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Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38XD86

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Redressing Colonial Genocide Under International Law: The Hereros' Cause of Action Against Germany

Rachel Anderson†

INTRODUCTION

It is widely supposed that the genocidal wars waged by colonial administrations against indigenous peoples or nations before 1948 did not violate rules of international law. Contemporary scholars and commentators assert that all forms of genocide were first criminalized and made punishable by the 1948 United Nations Convention on the Prevention and Punishment of Genocide (U.N. Genocide Convention). As a result, scholars argue that wars of annihilation2 perpetrated by colonial administrations were not illegal acts under contemporaneous international law.3 The

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any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) [k]illing members of the group; (b) [c]ausing serious bodily or mental harm to members of the group; (c) [d]eliberately inflict[ing] on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) [i]mposing measures intended to prevent births within the group; (e) [f]orcingly transferring children of the group to another group.

Id. art. 2.

2. Some scholars and commentators also use the historical term “war of extermination.” See JOHANN CASPAR BLUNTSCHLI, DAS MODERNE VÖLKERRECHT DER CIVILISIERTEN STATEN 299 (1878). Genocide, the modern term first used by Raphael Lémin, encompasses several subcategories, including wars of annihilation or extermination. See RAPHAEL LÉMIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION - ANALYSIS OF GOVERNMENT - PROPOSALS FOR REDRESS 79 (1944).

3. See generally JÖRN AXEL KÄMMERER & JÖRG FÖH, DES VÖLKERRECHT ALS INSTRUMENT DER WIEDERGUTMACHUNG? - EINE KRITISCHE BETRACHTUNG AM BEISPIEL DES HERERO-AUFSTANDES, 42 ARCHIV DES
German government, modern scholars, and other commentators take this stance toward the German-Herero War of 1904-07, the first genocidal war of the twentieth century. However, the German government, these scholars, and commentators fail to recognize that by the end of the nineteenth century, specific forms of genocide were already illegal under customary international law and multilateral treaties. This Comment argues that international treaty law and customary international law contemporaneous to the German-Herero War reveal that: (1) international law banned colonial acts of annihilation in Africa, and (2) this law was directly applicable to the German-Herero War. In consequence, the Hereros’ case for moral and even legal redress is stronger than heretofore assumed.

The Hereros, a minority ethnic group in Namibia, are seeking political and legal redress from the German government and corporations involved in the German colonial enterprise. They received an apology from the German government in 2004. However, the Federal Republic has not acknowledged any legal obligations, and the Hereros have not received any financial compensation. The Hereros are currently pursuing claims in U.S. courts against Deutsche Bank and Woermann Line (now Deutsche Afrika-Linien GmbH & Co.). The Hereros are suing Deutsche Bank based on its financing of the German colonial administration and participation in the German colonial enterprise. The Hereros have included Woermann
Line in the suit because it "employed slave labor and operated [a] concentration camp."

The Hereros' efforts have not been supported by the Namibian government, which has received more than five hundred million Euros in development aid since winning independence in 1990. The German government is Namibia's main donor country and acknowledges that it owes this aid as a "special responsibility" in light of its past colonization of Namibia. The Hereros benefit only marginally from this aid; however, substantial recovery through litigation could help them achieve financial independence. As momentum for their claim builds, the Hereros have received increasing press coverage.

Some of the discourse analyzing the legality of the atrocities the Germans committed against the Hereros examines the relationship arising from the bilateral protection treaties between the German Reich, which pursued a colonial enterprise in Hereroland from 1884 to 1919, and the Hereros, who numbered 80,000 prior to the war. However, this discourse is incomplete because it does not address the illegality of some forms of genocide under customary international law and multilateral treaties. This limited discussion of international legal prohibitions against certain forms

10. Id. ¶ 6 (alleging direct responsibility for and commission of crimes against humanity perpetrated against the Hereros).
12. Id.
15. See, e.g., Manfred O. Hinz, One Hundred Years Later: Germany on Trial in the USA-The Herero Reparations Claim for Genocide, 1 NAMIBIAN HUMAN RTS. ON-LINE J. (2003), at http://www.hrdc.unam.na/journal/V1_N1_Dec2003/index.htm; Kämmerer & Föh, supra note 3. The Herero Nation entered into bilateral protection treaties with Germany in 1885 and 1890. HELMUT BLEY, SOUTH-WEST AFRICA UNDER GERMAN RULE 1894-1914, at 6 (1971) (citation omitted). These treaties were limited in scope. See DRECHSLER, supra note 4, at 27 ("The Chief, as one party to the treaty, undertook not to enter into any treaties with other nations and not to cede his territory or portions thereof to any other nation or members thereof without the approval of the German government. He also pledged to protect the life and property of German nationals and to allow them to carry on trade without let or hindrance on his territory, the German authorities retaining jurisdiction over all Europeans. In return, the German government promised to extend "protection" to the chief and his tribe, while recognizing and supporting the chief's jurisdiction over his own people. Europeans were to respect the customs and traditions of the Africans and to abstain from any act that would be an infraction of laws and regulations in force in their own country.")
of genocide at the turn of the twentieth century has constrained the Hereros’ ongoing claims against the German government and German enterprises for reparations.

International legal prohibitions against some forms of genocide, such as wars of annihilation, developed long before their codification in the U.N. Genocide Convention and were embedded in both treaty and customary law by the late nineteenth century. An analysis of international law during the early twentieth century shows that the war of annihilation waged by the German colonial administration against the Herero Nation violated several treaties to which Germany was a signatory, as well as the customary law of the period. Most scholars do not dispute that Germany waged a war of annihilation against the Hereros. There is ample evidence that the Hereros endured slavery, forced labor, concentration camps, medical experimentation, destruction of tribal culture and social organizations, and systematic abuse of women and children. Nonetheless, commentators and scholars have argued that because these acts were not illegal at the time they were perpetrated, Germany has no legal obligation to the Hereros.

In contrast, this Comment argues that documents from the 1884 Berlin Conference, the 1890 Anti-Slavery Conference in Brussels, and the 1899 Hague Conference on the Laws of War support the Hereros’ claim for reparations against the German government and associated German enterprises. The 1885 Berlin West Africa Convention provides an additional avenue for redress under the third-party beneficiary doctrine. The writings of contemporaneous scholars also indicate that European powers had legal duties and obligations to indigenous African peoples under customary laws of the period.

Part I of this Comment outlines German colonial policies in Hereroland (also known as South West Africa, today Namibia) and recounts Germany’s systematic annihilation of the indigenous Herero population. Part II establishes the illegality of wars of annihilation under international law as it already stood by the end of the nineteenth century. Part III places Germany’s war of annihilation against the Hereros squarely within that contemporaneous jurisprudence. Part IV explains how


17. See Harring supra note 4, at 401. For a detailed account of the German-Herero War and its effects on the Herero Nation see, e.g., DRECHSLER, supra note 4; JAN-BART GEWALD, HERERO HEROES: A SOCIO-POLITICAL HISTORY OF NAMIBIA 1890-1923 (1999).

18. See generally Kämmerer & Füh, supra note 3 (arguing that the German colonial war of annihilation against the Herero people was not a violation of contemporaneous international law).

19. The Hereros’ status as a nation is discussed infra.
the third-party beneficiary doctrine provides the Hereros with a claim against Germany. Part V identifies some implications of the analysis in this Comment, including the possible impact of the Hereros’ cause of action upon other groups seeking redress for similar wrongs committed under colonial rule.

I

THE GERMAN COLONIAL WAR OF ANNIHILATION AGAINST THE HERERO NATION

At the beginning of the twentieth century, the Hereros numbered approximately 80,000 in Hereroland (also known as South West Africa, today Namibia), where the German colonial enterprise lasted from 1884 to 1919. The German merchant Adolf Lüderitz purchased the harbor of Angra Pequena and its surrounding lands, located on the southern coast of present-day Namibia, in 1883 and began calling for German protection. The following year, Germany declared Lüderitz’s land a protectorate.

The Herero Nation, seeking military support in conflicts with the Nama, another indigenous nation in the region, entered into a treaty of friendship and protection with the German government in 1885. This protectorate relationship supports the application of international law to the...
withdrew from the treaty when the Germans were unable to provide the expected military assistance. The treaty was later revived and a further peace agreement was concluded in 1894, but the German colonial administration did not “exercise sovereignty over the territory as it was internationally demarcated” until 1907. Nonetheless, Germany retained power in South West Africa until 1919, when it lost its colonies as a result of World War I. This Part details the German colonial administration’s war of annihilation against the Hereros at the beginning of the twentieth century and establishes that this conduct constituted a form of genocide.

A. Beginning of the German-Herero War

In 1904 Germany began a war of annihilation against the Hereros in retaliation for the Hereros’ resistance against the German colonial administration’s oppressive treatment. The German-Herero War was one of the world’s bloodiest conflicts occurring between 1815 and 1914. From the beginning of the war, many Germans supported the total annihilation of the Hereros. Two days after the Hereros began resisting the colonial administration, the German Colonial League’s Executive Committee released a pamphlet calling for a swift and harsh response. A letter written by a German missionary to his colleagues captures the violent sentiment among Germans in Hereroland supporting the annihilation of the Hereros:

Hereros’ claims. See Hinz, supra note 15, at 8 (“The more appropriate interpretation of the German Herero relationship around the German Herero war is to see it as a relationship governed by international law.”) (citing Friedrich Schack, Das deutsche Kolonialrecht in seiner Entwicklung bis zum Weltkriege. Die allgemeinen Lehren 343 (1923) (“Die zu den Stämmen in Südwestafrika zunächst vorhanden gewesenen Protektoratsbeziehungen des Reiches waren in Übereinstimmung mit unsern früheren theoretischen Ausführungen hinsichtlich der Protektorate über Stämme zunächst rein völkerrechtliche.”) (“The protectorate relationships that existed at that time between the empire and the tribes in South West Africa were initially purely based on international law which is in line with (or agreement with) our earlier theoretical remarks with respect to the protectorate.”) (author’s transl.).)

27. See Hinz, supra note 15, at 8. This withdrawal also declared void the mineral rights that had been granted to the Germans. Goldblatt, supra note 23, at 109.


29. Drechsler, supra note 4, at 7.


31. See Berat, supra note 23, at 177.

32. Jon Bridgman, The Revolt of the Hereros 1-2 (1981) (“Though casualty figures are notoriously inaccurate, the total dead was probably greater than in the Boer War, the Crimean War, the Spanish American War, the Seven Weeks War, and a dozen or more other conflicts that were fought between 1815 and 1914.”).

