. He claimed that those on Cuangar would not give an "idea of the importance of the fort and its buildings and annexes"; while the other of Naulila would show nothing of the fort. As was to be expected, Marx, in his duplique of June 1929, insisted on all the points he had made in March and rejected Magalhães criticism with previously used arguments.[376]

4.2.5 The Pleadings and the Dispute about the Young-Plan, 1929/30

After the exchanges of memoranda, arbitrator de Meuron invited the representatives for the oral proceedings on September 3, 1929 to a Hotel in Crans Montana, Switzerland. He also ordered the parties to pay to him 10,000 Swiss Franc each (8,077 RM).[377] To a large degree the pleadings over five days in Crans Montana concerned the Portuguese claims regarding damages in Belgium and on sea, which had not been dealt with in the latest exchange of memoranda or in the previous oral proceeding. While

375 Lapradelle/Politis 1905 vol.1: 469, 472; 1923 vol.2: 284; 285: 'L'arbitre doit donc tenir compte du manque à gagner lorsqu'il ne constitue pas un dommage indirect'; 285-7; 70; 636; 675. § 352 I HGB (1900) 'Die Höhe der gesetzlichen Zinsen, mit Einschluß der Verzugszinsen, ist bei beiderseitigen Handelsgeschäften fünf vom Hundert für das Jahr. Das Gleiche gilt, wenn für eine Schuld aus einem solchen Handelsgeschäfte Zinsen ohne Bestimmung des Zinsfußes versprochen sind.'

376 PA R 52534, Réplique du Gvt. portugais, ~15.4.29; Duplique du Gvt. allemand, 6/29.

377 PA Bern 1763, Ordonance de Meuron, 3.7.29.

preparing themselves for the new and complex legal issues, all involved personnel, including the arbitrators, had to refer to special law treatises.[378]

Again, representatives Magalhes and Marx, and Costa Dias and Franz as "colonial experts", 'crossed swords' over the question of assessing the direct damages and the 2 billion GM indemnity for the violation of Portugal's sovereignty. The Portuguese representatives were of the opinion that the assessment of the "equitable damages" to be paid by Germany should commence from the claimed sanction of 2 billion GM. Franz won the impression that the Portuguese therefore would expect to obtain "at least several 100 Million [GM]".[379]

Marx, who had previously complained about Magalhães' undiplomatic language and stylistic "faux pas" (*Entgleisungen*) in Lausanne and in some parts of his memoranda, emphasized that his counterpart this time was showing "restraint". He was satisfied with the course of the pleadings. Also arbitrator de Meuron, during a joint breakfast at the end of the pleadings, underlined the "pleasant atmosphere" during the sessions. Marx again applauded de Meuron, Fazy, and Guex for their impartiality during the hearing. De Meuron concluded the hearing with an appeal to the parties to find a compromise until November 30 and offered his support. In case, the parties would not conclude a settlement on the claims until that date, they would render their arbitration award. However, the Portuguese government did not come forward with an offer. And the Germans, who were in principle in favor of such a solution, argued that they had requested a settlement already once and were turned down by the Portuguese. This time, it would be for Lisbon to commence settlement negotiations.[380] Arbitrator Fazy conceded that the gap between the amounts the Portuguese government demanded and those the Germans deemed justified "is too big".[381] The time to find a compromise lapsed and the parties found themselves soon bogged down in another disagreement that grew out of the question of Germany's payment obligations – even before any final amount was indicated by the arbitrators.

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378 PA Bern 1763, AA to DG Bern, 17.8.29; 30.8.29; R 52534, Marx, Paris to AA, 4.7.29; also arbitrator Robert Guex counted on the library of the German Foreign Office. He requested in 1929 Vol.2 of the awards of the *Mixed Claims Commission* and Verzijl *Le droit de Prises de la Grande Guerre* and received them. He handed them back once the arbitration was over. PA Bern 1763, AA to DG Bern, 26.10.29; R. Guex to A. Müller, 8.11.29.

379 PA R 52534, remark Limmer, 12.9.29.

380 PA R 52534, Marx, Crans to Göppert, 7.9.29; AA to RFM, 20.9.29; AA to DGL, 20.9.29.

381 PA R 52535, Marx, Paris to AA, 14.10.29.

A few months before, on June 7, 1929, Germany and the Allied Powers had finally agreed on a new payment schedule for German reparation annuities. According to this Young Plan (replacing the Dawes Plan of 1924) Germany agreed to payment obligations of 54 annuities beginning in 1929 and ending in 1988 (reaching from 1,7 to 2,4 billion GM p.a., thus considerably less than the 2,5 billion p.a. according to the Dawes Plan). Furthermore, the payments could be partly postponed in times of economic turbulences. From the German perspective, the advantages of the Young Plan consisted in a "fix[ed] reparation total", and it also "provided for a distinct reduction in payments for the immediate future" (1929–32); third, "it proposed to end all foreign financial controls of the Dawes regime, thus re-establishing Germany's 'financial sovereignty'."[382] The newly established *Bank for International Settlement* in Basle replaced the Dawes supervisory structure "to receive and disburse reparation payments" and to coordinate central bank policies.[383]

