

THE HANSLOPE FILES: TO WHAT EXTENT IS THE BRITISH GOVERNMENT LIABLE UNDER INTERNATIONAL LAW FOR THE CRIME OF GENOCIDE COMMITTED DURING THE COLONIAL PERIOD IN KENYA?

*Ryan Kiruthu*⁴⁶

Introduction

The colonial rule that took place around the world after the notable Berlin Conference of 1884 (commonly known as the Scramble for Africa)⁴⁷ can be held to be part of our *zeitgeist*. This is considering the subsequent atrocities that arose during the colonial period that have played a consistently crucial role in the international world order, as it exists today, especially after the decolonisation of states. That is why this dissertation will attempt to answer the extent to which the British Government may be liable for the crime of genocide committed during the colonial period in Kenya, under international law, considering the revelation of the Hanslope Files?

In order to assess this question, this dissertation will critically discuss the concept of state responsibility, i.e. the role of the British government, for the crime of genocide. Although the foundation of international criminal law is individual criminal responsibility upheld by universal jurisdiction as well as the manifestation of the International Criminal Court (ICC) formed by the **Rome Statute 2001**,⁴⁸ this paper however, will not consider the criminal responsibility of individuals but whether the British government, a state, can be held responsible. At the same time, this paper will assess whether the crime of genocide took place during the colonial period in Kenya, a period stemming from the state of emergency that was declared in 1952 during the insurgency of the Mau Mau Rebellion leading up to the end of the emergency in 1960. Furthermore, this paper will consider the impact of the revelation of the Hanslope Files, incriminating documents that the British government remained with, after decolonisation, in order to avoid their disclosure.⁴⁹ Revealed in ***Mutua v Foreign and Commonwealth Office***,⁵⁰ these files bring to light a new perspective of what happened during the colonial period in Kenya due to previously missing facts.

46 Ryan Kiruthu holds a First-Class Honours Law Degree from the University of Essex and is currently enrolled in the Pre-Kenya School of Law programme at Riara University.

47 Henry Gates, Jr and Kwame Appiah, *Encyclopedia of Africa* (OUP 2010)

48 UNGA, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3

49 Foreign & Commonwealth Office, 'Cary report on release of the colonial administration files', (Independent Report, 2011)

50 *Mutua v Foreign and Commonwealth Office* [2012] EWHC 2678 (QB)

As the revelation of the Hanslope Files represent a disconnect with the historical data previously recorded, this newly discovered data can thus be considered essential to comprehend the colonial period of Kenya, and to an extent the Commonwealth. Therein remains the questions of whether the various atrocities committed shed a new light on this history-disrupting revelation or whether there are legal implications for this substantial change in narrative on the history of colonisation. By virtue of this, as genocide is considered a crime with a unique stigma and thus serves as a powerful deterrent, the possibility for the British government to be held liable for one of the gravest crimes to the international community sets a powerful precedent. That is why, this area of focus is of utmost value not only because of the impact of colonisation on states but due to the area of law discussed that brings about this issue into the international forum.

Background

The colonial period between 1952 and 1960, when a state of emergency was declared in Kenya by Sir Evelyn Baring as a response to the Mau Mau Rebellion was the genesis for atrocities committed on Kenyans by the Imperial British Colonial Empire.⁵¹ The Mau Mau Rebellion occurred between the Kenya Land and Freedom Army (KLFA), alternatively known as the Mau Mau, (who were fighting for Kenyan independence) and the British authorities.⁵² During this period of the state of emergency, it is estimated that human rights abuses were committed including torture, murder and castration at the hands of British-sponsored government forces including the police, Home Guard, and military.⁵³

Responsibility of States for Internationally Wrongful Acts

First and foremost, it would then be crucial to determine how the British government may be held liable or responsible for the alleged international crime of genocide committed during the colonial period in Kenya. The **Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001 (ARISWA)** provides an authority for this determination. **Article 1** of the ARISWA states that “every internationally wrongful act of a State entails the international responsibility of that State.”.⁵⁴ Although ARISWA “have not (or not yet) been reduced to treaty form, ... they have been much cited and have acquired increasing authority as an expression of the customary law of state responsibility.”.⁵⁵ Considering that the customary international law effect of state