The Germans are consumed with inexpiable hatred and a terrible thirst for revenge, one might even say they are thirsting for the blood of the Herero[s]. All you hear these days is "make a clean sweep, hang them, shoot them to the last man, give no quarter." I shudder to think what may happen in the months ahead. The Germans will doubtless exact a grim vengeance.\textsuperscript{34}

Some German politicians did oppose the policy of annihilation. In March 1904 August Bebel, the leader of the Social Democratic Party, objected in the German parliament to German troops' barbarous treatment of the Hereros.\textsuperscript{35} Likewise, Theodor Leutwein, the German governor of South West Africa, criticized the annihilation on economic grounds, arguing that Herero laborers were necessary for the success of the colonial enterprise.\textsuperscript{36}

In April 1904, three months after the war began, the German Emperor Wilhelm II appointed Lieutenant-General Lothar von Trotha as commander-in-chief of the German forces in South West Africa.\textsuperscript{37} Von Trotha had already become well known for his brutal suppression of indigenous resistance efforts in the 1896 East African Wahehe Rebellion and the 1900-1901 Boxer Rebellion in China.\textsuperscript{38} By November 1904 von Trotha had informed Governor Leutwein that "[h]is Majesty the Emperor only said that he expected me to crush the rebellion by fair means or foul,"\textsuperscript{39} and that "[i]t was and remains my policy to apply this force by unmitigated terrorism and even cruelty. I shall destroy the rebellious tribes by shedding rivers of blood and money."\textsuperscript{40}

\textbf{B. The Extermination Order}

Von Trotha promptly translated his intention to destroy the Hereros into official policy. On October 2, 1904, von Trotha issued an annihilation order stipulating:

The Herero people will have to leave the country. Otherwise, I shall force them to do so by means of guns. . . . Every Herero, whether found armed or unarmed . . . will be shot. I shall not accept

\textsuperscript{34} DRECHSLER, supra note 4, at 145 (citing Letter from Missionary Elger to the Rhenish Missionary Society (Feb. 10, 1904), collected in The Herero Uprising, supra note 18, in Imp. Col. Off. File No. 2114, at 80-82); see also Berat, supra note 23, at 178.

\textsuperscript{35} See DRECHSLER, supra note 4, at 151; Berat, supra note 23, at 178.

\textsuperscript{36} DRECHSLER, supra note 4, at 148 (citing Letter from Theodor Leutwein to the Colonial Department (Feb. 23, 1904), collected in The Herero Uprising, supra note 18, in Imp. Col. Off. File No. 2113, at 89-90); see also Berat, supra note 23, at 179.

\textsuperscript{37} See Berat, supra note 23, at 179.

\textsuperscript{38} See DRECHSLER, supra note 4, at 153; Berat, supra note 23, at 179.

\textsuperscript{39} DRECHSLER, supra note 4, at 153-54 (quoting Letter from Lothar von Trotha to Theodor Leutwein (Nov. 5, 1904), collected in Differences Between Lieutenant-General von Trotha and Governor Leutwein over Uprisings in German South West Africa during 1904, in Imp. Col. Off. File No. 2089, at 100-2 (on file at the Bundesarchiv Berlin)); see also Berat, supra note 23, at 180.

\textsuperscript{40} DRECHSLER, supra note 4, at 154.
any more women and children. I shall drive them back to their people—otherwise I shall order shots to be fired at them. These are my words to the Herero people.41

An official report sent two days later by von Trotha to the chief of the army general staff underlined the intent of the extermination order:

The crucial question for me was how to bring the war against the Herero [Nation] to a close.... As I see it, the nation must be destroyed as such.... I ordered the warriors...to be court-martialled and hanged42 and all women and children who sought shelter here to be driven back into the sandveld [the Kalahari Desert].... To accept women and children who are for the most part sick, poses a grave risk to the force, and to feed them is out of the question. For this reason, I deem it wiser for the entire nation to perish.... This uprising is and remains the beginning of a racial struggle....43

The day after the Germans announced the extermination order, they forced thirty Herero prisoners, including women and children, to watch the hanging of the Hereros who had been sentenced to death.44 The German officials read the extermination order to the prisoners, handed out printed copies, and drove them into the Kalahari Desert.45 The hangings marked the beginning of the German efforts, led by von Trotha, to destroy the Hereros.

Von Trotha’s correspondence confirms that the German-Herero War was a war of annihilation expressly intended to wipe out the Hereros. In a letter to Governor Leutwein on October 27, 1904, he wrote, “That [Herero] nation must vanish from the face of the earth.”46 Governor Leutwein responded to this letter by requesting permission from the German Foreign Office to allow the Hereros to surrender,47 writing that “[a]ccording to reliable sources, a number of Herero[s] have offered to submit.”48 The writings of von Trotha’s subordinate officers in Hereroland also provide

41. DRECHSLER, supra note 4, at 156-57 (quoting VORWÄRTS, No. 294, Dec. 16, 1905); see also GEWALD, supra note 17, at 172-73.
42. DRECHSLER, supra note 4, at 160-61 (citation omitted).
43. DRECHSLER, supra note 4, at 160-61 (quoting Report from Lothar von Trotha to the army chief of staff (Oct. 4, 1904), collected in Differences Between von Troth and Leutwein, supra note 24), in Imp. Col. Off. File No. 2089, at 5-6 [hereinafter Report from von Trotha to army chief of staff].
44. See GEWALD, supra note 17, at 173.
45. See WALTER NUHN, STURM ÜBER SÜDWEST 282 (1989); KONRAD RUST, KRIEG UND FRIEDEN IM HEREROLANDE 386 (1905).
46. DRECHSLER, supra note 4, at 161 (quoting Letter from Lothar von Trotha to Governor Theodor Leutwein (Oct. 27, 1904), collected in Differences Between von Trotha and Leutwein, supra note 24, in Imp. Off. File No. 2089, at 29).
47. See Berat, supra note 23, at 182.
48. DRECHSLER, supra note 4, at 161 (quoting Letter from Lothar von Trotha to the general staff (Oct. 28, 1904), collected in Differences Between von Trotha and Leutwein, supra note 24, in Imp. Off. File No. 2089, at 103 [hereinafter Letter from von Trotha to Leutwein]. Von Trotha quotes Leutwein in this letter.).
evidence of von Trotha’s intent to annihilate the Hereros. In September 1904 Major Ludwig von Estorff wrote:

I followed their [tracks] and found numerous wells which presented a terrifying sight. . . . The Herero[s] fled ahead of us into the [Kalahari]. Again and again this terrible scene kept repeating itself. With feverish energy the men had worked at opening the wells, however the water became ever sparser, and wells evermore rare. They fled from one well to the next and lost virtually all their cattle and a large number of their people. The people shrunk into small remnants . . . . It was a policy which was equally gruesome as senseless, to hammer the people so much[,] . . . [T]hey had been punished enough. I suggested this to General von Trotha but he wanted their total extermination.49

In November 1904 the Foreign Office recalled Leutwein to Germany, and Lothar von Trotha replaced him as governor of South West Africa.50 Although Leutwein’s recall quieted his criticism of von Trotha’s tactics, opposition to von Trotha’s extermination policy increased. Missionaries, members of the Colonial Department, and others criticized von Trotha’s plan.51 Imperial Chancellor Bernhard von Bülow52 wrote to Emperor Wilhelm II requesting permission to revoke von Trotha’s Extermination Order. The request stated four reasons: (1) inconsistency of the plan to annihilate the Hereros with Christianity and humanity, (2) impossibility of success, (3) economic detriment to the colonial enterprise by depriving it of its “productive forces,” and (4) establishment of a policy that was “demeaning to [Germany’s] standing among the civilized nations of the world.”53

On December 8, 1904, the Emperor rescinded the Extermination Order.54 However, the decision was narrowly tailored and did not prohibit future genocidal acts. Instead it only required that “mercy” be included among the colonial administration’s possible policy options.55 The general staff wrote, “His Majesty has not forbidden you to fire on the

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49. Gewald, supra note 17, at 174 (citing Namibian National Archives Windhoek, Acc. 109, 49 (Gewald transl.)).
51. See id. at 164-65.
52. The imperial chancellor was the head of the German government, the emperor’s first minister, and the presiding officer of the upper chamber of the German Parliament. See Wikipedia: The Free Encyclopedia, Chancellor of Germany, at http://en.wikipedia.org/wiki/German_chancellor (last modified Feb. 10, 2005).
53. Drechsel, supra note 4, at 163-64 (quoting Letter from Imperial Chancellor Bernhard von Bülow to Emperor Wilhelm II (Nov. 24, 1904), collected in Differences Between von Trotha and Leutwein, supra note 24), in Imp. Col. Off. File No. 2089, at 8-11).
54. See Bley, supra note 15, at 167.
Herero[s]... But the possibility of showing mercy, ruled out by the proclamation of 2 October [the Extermination Order], is... to be restored again.\(^{56}\) In addition, the rescission of the Order did not officially disapprove of von Trotha or his tactics. Indeed, the following year Emperor Wilhelm II awarded von Trotha a medal of honor for his work in South West Africa.\(^{57}\)

C. Slave Labor and Concentration Camps

Even after the Emperor rescinded the Extermination Order, the German colonial administration continued to decimate the Hereros by forcing Herero prisoners of war into slave-labor and concentration camps.\(^{58}\) The German Imperial Chancellor, Prince von Bülow, ordered the creation of concentration camps in Hereroland in 1904.\(^{59}\) By late May 1905 the Germans had taken 8,040 Herero prisoners of war, of whom more than three-quarters were women and children.\(^{60}\) The Germans immediately shipped the prisoners to slave-labor camps, where they worked under grueling conditions\(^{61}\) and were subjected to medical experiments.\(^{62}\) The

\(^{56}\) Id. Von Trotha was never happy with this decision and lobbed for its reversal until he left for Germany in November 1905. See Bley, supra note 15, at 167.

\(^{57}\) See Bley, supra note 15, at 165, 169.