Most of all due to German and British opposition there was a "protracted and acrimonious struggle over the ratification of the [Young] Plan at the Hague Conferences of August 1929 and January 1930."[384] During these two conferences, officially entitled "The Conference on the Final Liquidation of the War", the implementation of the Young Plan and the end of the Rhineland occupation by Allied forces were negotiated not only between the Great Powers and Germany, but also with the British Dominions and six smaller European nations, including Portugal. While the British and French were not in accord about the allocation of German annuities, the French and the Germans argued hard about the Rhineland and possible sanctions in case of German default. The Germans also insisted that these negotiations about the "final liquidation of the war" should determine that all other claims based on the Treaty of Versailles (including

382 *Cohrs* 2006: 537; cf. *Lamont* 1930: 350-63; *Krüger* 1985: 476-95; *Ferguson* 1998: 437-9.

383 *Kraus* 2013: 121; *Marks* 1978: 251; cf. *Myers* 1929; *Draeger* 1929; *Lamont* 1930: 354; *Lamont* 1929: 366f. 'The Bank will be the Trustee of the creditor countries in dealing with annuities. … It will receive funds from Germany in foreign exchange and in reichsmark – the latter in an amount sufficient to cover payments within Germany on account of deliveries in kind. Out of the funds received in foreign exchange, it will make distributions to the creditor countries by crediting the accounts which the several central banks maintain at the Bank. … All political influences are excluded from the operations of the Bank, which will be carried on according to business principles only."

384 *Kent* 1991: 287; cf. *Heyde* 1998: 65-75; *Gomes* 2010: 166-83.

the liquidation of German property) would be considered as replaced by the payments according to the Young Plan.[385]

The Portuguese, however, were alarmed by the prospect of possibly not being entitled to claim payments separately and *in addition* to their percentage (between 1,5 and 6,5 million RM p.a. until 1939) of the German annuities. Legal difficulties would arise from a demand to execute German payment obligations that should follow from the award of de Meuron, Guex and Fazy. During the discussions on January 19 and 20, 1930, Portugal (together with Romania and Czechoslovakia) raised its reservations against Art. III of the Second Hague Agreement on the final acceptance of the Young Plan.[386] This reservation was based on Portugal's intention not to lose its rights under § 4 of the annex to Art. 298 of the Treaty of Versailles, in particular due to the "neutrality damages" in Angola, the amounts of which were still not decided by the arbitrators. Portugal's representative, the law professor and former director of the *Banco de Portugal* Rui Ennes Ulrich (1883–1966), remarked on January 19, 1930:

> "The Portuguese delegation unfortunately is not in a position to accept Article 3 of the Protocol as drafted now, as long as the German Government and the Portuguese Government have not reached an Agreement … I have made all efforts since the beginning of the Conference but, as I have not been able to get the necessary reply [from Germany] I must make reservations on Article 3."

Julius Curtius (1877–1948), Germany's new Foreign Minister, who distanced himself from the fulfillment policy of Gustav Stresemann (1878–1929), responded that his delegation was of the opinion that all additional claims of Portugal against Germany had lapsed by the Young Plan. A percentage of the German annuities would be all Portugal was entitled to. Still, Ulrich signed the Agreement on January 20. Portugal's reservations were found only in the minutes of the meeting, whereas Ulrich's signature

385 Cf. *Kraus* 2013: 122; *Marks* 1978: 250; *Krüger* 1985: 495f.; *Kent* 1991: 313-9; *Lamont* 1930: 361; *Pfleiderer* 2002: 271f. on the course of the conference; cf. 244; 287.

386 Art. III B (b) Creditor Powers accept 'the payment in full of the annuities fixed thereby as a final discharge of all liabilities of Germany still remaining undischarged and waive every claim additional to those annuities, either for a payment or for property, which had been addressed or might be addressed to Germany for past transaction …'
Art III C (a) Creditor Powers undertake 'as from the date of the acceptance of the Experts' Report [Young Plan] of the 7th June, 1929, to make no further use of their right to seize, retain and liquidate the propery, rights and interests of German nationals or companies controlled by them, in so fas as not already liquid or liquidated or finally disposed of…' cf. *Santos* 1978: 234.

under the text of the Agreement was not marked with a reservation (*Vorbehalt*).[387]

Also among German politicians the Young Plan was highly disputed. "Reparations dominated the political life of the Weimar Republic until its breakup." It was not accepted that obligations "dictated a decade ago" would bind Germany "forever".[388] Adolf Hitler's NSDAP and other right wing parties initiated a plebiscite in December 1929 against its obligations. However, on March 12 1930, after Chancellor Hermann Müller's promises of budget consolidation and austerity measures, parliament ratified the Young Plan and the payment details set-forth in the second Hague Agreement. On June 30, 1930, the Rhineland was evacuated by foreign troops.[389]

5. The Award of 1930 (Amounts)

5.1. Direct and Indirect Damages – Content of the Award

Robert Fazy uttered in January 1930 that due to his "overwork" the three arbitrators could not yet meet to find a conclusion on the Luso-German dispute about the amount of damages to be paid.[390] Finally, in May 1930, de Meuron announced the decision on the damages and ordered a last payment of 25,000 Swiss Francs (20,294 RM) from each party.[391]

After having concluded in 1928 that the German Empire violated international law when invading Angola, as a measure of alleged "reprisal", the

387 AHD 3p ar 25 m 1-Reparações: 58, Extrato da Acta da 3ª Sessão, 19.1.30; PA R 52535, objections Port., 11.2.30; *Kraus* 2013:134; *Köppen* 2014: 351; *Mata/da Costa* 2014: 907.

