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Recommended Citation

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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).¹ 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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1. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 1, 78 U.N.T.S. 277, available at <http://www.yale.edu/lawweb/avalon/un/genocide/htm>. Article 2 of the Convention on the Prevention and Punishment of Genocide defines genocide as:

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 inflicting 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]orcibly 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 BLUNTSHLI, *DAS MODERNE VÖLKERRECHT DER CIVILISIRTEN STATEN* 299 (1878). Genocide, the modern term first used by Raphael Lemkin, encompasses several subcategories, including wars of annihilation or extermination. See RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION - ANALYSIS OF GOVERNMENT - PROPOSALS FOR REDRESS* 79 (1944).

3. See generally Jörn Axel Kämmerer & Jörg Föh, *Das 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.⁴ 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.⁵ 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,⁶ 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 2004.⁷ 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.).⁸ The Hereros are suing Deutsche Bank based on its financing of the German colonial administration and participation in the German colonial enterprise.⁹ The Hereros have included Woermann

VÖLKERRECHTS 294 (2004) (arguing that the German colonial war of annihilation against the Herero people was not a violation of contemporaneous international law).

4. See HORST DRECHSLER, *LET US DIE FIGHTING: THE STRUGGLE OF THE HERERO AND NAMA AGAINST GERMAN IMPERIALISM (1884-1915)*, at 7 (Bernd Zöllner transl., 1980) ("The war against the Herero and Nama was the first in which [the] German [colonial administration] resorted to methods of genocide . . ."); Leona Toker, *One [H]undred [Y]ears of [E]vil*, Haaretz.com, Apr. 15, 2005, at <http://haaretz.com/hasen/spages/565268.html> (This was the "first genocide of the [twentieth] century."). The German-Herero war has been described by Dan Stone as "[o]ne of the most horrific[] and still comparatively unknown" genocides. Dan Stone, *White [M]en with [L]ow [M]oral [S]tandards? German [A]nthropology and the Herero [G]enocide*, 35 *PATTERNS OF PREJUDICE* 33 (2001). See also Sidney L. Harring, *German Reparations to the Herero Nation: An Assertion of Herero Nationhood in the Path of Namibian Development*, 104 *W. VA. L. REV.* 393 (2002) ("The war, although not well known in a world of far more deadly wars, was among the twentieth century's bloodiest colonial wars . . .").

5. See, e.g., Kämmerer & Föh, *supra* note 3.

6. See Central Intelligence Agency, *The World Factbook: Namibia*, at <http://www.cia.gov/cia/publications/factbook/geos/wa.html> (last updated Feb. 10, 2005). The Hereros make up 7% of the Namibian population. *Id.*

7. See German Parliament, In [C]ommemoration of the [V]ictims of the Colonial War in the [F]ormer German-South West Africa, 15th Legislative Period, June 16, 2004, available at www.windhuk.diplo.de/de/seite_erklaerung_BT_16_06_04.html [hereinafter German Parliament].

8. Complaint, *Herero People's Reparations Corp. v. Deutsche Bank AG* (S.D.N.Y. filed Feb. 13, 2003) (on file with author) (alleging violations of international law, crimes against humanity, genocide, slavery, and forced labor).

9. See *id.* ¶ 4 (alleging direct responsibility for and commission of crimes against humanity perpetrated against the Hereros).

Line in the suit because it “employed slave labor and operated [a] concentration camp.”¹⁰

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 1990.¹¹ 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.¹² The Hereros benefit only marginally from this aid,¹³ however, substantial recovery through litigation could help them achieve financial independence. As momentum for their claim builds, the Hereros have received increasing press coverage.¹⁴

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.¹⁵ 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).

11. German Federal Foreign Office, *Namibia: Relations Between Namibia and Germany*, at http://www.auswaertiges-amt.de/www/en/laenderinfos/laender/laender_ausgabe_html?land_id=118 (last modified Jan. 2005).

12. *Id.*

13. See, e.g., Peace Pledge Union, *Genocide - Namibia*, at http://www.ppu.org.uk/genocide/g_namibia2.html (last visited Feb. 27, 2005).