51 John Lonsdale, ‘Mau Maus of the Mind: Making Mau Mau and Remaking Kenya’ [1990] 31 The Journal of African History 393, 394

52 (Blakely pg. 81)

53 Ibid.

54 International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (November 2001) (A/56/10) (ARISWA) Art 1

55 James Crawford and Ian Brownlie, *Brownlie’s Principles of Public International Law* (OUP 2019) 524.

practice and *opinio juris* in the ARISWA date back to a time during the colonial period in Kenya,⁵⁶ this would not function as *ex post facto law* and would therefore apply to the discussion at hand.

Additionally, **Article 2 of the ARISWA** goes on to state the elements of an internationally wrongful act of a State. This is whereby...

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) is attributable to the State under international law; and

(b) constitutes a breach of an international obligation of the State.⁵⁷

Can genocide be attributable to the British Government?

Chapter II of the ARISWA considers the requirements of attribution of conduct to a state. In the case of Kenya, individual officers given authority by the British government conducted the many criminal acts of violence including the violation of the prohibition against torture (a peremptory norm) as well as rape, castration and murder of Mau Mau members and their alleged supporters.⁵⁸ **Article 9 of the ARISWA** states that...

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.⁵⁹

Therefore, even though it was typical in 1950s Kenya for the British government to dismiss each proven case of abuse with the ‘bad apple’ explanation, or ... the dispositional-individual thesis,”⁶⁰ Article 9 of the ARISWA clearly stipulates that the actions of “misguided or pathological individuals”⁶¹ would still amount to an act of the State, i.e. the British government.

Furthermore, it could be argued that the individuals who conducted the atrocities were

56 International Law Commission, ‘Yearbook of the International Law Commission’ (2001) A/CN.4/SER.A/2001/Add.1 (Part 2) (Art 1, Para 2, pg. 32-33)

57 International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (November 2001) (A/56/10) (ARISWA) Art 2

58 David M. Anderson, ‘British abuse and torture in Kenya’s counter-insurgency, 1952-1960’ [2012] 23 Small Wars & Insurgencies 700, 705

59 International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (November 2001) (A/56/10) (ARISWA) Art 9

60 David M. Anderson, ‘British abuse and torture in Kenya’s counter-insurgency, 1952-1960’ [2012] 23 Small Wars & Insurgencies 700, 702

61 Ibid.

acting ultra vires, i.e. in excess of their authority. This would still be held to be attributable to the State under **Article 7 of the ARISWA** which discusses the attributability of a State in a situation of an excess of authority or contravention of instructions.⁶²

However, considering that “after 1956, documentary evidence, now augmented and elaborated by the Hanslope Disclosure, confirms that those at the highest levels of government in both Kenya and Britain were complicit in the introduction of a system of abuse,”⁶³ this implies a systemic conduct by the British government that ranges from the conduct of organs of a State, which are attributable to the State under **Article 4**,⁶⁴ to conduct of persons or entities exercising elements of governmental authority, attributable under **Article 5**,⁶⁵ or the conduct of the “person or group of person is in fact acting on the instructions of, or under the direction or control of, that State,” this conduct would still be attributable to the given State under **Article 8 of the ARISWA**.⁶⁶

Nevertheless, although the landmark case *Mutua v Foreign and Commonwealth Office*,⁶⁷ that publicly exposed the Hanslope Files, illustrate that the British government, under domestic law, was “both negligent and jointly responsible for the actions of the colonial administration,”⁶⁸ the British government has maintained the position “that any liability arising from the colonial administration had been transferred to the Kenyan government at independence.”⁶⁹ This aligns with the notion of **Article 10 of the ARISWA** that “the conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.”⁷⁰ However, it could be argued that the conduct of the insurrectional movement, the Mau Mau in this case, although committed crimes that amount to murder, the Mau Mau were not the ones perpetrating the torture, castration, rape and murder of the Kenyans. Therefore, that responsibility rests with the British government and so the attributability of the actions of the individual officers, given authority by the British government, and the government as a whole would remain with the British government.