388 *Felix* 1971: 175; *Schöttler* 2012: 372f.; cf. *Lorenz* 2008: 133f.

389 *Köppen* 2014: 366; *Kraus* 2013: 126; *Myerson* 2004: 203; *Krüger* 1985: 505; *Marks* 1978: 252.

390 PA R 52535, Marx, Paris to AA, 20.1.30, 'Arbeitsüberlastung'.

391 PA Bern 1763, de Meuron to DG Bern, 21.5.30. The publication of the award was postponed until end of July since the Portuguese money transfer did not arrive in time in Lausanne (R 52535, Marx to AA, 8.7.30; Telegr. DG Bern to AA, 28.7.30). Altogether, the Portuguese and German Governments paid to de Meuron 130,000 Swiss Francs. Considering that during the first two payments of 20,000 Swiss Francs each (1921; 1924) de Meuron was the sole arbitrator, and during the last three payment of 45,000 Swiss Francs each (1928, 1929, 1930) he was supported by Guex and Fazy, de Meuron had earned 70,000 Swiss Francs and Fazy and Guex 30,000 Swiss Francs each. Contrary to the German Finance Ministry the Foreign Ministry regarded these amounts as 'modest' (PA R 52536, Limmer to Martius, 15.12.30 'mäßig').

award of June 30, 1930 dealt with questions of the amount of damages claimed by Portugal. By far the largest part of the award concerned the damages in Belgium due to German requisitions and the damages on the high seas (parts A and B), which were not mentioned in the decision of July 1928. These cases were decided on the merits as well as on the amounts to be paid by Germany.[392]

As to the amounts due for the colonial damages (parts C and D), the arbitrators based their decision on the provisions of the interim judgment of 1928. They upheld their distinction between direct and indirect damages in the colonies that was criticized by the Portuguese in the memorandum and during the oral proceedings. It was also repeated that the "native rebellion" on which Portugal based most of its claims, had neither been instigated nor encouraged by Germany (p. 1074). On the other hand, de Meuron, Fazy, and Guex did not follow the German argumentation that – contrary to what was stated in the award of 1928 – only private damages should be taken into consideration and damages to Portuguese state property be excluded from the award (Marx made this argument to please his Finance Ministry, he did not believe in it [p. 1071]). The distinction between "private" and "state" claims was less clear under public international law than the wording of § 4 might have suggested. In the wake of the First World War also numerous "private" business claims pitted governments against each other.[393]

With regard to *direct damages* de Meuron, Fazy, and Guex held that Germany was not only responsible for the losses caused in connection with the destruction of Fort Naulila and others. Germany, they decided, was also responsible for the losses suffered as the result of the retreat of the Portuguese troops beyond the line of German attack. For the Portuguese commander had no reason to assume that the German force would regard its objective as achieved with the destruction of Fort Naulila and would *not* "exploit the fruits of victory" by a further advance aiming at the annihilation of Roçadas' forces. The retreat was thus the "immediate, normal, and necessary consequence" (p. 1069f.) of the defeat. "Owing to the haste" required after the first German attacks, the arbitrators included even the additional costs for delivering Portuguese military goods to Fort Naulila among the direct damages. Other items of direct damages includ-

392 RIAA II: 1035-77; cf. *Lauterpacht* 1935: 200-2 (Case No. 126); *Parry/Grant* 1986: 299.
393 *Caron* 1990: 151 'many…disputes were not truly between two states named as parties'.

ed: (a) Damages for loss of life in respect of persons killed in the course of the military operations. However, considering the claims put forward in this matter by Portugal the arbitrators remarked that they were exaggerated inasmuch as they were higher than the claims put forward under this head by the Allied Powers against Germany or than the sums awarded in similar cases by arbitral tribunals; (b) damages for destroyed roads, cattle, forts, farms, ammunition, and provisions; (c) 5 per cent interest on the sum awarded (*intérêts compensatoires*). The arbitrators refused to award compound interests to the amount of 30 per cent on account of loss of profits as demanded by Portugal. They pointed out, in regard to some of the claims, that the objects in question could have been replaced by the owners who, by purchasing substitutes for them, would have been able to earn the profits. "If they now receive their full value, plus normal interest as from the date of the loss, they must be regarded as fully compensated." (p. 1074)

With regard to *indirect damages* the arbitrators awarded damages *ex aequo et bono* on account of the losses suffered in consequence of the "African rebellion" following upon the retreat of the Portuguese troops. As stated in the previous award, the rising of Africans constituted an injury which Major Franke "ought to have foreseen as a necessary consequence of the military operations" (p. 1075). Also, the German attack resulted in disorganization of the Portuguese forces which would otherwise have been available for suppressing the "rebellion". On the other hand, as a mitigating circumstance, the arbitrators considered as relevant the continued inaction of the Portuguese troops subsequent to the German invasion. This inaction was due to the mistaken belief of the Portuguese authorities that Franke had the intention to continue and extend the German invasion and to the resulting decision of the Portuguese authorities to choose a rallying point at a considerable distance from the original operations and to delay unduly the resumption of the operations against the Africans. Germany, they decided, could not be blamed for this "error of judgment" (p. 1076).