14. See Deutsche Welle Staff, *Germany Urges Herero to Drop Lawsuit*, DEUTSCHE WELLE, Aug. 5, 2004, at <http://www.dw-world.de/dw/article/0,,1287663,00.html>; Ben Kiernan, *Less Talk, More Action*, Scotland on Sunday, Mar. 20, 2005, at <http://news.scotsman.com/opinion.cfm?id=299422005>; Petros Kuteeue, *Namibia: No [A]pology, [N]o [P]ayout for Herero*, THE NAMIBIAN, Jan. 12, 2004, <http://www.afrika.no/Detailed/4613.html>; Andrew Matjila, *Everyone Should Back Herero Reparations*, THE NAMIBIAN, Mar. 5, 2004, at <http://www.namibian.com.na/2004/march/letters/042BCB67EF.html>; Philip Ngunjiri, *Germany Refuses to Apologize for Herero Holocaust*, Black Voices, Oct. 14, 2002, at http://archive.blackvoices.com/articles/daily/index_20021014.asp.

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 [g]overnment. 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 [g]overnment promised to extend “protection” to the chief and his tribe, while recognizing and supporting the [c]hief’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.¹⁶ 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.¹⁷ 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.¹⁸

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 Hereros¹⁹ squarely within that contemporaneous jurisprudence. Part IV explains how

16. The Herero genocide has been featured in exhibits around the world, including ones at the Genocide Memorial in Kigali and the recently reopened Center for Studies of Holocaust and Religious Minorities in Oslo. See Robert Walker, *Rwanda Remembers the Holocaust*, BBC News, <http://news.bbc.co.uk/2/hi/africa/4211621.stm> (last modified Jan. 27, 2005); *Norwegian Nazi Leader's Villa Converted into a Holocaust Museum*, CAPE TIMES, Dec. 29, 2004, <http://www.capetimes.co.za/index.php?fSectionId=272&fArticleId=2357418> [hereinafter CAPE TIMES].

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 & Föh, *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 80,000²⁰ in Hereroland (also known as South West Africa, today Namibia), where the German colonial enterprise²¹ lasted from 1884 to 1919.²² 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.²³ The following year, Germany declared Lüderitz's land a protectorate.²⁴ The Herero Nation, seeking military support in conflicts with the Nama, another indigenous nation in the region, entered into a treaty of friendship and protection²⁵ with the German government in 1885.²⁶ The Herero Nation

20. DRECHSLER, *supra* note 4, at 214 (citation omitted); BLEY, *supra* note 15, at 150.

21. Because Germany became a unified nation much later than other European countries, it pursued colonial interests to procure a "place in the sun" with other world powers. At the session of the German Parliament on Dec. 6, 1897, Imperial Chancellor von Bülow described Germany's right to colonial territories in the context of a "desire for [Germany's] place in the sun" ("das Verlangen nach unserem Platz in der Sonne"), a phrase that is still famous today. Paulette Reed-Anderson, "Ein Platz an der afrikanischen Sonne"—*Deutsche Hegemonie auf dem afrikanischen Kontinent*, at <http://www.cybernomads.net/cn/home.cfm?p=995#> (last visited Apr. 13, 2005) (citation omitted). This phrase symbolizes the intent to achieve domination over the Africans and to conquer and rule their lands. *See id.*

22. See Sam Nujoma, *Preface*, in DRECHSLER, *supra* note 4, at VII.

23. See ISRAEL GOLDBLATT, *HISTORY OF SOUTH WEST AFRICA FROM THE BEGINNING OF THE NINETEENTH CENTURY* 81 (1971); Lynn Berat, *Genocide: The Namibian Case Against Germany*, 5 PACE INT'L L. REV. 165, 174 (1993). This fateful event led to the establishment of the first German colony in Africa. *See* Harring, *supra* note 4, at 398.