62 International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (November 2001) (A/56/10) (ARISWA) Art 7

63 David M. Anderson, ‘British abuse and torture in Kenya’s counter-insurgency, 1952-1960’ [2012] 23 Small Wars & Insurgencies 700, 701

64 International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (November 2001) (A/56/10) (ARISWA) Art 4

65 International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (November 2001) (A/56/10) (ARISWA) Art 5

66 International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (November 2001) (A/56/10) (ARISWA) Art 8

67 *Mutua v Foreign and Commonwealth Office* [2012] EWHC 2678 (QB)

68 Andrew Songa, ‘Reparations for Colonial Atrocities: the Case of the Mau Mau in Kenya’, (2014) 2 Pan-African Reparation Perspectives 2, 3

69 Ibid.

70 International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (November 2001) (A/56/10) (ARISWA) Art 10

Can genocide be considered a breach of an international obligation?

As a result of fulfilling the attribution requirement necessary for a state to be held responsible for internationally wrongful acts, it then becomes essential to consider whether the conduct in question would amount to a breach of an international obligation of that State. Although the prohibition of genocide is considered to be a peremptory norm in the modern-day context, the first utilisation of the term *jus cogens* was in the **Vienna Convention on the Law of Treaties (VCLT)**,⁷¹ thus it would be hard to distinguish whether during the colonial period, between 1952-1960, the prohibition of genocide as an internationally wrongful act would breach the British government's *erga omnes* obligations. However, considering the earlier intention of the International Law Commission when drafting the ARISWA, was to characterize genocide as "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being".⁷² This would distinguish genocide as ...

An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, [constituting] an international crime

Therefore, if the British government fulfils the requirements of genocide, not only would the conduct be attributable to their government, it would constitute a breach of an international obligation of the State.

Liability for the crime of genocide

The question that must now be discussed is whether the crimes committed by the British government committed during the colonial period in Kenya fulfil the requirements of genocide under international law.

The **Convention on the Prevention and Punishment of the Crime of Genocide 1948** defines what genocide actually entails. This is a crime "whether committed in time of peace or in time of war,"⁷³ consisting ...

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

⁷¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT)

⁷² (Article 19(3)(c)) DRAFT 1996

⁷³ UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 Art 1

- (a) *Killing members of the group;*
- (b) *Causing serious bodily or mental harm to members of the group;*
- (c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- (d) *Imposing measures intended to prevent births within the group;*
- (e) *Forcibly transferring children of the group to another group.*⁷⁴

However, the liability of the British government for the crime of genocide cannot be established through the use of this Convention. This is due to the fact that the United Kingdom only acceded to the Convention on 30 January 1970 and Kenya is not a party to the Convention thus acting as *ex post facto* law.⁷⁵ Nevertheless, the Genocide Convention reflects customary international law principles and has found basis not only in the international criminal tribunals of Yugoslavia (ICTY) and Rwanda (ICTR) but in ICJ jurisprudence as well.⁷⁶ In addition, it is important to note that the Nuremberg Trials included charges of genocide, using Lemkin's definition ... the progenitor of the term genocide,⁷⁷ which illustrates how genocide has been upheld as an international crime even before the crimes that took place in Kenya during the colonial period under customary international law.⁷⁸

Although the Genocide Convention states, in Article I, that the crimes must be committed in times of peace or in times of war,⁷⁹ an interpretation of this Article could constitute that it is in reference to actions committed at any time. However, as the declaration of a state of emergency could also be described as being neither a time of peace nor war, if taken by the literal meaning, it could thus be argued to classify as a loophole to the Genocide Convention as an international armed conflict. This classification arises from **Protocol I of the Geneva Conventions where Article 1 (4)** states an international armed conflicts include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination,"⁸⁰ However, as the specified Protocol came into effect in 1977, this would function as *ex post facto* law, though there is an alternative interpretation considering