Finally, the arbitrators dealt with the question of *penal damages*. They were unable to accede to the Portuguese claim for penal damages of 2 billion GM as compensation for the "violation of Portuguese sovereignty and offences against international law", as such "sanction" lay beyond their "sphere of competence". De Meuron, Fazy, and Guex justified this by pointing out that this claim was not in fact a claim for indemnity, but a demand for retributory and deterrent punishment. However, Portugal and

Germany in charging the arbitrator(s) with fixing the amount of damages did not intend to endow them with the right to inflict punishment. The arbitration procedure acted under a part of the Treaty of Versailles entitled "Economic Clauses" (part X), whereas it was another part of this Treaty (part VII) which bore the designation "Sanctions". Moreover, Article 232 of the Treaty recognized that Germany was financially unable to bear fully the burden of purely economic compensation.

With regard to questions of computation of damages the arbitrators, contrary to the memoranda and contrary also to their assessment of damages in Belgium and on sea (parts A and B), did not go into factual details. They concluded that

> "Portuguese claims are admitted to the amounts which follow, in capital and interest, to the date of the present award: Damages in Belgium: 653,861 GM; Damages on sea: 572,607.30 GM; Direct damages in Africa: 22,000,000 GM [5 Million below the Portuguese claims]; Indirect Damages in Africa: 25,000,000 GM [which included the expenses for the entire arbitration], totaling 48,226,468.30 GM. For these reasons the indemnity to be paid to Portugal in terms of § 4 of the Annex to Articles 297-298 of the Treaty of Versailles, is fixed at 48,226,468.30 GM" (p. 1077).

This sum was less than 1 per cent of what the Portuguese government had hoped for since 1921; it was more than double of what Marx had estimated in 1928; but it was much lower than what the Germans had expected when they had tried to make a settlement offer in the early 1920s.

5.2 The Negotiations over the Young-Plan

"The Young Plan proved non-viable in the grim economic conditions of the late 1920s", but its provisions had nevertheless profound legal consequences. And the German officials were eager to use them to Germany's advantage.[394] Immediately after the second award was published Judge Marx pointed out with relief that the arbitrators did *not* mention the question of the award's enforceability (*Erfüllung*), as he had requested during the pleading. The Portuguese could thus not find any indication in the award for their intention – made visible through their reservation to the second Hague Agreement on the Young Plan – to obtain direct payments for their "neutrality claims" (*Neutralitätsansprüche*). Even though the

394 *Gomes* 2010: 182.

awards final phrase spoke of an "indemnity to be paid to Portugal", there was no "sentence" (*Verurteilung*) of the German government to payments. The award merely stipulated the amount of damages.[395]

Consequently, the Portuguese government was in an awkward position. It planned to demand the execution of the award of June 1930, but it had also signed in January 1930 the second Hague Agreement with the abovementioned reservations. However, in case of a ratification of the Young Plan, the Portuguese entitlement for claims of damages deriving from the time before the declaration of war in 1916 (neutrality damages, as awarded by the arbitrators in Lausanne) might be lost, since the annuities (and Portugal's percentage thereof) were Germany's "final" payments according to the Hague Agreement. During meetings in Lisbon, the German Minister Albert von Baligand (1881–1930) repeated what his Foreign Minister Curtius had uttered at the Hague Conference: Portugal would not receive additional payments for the neutrality damages, "because these claim had also been made good through German reparation payments" and would "be void due to the Young Plan."

However, the Portuguese government, also with regard to public opinion, believed that there needed to be some acknowledgement of the results of the Lausanne arbitration and therefore insisted on separate German payments outside of the scope of the Young annuities. The Portuguese never accepted the German understanding of § 4 that it would be a violation of the Treaty of Versailles if the Allied state were to use the proceeds of the liquidated German property, rights and interests for its own budget or to cover its war expenses. After several rounds of negotiations in the first half of 1930, the Portuguese and the Germans agreed that Lisbon would ratify the Young Plan provided that 1) the question of payments to be stipulated by the Lausanne award would be referred anew to an arbitration tribunal; and 2) negotiations would continue over the Portuguese payments of German pre-war loans (*Staatsanleihe*) and in case an agreement should not be found on this issue, an arbitration procedure would be initiated too. Only after the ratification of the Young Plan a new arbitration (Art. XV of the Hague Agreement of January 20, 1930) would commence.[396] The Portuguese re-payment of private German pre-war loans to the Portuguese government (in gold) was a question that complicated the negotiations.