24. See Walfish Bay & St. John's River Territories Annexation Act, No. 35 (1884); Berat, *supra* note 23, at 174 (citing Proc. No. 184 (1884), CAPE OF GOOD HOPE GOVERNMENT GAZETTE, Aug. 8, 1884, at 408); *id.* at 175 (citing 2 EDWARD HERTSLET, *THE MAP OF AFRICA BY TREATY* 693 (1909)); *id.* (citing Agreement, reprinted in 2 MICHAEL HURST, *KEY TREATIES FOR THE GREAT POWERS, 1814-1914*, at 873 (1972)); *see also* JAN HENDRIK ESTERHUYSE, *SOUTH WEST AFRICA, 1880-1894: THE ESTABLISHMENT OF GERMAN AUTHORITY IN SOUTH WEST AFRICA* 46-65 (1968).

25. *Traité de protection et d'amitié entre l'Allemagne et Maharero Katyuamua* Chef suprême des Hereros, Oct. 21, 1885, F.R.G.-Hereroland, 165 Consol. T.S. 14 (German); Treaty of Protection and Friendship with the Hereros, Oct. 21, 1885, F.R.G.-Hereroland, 165 Consol. T.S. 20 (English).

26. See generally Hinz, *supra* note 15, at 8 (citing *Schutz- und Freundschaftsvertrag zwischen dem Deutschen Reich und den Herero*, in JAKOB IRLE, *DIE HERERO: EIN BEITRAG ZUR LANDES-, VOLKS- UND MISSIONSKUNDE* (1906)). See also Harring, *supra* note 4, at 398 (citation omitted). Some modern analyses of the Herero legal claims focus on the relationship between the Herero Nation and the German government stemming from this treaty. See generally Hinz, *supra* note 15, at 8; Kämmerer & Föh, *supra* note 3. 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.²⁷ 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”²⁸ until 1907.²⁹ Nonetheless, Germany retained power in South West Africa until 1919, when it lost its colonies as a result of World War I.³⁰ 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.³¹ The German-Herero War was one of the world’s bloodiest conflicts occurring between 1815 and 1914.³² 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.³³ 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 unseren 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.

28. Hinz, *supra* note 15, at 8.

29. DRECHSLER, *supra* note 4, at 7.

30. See Treaty of Versailles, June 28, 1919, art. 119, 225 Consol. T.S. 188, 255.

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.”).

33. According to the pamphlet, “Anyone familiar with the life of African and other less civilized non-white peoples knows that Europeans can assert themselves only by maintaining the supremacy of their race at all costs. . . . [T]he swifter and harsher the reprisals taken against rebels, the better the chances of restoring authority.” DRECHSLER, *supra* note 4, at 142 (quoting Flugblätter des Deutschen Kolonial-Bundes, IX: “Zu den Unruhen in Deutsch-Südwestafrika,” collected in The Herero Uprising in 1904, Vols. 1-9 (1904–1909), Imp. Col. Off. File Nos. 2111-19, in Imperial Colonial Office File [hereinafter Imp. Col. Off.] No. 2111, at 26 (on file at the Bundesarchiv Berlin)) [hereinafter The Herero Uprising]; see also Berat, *supra* note 23, at 177-78.

The Germans are consumed with inexpressible 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.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.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.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.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.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,"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."⁴⁰

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. . . . [E]very Herero, whether found armed or unarmed . . . will be shot. I shall not accept

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.

35. See DRECHSLER, *supra* note 4, at 151; Berat, *supra* note 23, at 178.

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.

37. See Berat, *supra* note 23, at 179.

38. See DRECHSLER, *supra* note 4, at 153; Berat, *supra* note 23, at 179.

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)) [hereinafter *Differences Between von Trotha and Leutwein*]; see also Berat, *supra* note 23, at 180.

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 struggle⁴³

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

49. GEWALD, *supra* note 17, at 174 (citing Namibian National Archives Windhoek, Acc. 109, 49 (Gewald transl.)).

50. BLEY, *supra* note 15, at 159.

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. DRECHSLER, *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.