74 UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 Art 2

75 UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 Art 1

76 Yudan Tan, 'The Identification of Customary Rules in International Criminal Law' (2018) 34 Utrecht J. Int'l & Eur. L. 92

77 Alexa Stiller, 'The Mass Murder of the European Jews and the Concept of 'Genocide' in the Nuremberg Trials: Reassessing Raphaël Lemkin's Impact' [2019] 13 Genocide Studies and Prevention: An International Journal 144

78 Lori Lyman Bruun, 'Beyond the 1948 Convention – Emerging Principles of Genocide in Customary International Law' [1993] 17 Maryland Journal of International Law 193

79 UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 Art 1

80 International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3 Art 4

the virtual acceptance of the 1949 Geneva Conventions and the trend towards a similarly wide acceptance of the two Additional Protocols.⁸¹ This would function as customary international law for the classification of the Mau Mau Rebellion an international armed conflict. On the other hand, if its role as custom was not prior to when the events of the Mau Mau Rebellion took place, between 1952 and 1960, then this would function as *ex post facto* law and would be classified as a non-international armed conflict. Nevertheless, if the armed conflict witnessed in the Mau Mau Rebellion does not account for a time in peace or war, it would thus be more reasonable to attribute the crimes of the British and hold them liable for war crimes or alternatively, crimes against humanity instead, that occurs during times of armed conflicts or peacetime.⁸² However, as it is acknowledged under **Common Article 2 to the four 1949 Geneva Conventions** that provides the application of armed conflicts “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties,”⁸³ it could thus be ascribed that the intention of the legislative body of the Geneva Conventions was to create a term that encompasses a time of war. Hence, the term, armed conflict, as what occurred during the Mau Mau Rebellion is not a derogation of the scope of application of the terms of genocide when taken into the context of the subsequent Geneva Conventions. This is further iterated in the commentary of Common Article 2⁸⁴ as well as *The Prosecutor v Ljube Bošković and Johan Tarčulovski* case,⁸⁵ where rather than the utilisation of the term ‘war’, the Geneva Conventions used the term ‘armed conflict’ to “highlight that the determination [of] whether an armed conflict exists within the meaning of Common Article 2 depends on the prevailing circumstances [an objective criterion], not the subjective views of the parties to the conflict.”⁸⁶ It could thus be said that whether the classification of the Mau Mau Rebellion aligns with a time of war, the Genocide Convention could be said to apply as the circumstances surrounding the subsequent Geneva Conventions do not speak of the legislative intent of the Genocide Convention to create a law that holds the punishment and prevention of genocide sacrosanct. Therefore, if an armed conflict would function as a derogation of the Genocide Convention or its custom, this would be contra to the intent of the legislators and hence unconscionable to do so.

Thereafter, it then calls to question whether the British government may be liable for the crime of genocide by fulfilling the actus rea requirement, i.e. the exhaustive list of acts

81 UNGA Res 506 (16 December 2004) A/RES/59/36, para 1

82 UNGA, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art 7

83 International Committee of the Red Cross (ICRC), Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85

84 Ibid.

85 *The Prosecutor v Ljube Bošković and Johan Tarčulovski* (Judgement) (2005) (IT-04-82)

86 Rule of Law in Armed Conflicts (RULAC), ‘International Armed Conflict’ (30 August 2017) <<https://www.rulac.org/classification/international-armed-conflict#collapse3accord>> accessed May 2021

against a national, ethnical, racial or religious group. As this follows from the customary international law definition of genocide, the definition is expanded to include political groups and social groups as well, as the Genocide Convention only codified parts of customary international law.⁸⁷ Considering the majority of the affected by the crimes of the British during colonial rule were Kikuyu,⁸⁸ which is an ethnic group native to Central Kenya, the crimes of the British go against a national, ethnical, racial or religious group. Furthermore, as the Mau Mau designated themselves as the Kenya Land and Freedom Army, a political group, it could therefore be included as acts consisting of this designated group as well. Hence, the alleged criminal acts committed by the British government could be held to go against the various groups that are prohibited under the customary international law definition of genocide.