\(^{58}\) See generally Joachim Zeller, "Wie Vieh wurden hunderte zu Tode getrieben und wie Vieh begraben": Fotodokumente aus dem deutschen Konzentrationslager in Swakopmund/Namibia 1904-1908, 49 ZEITSCHRIFT FÜR GESCHICHTSWISSENSCHAFT 226 (2001) (discussing the concentration camps established and run by the German colonial enterprise and including eleven photographs from this period from the National Archives of Windhoek, the Stadtarchiv Nürnberg, Frankfurter Stadt- und Universitätsbibliothek, which has a collection of more than 55,000 pictures from the former Deutschen Kolonialgesellschaft and the Reichskolonialbundes, some of which are available online at Der Bildbestand der Deutschen Kolonialgesellschaft in der Stadt- und Universitätsbibliothek Frankfurt am Main, at http://www.stub.bildarchiv-dkg.uni-frankfurt.de (last visited Apr. 16, 2005)); see also DRECHSLER, supra note 4, at 207. The parallels between these concentration camps and those used by the Nazis during the Holocaust are unmistakable, and the genocides committed by the German colonial administration in Africa were the predecessors of and served as models for the Holocaust. Scholars such as Professor Edward Kissi, a leading expert on genocide, argue that "...the road to the Holocaust went through Africa" because research during the 1920s by German anthropologists studying theories of racial purification in Africa was used to justify the Nazis' belief in eugenics. Matthew Pleasant, From Africa to Auschwitz, ORACLE, Jan. 11, 2005, available at http://www.usforacle.com/vnews/display.v/ART2005/01/11/41e3df9de5ee797. See Harring, supra note 4, at 396-97 ("Indeed, there is evidence that the virulent racism that promoted the Holocaust was not only characterized German colonization of Africa, but was also partially formed there: (citation omitted) the Germans began experiments with sterilization in the name of the science of eugenics, the creation of a [']master race,' in German South West Africa at the turn of the century."). This racism was also passed down from father to son; racism against African people to racism against Jewish people. See Hanchard, supra note 62 ("Rudolph Goering, the governor general of German South West Africa at the time, was the father of Herman Goering, Hitler's second-in-command under the Third Reich.").

\(^{59}\) See Zeller, supra note 58, at 226 (citation omitted).

\(^{60}\) Id.

\(^{61}\) Id. According to one account, conditions within the camps were brutal: [Prisoners of war] were placed behind double rows of barbed wire fencing... and housed in pathetic [jammerlichen] structures constructed out of simple sacking and planks, in such a manner that in one structure 30 to 50 people were forced to stay without distinction as to age
mortality rate was extremely high: more than 12% of the Hereros serving as slave labor for railroad construction died in a period of six weeks.\textsuperscript{63} The Germans killed all Hereros who tried to escape the inhuman conditions in the camps immediately and without mercy.\textsuperscript{64}

The brutal living and working conditions in the camps constituted a policy decision on the part of Germany.\textsuperscript{65} Vice Governor Hans Tecklenburg commented on the high mortality rate in the camps in a letter to the Colonial Department stating, "[T]he more the Herero people experience personally the consequences of the rebellion, the less will be their desire—and that of generations to come—to stage another uprising.... [T]he ordeal they are now undergoing is bound to have a more lasting effect."\textsuperscript{66}

and sex. From early morning until late at night, on weekdays as well as on Sundays and holidays, they had to work under the clubs of raw overseers.... until they broke down.... Like cattle, hundreds were driven to death and like cattle they were buried. Jan-Bart Gewald, \textit{The Road of the Man Called Love and the Sack of Sero: The Herero-German War and the Export of Herero Labour to the South African Rand}, 40 J. Afr. Hist. 21, 27-28 (1999) (citation omitted), Zeller, supra note 58, at 227 (citation omitted). In Windhoek, the capital of the territory, a separate camp was created in which Herero women were kept specifically for the sexual gratification of German troops. \textit{Id.} at 28.

62. See Harring, \textit{supra} note 4, at 396-97 ("Herero prisoners of war were the subject of these experiments."); Michael G. Hanchard, \textit{Herero and Nama Revolts, 1904-1907: A [P]relude to the [M]odern [H]olocaust", in \textit{A Political Atlas of the African Diaspora}, at http://diaspora.northwestern.edu/mbin/WebObjects/DiasporaX.woa/wa/displayArticle?atomid=619 (last visited Apr. 11, 2005) ("[C]amp prisoners were transformed into human subjects for various laboratory experiments designed to confirm the racial inferiority of black peoples. These experiments were overseen by Dr.[J] Eugen Fischer who became the senior geneticist of the Nazi regime."); Toker, \textit{supra} note 4, ("[M]edical experiments were also conducted there by (literally) the teachers of Josef Mengele, the Auschwitz "Angel of Death" [forty] years later."). Fischer's work influenced Nazi physicians and German medical experiments in concentration camps. Ngunjiri, \textit{supra} note 14. Fischer's book on his research in Namibia, \textit{The Principles of Human Heredity and Race Hygiene}, "went on to become one of Hitler's favorite reads." \textit{Id.} He later became chancellor of the University of Berlin, and one of his prominent students was Josef Mengele, "the notorious doctor who performed genetic experiments on Jewish children at the Auschwitz concentration camp." \textit{Id.}

63. See Drechsler, \textit{supra} note 23, at 207 (citing letter to Hans Tecklenburg to the Colonial Department (July 3, 1905) (on file with German Imp. Col. Off.)) (hereinafter Tecklenburg I).

64. \textit{Id.}

65. Compare Gunter Spraul, \textit{Der "Völkermord" and den Herero: Untersuchungen zu einer neuen Kontinuitätthese}, 39 GESCHICHTE IN WISSENSCHAFT UND UNTERRICHT 713 (1988) ("Hier [in deutschen Süd-westafrika] seien die ersten KZ [Konzentrationslagern] errichtet und dreißig Jahre vor Hitler "deutsches Herrenmenschentum" praktiziert worden. Damit habe die deutsche Kolonialpolitik in Zeitsetzung und Methoden das Dritte Reich vorweggenommen." (citation omitted)) ("Here [in German South West Africa] the first concentration camps were set up, and 30 years before Hitler the cult of the German master race was practiced.")(author's transl.); \textit{with Toker, supra note 4, ("Concentration camps were neither a Russian invention nor a German one. They were first established in 1896 by Spaniards in Cuba .... The German colonial powers ... contributed to the history of the concentration camp by introducing the idea of forced labor .... ").

The brutality against the Hereros continued as Friedrich von Lindequist succeeded von Trotha as governor of South West Africa.67 Under von Lindequist, German military hostilities ceased briefly from December 1905 until mid-1906.68 Despite the pause in military strikes, von Lindequist established concentration camps in December 1905 for Hereros who had surrendered to Germans.69 By May 1906, the Germans had captured 14,769 Hereros: 4,137 men, 5,989 women, and 4,643 children.70 Two months later, von Lindequist wrote to the Colonial Department that “[t]he northern and central parts of the country, in particular Hereroland proper, are virtually devoid of Herero[s]... Those still roaming about will consider themselves lucky if they come to no harm.”71

The German’s annihilation campaign was brutal and successful. When the Germans did not shoot or hang Herero prisoners of war, they drove them into the desert.72 The Germans tattooed survivors “GH, Gefangene Herero (imprisoned Herero[s])”73 and forced them into slave-labor and concentration camps.74 By the end of the war in 1907, “the Herero people as such was annihilated.”75 In just a few years, the Germans killed more than 65,000 of the 80,000 Hereros:76 they slaughtered them in battle, poisoned them, tortured them to death, trapped them in their huts and burned them to death, and drove them into the Kalahari Desert to die of hunger and thirst.77 As the following Part illustrates, Germany’s massacre of the Hereros differs from many other atrocities perpetrated by European colonizers against indigenous Africans because its express purpose was annihilation.

68. Id. at 183-84.
69. Id. at 184. See also Jeremy Sarkin, Reparation for Past Wrongs: Using Domestic Courts Around the World, Especially the United States, to Pursue African Human Rights Claims, 32 INT'L J. LEGAL INFO. 426 (2004) (The German colonial administration’s policy included the “establishment of concentration camps in which more than half the prisoners died.”); Jan-Bart Gewald, supra note 61, at 21, 27-28. The camps were finally abolished in April 1908. Id. at 29.
70. DRECHSLER, supra note 4, at 208.
71. Id. (quoting Letter from Friedrich von Lindequist to the Colonial Department (July 24, 1906), collected in The Herero Uprising, supra note 19, in Imp. Col. Off. File No. 2119, at 46, published in 17 DEUTSCHES KOLONIALBLATT 641 (1906)).
72. See Gewald, supra note 17, at 173; Nuhn, supra note 45, at 282; RUST, supra note 45, at 386.
73. Stone, supra note 4, at 34.
74. See Letter to the general staff, supra note 60; DRECHSLER, supra note 4, at 207; Gewald, supra note 61, at 27-28.
76. See id.; DRECHSLER, supra note 4, at 214 (discussing the results of the 1911 census); Harring, supra note 4, at 401 (“The census of 1911 gives the Herero population in South West Africa as 15,130, down from about 80,000 before the war.”).
77. Harring, supra note 4, at 400 (“The Herero[s], including women and children, died after being driven out into the Kalahari and denied access to water holes.”).
II
WARS OF ANNIHILATION AS VIOLATIONS OF CONTEMPORANEOUS INTERNATIONAL LAW

International law during the German colonial enterprise in South West Africa obligated European powers to protect the moral and humanitarian interests of colonized peoples. These interests included (1) protection of the indigenous people of Africa from destruction and annihilation, (2) prohibition of the trade in human beings, and (3) preservation of freedom of religion among Christian denominations. This Part focuses on the obligation of colonial powers to protect indigenous Africans from annihilation under multilateral treaties, customary international law, and laws of war.

A. International Treaties

Treaties of peace, alliance, and commerce have shaped the positive law of nations since the beginning of the nineteenth century.\(^78\) Treaties have also played an important role in delineating international humanitarian law and elements of fundamental rights, including protections of religious freedom\(^79\) and prohibitions against trafficking in human beings. For example, the 1884-1885 Berlin West Africa Conference, which established guidelines for the European colonization of Africa, included humanitarian obligations such as the “preservation of the native tribes,” the suppression of slavery and the slave trade, and the protection of religious freedom.\(^80\) Treaties prohibiting trade in human beings provide further evidence that

\(^{78}\) Henry Wheaton, Elements of International Law 22 (3d Eng. ed. Stevens & Sons Ltd. 1889) (1836); see generally The Paquete Habana, 175 U.S. 677 (1900); The Antelope, 23 U.S. (10 Wheat.) 66 (1825). See George Frédéric de Martens, A Compendium of the Law of Nations 5 (1802).