55. DRECHSLER, *supra* note 4, at 164 (quoting Letter from general staff to von Trotha (Dec. 12, 1904), collected in Differences Between von Trotha and Leutwein, *supra* note 24, in Imp. Col. Off. File No. 2089, at 85).

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 conditions⁶¹ and were subjected to medical experiments.⁶² The

56. *Id.* Von Trotha was never happy with this decision and lobbied 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 “[t]he 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/ART/2005/01/11/41e3dfd9ee797>. See Harring, *supra* note 4, at 396-97 (“Indeed, there is evidence that the virulent racism that promoted the [H]olocaust 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.⁶³ The Germans killed all Hereros who tried to escape the inhuman conditions in the camps immediately and without mercy.⁶⁴

The brutal living and working conditions in the camps constituted a policy decision on the part of Germany.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.”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, *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. H. 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. *Id.* at 28.

62. See Harring, *supra* note 4, at 396-97 (“Herero prisoners of war were the subject of these experiments.”); Michael G. Hanchard, *Herero and Nama Rebellions, 1904-1907: A [P]relude to the [M]odern [H]olocaust?*, in 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.[] Eugen Fischer who became the senior geneticist of the Nazi regime.”); Toker, *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, *supra* note 14. Fischer’s book on his research in Namibia, *The Principles of Human Heredity and Race Hygiene*, “went on to become one of Hitler’s favorite reads.” *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.” *Id.*

63. See Drechsler, *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. *Id.*

65. Compare Gunter Spraul, *Der “Völkermord” and den Herero: Untersuchungen zu einer neuen Kontinuitätsthese*, 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 Zielsetzung 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.), 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 . . .”).

66. DRECHSLER, *supra* note 4, at 207 (quoting Letter from Hans Tecklenburg to the Colonial Department (July 3, 1905), collected in *The Herero Uprising*, *supra* note 19, in Imp. Col. Off. File 2118, at 153-54).

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.

67. Berat, *supra* note 23, at 183.

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.

75. See WILHELM KÜLZ, DEUTSCH-SÜDAFRIKA IM 25. JAHRE DEUTSCHER SCHUTZHERRSCHAFT: SKIZZEN UND BEITRÄGE ZUR GESCHICHTE DEUTSCH-SÜDAFRIKA 159 (1909).

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 freedom⁷⁹ 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.*

80. General Act of the Berlin Conference, Feb. 26, 1885, art. VI, 165 Consol. T.S. 485, reprinted in 3 SUPPLEMENT AM. J. INT'L L. 7 (1909), reprinted in R.J. GAVIN & J.A. BETLEY, *THE SCRAMBLE FOR AFRICA: DOCUMENTS ON THE BERLIN WEST AFRICAN CONFERENCE AND RELATED SUBJECTS, 1884/1885*, 291 (1973) [hereinafter *BERLIN WEST AFRICA CONVENTION*]. For a reprint in original French and German of the Berlin West Africa Convention as drawn from the *Reichs-Gesetzblatt* No. 23, June 20, 1885, see *Berlin West Africa Conference (1884-1885), Protokolle und Generalakte der Berliner Afrika-Konferenz, 1884-1885* (Übersee-Museum Bremen 1984). The effect of the 1884-1885 Berlin West Africa Conference and the Berlin West Africa Convention upon the Hereros' legal claims are discussed in detail *infra*.

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.⁸¹ 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.⁸²

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.⁸³ Until the twentieth century, customary international law was the dominant source of international law.⁸⁴ Custom and tacit conventions have shaped the development of the positive law of nations since the beginning of the nineteenth century.⁸⁵ 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 Ballreich, *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.

See Nuremberg Trial Proceedings, Charter of the International Military Tribunal, art. 6, <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> (last modified Mar. 30, 2005).

authority.⁸⁶ For example, in his 1889 *Elements of International Law*, contemporaneous international legal scholar Henry Wheaton,⁸⁷ “the Blackstone of international law,”⁸⁸ gave primacy to the views of publicists as evidence of customary international law.⁸⁹

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.⁹⁰ 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 1878.⁹¹

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.⁹² For example, in his 1907 work *Das Völkerrecht*, legal theorist Franz von Liszt⁹³ analyzed the intentions of European powers that had entered into obligations to protect indigenous Africans under Article VI of the Berlin West Africa Convention.⁹⁴ Von Liszt found that the European powers intended Article VI to prohibit the annihilation of these peoples.⁹⁵ 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.