Article II of the Genocide Convention provides an exhaustive list of the acts that can be committed that can be characterized as genocidal actions. Firstly, killing members of the group,⁸⁹ whilst considering that the British actions during the state of emergency led to the official deaths of 11,000 Mau Mau and other rebels,⁹⁰ unofficially, the deaths mirror more than 20,000.⁹¹ However, due to the documents contained in the Hanslope Files, the statistics of the atrocities that occurred during this period of time in Kenya are fragmented. Nevertheless, the genocidal definition does not require a number element in order for crimes to be designated as genocide. Therefore, the killing of members of the selected group would fulfil the *actus rea* requirement of genocide.

Secondly, there is the issue of whether the British government caused serious bodily or mental harm to members of the group. Under **Article II (b) of the Genocide Convention**,⁹² this may constitute an act that may amount to genocide. Therefore, by “detaining nearly the entire Kikuyu population of 1.5 million people and physically and psychologically atomizing its men, women, and children,” this could amount to serious bodily or mental harm that caused the victims trauma.⁹³ By virtue of this, the acts of the British government may be constituted as fulfilling another action that describes genocide during the state of emergency in Kenya.

87 Yudan Tan, ‘The Identification of Customary Rules in International Criminal Law’ (2018) 34 Utrecht J. Int’l & Eur. L. 92

88 Caroline Elkins, ‘Alchemy of Evidence: Mau Mau, the British Empire, and the High Court of Justice’ [2011] 39 The Journal of Imperial and Commonwealth History 731, 735

89 UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 Art II (a)

90 BBC News, ‘Mau Mau uprising: Bloody history of Kenya conflict’ (London, 7 April 2011) <https://www.bbc.com/news/uk-12997138> accessed May 2021

91 David Anderson, *Histories of the Hanged: The Dirty War in Kenya and the End of Empire* (W.W. Norton 2005) 4

92 UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 Art II (b)

93 Caroline Elkins, ‘Alchemy of Evidence: Mau Mau, the British Empire, and the High Court of Justice’ [2011] 39 The Journal of Imperial and Commonwealth History 731, 734

The third issue that must be raised, is whether the actions of the British government amount to deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.⁹⁴ Due to the interconnectivity of the acts required by the Genocide Convention, the aggregated use of torture, maiming, castration, sexual assault, and murder could be established as a deliberate infliction of the Kikuyu people, conditions of life that are calculated to bring about its physical destruction. Whether this is partly or as a whole, is a question of the degree to which victims suffered and due to the recent disclosure of the Hanslope Files, this could deduce sufficient evidence that ties the British government with fulfilling this requirement. However, although the British government may be considered to have perpetuated a regime of systemic abuse in Kenya,⁹⁵ whether this amounts to a deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole, or in part, is ambiguous as it is based on subjective reasoning on the part of the British government.

Fourthly, the question of whether the British government imposed measures intended to prevent births within the group,⁹⁶ i.e. the Kikuyu, must be addressed. Considering that accounts by victims describe the use of castration in the detention camps,⁹⁷ this may amount to measures imposed that are intended to prevent births in the group, as castration is an effective way to do this. Conversely, the castration itself was an instrument of torture to be used against detainees and could be argued to lack an intention to prevent births within the Kikuyu but may just be a consequence of the action. This issue of the intention and in actuality its effect is ambiguous at best and may lead to the fourth act to characterize a genocide, i.e. imposing measures intended to prevent births within the group, being deemed as not having taken place at all.

Lastly, a matter of concern is where the British government engaged in forcibly transferring children of the group to another group, under **Article II (e) of the Genocide Convention**.⁹⁸ This action would constitute an act that designates genocide. However, there is no conclusive evidence that the British government engaged in such an act.

