

GERMANY'S RESPONSIBILITY UNDER INTERNATIONAL LAW
TO COMPENSATE THE OVAHERERO AND NAMA PEOPLES OF
NAMIBIA FOR THE 1904-1908 GENOCIDE

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This paper argues that the Federal Republic of Germany has a substantial obligation towards the Ovaherero and Nama peoples of Namibia, the former colony of German Southwest Africa. During the years of 1904 to 1908, Imperial Germany embarked on a war of extermination in the territory, which resulted in the attempted – and nearly successful – genocide of both groups, along with the expropriation of their property without compensation. Germany has steadfastly refused to provide reparations or any other form of restorative justice for the surviving communities, despite its admission that this attempted extermination of two entire sovereign and indigenous peoples constituted genocide as defined and universally condemned under international law. On August 16, 2004, for example, at the 100th anniversary of the start of the genocide, German Minister for Economic Development and Cooperation Heidemarie Wiecezorek-Zeul spoke on behalf of Germany:

“We Germans accept our historical-political and moral-ethical responsibility and the guilt incurred by the Germans at that time. The atrocities committed at that time would today be termed genocide.”²

When German colonists first arrived in southwestern Africa in 1885, the Ovaherero and Nama owned vast expanses of the rich grazing lands for the purpose of cattle herding in the area. Both groups also had their own fully functional and structured forms of sovereign government. German settlers and their colonial authorities took over substantial areas of these lands, either through fraudulent protectorate treaties with Ovaherero and Nama leaders, or through the use of force. The continued expansion provoked an uprising by the Ovaherero and Nama in 1904, which was quelled by German troops under the notorious command of General Lothar von

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² See HEIDEMARIE WIECZOREK-ZEUL, *Forward to REINHART KÖBLER & HENNING MELBER, VÖLKERMORD – UND WAS DANN?* 9 (2017) (“... eine fortdauernde Verletzung der Nachfahren der Opfer.”), at 54 (quoting HEIDEMARIE WIECZOREK-ZEUL, *WELT BEWEGEN: ERFAHRUNGEN UND BEGEGNUNGEN*, “Moving the World: Experiences and Meetings” 47 (2007)); see also Andrew Meldrum, “German Minister Says Sorry for Genocide in Namibia, *The Guardian*” (Aug. 15, 2004), <https://www.theguardian.com/world/2004/aug/16/germany.andrewmeldrum>.

Trotha, who issued an extermination order in writing on Imperial German stationery (Reference No. 3737, dated October 2, 1904), declaring, in part,

“Every Herero found inside the German border [of South West Africa], with or without a gun or cattle, will be shot. I shall spare neither women nor children: send them back to their people or shoot them. These are my words to the Herero people.”³

The imperial authorities subsequently set up a system of concentration camps, which exploited captured Ovaherero and Nama during the war and survivors thereafter for forced labor until the year 1908. With the knowledge and consent of the colonial authorities, German settlers and their agents subjected Ovaherero and Nama women and children to widespread and systematic rape.⁴ Concurrent to the opening of concentration camps in 1905, German colonial authorities announced they would ruthlessly expropriate the remainder of Ovaherero lands and livestock.⁵

When the Ovaherero and Nama rose up in protest, Germany responded by carrying out a systematic campaign of extermination and genocide.⁶ Remarkably, Germany actually put these extermination orders into writing when General Lothar von Trotha issued written orders directing that his troops kill every Ovaherero and Nama man, woman and child, without mercy.⁷ German soldiers carried out the campaign with methodical efficiency, killing an estimated 65,000 (80%) Ovaherero and 10,000 (50%) Nama.⁸ The survivors, who were forced into

³ Imperial Order, Ref. No. 3737, District Office of Windhoek (Oct. 2, 1904); see DAVID OLUSOGA & CASPER W. ERICHSEN, *THE KAISER'S HOLOCAUST* 149-51(2010).

⁴ See JAN-BART GEWALD, *HERERO HEROES: A SOCIO-POLITICAL HISTORY OF NAMIBIA* at 201-02 (1999); see also OLUSOGA & ERICHSEN, *supra* note at 166–208 (describing concentration camp rental policies for girls as young as twelve, given the high demand for “domestic servants”).