\(^{79}\) Two and one-half centuries before the German-Herero War, the 1648 Peace of Westphalia assured freedom of religion for Christians of different denominations in European nations. See Franz von Liszt, Das Völkerrecht 284 (1907); see also Bluntschli, supra note 2, at 23-24 (discussing the protection of religious freedom in international law). The 1861 German-Chinese Treaty of Friendship extended freedom of religion to Christians in China and Russia. See id. The 1878 Berlin Congress expanded protections for religious freedom in Europe to Christians in Montenegro, Serbia, Romania, Bulgaria, and Turkey. See id. One year later, the Treaty of 1879 secured freedom of religion for Turkish minorities in territories occupied by the Austro-Hungarian Empire. See id. Finally, the 1885 Berlin West Africa Convention extended religious freedom to the indigenous people in the African colonies. See id.

international law recognized and protected indigenous Africans during the late nineteenth century. These treaties included the 1889 German-Dutch Agreement, the 1890 German-Belgian Agreement to Criminalize Trade in Girls, and the 1904 Agreement on Administrative Regulation to Ensure Effective Protection Against Trade in Girls, which was ratified by fourteen countries. Additionally, trade in human beings, specifically indigenous Black Africans, was criminalized by the 1815 Second Paris Peace Agreement and the 1841 Quintuple Treaty between England, France, Russia, Austria, and Prussia.

B. Customary International Law

International law, as applied to the rights and obligations of nations in the late 1800s and early 1900s, was based in part upon custom. Until the twentieth century, customary international law was the dominant source of international law. Custom and tacit conventions have shaped the development of the positive law of nations since the beginning of the nineteenth century. Sources of customary international law include state practice, bilateral agreements between states, domestic laws, nonbinding decisions of international tribunals, and works of jurists and text writers of

81. See von Liszt, supra note 79, at 32, 285.
82. See id. at 291-96; see also Bluntschli, supra note 2, at 22 (discussing the criminalization of the slave trade in international law).
83. Customary international law and treaties are the two most important sources of international law. See Hans Balchreich, Treaties, Effect on Third States, in 7 Encyclopedia of Public International Law 476 (Rudolf Bernhardt ed., 1984).
84. See Rudolf Bernhardt, Customary International Law, in 7 Encyclopedia of Public International Law 61 (Rudolf Bernhardt ed., 1981) (“For centuries, customary law was the predominant source of international law.”).
85. See Martens, supra note 78, at 5. Modern human rights laws represent, in part, codifications of earlier customary international humanitarian law. Under modern international law, the German war of annihilation against the Hereros would be defined as a crime under Article 6 of the 1945 Charter of the International Military Tribunal (Nuremberg Charter), which established three types of crimes under modern positive international law:

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

authority. For example, in his 1889 *Elements of International Law*, contemporaneous international legal scholar Henry Wheaton, "the Blackstone of international law," gave primacy to the views of publicists as evidence of customary international law.

An analysis of historical sources of customary international law shows that from 1884 to 1915, European powers had obligations to colonized peoples both under natural law (humane, ethical, moral, and religious duties) and under positive law (treaties such as the Berlin West Africa Convention, the Anti-Slavery Convention, and the Hague Convention on the Laws and Customs of War on Land). These duties and obligations covered the preservation and welfare of the indigenous peoples. Although the broader term "genocide" was not yet in use, certain forms of genocide such as wars of annihilation were already violations of customary international law at the time of the German-Herero War. In fact, evidence indicates that wars of annihilation were violations of international law as early as 1878.

The works of text writers of authority, which show "the approved usage of nations, or the general opinion respecting their mutual conduct," provide further evidence that international law had evolved since scholar Johann Caspar Bluntschli criticized the law's failure to protect indigenous Africans. For example, in his 1907 work *Das Völkerrecht*, legal theorist Franz von Liszt analyzed the intentions of European powers that had entered into obligations to protect indigenous Africans under Article VI of the Berlin West Africa Convention. Von Liszt found that the European powers intended Article VI to prohibit the annihilation of these peoples. Commentary such as this suggests that although prohibitions on wars of annihilation did not extend protection to indigenous Africans in the early

86. See Von Liszt, supra note 79, at 12; Wheaton, supra note 78, at 22; see generally The Paquete Habana, 175 U.S. 677 (1900); The Antelope, 23 U.S. (10 Wheat.) 66 (1825).
87. Henry Wheaton was the most influential and preeminent international legal scholar for over three decades. See Mortimer Sellers, *The Elements of International Law*, 6 INT'L LEGAL THEORY 13 (Francesco Parisi et al. eds., 2000).
88. *Id.* at 11.
89. See Wheaton, supra note 78, at 22.
90. Berlin West Africa Convention, supra note 80.
91. See Bluntschli, supra note 2, at 299-300.
92. *Id.* Bluntschli noted in 1878 that wars of annihilation or extermination were illegal under international law only when the targeted people and tribes were "capable of life and culture." See Bluntschli, supra note 2, at 299. However, Bluntschli criticized this lack of protection afforded by international law based on his reasoning that the humanity of the Africans prohibited the denial of their human rights. *Id.* at 299-300.
94. Article VI of the Berlin West Africa Convention is discussed in detail infra.
95. See Von Liszt, supra note 79, at 287.
1800s, European nations had entered into obligations under international law to protect these peoples by the end of the nineteenth century.

In 1889, Henry Wheaton wrote that the customary law of nations is "binding upon those [s]tates . . . which have given their tacit consent to it." While international law in the late 1800s did not apply to all nations, it did regulate those which had tacitly consented to it, including European nations such as Germany. Finally, European nations were bound in their relations with indigenous peoples, as well as with other European nations, by international humanitarian law limiting barbarism. As a result, some scholars argue that international law governed the relationship between Germany and the Herero Nation resulting from their 1885 Treaty of Friendship and Protection.

C. Laws of War

In addition to international law, rules reflecting a mixture of customary and treaty law applied to European nations during times of war. International law generally prohibited the use of force at the end of the nineteenth and the beginning of the twentieth century. However, under the laws of war, necessity provided a limited exception to this general prohibition. Specifically, the use of force against persons in war was restricted to the amount of force necessary to achieve the "just ends of war" such "as may be necessary to secure the object of hostilities" or defeat the enemy's resistance.

Even during war, the European powers considered certain uses of force unlawful. For example, loading cannons with nails or pieces of iron violated the laws of war because it unnecessarily increased the number of casualties and "wantonly increase[ed] the pain." Use of poison in war
had been illegal under international law since the beginning of the seventeenth century.\textsuperscript{106} Further, the laws of war condemned the killing of "children, old men, women, and in general all those who cannot carry arms, or who ought not to."\textsuperscript{107} By the second half of the nineteenth century, European customary international law forbade torture and rape.\textsuperscript{108}

The laws of war also regulated the treatment of prisoners. Customary laws requiring captors to spare the lives of prisoners of war date back to early India and were followed during the Roman Empire and the Middle Ages.\textsuperscript{109} By the 1870s, customary laws of war prohibited the killing or wounding of prisoners of war.\textsuperscript{110} Finally, although departure from the laws of war was considered permissible at the beginning of the nineteenth century if the enemy "set[] the example" or if such departure was an "urgent necessity,"\textsuperscript{111} customary international law barred retaliatory violations of this kind by the end of the century.\textsuperscript{112}

As with much international law, customary laws of war were eventually codified in a convention. The 1899 Hague Convention, in particular the Laws and Customs of War on Land (commonly known as Hague II), codified the laws of war\textsuperscript{113} and was the first convention regulating the treatment of prisoners of war.\textsuperscript{114} This codification stemmed from a "desire to diminish the evils of war"\textsuperscript{115} and was based on the law of nations, established usages, laws of humanity, and public conscience.\textsuperscript{116} Although the provisions of Hague II were binding on its signatories only in the event of

\textsuperscript{106} Id. at 288 ("It is a violation of the laws of war to poison wells in order to destroy the enemy."); see also BLUNTSCHLI, supra note 2, at 316 ("Das Völkerrecht verwirft den Meuchelmord eines feindlichen Individualums als unerlaubtes Kriegsmittel." This includes "Meuchelmord durch verräterisches Beibringen von Gift." ("International law condemns the treacherous murder of enemy individuals as impermissible weapons of war. This includes treacherous murder by use of poison.") (author's transl.).

\textsuperscript{107} MARTENS, supra note 78, at 289-90.

\textsuperscript{108} See BLUNTSCHLI, supra note 2 at 325 ("Alle solche [scheuselischen Misshandlungen und Folterqualen, wie die Notzucht an den Weibern] wird von der heutigen Kriegssitte und dem civilisirten Kriegsrecht als barbarisch untersagt.") ("All such [hideous abuses and tortures, such as the rape of women], is forbidden as barbaric by the contemporary war morality and the civilized laws of war.") (author's transl.).

\textsuperscript{109} See id. at 329.

\textsuperscript{110} See id. at 287.

\textsuperscript{111} See id. at 319 ("Die Barberi des Feindes rechtfertigt nicht die eigne Barberi.") ("The barbarism of the enemy does not justify one's own barbarism.") (author's transl.). Even if retaliatory violations had been a legal exception to the laws of war at the time of the German-Herero War, these violations were not justified in the case of the Hereros. See GEORGE LOWTHER STEER, JUDGEMENT ON GERMAN AFRICA 62 (1939).


\textsuperscript{113} Anton Schlögel, Geneva Red Cross Conventions and Protocols, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 183 (Rudolf Bernhard ed., 1982).

\textsuperscript{115} Hague Convention (II), supra note 113.