395 BAB R 1001/6642: 55-9, Marx, Paris to AA, 1.8.30, 'l'indemnité à payer par l'Allemagne'.
396 PA R 52536, AA, 26.9.30; *Fuchs* 1927:269 Liquidationserlös nicht für Haushalt verwerten.

While the Portuguese aimed at compensating parts of their loan-repayment with (future) German payments out of the Lausanne arbitration, the Germans tried (in vain) to separate both issues as far as possible.[397]

After the arbitrators in Lausanne had published their award in July 1930, the Portuguese government was not satisfied and changed its approach to the Young Plan. Not only were the 48,226,468.30 GM considered a completely insufficient indemnity, the ministers in Lisbon were also concerned about possible effects the award of the Lausanne arbitration could have on other disputes with Germany. On August 8, 1930, the Portuguese Secretary of State told the German Minister the award had "created a new situation". An agreement between the governments with the aim to refer disputes under the Young Plan to an arbitration tribunal would be out of question now. New negotiations should start on the issue in Lisbon. The German claim for payment in gold for the pre-war loans could be discussed in concert with other concerned countries. Irrespective of what had been stated before, the Portuguese government would demand from Germany the immediate execution of payment of the amounts awarded by the Lausanne tribunal, since they needed to be paid separately and over all the Young annuities. Only *after* Germany had paid its "Lausanne debts", Portugal would ratify the Young Plan.

Neither the Portuguese Secretary nor his German interlocutor had any illusions: Germany would not pay the amounts stipulated by the Lausanne tribunal, and Portugal would not initiate the repayment of the German pre-war loan. However, without ratification of the Young Plan, Portugal could not participate in the distribution of German annuities; money, Portugal's new strongmen, Finance Minister Salazar, needed "urgently", since he saw it as his "first task … to balance the budget, deemed to be an impossible feat".[398]

The German government, on the other hand, was of the opinion that the award of June 30, 1930 had changed nothing. Rather, it was claimed that both, the German and the Portuguese government had agreed right from the beginning that the Lausanne arbitration concerned Portugal's claims "only on the merits and on the amounts". For the Germans there was thus also an understanding that the execution of the award would be guided by the legal principles currently in force between both governments. Irrespec-

397 PA R 52534, DGL to AA, 6.7.29; AA to DGL, 31.7.29.
398 PA R 52535, Telgr DGL to AA, 9.8.30; *Meneses* 2009: 46; 59; *Kay* 1970: 79.

tive of an application of the provisions of the Dawes Plan or the Young Plan, the German reparation payments, "in view of its all-encompassing nature", would cover also the obligations from the Lausanne award. From the German point of view this resulted in particular from the provisions of Art. II and III B b of the Hague Agreement of January 20, 1930. Again and again German representatives in Lisbon stressed that "an immediate payment of the amount stipulated by the arbitrators was out of question".[399]

Nevertheless, end of August 1930, Portugal's Minister in Berlin, António da Costa Cabral, met the new German Secretary of State Bernhard W. von Bülow to formally demand the execution of the award of de Meuron, Fazy, and Guex. Cabral assumed that the German answer would refer to the annuity payments of the Young Plan, as the German Minister in Lisbon had done already, and warned: "that is a non-starter". When Cabral pointed to the possibility to refer the payment-dispute to the arbitration tribunal set forth in the Hague Agreement, Bülow, "a decided opponent of Stresemann's ideas and the exponent of an outspoken nationalist policy", reminded him that this procedure could only be applied if Portugal had ratified the Young Plan.[400]

The German Ministries of Finance and Economy wanted to prevent any negotiations with Portugal on the payments before Lisbon had ratified the Young Plan. However, since the negotiations in Lisbon had reached a dead end, the Foreign Office wanted to continue the dialog with Cabral in Berlin. It sent a councilor to him twice to discuss the possibility to agree on a new arbitration *before* Portugal would ratify the Young Plan. The formal German answer of September 6 to the Portuguese request stated merely, as Cabral had anticipated, "that the execution of the arbitration award would be fulfilled according to the principles set forth in the New [Young] Plan." The wording avoided any justification that could create a prejudice by which Germany were bound in a future arbitration. When Cabral had received this statement he deemed an agreement on the arbitration (mentioned only verbally by the Germans) reasonable; however, he reminded his German interlocutor that for their next step the Portuguese government would also have to take into consideration "public opinion in Portugal.[401] The same was true for the German side. The new foreign policy of the

399 PA R 52535, AA Note, 6.9.30 'im Hinblick auf ihre allumfassende Natur'.
400 *Kolb* 2007: 201; PA R 52535, remark Bülow; Cabral to Curtius, 30.8.30; *Santos* 1978: 237.
401 PA R 52535, Bülow to Cabral, 6.9.30; remark Busch, 8.9.30, remark on meeting, 2.9.30.

presidential cabinets after the death of Stresemann focused on "bring[ing] about a rapid and offensive solution to the reparation … questions".[402]