⁵ Imperial Decree, *Einziehung von Vermögen von Eingeborenen in Deutsche Südwestafrika* [on the Expropriation of Property of Natives in the Germany South West Africa] § 1, 10, Reichskolonialamt R1001, 79419 / 1220 5b 21212 (Dec. 26, 1905) (Ger.), reprinted in XVI DEUTSCHE KOLONIALBLATT: AMTSBLATT FÜR DIE SCHUTZGEBIETE IN AFRIKA UND IN DER SÜDSEE [German Colonial Gazette: Official Gazette for the African and Pacific Colonies] 1–2 (1906).

⁶ Although the term “genocide” was not widely used until after World War II, and was not formally incorporated into international law until the passage of the Genocide Convention of 1948, customary international law at the time (1904-08) universally prohibited the acts complained of, using the terms “War of Annihilation” and “War of Extermination,” rather than “genocide.” See J.C. Bluntschli, *DAS MODERNE KRIEGSRECHT DER CIVILISIRTEN STATEN* [THE MODERN LAW OF WAR OF CIVILIZED STATES] § 26 at 6 (1866) (“*Ausrottungs- und Vernichtungskriege*”), Ex. D-1; J.C. Bluntschli, trans. C. Lardy, *LE DROIT INTERNATIONAL CODIFIÉ* [THE RESTATEMENT OF INTERNATIONAL LAW] § 535 at 300 (2d ed. 1874) (“*Les guerres d’extirpation et d’anéantissement*”) Ex. D-2. Cf. ¶ 47. Bluntschli drafted of the first RESTATEMENT OF MODERN INTERNATIONAL LAW OF CIVILIZED STATES [DAS MODERNE VÖLKERRECHT DER CIVILISIRTEN STATEN ALS RECHTSBUCH DARGESTELLT] (Nördlingen 1868).

⁷ *Supra*, note 3.

⁸ ADMINISTRATOR’S OFFICE, WINDHUK, UNION OF SOUTH AFRICA, REPORT ON THE NATIVES OF SOUTH-WEST AFRICA AND THEIR TREATMENT BY GERMANY at 35 (1918).

concentration camps, endured horrific conditions. One infamous practice was for inmates to boil the decapitated heads of other prisoners and then to cut off the remaining skin with broken shards of glass until the skulls were deemed ready for shipment back to Germany; they then were used for pseudo-scientific experiments designed to “prove” the superiority of the Caucasian race and the Germanic people.⁹

Germany’s colonial experience in its former colony of German South West Africa is fairly unique, in that the colonial occupation engaged in the documentation of its genocide of the native and indigenous peoples. Germany’s colonial experience and legal liability is also distinguishable from many other colonial histories in that Germany has explicitly admitted that its actions in German South West Africa constituted genocide. As mentioned prior, the German development minister, Heidemarie Wiczorek-Zeul, first apologized for the killings in 2004, describing the massacres as a “genocide.”¹⁰ In 2015, German Foreign Ministry guidelines started referring to these events as a “genocide,”¹¹ and in July 2016 the German government confirmed in writing to the Bundestag (the parliament) that it was official German policy to consider this event as a genocide.¹²

Germany’s admission that its actions during the colonial period amounted to genocide makes it thus liable under international law since Germany is a member of the United Nations and a party to the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on December 9, 1948. Germany’s well-documented murder of the Ovaherero and Nama peoples falls squarely within the definition of “genocide” under this Convention. Germany has also conceded the retroactive application of this Convention to events occurring prior to its enactment, since, for example, it entered into a comprehensive settlement agreement with victims of the Nazi Holocaust. The same applies for Germany’s official condemnation of Turkey for the genocide of the Armenian people during the period of the Ottoman Empire.

Even if the Genocide Convention had never been enacted, Germany’s attempt to exterminate the Ovaherero and Nama peoples during the 1904-1908 period, and its unlawful taking of their properties without compensation, violated international law as it existed during this German colonial period of 1885–1915, including (i) customary international law;¹³ (ii) positive international law;¹⁴ and (iii) Germany’s legal obligations as codified in its treaties.¹⁵

⁹ OLUSOGA & ERICHSEN, *supra* note at 224–25.

¹⁰ *Supra*, note 2.