Therefore, when concerning the criteria that must be met to fulfil the *actus reus* requirements of genocide, i.e. the exhaustive list under **Article II (a-e)**,⁹⁹ it is not essential that all acts must be committed. However, the fact that there is evidence illustrating that the

94 UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 Art II (c)

95 David M. Anderson, 'British abuse and torture in Kenya's counter-insurgency, 1952-1960' [2012] 23 Small Wars & Insurgencies 700, 701

96 UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 Art II (d)

97 David M. Anderson, 'British abuse and torture in Kenya's counter-insurgency, 1952-1960' [2012] 23 Small Wars & Insurgencies 700, 704

98 UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 Art II (e)

99 UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 Art II

British government was engaged in multiple acts that are requirements of genocide, demonstrates a systemic regime that breached their international obligations by committing internationally wrongful acts.

By virtue of this, it then becomes necessary to consider whether the actions of the British government fulfil the mens rea requirement. The requirement in question is whether the British government committed the exhaustive list of criteria ‘with intent to destroy, in whole or in part’ geared towards the targeted group, i.e, the Kikuyu and the Mau Mau. According to the International Law Commission,¹⁰⁰ the intent requirement is not “to achieve the complete annihilation of a group from every corner of the globe,” it is nonetheless a requirement that requires specific intent and mere knowledge that the intended actions would destroy a protected group would not suffice to fulfil the mens rea requirement of genocide.¹⁰¹ Therefore, it could be said that based on the facts, as the British government committed the various actions as a counter-insurgency against the Mau Mau, the acts were not done with specific intent to destroy, in whole or in part thus the evidence provided is not conclusive to whether the intent requirement is fulfilled.

Conclusion

To conclude, as this discussion sought to answer... the extent to which the British Government may be liable for the crime of genocide committed during the colonial period in Kenya, under international law, considering the revelation of the Hanslope Files, the answer is varied and is dependent on how one interprets the law.

The first question that served as a cornerstone of this paper is whether a state, i.e. the British government, could be held responsible/liable for its actions during the colonial period in Kenya. Through the discussion, it was ascertained that through the ARISWA, it is possible for a state to be held responsible for internally wrongful acts that it has committed. The first requirement in order to be held responsible, is that the actions or omissions of the state must be attributable to the state. In this case, as the individual officers given authority by the British government were committing these acts of torture, murder, maiming, sexual assault, *inter alia*, and that critical arms of the government both in Kenya and in Britain knew of the aforementioned acts and did not stop these atrocities, these conditions encompass accountability for actions committed and the ARISWA specifies distinctions where attributability can be determined. As the second requirement substantiates that the wrongful act must be a breach of an international obligation, the crime of genocide and its punishment and prevention is held sacrosanct in international

¹⁰⁰ International Law Commission, ‘Draft Code of Crimes Against the Peace and Security of Mankind’ (1996) UN Doc A/51/10

¹⁰¹ Raphael Lemkin, ‘Mens Rea and Genocide’ in William A. Schabas, *Genocide in International Law* (CUP 2009) 94

law and is considered a breach of the *erga omnes* obligations owed toward the international community as a whole.

The second question examines whether the requirements for genocide are fulfilled. This paper does not provide a conclusive answer. This is because there is a determination in the Genocide Convention that could act as a loophole as the Mau Mau Rebellion was an armed conflict and not necessarily a time of peace or war. Nevertheless, although a peremptory norm is one that cannot be derogated from, the classification of it, in this scenario, would act as *ex post facto* law. However, the actions of the British government could be classified as fulfilling the *actus reus* requirements of genocide, although the question of whether the *mens rea* requirement of specific intent is met is inconclusive considering the threshold imposed.

As a result of these results, although whether the British government may not be liable for the crime of genocide, there are alternative crimes to which they may be held liable for considering the severity of their actions such as war crimes, crimes against humanity, torture or alternatively, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide or complicity in genocide.