Given the disappointment in Portugal that no payments followed the Lausanne award, the government did not even introduce the Young Plan for ratification. The German government in turn increased the pressure. In September 1930, the German reparation commissioner in Paris was ordered to stop any delivery of reparations in kind to Portugal according to the Young Plan. The Finance Ministry justified this act to the *Bank for International Settlements* by arguing that it would be unjustified to concede to the Portuguese government unilateral advantages based on the Young Plan, while Portugal did not honor its obligations from the Young Plan. The Ministry emphasized that prompt Portuguese ratification had been assumed and therefore deliveries had taken place; but from now on, Germany would refrain from doing so until Portugal's ratification. The commissioner of the Portuguese government for deliveries in kind with the reparation commission in Paris, Captain Tomás Wylie Fernandes (b. 1883), reminded his German colleague Litter that first of all the German industry producing the goods would be hurt. He pointed to the possibility to refer the matter to a new arbitration tribunal and underlined that it should be clear that by ratifying the New Plan, Portugal would not lose its entitlements to refer the matter of the Lausanne award to a new arbitrator.[403]

End of September 1930, Portugal's Foreign Minister met with his German counterpart in Geneva during a session of the League of Nations and spoke about the dispute regarding the payment out of the Lausanne award. Both concluded to exchange notes detailing the number of open issues between the two countries and to formally agree to refer these disputes to arbitration.[404] In December, Germany protested against the payments to Portugal by the *Bank for International Settlements* out of German Young annuities. Again, the Germans argued that "a power which has not ratified the [Young Plan] should not enjoy [its] advantages". Concerned about seeing his bank dragged into a complicated legal dispute with Germany, the bank's director, Leon Fraser (1889–1945) wrote a personal letter to commissioner Fernandes in Paris. Frazer expressed his hope that Finance Minister Salazar would "abstain from drawing further funds from us until …

402 *Kolb* 2007: 202; cf. *Cohrs* 2006: 569; *Köppen* 2014: 357f.; *Graml* 2001.
403 PA R 52535, RFM to BIS, Basel 6.9.30; Telgr German Commissioner Paris to AA, 9.9.30.
404 PA R 52536, Telgr Curtius to AA, 24.9.30; Telgr DGL to AA, 30.10.30.

ratification takes place". The bank had sent a telegram to Salazar in this respect. And Fernandes wrote another long letter to him personally, pointing to the public opinion of the world and asked him to abstain from drawing German reparation funds. Salazar, who had "[f]rom his ivory tower [at Coimbra] built up a mystique about his financial omniscience", conceded. He responded that negotiations with the Germans should be initiated soon in order to permit ratification of the Young Plan.[405]

However, the suggested exchange of notes was not finalized until July 8, 1931.[406] It stipulated the different opinions of the parties on the execution of the arbitration award of June 30, 1930 and confirmed that an arbitral tribunal according to Article XV of the Hague Agreement of January 20, 1930 should decide on the matter. On July 11, 1931 Portugal ratified the Hague Agreement on the final acceptance of the Young Plan.[407] In the meantime, the international discussion about the reparation payments continued unabated, conference followed after conference. While Portugal's public could not understand why no payments had come forward for the colonial damages after ten years of legal reasoning, many in Germany considered the Young Plan an affront, yet alone additional payments. The president of the German Reserve Bank, Hjalmar Schacht (1877–1970), in his critique of the reparation regime *Das Ende der Reparationen* (1931) stressed that foreign governments "must refrain from any attempts to squeeze (*herauspressen*) extra-payments beyond the Young Plan". Schacht, exonerating himself from any responsibility for the execution of the Young Plan, demanded from his government "that it does not condone additional outflows".[408] Since 1929 Germany lurched near bankruptcy, a fact that weighed heavily on its political stability. Portugal did not profit from its ratification of the Young Plan, for in 1931 the annuities could no longer be paid. Given the "Great Depression" around the world, in Germany the feeling prevailed that "we have paid enough". The Young Plan "had failed" and "reparations had been spirited off the international stage."[409] In early 1932 it seemed clear – at least to Germans – that payments would not be resumed. The Lausanne Agreement of July 9, 1932,

405 *Birmingham* 2011: 162; cf. *Wheeler* 1978: 248f; AHD 3p ar 25 m 12-Reparações, BIS to Salazar, 19.12.30; Fraser to Fernandes, 19.12.30; 21.12.30; Fernandes to Fraser, 21.12.30; Fernandes to Salazar, 21.12.30; BIS to Salazar, 20.12.30; Salazar to Fernandes, 23.12.30.

406 AHD 3p ar 25 m 1-Reparações: 58, *Diário do Governo. Supplemento*, 11.7.31

407 PA R 52536, *Reichsanzeiger* Nr. 159, 11.7.31.

408 *Schacht* 1931: 107; cf. *Heyde* 1998: 71; *Cohrs* 2006: 515.