¹¹ *See, e.g.*, Der Spiegel, “German colonial crimes: Government calls Herero-massacre for the first time ‘genocide’” <http://www.spiegel.de/politik/deutschland/namibia-massaker-bundesregierung-spricht-von-voelkermord-a-1043117.html>

¹² *See, e.g.*, Deutsche Welle, “Germany officially refers to Herero massacre as genocide” <http://www.dw.com/en/germany-officially-refers-to-herero-massacre-as-genocide/a-19396892>

¹³ *See, e.g.*, the jurisprudence of Hugo Grotius, Emer de Vattel, George Frederic de Martens, Henry Wheaton, and Francis Lieber.

¹⁴ *See* the Second Paris Peace Agreement of 1815, the 1841 Quintuple Treaty, the Geneva Conventions of 1864, the Brussels Declaration of 1874, the General Act of the Berlin West Africa Conference of 1885, the 1889 German-Dutch Agreement, the 1890 Anti-Slavery

Nevertheless, Germany has steadfastly refused to consider making reparations or providing any form of restorative justice to the descendants of the Ovaherero and Nama peoples. Germany also has entered into negotiations with the Namibian government regarding this dark period in German and African history. However, Germany has excluded the legitimate and recognized leaders of the Ovaherero and Nama peoples from participation in these negotiations. In so doing, Germany continues to violate international law, since it is a signatory to the U.N. Declaration on the Rights of Indigenous Peoples (“the U.N. Declaration”), adopted by the U.N. General Assembly on September 13, 2007, which was intended to acknowledge and protect the rights of indigenous peoples.¹⁶

Thus, aside from the more general question of whether European countries have continuing international law obligations to their former colonies, there can be no serious doubt with regard to Germany’s obligations as to the affected communities in its former colony in South West Africa. As a result of this genocide, the Ovaherero and Nama peoples have been condemned to generations of deprivation and poverty, from which they have never recovered. Without question, Germany has a continuing moral and legal obligation to the Ovaherero and Nama of Namibia for the brutal policy of extermination and unlawful expropriation of property without compensation.

Convention, the 1890 German-Belgian Agreement to Criminalize Trade in Girls, the Hague Conventions of 1899 and its Martens Clause, the 1904 Agreement on Administrative Regulation to Ensure Effective Protection Against Trade in Girls, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of July 6, 1906, the 1907 Hague Conventions and its Martens Clause.

¹⁵ See, e.g., Treaty with the Rehoboth Bastards of October 13, 1884; the Treaty with the Bethanien Nama of October 28, 1884; the Treaty with Jacob Isaak of Bersaba (Nama) of July 28, 1885; the Treaty with Manasse of Hoachanas (Nama) of September 2, 1885; the Treaty with Captain Hermanus von Wyk of the Rehoboth Bastards of September 15, 1885; the Treaty with Chief Kamaherero of the Ovaherero of October 21, 1885; the Treaty with the Ovaherero of Omaruru of November 3, 1885; the Treaty with Jan Hendriks of the Veldschoendrager Nama of August 21, 1890; the Treaty with William Christian of the Bondelszwart Nama of August 21, 1890; the Treaty with Eduard Lambert of the Khaua Nama of March 9, 1894; the Treaty with Simon Cooper of the Fransman Nama of March 19, 1894; the Treaty with Dietrich Goliath of Berseba (Nama) of July 7, 1894; the Treaty with David Vilander of the Vilander-Bastards of July 27, 1894; the Treaty with Hendrik Witbooi of the Nama of September 15, 1894; the Treaty with Samuel Maharero of the Ovaherero of December 6, 1894; the Treaties with the Ovaherero of Omururu of November 30, 1894; the Treaty with Samuel Maharero of the Ovaherero of December 6, 1894; the Treaty with David Zwaartbooi of the Zwaartbooi Nama of January 19, 1895; the Treaty with Manasse Lambert of the Khaua Nama of February 4, 1895; the Treaty with Hermanus von Wyk of the Rehoboth Bastards of July 26, 1895; and the Treaty with Hendrik Witbooi of the Nama of November 16, 1895.

¹⁶ U.N. Declaration on the Rights of Indigenous Peoples, Arts. 11 and 18, G.A. Res. 61/295, U.N. Doc. A/61/L.67 and Add. 1 (2007). See, *infra*, at ¶¶ 295-296.