\textsuperscript{116} Id.
war between parties to the Convention,\textsuperscript{117} they are nonetheless evidence of the development of customary international law. Among other provisions, the Hague II Convention required the humane treatment of prisoners of war,\textsuperscript{118} restricted the permissible use of force,\textsuperscript{119} required permission for combatants to surrender,\textsuperscript{120} and prohibited the use of poison or killing of enemies who surrendered.\textsuperscript{121}

III

THE ANNIHILATION OF THE HERERO NATION AS A VIOLATION OF INTERNATIONAL LAW

Notwithstanding Germany's legal obligations to the Hereros under international treaties, customary international law, and laws of war, the debate continues as to whether the German war of annihilation against the Hereros was "merely" a moral rather than a legal wrong. To date, scholars and commentators have articulated four main arguments to support the contention that the German war of annihilation against the Herero Nation did not violate contemporaneous international law.\textsuperscript{122} First, Germany's war of annihilation should fall outside the scope of international law because European powers did not regard indigenous colonial peoples as members of the "family of nations."\textsuperscript{123} Second, because Germany achieved colonial rule of South West Africa through occupation, the German war of annihilation against the Hereros should not be considered an international conflict.\textsuperscript{124} Third, contemporaneous customary international law should not apply to Germany's acts against the Hereros because the Hereros were an "uncivilized" people.\textsuperscript{125} Fourth, the Berlin West Africa Convention should

\begin{footnotesize}
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\item \textsuperscript{117} Id.
\item \textsuperscript{118} Id. § I, ch. II, art. 4.
\item \textsuperscript{119} Id. § II, ch. I, art. 22.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id. § II, ch. I, art. 23.
\item \textsuperscript{122} See Kämmerer & Föh, supra note 3.
\item \textsuperscript{123} See, e.g., id. at 306.
\item \textsuperscript{124} Id. at 308-09.
\item \textsuperscript{125} Id. at 315. This argument seems to be weakened by the inclusion of the "laws of humanity" in the Marten's Clause of the preamble to the 1899 Hague Convention II, which does not discriminate between "civilized" and "uncivilized" peoples. See Hague Convention (II), supra note 113. Also, up until shortly before the German-Herero War, "the Hereros were often portrayed in a positive light, as a noble warrior race." Stone, supra note 4, at 39. See generally, id. (discussing the connection between the German's frustration with the progress of their colonial enterprise in Hereroland and the changes in the German's depictions of the Hereros). Thus, it would seem that later characterizations of the Hereros as "uncivilized" and therefore not deserving of the protection of international law may be based more on political expediency than on an accurate description of their status under contemporaneous international law. There is evidence that the German government may have purposefully created an atmosphere in which racist sentiments would be intensified. See Gewald, supra note 17, at 191 (discussing the role of German legislation creating a false shortage of land for German settlers that led to jingoistic attitudes among settlers and their sympathizers, which contributed to "the creation of a climatic wherein the outbreak of war became inevitable.").
\end{itemize}
\end{footnotesize}
not be read to confer rights on the indigenous peoples of Africa. All four arguments overlook the ramifications of the Berlin West Africa Convention’s dispute-settlement clause in the context of the third-party beneficiary doctrine.

Modern international law does not apply to the German-Herero War. Twentieth-century codifications of international humanitarian law, such as the Nuremburg Charter and the United Nations Convention on the Prevention and Punishment of Genocide, were not in force during the German-Herero War, which lasted from 1904 to 1907. Therefore, any claim that the Hereros make against Germany must rely on international law as it stood at the beginning of the twentieth century. This Part examines the contemporaneous international law at the time of the German-Herero War in more detail.

A. 1885 Berlin West Africa Convention

The 1885 Berlin West Africa Convention directly establishes a claim for the Hereros under international law. The Convention was an international agreement that divided Africa into spheres of European colonial influence. It also established European nations’ obligations and duties to indigenous Africans, as well as third-party beneficiary rights for the colonized peoples of Africa.

Germany signed and ratified the Berlin West Africa Convention in 1885. Article VI of the Convention explicitly bans annihilation by requiring its signatories to protect African peoples. Under Article VI, all

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126. See Kämmerer & Föh, supra note 3, at 312. Nonetheless, some scholars do acknowledge that Article VI of the Convention legally bound Germany to protect the indigenous peoples of Africa.

127. See generally id. The third-party beneficiary doctrine is discussed in further detail infra.

128. Third-party beneficiary rights are discussed infra.

129. See Berlin West Africa Convention, supra note 80. Other signatories included Austria, Belgium, Denmark, Spain, the United States, France, the United Kingdom, The Netherlands, Portugal, Russia, and the Ottoman Empire.

130. Id. The Convention also confirms the expansion of international humanitarian law in the area of religious tolerance. Wheaton, supra note 78, at 804. Article VI states that “[f]reedom of conscience and religious toleration are expressly guaranteed to the natives, no less than to subjects and to foreigners.” Berlin West Africa Convention, supra note 80. Participants at the third session of the Berlin West Africa Conference addressed the wording in Article VI to protect religious freedom. Prince von Bismarck suggested the following phrasing:

All the Powers exercising the rights of sovereignty or having influence in the said territories will undertake the obligation to assist in the suppression of slavery, and more especially of the Slave Trade in negroes, to protect and assist the labours of Missions and all institutions serving to instruct the natives and to make them understand and appreciate the advantages of civilization.

Protocol No. 3 to the Berlin West Africa Conference, Nov. 27, 1884, reprinted in Gavín & Betley, supra note 80, at 147. Sir Edward Malet, supported by Said Pasha, suggested that this wording be amended to include “the exercise of every religion without distinction of creed” between the words “labours of the Mission” and “and all institutions.” Protocol No. 3 to the Berlin West Africa Conference, Nov. 27, 1884, reprinted in Gavín & Betley, supra note 80, at 148. For further discussion of the specific religions and religious freedoms intended to be guaranteed under the Berlin
powers exercising sovereign rights in Africa bound themselves "to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery, and especially the Slave Trade."\textsuperscript{131} The Convention also contains a dispute-settlement clause.\textsuperscript{132}

The Protocols from the Berlin West Africa Conference reveal that the European powers intended to use the Convention’s affirmative obligations to protect indigenous Africans. In November 1884, Prince von Bismarck, German chancellor and president of the Conference, outlined the intention of the Conference as “guided by the conviction that all the Governments invited share the wish to bring the natives of Africa within the pale of civilization.”\textsuperscript{133} At the same meeting, Sir Edward Baldwin Malet, British ambassador and representative at the Conference, expanded on this issue by reading aloud a declaration stating that commercial interests should not be the exclusive subject of the deliberations of the Conference. Malet instead urged the Conference’s participants to consider the following:

[T]he welfare of the natives should not be neglected[,] I venture to hope that . . . its introduction will confer the advantages of civilization on the natives, and extinguish such evils as the internal Slave Trade. . . . I cannot forget that the natives are not represented amongst us, and that the decisions of the Conference will, nevertheless, have an extreme importance for them. The principle which will command the sympathy and support of Her Majesty’s Government will be . . . for the equality of treatment of all nations, and for the well-being of the native races.\textsuperscript{134}

The recorded comments of other governments represented at the Conference reflect and expand upon the general intent of Malet’s statement. The statements made at the outset of the Conference thus provide evidence of the European powers’ intention to assume obligations under international law to protect indigenous Africans. Read in light of these intentions, Article VI of the Berlin West Africa Convention creates a duty of protection under international law that de facto criminalizes the intentional annihilation of indigenous peoples of Africa.

Statements made in Convention meetings also reveal the delegates’ acceptance of the duty of protection and their intentions to create a model of European “civilization” for indigenous Africans. Da Serra Gomes, who

\textsuperscript{131} Berlin West Africa Convention, supra note 80, at 160-62.
\textsuperscript{132} Id. art. 12 (reserving a right to mediation or arbitration of disputes before “serious dissention” is resolved through the use of force).
\textsuperscript{133} Protocol No. 1 to the Berlin West Africa Conference, Nov. 15, 1884, reprinted in Gavin & Betley, supra note 80, at 129.
\textsuperscript{134} See id., reprinted in Gavin & Betley, supra note 80, at 131.
represented Portugal at the Conference, echoed the sentiments of British representative Sir Malet at a November 1884 meeting by expressing the hope “that the natives may profit as much as possible by the advantages of civilization.”

The specific obligations of the signatories were discussed several times, suggesting that Convention representatives viewed these obligations not as an afterthought but as a significant undertaking. For example, Article VI was discussed in detail at a meeting in December 1884. The resulting Declaration Relative to the Freedom of Commerce in the Basin of the Congo, its Mouth, and Surrounding Countries (Congo Basin Commerce Declaration), states:

All the Powers exercising the rights of sovereignty or an influence in the said territories engage themselves to watch over the preservation of the native populations and the improvement of the conditions of existence, both moral and material, and to assist in suppressing slavery, and more especially the Slave Trade in blacks; they will protect and assist, without distinction of nationality or faith, all institutions and undertakings, religious, scientific, or charitable, created and organized with those objects, or tending to instruct the natives and to make them understand and appreciate the advantages of civilization.

Documents discussing the content of Article VI further support the intent of the signatories to protect indigenous African peoples. The Report on the Congo Basin Commerce Declaration, which examined the intent of the delegates regarding each article of the Convention, described Article VI as protecting humanitarian interests. According to the Report, “[t]he Fifth Article regulates various matters, all of which, however, [apply to] moral interests.” Specifically, Article VI addresses three areas of humanitarian international law: (1) protection of indigenous African populations, (2) elimination of the Slave Trade, and (3) protection of religious

135. Protocol No. 2 to the Berlin West Africa Conference, Nov. 19, 1884, reprinted in GAVIN & BETLEY, supra note 80, at 135.
137. However, it should be noted that “this document is not called upon to play the role of a legal commentary upon the acts of the [Berlin West Africa] Conference.” Protocol No. 5 to the Berlin West Africa Conference, Dec. 18, 1884, reprinted in GAVIN & BETLEY, supra note 80, at 177 (statement of Count Kapnist, Russian ambassador to Germany and Russian representative at the Conference). According to the President of the Berlin West Africa Convention, Prince von Bismarck, the Report of the Commission was “destined to serve as a guide, but not as a legal commentary.” Id.
The first element is the most important with regard to the German war of annihilation against the Hereros. The Report discussed the first element in detail, stating:

With regard to [native] populations, which, for the most part, ought, undoubtedly, not to be considered as placed without the pale of international law, but which in the present state of affairs are scarcely of themselves able to defend their own interests, the Conference has been obliged to assume the role of an unofficial guardian. The necessity of insuring the preservation of the natives, the duty of assisting them to attain a more elevated political and social state, the obligation of instructing them and of initiating them in the advantages of civilization, are unanimously recognized.140

The Report also demonstrates that European powers intended Article VI to embody protections and guarantees for indigenous Africans by declaring: “It is the very future of Africa which is here at stake; no difference of opinion was or could be manifested in the Commission on this point.”141 The Report concludes by reconfirming that “the moral and material conditions of existence of the native populations . . . form the subject of guarantees which fulfill the most lofty aim of your labours.”142

The Berlin West Africa Convention created binding international law protecting African peoples and nations with the express intent of the signatory governments. The Conference representatives were well aware that the Berlin West Africa Convention would result in the creation of international law. Indeed, the protocol of the eighth session of the Conference closed with the following words:

Gentlemen, after having surrounded freedom of commerce and navigation in the centre of Africa with guarantees, and after having shown your solicitude for the moral and material welfare of the populations which inhabit it, you are about to introduce rules into positive international law which are destined to remove all causes of disagreement and strife from international relations.143

B. 1890 Anti-Slavery Convention

The 1890 Anti-Slavery Convention strengthened international legal protections of African nations from annihilation. Also known as the Brussels Act of 1890, the Anti-Slavery Convention includes language

139. See id., reprinted in GAVIN & BETLEY, supra note 80, at 172.
140. Id., reprinted in GAVIN & BETLEY, supra note 80, at 172.
141. Id., reprinted in GAVIN & BETLEY, supra note 80, at 172.
142. Id., reprinted in GAVIN & BETLEY, supra note 80, at 173.
143. Annex 1 to Protocol No. 8 of the Berlin West Africa Conference, Jan. 31, 1885, reprinted in GAVIN & BETLEY, supra note 80, at 250.
similar to that of the Berlin West Africa Convention. Article II of the Convention states that the Convention’s purpose is “to improve the moral and material conditions of existence of the native races.” Further, as part of the European powers’ goal to ensure the survival of indigenous Africans, Article VIII of the Convention limits the use of certain weapons. As these clauses illustrate, by the end of the nineteenth century European colonial powers were codifying international legal standards on the treatment of indigenous peoples. In the decade preceding the German-Herero War, European powers were also taking significant steps to strengthen protections for indigenous Africans.