409 *Kent* 1991: 321; *Fischer* 1932: 193; *Grimm* 1932: 64-6 ~67 billion GM in reparations.

the 35th intergovernmental conference on reparations, sealed the end of German reparations.[410]

In November 1931 a new Luso-German arbitration on Portugal's demand for the payment of the amount awarded by the Lausanne tribunal was initiated. An exchange of memoranda and counter-memoranda followed.[411] The Portuguese, in their presentation of the facts and the law of the Young Plan did not save theatric means. The 50-pages memorandum was adorned with a strong quotation about the duties of those who execute the Hague Agreements by Henri Jaspar (1870–1939), Prime Minister of Belgium and President of the Hague Conference.[412] The Portuguese replique of 1932, emphasizing the legitimacy of the claims for payment, concluded in demanding from the arbitrators: "JUSTICE!"[413]

6. *Can the Germans Pay? The Award of 1933 (Execution)*

"With his passion for balanced budgets", Finance Minister António Salazar had reason to look for reparation payments from Germany. His ministry (he remained Minister of Finance also after becoming President of the Council of Ministers in July 1932) became much more involved in the arbitration than in previous years. As the "undisputed center of the political system"[414] Salazar was always informed about new developments in the arbitration and received the same correspondence as did the Foreign Minister.[415] His keenness for detail – which would characterize his handling of government affairs for the next thirty-six years – was already apparent at this point in his career. It was in this time leading up to the final award that the decisive steps were taken in the ascent of Salazar and his innermost circle which led to the creation of the New State (*Estado Novo*)

410 *Petersson* 2009: 131; 114-133; *Kraus* 2013: 141-6; *Kolb* 2011: 100; *Wehler* 2003: 250.

411 AHD 3p ar 25 m 1-Reparações: 58, Arbitration Tribunal to Fernandes, 5.9.31.

412 AHD 3p ar 25 m 1-Reparações: 58, Case of the Portuguese Government, Lisbon 1931: 5: The Hague Agreement 'will only stand if those who execute it bring to the task the same faith of those who were its first craftsmen. To carry it through, they must also remember a past overburdened with murderous terrors, with countless sorrows, with perilous discussions and deceptive revisions.'

413 AHD 3p ar 25 m 1-Reparações: 58, Réplique du Gouvernement Portugais, Lisbon 1932: 24: the memoranda (and all three awards) are reprinted in *Portugal* 1936 (340 pages).

414 *Smith* 1974: 662; *Roberts* 1986: 499; *Lewis* 1978 629; cf. *Meneses* 2010: xxx.

415 AHD 3p ar 25 m 1-Reparações: 58, Fernandes to Salazar and MNE, 31.1.33; 10.2.33.

in 1933. However, the dictatorship was not yet consolidated as several military and civil revolts from left and right against the new authoritarian institutions attested.[416]

As head of government, Salazar "was finally free to recruit those who identified most closely with his own position".[417] Feeling that the former republican minister Magalhães who was Costa's confidant would not be a suitable representative of the new regime, Salazar appointed a new arbitration representative: José Lobo d'Avila Lima. Like his predecessor, he was Professor of Law at Coimbra and in Lisbon. He acted as the legal counsel to the Foreign Ministry. Together with Magalhães (who would, in the 1940s, join the opposition's ranks of the *Movimento de Unidade Democrática* [MUD]), d'Avila Lima had represented Portugal in numerous League of Nations conferences on international law. During the new arbitration on Portugal's claim to the payment by Germany of the amount fixed by the award of 1930, d'Avila Lima was supported by Tomas Fernandes, the commissioner with the reparation commission in Paris. As we have seen, the outspoken admirer of Salazar had dealt with the questions previously.

The German government retained Judge Marx, who had received much acclaim from the Foreign Ministry after the award in 1930. However, considering that the new arbitration was no longer about the war in southern Angola, but most of all about the technicalities of the Young Plan and the law and policies of reparation, Dr. Richard Fuchs (1986–1970), councilor in the Finance Ministry and author of a treatise on the *Sequestration, Liquidation and Release of German Assets Abroad* (1927) was considered the main expert and thus drafted most of the German memoranda.[418]

Even though – given the state of Germany's finances – there was some doubt among specialists "that the legal position is to be decisive now", the new arbitration tribunal in Paris was set up with great care. It consisted of five high-profile arbitrators: George W. Wickersham (U.S.) as president, Marc Wallenberg (Sweden), Anton Kröller (Netherlands), Albrecht Mendelsohn-Bartholdy (Germany), and José Caeiro da Matta (Portugal).[419]

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416 *Baiôa/Fernandes/Meneses* 2004; cf. *Livermore* 1967: 331f.

417 *Madureira* 2007: 86.

418 *Matta* 1934: 9; PA R 52536, RFM to AA, 8.12.30; Minister to Marx, 18.12.30; 27.12.30.