In addition to violating the positive laws that were in place prior to the German-Herero conflict, the German war of annihilation against the Hereros contravened contemporaneous customary international law. Even though Germany’s acts of genocide took place during wartime, actions such as poisoning wells, committing rape, killing women and children, and wounding and killing prisoners of war violated the permissible exceptions to contemporaneous customary international law allowed in wartime.

IV

THE HEREROS’ CAUSE OF ACTION UNDER THE THIRD-PARTY BENEFICIARY DOCTRINE

Although the Hereros were not signatories to the 1885 Berlin West Africa Convention and the 1890 Anti-Slavery Convention, these conventions conferred rights on the Hereros through the third-party beneficiary doctrine. The parties to these international agreements intended to confer a

144. See Von Liszt, supra note 79, at 287 (“Mit voller Deutlichkeit ist das Bestreben, die Eingeborenen der europaischen “Schutzgebiete” vor dem Untergang zu schützen, in der Kongoakte von 1885 wie in der Antisklaveriakte von 1890 zum Ausdruck gebracht.”) (“The endeavor to protect the indigenous peoples from destruction is clearly expressed in the Berlin Africa Convention from 1885 and the Anti-Slavery Convention of 1890.”) (author’s transl.). Eighteen countries signed the Anti-Slavery Convention, including Germany. See von Liszt, supra note 79, at 293-94.


146. See Von Liszt, supra note 79, at 288 (“Art. VIIIff. . . dient der ‘Erhaltung der afrikanischen Völkerschaften, deren Fortbestehen zu sichern der ausdrückliche Wille der Mächte ist.’” (“Art. VIIIff. . . serves the ‘preservation of the African peoples, the securing of whose continued existence is the express intent of the powers.’”) (author’s transl.)) (quoting the Deutsches Reichsgesetzblatt 1892, at 605).

147. See Bluntschli, supra note 2, at 283, 299-300; Wheaton, supra note 78, at 14.

148. See Martens, supra note 78, at 288.

149. See Bluntschli, supra note 2, at 325.

150. See id. at 289-90.

151. See id. at 329.
distinct set of protections upon indigenous Africans. In other words, the parties expected peoples such as the Hereros to benefit from these agreements. Further, the protocols of the Berlin West Africa Conference lend substantial support to this interpretation. As third-party beneficiaries of these instruments, the Hereros had the right to protection from harm by colonial powers. Because Germany failed to provide these protections and instead waged a war of annihilation against indigenous Africans, the Hereros are entitled to a cause of action under international law.

In sum, if an analysis of international law at the beginning of the twentieth century establishes that (1) actions committed by the German colonial administration violated customary or treaty law, and (2) the Berlin West Africa Convention and the Anti-Slavery Convention conferred third-party beneficiary rights of protection on the Herero Nation and its people, then the Hereros have a cause of action to claim injuries and reparations for the atrocities Germany committed against them. This Part analyzes the Hereros' third-party beneficiary rights in greater depth.

A. Third-Party Beneficiary Doctrine Under International Law

The third-party beneficiary doctrine is recognized in international as well as domestic law. In international law, this doctrine applies to treaties and other international agreements. A third party is “a subject of international law [such as a state] which has not subscribed to the agreement.” Third parties are usually not affected by agreements to which they are not a party. The basic rule, known by the phrase *pacta tertii nec nocent nec prosuntis*, states that an international agreement or treaty “does not create either obligations or rights for a third State without its consent.”

However, there are exceptions to this general rule. Under the 1965 Restatement (Second) of the Foreign Relations Law of the United States, “[a]n international agreement may create a right in favor of a state not a party to it if the agreement manifests the intention of the parties that it shall

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154. *Id.* at 945.

155. *Id.*

156. Vienna Convention, supra note 132, art. 34; Restatement (Third), supra note 132, § 324(1).
have this effect.”157 This statement of the third-party beneficiary doctrine explicitly states that the intentions of the contracting parties could create positive rights for non-parties.158 The third-party beneficiary doctrine is also addressed in international case law. For example, in Free Zones of Upper Savoy and the District of Gex, the Permanent Court of International Justice found that a declaration signed by France and other powers conferred rights upon Switzerland to French territory even though Switzerland was not a party to the declaration.159

Under international and domestic law as delineated by the Free Zones case, the Restatement (Second), and the Vienna Convention on the Law of Treaties, the intent of the parties to the contract or treaty is controlling.160 The existence of third-party beneficiary rights and intent must be established on a case-by-case basis.161 Intent of the parties may be established using “travaux preparatoires, diplomatic correspondence, and voting on pertinent proposals and resolutions.”162

International law provides that “[a] right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right . . . to the third State . . . and the third State assents thereto.”163 The assent of the third party “shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.”164 Once third-party beneficiary rights have been created, contracting states may not revoke or modify them without the consent of the third party.165

158. The Restatement (Second)’s formulation is relevant because it is more likely to reflect the understanding of the doctrine as it stood at the beginning of the twentieth century than the Restatement (Third), which has narrowed the third-party doctrine under modern international law. Although the Vienna Convention of 1969 officially codified the legal standard for revoking or modifying third-party beneficiary rights, it also reined in its scope.
159. Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46, 147-48 (June 7) [hereinafter Free Zones Case]. “It cannot be lightly presumed that stipulations favourable to a third [s]tate have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect.” Id. at 147.
162. Lee, supra note 160, at 547.
164. Vienna Convention, supra note 156, art. 36, ¶ 1. See also Restatement Third, supra note 156, § 324 cmt. d (“[C]onsent of third parties to the creation of a right in rem in their favor seems unnecessary.”); Ballreich, supra note 153, at 945.
165. See Vienna Convention, supra note 156, art. 37, ¶ 2 (“When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.”); Restatement Third, supra note 156, § 324, cmt. d (“[R]ights in rem should be no more subject to termination or modification without consent than rights under [§ 324].”).
At the end of the nineteenth century, the three core elements that defined a state were population, territory, and government. The essential factor underlying a state's government is that it is capable of acting independently of foreign governments. The state has jurisdiction over its own people and territory. Foreign governments require the consent of the state to exercise jurisdiction over their nationals in its territory. However, a state may partially limit its jurisdiction by concluding treaties with other states. The test for whether a state has remained a sovereign entity in spite of limitations through treaties is whether it remains independent from direct orders by other states.

States have certain rights under international law. States are entities that have exclusive jurisdiction over their territory and nationals. One of the rights of states under international law is the competence to conclude treaties. In other words, states have “the legal possibility of conferring rights and duties on other subjects of international law.” Such rights and duties could include jurisdiction over its nationals in the signatory nation’s territory and the obligation to provide military aid.

The terms “state” and “nation” are often used synonymously in international law. The definition of a state population is more expansive and is not limited by criteria such as ethnic, cultural, religious, or racial commonalities that may play a role in defining a nation. The powers of a state within its territory may be more expansive than is true for some nations because states possess sovereignty within their territory. Thus, the key difference between states and nations is the element of government. Where nations have the added element of a government, they should be treated as states under the third-party beneficiary doctrine.

167. See id. at 603.
168. See id. at 602.
169. See id.
170. See id.
171. See id.
172. See id.
173. Id.
174. See id. at 601.
175. See id. at 603.
176. See Karl Josef Partsch, Nations, Peoples, in 3 Encyclopedia of Public International Law 512 (Rudolf Bernhardt ed., 1997) (“The term ‘nation’ is used in modern international law nearly generally as equivalent to its primary subject, namely the State.”). This is also evidenced in the names of institutions such as the League of Nations and the United Nations. Historically, international law was also referred to as the law of nations.
177. See id.
178. See id.
179. See Partsch, supra note 176, at 512; Doehring, supra note 166, at 601.
B. The Herero Nation as a Third-Party Beneficiary

Given the socio-political history and structure of the Herero Nation, its exercise of the powers of a state, and its de facto recognition by other states, the distinction between the Hereros’ status as a “nation” rather than a “state” is nominal rather than substantive. The Herero Nation falls within the scope of the third-party beneficiary doctrine because it: (1) had the characteristics of a sovereign state and (2) was the intended beneficiary of the 1885 Berlin West Africa Convention.

First, the Hereros’ socio-political structure was that of a state. The Hereros had a population, a territory, and a government, which are the core elements of a state under contemporaneous international law. The Hereros, a Bantu speaking people, formed a distinct population group comprising the Mbandjeru and the Tjimba. At the turn of the twentieth century, the Hereros constituted both a people and a nation. The Herero Nation is analogous to other recognized nations of indigenous peoples such as the Native American Nations of North America. Nations are distinct from “peoples” because the term “nation” denotes a people who occupy a specific territory. Nations can be “understood as cultural groups with a common language, a common cultural identity[,] and common traditions . . . .” In the late 1800s, Herero society became “strongly centralized and centred upon a number of specific urban centres” and “specific geographical areas.” By the nineteenth century “an influential aristocracy” was assuming control of the Herero Nation, and “the contours of a class society had become clearly visible.” Before 1870, “the Hereros’ socio-political organization was a complex system of . . . groupings.” The approximately 80,000 Hereros in Hereroland (now Central Namibia) were governed by four principal Herero chiefs and a “new form of centralized Herero polity” was created and maintained. Further, “[p]roperty rights . . . were protected by a well

180. See Partsch, supra note 176, at 512.
181. See Doehring, supra note 166, at 601.
182. Drechsler, supra note 4, at 17.
183. Id. (citation omitted).
184. See Partsch, supra note 176.
185. Id. at 511.
186. Gewald, supra note 17, at 8.
187. Id. at 28.
188. Drechsler, supra note 4, at 17-18.
189. Bridgman, supra note 32, at 18.
190. See HPRC I, supra note 22, ¶ 30, Harring, supra note 4, at 401, Gewald, supra note 70, at 27 (depicting areas under the control of the four principal Herero chiefs at the advent of German colonialism in 1884 in Map 1.2); Bley, supra note 15, at xxx (depicting South West Africa before the Herero Revolt (1902) including the territorial boundaries of the Herero Nation in Map 2).
191. Gewald, supra note 17, at 28.
organized judicial system.”¹⁹² Scholars describe this stage of the Herero socio-political development as the transition to an early type of pastoral feudalism.¹⁹³

The German government de facto recognized the Herero people as a nation or state by referring to them as a nation in official government documents and entering into bilateral treaties with them. For example, Lieutenant-General Lothar von Trotha, who later orchestrated the German war of annihilation against the Hereros, repeatedly described them as a nation in an official 1904 report to the chief of the army general staff. First, he stated that “[a]s [he] saw it, the [Herero N]ation must be destroyed as such.”¹⁹⁴ He also wrote that he “deem[ed] it wiser for the entire [Herero] nation to perish.”¹⁹⁵ Von Trotha also referred to the Herero Nation in his correspondence with Governor Leutwein at the beginning of the war, writing that the “[Herero N]ation must vanish from the face of the earth.”¹⁹⁶

The Herero Nation also exercised the powers of a state by entering into treaties with African¹⁹⁷ and European nations. The bilateral protection treaties with the German government evidence the Herero Nation’s exclusive jurisdiction over its territory and nationals, and they provide proof of its competence to conclude treaties conferring rights and duties upon other subjects of international law.¹⁹⁸ The treaties gave German nationals the right to trade in the Hereros’ territory and gave the German government jurisdiction over German nationals in Hereroland.¹⁹⁹ The treaties also created an obligation for the Germans to provide military support to the Hereros.²⁰⁰ Although the treaties limited the Herero Nation’s jurisdiction over German nationals, the Hereros remained an independent sovereign entity because the treaties did not make the Herero government subject to direct orders by the German government.²⁰¹ Germany did not exercise sovereign control over South West Africa as a colony until after the end of the German-Herero War in 1907.²⁰²

¹⁹². BRIDGMAN, supra note 32, at 18 (quoting HEINRICH LOTH, DIE CHRISTLICHE MISSION IN SÜDWESTAFRIKA. ZUR DESTRUKTIVEN ROLLE DER RHEINISCHEN MISSIONSGESELLSCHAFT BEIM PROZESS DER STAATSBLDUNG IN SÜDWESTAFRIKA (1842 BIS 1893) 23-24 (1963)).
¹⁹³. DRECHSLER, supra note 4, at 18 (paraphrasing LOTH, supra note 192, at 8).
¹⁹⁴. DRECHSLER, supra note 4, at 160-61 (quoting Report from Lothar von Trotha to the army chief of staff (Oct. 4, 1904) (on file with German Imp. Col. Off.)).
¹⁹⁵. Id.
¹⁹⁶. Id. at 161 (quoting Letter from von Trotha to Leutwein, supra note 48).
¹⁹⁷. BRIDGMAN, supra note 32, at 20 (“The Hereros...regulated their affairs with other tribes on the basis of treaties.”).
¹⁹⁸. See DRECHSLER, supra note 4, at 27 (discussing the scope of the treaties).
¹⁹⁹. See id.
²⁰⁰. See id.
²⁰¹. See Doehring, supra note 166, at 603; DRECHSLER, supra note 4, at 27.
²⁰². See DRECHSLER, supra note 4, at 7.
The German government’s conclusion of bilateral treaties\textsuperscript{203} with the Herero Nation is proof of their recognition of the Herero Nation as a subject of international law\textsuperscript{204} with the “general competence to conclude treaties.”\textsuperscript{205} These acts implicitly affirm that the Hereros were within the ambit of international law and that they possessed rights normally reserved for states under international law.\textsuperscript{206} In short, although contemporaneous documents may have used the term “nation” to describe the Hereros’ socio-political structure, in practice they exercised rights accorded only to states. In addition, other states interacted with them in a manner that confirmed their valid exercise of these rights.

Second, the creation of third-party beneficiary rights for indigenous African peoples and nations was an intended result of the Berlin West Africa Convention\textsuperscript{207} and the Anti-Slavery Convention.\textsuperscript{208} The plain language of both of these international agreements requires “the preservation of the native populations.”\textsuperscript{209} This language shows an intent to protect indigenous Africans not only as individuals but also as distinct socio-political groups.\textsuperscript{210} The protocols from the Berlin West Africa Conference provide further evidence of the European powers’ intent regarding the Hereros’ rights under the Convention. As previously established in this Comment, the protocols contain evidence of an intent to preserve the continued existence of indigenous Africans, among them the Herero Nation. Because the intent of the parties to a contract or treaty is controlling,\textsuperscript{211} the protocols support the provision of a third-party beneficiary right to the Hereros for protection from annihilation.

Under the Berlin West Africa Convention, the signatories intended to “bind themselves to watch over the preservation of the native tribes.”\textsuperscript{212} Contemporaneous commentators wrote that Article VI of the Convention was intended to create an obligation for the signatories to protect indigenous African peoples and to protect them from annihilation.\textsuperscript{213} Further, these obligations were framed in the form and language of guarantees,

\begin{itemize}
\item \textsuperscript{203} Bley, supra note 4, at 6.
\item \textsuperscript{204} See Doehring, supra note 166, at 601; Ballreich, supra note 153, at 945.
\item \textsuperscript{205} See Doehring, supra note 166, at 601.
\item \textsuperscript{206} See id.
\item \textsuperscript{207} See Berlin West Africa Convention, supra note 80, art. VI.
\item \textsuperscript{208} See General Act of the Brussels Conference, supra note 145, art. II.
\item \textsuperscript{209} Declaration Relative to the Freedom of Commerce in the Basin of the Congo, its Mouth, and Surrounding Countries, reprinted in Gavin & Betley, supra note 80, at 167-70. See also Von Liszt, supra note 79, at 287.
\item \textsuperscript{210} See Restatement Second, supra note 157, § 139(1). Under modern international law “[p]rotective norms in international humanitarian law entitle even non-government claimants as much as the language directly reflects rights and interests of individuals.” See Hinz, supra note 15, at 10 (citing Knut Ipen, Völkerrecht: Ein Studienbuch 1071 (4th ed. 1999)).
\item \textsuperscript{211} See Lee, supra note 160, at 545.
\item \textsuperscript{212} Berlin West Africa Convention, supra note 80.
\item \textsuperscript{213} See Von Liszt, supra note 79, at 287.
\end{itemize}
supporting the interpretation that these documents provide third-party beneficiary rights.\textsuperscript{214}

The Herero Nation was a third party to the 1885 Berlin West Africa Convention\textsuperscript{215} and the 1890 Anti-Slavery Convention.\textsuperscript{216} The Hereros were subjects of international law as discussed above and were not signatories.\textsuperscript{217} Since the Hereros were not in attendance at the conferences and did not sign the conventions, they arguably did not consent to the creation of rights for them. However, because the Hereros did not affirmatively oppose the conferral of third-party beneficiary status, their consent should be presumed.\textsuperscript{218} Further, once the conventions went into effect, the signatory nations could not have revoked or modified the Hereros' right to protection from annihilation without the Hereros' consent.\textsuperscript{219} Thus, the Hereros have a cause of action based upon the third-party beneficiary rights conferred on them through the Berlin West Africa Convention and the 1890 Anti-Slavery Convention.

V

THE POLITICAL AND LEGAL IMPLICATIONS OF THE HEREROS' CAUSE OF ACTION

The final Part of this Comment departs from the previous analysis of the various laws and doctrines that apply to the German-Herero War and examines the implications of the Hereros' claim as a whole. First, this Part addresses the political implications of the Hereros' efforts because states often see reparations as a “political rather than a legal issue.”\textsuperscript{220} Second, this Part addresses the legal implications of the Hereros' claim because although the Hereros' success in this area has been somewhat limited to date, the ultimate impact of their claim may depend upon the application of contemporaneous international law. In addition, the Hereros' success could have wide-reaching legal implications for other victims of colonial genocide.


\textsuperscript{215} See Berlin West Africa Convention, supra note 80, art. VI.

\textsuperscript{216} See General Act of the Brussels Conference, supra note 145, art. II.

\textsuperscript{217} See Ballreich, supra note 153, at 945.

\textsuperscript{218} See Vienna Convention, supra note 156, art. 36, ¶ 1. See also RESTATEMENT THIRD, supra note 156, § 324(3).

\textsuperscript{219} See supra note 142.

\textsuperscript{220} Sarkin, supra note 69, at 432. See also Harring, supra note 4, at 417 (“Reparations claims are never heard outside of their political context, and the Herero people will have to bring political pressure on modern Germany to rethink their responsibility for their actions in the Herero War.”).
A. Political Implications

The Hereros' efforts to achieve a political or negotiated solution to remedy the harms the nation suffered during the German-Herero War have had only limited success. For several years, the Hereros attempted to extract an apology from the Federal Republic of Germany.\(^{221}\) Some of the reasons given by the German government for their resistance to a formal apology included (1) too much time has passed,\(^{222}\) (2) international law did not protect civilian populations at the time of the war, and (3) German foreign aid to Namibia obviates the need for other forms of compensation.\(^{223}\) However, in 2004 the Hereros finally received a formal apology for the mass killings perpetrated by the German colonial administration.\(^{224}\) In most cases, including that of the Hereros, apologies and development aid cannot fully compensate wrongs committed by colonial powers against indigenous peoples. As of early 2005, the Hereros had not received financial reparations for the 1904-1907 genocide.

The Hereros' need for an avenue of redress becomes even more significant in light of the Namibian government's failure to support the Hereros' reparations claims.\(^{225}\) Since Namibia is the largest recipient of German foreign aid\(^{226}\) and the Hereros are an ethnic minority\(^{227}\) with limited political power, it is unlikely that domestic or foreign political pressure will force the Namibian government to support the Hereros' claims. In addition, the Hereros' "claim is not justiciable in Namibian courts."\(^{228}\) Recognizing the Hereros' right to bring a claim as a people and a former nation allows them to seek reparations under international law without having to rely on the Namibian national government.