419 *Fischer* 1932: 192; 194 'legal view is necessarily inadequate'; George W. Wickersham (1858–1936), US Attorney General 1909–13; President of the Council on Foreign Relations

After a week of deliberations these experts in law and business pronounced on February 16, 1933 that Germany was "not obliged to make payments to Portugal, separately and over and above all the other obligations accepted under the New [Young] Plan, of the amount [48,226,468.30 GM] awarded by the [Lausanne] tribunal" on June 30, 1930.[420] The tribunal found that this amount came under the general reparation payment for war damages paid by Germany, limited to the annuities according to the Young Plan. The Portuguese based their claim primarily on three arguments: 1) Portugal was still neutral when it suffered the damages due to German aggression; 2) the indemnity for damages was based on a valid award rendered by an international arbitration tribunal before the Young Plan came into force. Therefore, this award should be executed without taking the Young Plan into consideration; 3) the Portuguese government had its reservations to the execution of the Young Plan recorded during the Hague conference (and before the Plan's ratification). These reservations explicitly referred to the claims disputed between Germany and Portugal.[421] The arbitrators, however, were not convinced by these arguments, but held that with the Luso-German agreements of 1931, "Portugal waived any question of reservation to the agreement of January 20, 1930". They concluded "that the payment fixed by the [Lausanne] award cannot be made separately and over and above all the other obligations accepted by Germany in the [Young] Plan as a definite settlement of the financial questions resulting from the war." (p. 1385). This award was final and binding. It created a precedent for other governments claiming due neutrality damages, since the Hague conference declared the arbitration awards of the tribunal to be a binding interpretation of the content of the conference.[422]

1933–36; Marc Wallenberg, banker and businessman; Anthony George Kröller (1862–1941), banker and businessman; Albrecht Mendelsohn-Bartholdy (1874–1936), Professor of International Law in Hamburg, 1919 German representative in Versailles and in arbitration procedures (*Nicolaysen* 2011: 217); José Caeiro da Matta (1877–1963), Rector of the University of Lisbon (1929–46), Professor of Private International Law with a decidedly 'anti-positivist' stand (*Hespanha* 1981: 430), served as judge (*juge suppleant*) at the PCIJ (1931–45). He, Barbosa de Magalhães and Lobo d'Avila Lima usually represented Portugal during law conferences of the Leage of Nations.

420 RIAA II: 1371-1391; AJIL 27 (1933): 543-554 (543); *Berliner Börsen-Zeitung* No.66, 8.2.1933; cf. *Santos* 1978: 236f.

421 AHD 3p ar 25 m 1-Reparações: 59, Fernandes: Observações, 18.12.31; Informação, 7.12.31.

422 BAB R 1001/6642: 64, *Nachmittags-Ausgabe*, 16.2.33, 84. Jg. Nr. 329.

While the Germans were celebrating one of the first foreign policy successes of the Third Reich, arbitrator Caeiro da Matta informed Salazar immediately after the decision of the tribunal. The disappointing outcome of the arbitration did not hinder Caeiro da Matta's rise to an illustrious *cursus honorum* in the *Estado Novo*. Less than two month after the award Salazar made him his Foreign Minister (1933–35).[423] Both parties continued their negotiations about German property in Portugal (which had been ongoing since the 1920s[424]) during and after the arbitration procedure – among these properties were still parts of the load of the steamer *Adelaide*, which in 1914 was seized in the harbor of Luanda by order of Norton de Matos.[425]

German payments had come to an end. "Reparations were never formally cancelled [the Lausanne Agreement of 1932 was never ratified by either party], but fell into limbo as they became increasingly unrealistic." Although the Portuguese hoped that legal technicalities would allow them to recover the money, this turned out not to be the case. However, reconstruction and pensions still had to be paid for. "In the end, the victors paid the bill."[426] Also the Angolan treasury never received any transfer money from Germany. In the words of historian Filipe Meneses, the arbitration procedures, so eagerly anticipated by those who had pushed Portugal into the World War, "yielded even less [than German reparation payments]; they proved to be an elaborate and overly long waste of time and energy." With the award of 1933 "Portugal had been well and truly defeated."[427]

423 AHD 3p ar 25 m 1-Reparaçoes, P 58, Caeiro da Mata to Salazar and MNE, 16.2.33; he became Portugal's representative in Vichy-France and returned to the Council of Ministers (Education, 1944–50; Foreign Affairs, 1947–50).

424 AHD 3p ar 25 m 12-Reparações, DGL to MNE, 21.2.25 on German restitution claims. The Portuguese government could liquidate the German property it had sequestrated during the war and kept the proceeds. Information about these properties was not given by the Portuguese government to German proprietors, as the German Legation responded to numerous inquiries from Germany. Negotiations about clearance remained 'unsuccessful' (PA Lissabon 176 (Vorkriegsforderungen), DGL to IHK Remscheid, 29.10.29).

425 AHD 3p ar 25 m 1-Reparações, P 59, Fernandes to MNE, 20.7.32; Fuchs to Fernandes, 18.1.33; 23.3.33;5.4.33; Fernandes: Mémoire au sujet de la réclamation de 'Stahlwerksverband', 11.4.33; minutes of meeting, Fuchs, Hechler, Fernandes, Paris, 13.2.33.

426 *Marks* 1978: 254; cf. *Felix* 1971: 176; *Heyde* 1998: 430-55; *Gomes* 2010: 203-12.

427 *Meneses* 2010: 162f.