Efforts by the Hereros to raise awareness of their claims have attracted both local and international press. An expanding number of museums and exhibits include information about the German war of annihilation.

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222. Ngunjiri, supra note 14. Some land restitution claims by Native American nations have not been limited in the United States and Canada, which seems to undermine passage of time or statute of limitations arguments. See Harring, supra note 4, at 409 (citing County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (a claim dating from 1795 that is still being litigated)).
223. See Sarkin, supra note 69, at 454 (citation omitted); Harring, supra note 4, at 406 (citation omitted); Kutecue, supra note 14.
224. See German Parliament, supra note 7 ("The military campaign against the African peoples in South West Africa from 1904, and in particular the victims of the Herero and Nama population are today in the centre of this commemoration. The German Parliament extends its deeply-felt regrets and its sorrow to the suppressed African peoples."); Harring, supra note 4, at 395 (stating that the Namibian government's position is that "all Namibian tribes were victimized by colonial exploitation, and therefore, no group in particular should be singled out to receive reparation payments") (citation omitted).
225. See Sarkin, supra note 69, at 454; Ngunjiri, supra note 14.
226. See Harring, supra note 4, at 393 (citation omitted).
228. Harring, supra note 4, at 410.
against the Hereros. In addition, the Hereros brought some political pressure to bear on the German government by publicizing their claims at the U.N. World Conference on Racism in Durban, South Africa. Increasing awareness of the Hereros' claims outside of Namibia and Germany may have contributed to the German government's formal apology in 2004. However, the apology recognized only moral wrongs, not legal obligations. As a result, the Hereros' legal claims continue to be the most likely avenue through which they can obtain financial compensation.

B. Legal Implications

The Hereros' case is of particular importance because it is "[p]robably one of the first cases based on human rights abuses during colonialism...." In February 2003 the Herero People's Reparations Corporation filed a complaint against Germany in the District Court of the District of Columbia, which is the equivalent of a state court in Washington, D.C. Germany cannot be brought into court in the United States without its consent. Since Germany refused to accept service of process, the Hereros voluntarily dismissed the case without prejudice. Dismissal of the case without prejudice allows the Hereros to revive their claim at a later date, perhaps when the claim is more politically viable. Accordingly, the Hereros will refile once service of process issues are resolved. Political pressure by the U.S. government will likely be necessary to convince Germany to accept jurisdiction and service of process. So far, the U.S. government has not expressed a willingness to pressure the German government in this case. It is unclear whether issues of race or the current debate on reparations in the United States factors into the U.S. government's decision not to intervene.

In addition to their claim against Germany, the Hereros are currently involved in a case against two large corporations, Deutsche Bank and

\[229. \text{ See supra note 16.} \]
\[231. \text{ Sarkin, supra note 69, at 452.} \]
\[234. \text{ Other jurisdictional and forum issues are beyond the scope of this Comment.} \]
\[235. \text{ Telephone Interview with Philip M. Musolino, Counsel for Plaintiffs, Musolino & Dessel (Oct. 23, 2003).} \]
\[236. \text{ See Letter from Linda Jacobson, assistant legal adviser, Office of Diplomatic Law and Litigation, U.S. Dep't of State, to Philip M. Musolino, Musolino & Dessel, Counsel for the Hereros (Nov. 14, 2001) (on file with author).} \]
Woermann Line (now known as Deutsche-Afrika Linien Gmbh & Co.).237 The Hereros allege that the two corporations committed violations of international law, crimes against humanity, forced labor, genocide, and slavery.238 This case is still pending.239 Deutsche Bank and Woermann Line have filed motions to dismiss, which have been opposed by the Hereros.240

As previously argued, the Hereros have cognizable claims based in several forms of international law, and recognition of these claims is essential to providing adequate redress. This Comment has established that the German colonial administration’s actions violated contemporaneous international law as well as the third-party beneficiary rights conferred on the Hereros by international agreements. Further, the German colonial administration’s war of annihilation against the Hereros violated customary international law. Poisoning wells, killing women and children, and killing and wounding prisoners of war were illegal under the laws of war. The war also violated applicable treaty law prohibiting the annihilation of African peoples, including clauses in the Berlin West African Convention and the 1890 Anti-Slavery Convention that obligated colonial powers to protect indigenous Africans.

A settlement agreement241 with the German government or eventual success in U.S. or international courts could have precedential value for claims brought by other groups to redress similar wrongs committed under

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237. See Email from Philip M. Musolino, Counsel for the Hereros, Musolino & Dessel, to Rachel J. Anderson, California Law Review (Apr. 17, 2005, 21:32:29 EST) (on file with author) [hereinafter Email from Philip M. Musolino]; Herero People’s Reparations Corp. v. Deutsche Bank AG (S.D.N.Y. filed Feb. 13, 2003) (alleging violations of international law, crimes against humanity, genocide, slavery, and forced labor and seeking relief under the Alien Tort Claims Act, 28 U.S.C. § 1350). This case is a companion case to one filed by the Hereros in Washington, D.C., at the same time as the case against the Federal Republic of Germany. See Email from Philip M. Musolino, supra. The D.C. District Court case, which was affirmed on appeal, was dismissed against Woermann Line for lack of personal jurisdiction and against Deutsche Bank for failure to present a valid cause of action since “the District Court of Columbia Circuit does not appear to recognize a private right of action for violations of international law.” Herero People’s Reparations Corp. v. Deutsche Bank AG, Civ. No. 01-1868, slip op. (D.C.C. June 31, 2003); Herero People’s Reparations Corp. v. Deutsche Bank AG, 370 F.3d 1192 (2004), cert denied 125 S. Ct. 508 (2004) (holding that (1) federal claims were present, (2) plaintiffs’ claims were not too insubstantial and frivolous to support federal jurisdiction, and (3) the doctrine of universal jurisdiction could not supply basis for exercise of personal jurisdiction). However, the Hereros have filed a case in New Jersey District Court, where Woermann Line has agreed to submit to jurisdiction. Email from Philip M. Musolino, supra.


239. Email from Philip M. Musolino, supra note 237.

240. Id.

colonial rule. The Damara\textsuperscript{242} could sue the German government for their slaughter during the German-Herero War. The Maji-Maji could sue for their brutal repression in former German East Africa (now Tanzania) from 1905 to 1908.\textsuperscript{243} The Congolese could sue Belgium for perpetrating genocide in Congo under King Leopold’s reign.\textsuperscript{244} The Bunyoro\textsuperscript{245} could sue the United Kingdom for war crimes in Uganda during the 1890s.

An agreement or successful case in court for the Hereros could help to dissolve the line traditionally drawn between moral and legal wrongs, whereby perpetrator nations can admit to the former while avoiding the legal and financial consequences of the latter. Recognizing a claim for the Hereros under any of the legal theories discussed in this Comment would likely open the door to other claims by similarly situated groups. For example, as the Hereros’ quest for reparations drew increasing attention, other groups such as the Damara\textsuperscript{246} began to seek similar recognition for their own claims.\textsuperscript{247} Finally, recognition of the Hereros’ claim could bar Germany and other former colonial powers from shirking legal responsibility for acts of genocide committed by their colonial administrations. In particular, these governments would be precluded from arguing that indigenous peoples who were harmed before the 1948 Genocide Convention had no legal protections.

CONCLUSION

The German colonial enterprise in Hereroland lasted thirty-five years. In 1904, twenty years after Germany began pursuing its colonial enterprise, the Herero Nation initiated an armed resistance against the colonial administration. In the war that followed, Germany annihilated 80% of the Herero population. The German Imperial Colonial Office preserved multitudinous evidence, including primary documents ranging from Lothar von Trotha’s infamous Extermination Order to correspondence between German officials, bearing witness to the intent of the German government.

\textsuperscript{242} One third of the Berg Damara were killed during the German colonial administration’s attempted annihilation of the Herero as a result of “the German troops’ inability to tell them from the Herero.” DRECHSLER, supra note 4, at 214. See also Paulette Reed-Anderson, Chronologie zur Deutschen Kolonialgeschichte, at http://www.cybernomads.net/cn/home.cfm?p=1033&CFID=9414885&CFTOKEN=22256721 (last visited Apr. 16, 2005).


\textsuperscript{244} See, e.g., ADAM HOCHSCHILD, KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA (1998) (containing an extensive bibliography).

\textsuperscript{245} See Sarkin, supra note 69, at 452.

\textsuperscript{246} See supra note 242.

Undoubtedly, the 1904-07 German-Herero War was waged to annihilate the Hereros.

At the time of the German-Herero conflict, wars of annihilation were prohibited under contemporaneous international law. The 1899 Hague Convention on the Laws and Customs of War on Land provides evidence of developments in the customary international laws of war at the beginning of the twentieth century. It also supports the premise that natural law, positive law, and customary law limited the use of force, and it confirms that wartime atrocities were unacceptable from 1899 onward.

Beyond the protections afforded by customs limiting the use of force in war, international agreements conferred humanitarian rights upon the Hereros. In turn, European powers had obligations, both under the Berlin West African Convention and under the 1890 Anti-Slavery Convention, to protect indigenous Africans from annihilation and to preserve their well-being. Only the Hereros could revoke or modify these third-party beneficiary rights, which were violated by Germany’s war of annihilation. Justice requires that the Hereros, as victims of Germany’s refusal to observe international law, should have rights of redress similar to those of genocide victims after 1948. Establishing a right to redress for the Hereros also has broader implications because it sets a precedent for reparations for colonial genocide. This precedent is important because reparations serve multiple functions, which include (1) giving victims and their descendents an opportunity to “cope with the financial deprivation that they have suffered,”248 (2) providing “an official recognition of the past,”249 and (3) “deterring future perpetrators from committing similar violations in the future.”250 The implications of recognizing the Hereros’ claim would sweep beyond the borders of Namibia, providing a voice for the silenced colonized masses annihilated throughout Africa and the world. To help ensure that human rights are respected in the future, international law must acknowledge this voice, even if individual governments refuse to do so.


249. Sarkin, supra note 69, at 430. See also Winston P. Nagan & Vivile F. Rodin, Racism, Genocide, and Mass Murder: Toward a Legal Theory About Group Deprivations, 17 NAT’L BL. J. 133, 217 (2004) (“In the case of genocide or mass murder, after-the-fact accounting and justice may not help those who have been killed. However, those who survive should have a right to rehabilitation and either public or private compensation.”).

250. Id.