93. See Liszt, Franz von, *1851, Österreich-Lexikon (Verlagsgemeinschaft Österreich-Lexikon), available at <http://www.aeiou.at/aeiou.encyclop.l/1755000.htm> (last visited Mar. 12, 2005). Von Liszt (1851-1919), a well-known international legal theorist, was a professor at German universities and the founder of the German criminal-sociological school of criminal law.

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.”⁹⁶ 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.⁹⁷ Finally, European nations were bound in their relations with indigenous peoples, as well as with other European nations, by international humanitarian law limiting barbarism.⁹⁸ 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.⁹⁹

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.¹⁰⁰ International law generally prohibited the use of force at the end of the nineteenth and the beginning of the twentieth century.¹⁰¹ However, under the laws of war, necessity provided a limited exception to this general prohibition.¹⁰² 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.¹⁰³

Even during war, the European powers considered certain uses of force unlawful.¹⁰⁴ 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.”¹⁰⁵ Use of poison in war

96. WHEATON, *supra* note 78, at 14.

97. *See id.* at 17.

98. *See* BLUNTSCHLI, *supra* note 2, at 283; *see also* text accompanying note 107, *supra*.

99. *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 SCHACK, *supra* note 26).

100. *See* BLUNTSCHLI, *supra* note 2, at 296.

101. *See* WHEATON, *supra* note 78, at 466.

102. *See id.* at 461, 466.

103. *See id.* at 473; *see also* VON LISZT, *supra* note 79, at 333 (“Im allgemeinen darf der Kriegsführende alle Mittel anwenden, deren Anwendung notwendig ist, um den Widerstand des Gegners niederzuwerfen.”) (“In general, the warring party is allowed to use all means necessary to overcome the opponent’s resistance.”) (author’s transl.). For a discussion of the laws of war regarding the use of force, *see* BLUNTSCHLI, *supra* note 2, at 35-40.

104. *See* MARTENS, *supra* note 78, at 286; *see also* BLUNTSCHLI, *supra* note 2, at 299 (“Das Völkerrecht verbindet auch die Kriegsparteien während des Kriegs als Glieder der Menschheit und beschränkt dieselben in der Anwendung der zulässigen Gewaltmittel.”) (“International law binds the warring parties during wartime as parts of humanity and limits them in the use of force.”) (author’s transl.).

105. MARTENS, *supra* note 78, at 289.

had been illegal under international law since the beginning of the seventeenth century.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.”¹⁰⁷ By the second half of the nineteenth century, European customary international law forbade torture and rape.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.¹⁰⁹ By the 1870s, customary laws of war prohibited the killing or wounding of prisoners of war.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,”¹¹¹ customary international law barred retaliatory violations of this kind by the end of the century.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 war¹¹³ and was the first convention regulating the treatment of prisoners of war.¹¹⁴ This codification stemmed from a “desire to diminish the evils of war”¹¹⁵ and was based on the law of nations, established usages, laws of humanity, and public conscience.¹¹⁶ Although the provisions of Hague II were binding on its signatories only in the event of

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 Individuums 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.).

107. MARTENS, *supra* note 78, at 289-90.

108. *See* BLUNTSCHLI, *supra* note 2 at 325 (“Alle solche [scheusslichen Misshandlungen und Folterqualen, wie die Notzucht an den Weibern] wird von der heutigen Kriegssitte und dem civilisirten Kriegerrecht 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.).

109. *See id.* at 329.

110. *See id.*

111. *Id.* at 287.

112. *See id.* at 319 (“Die Barberei des Feindes rechtfertigt nicht die eigne Barberei.”) (“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).

113. Hague Convention (II) with Respect to the Laws and Customs of War by Land, July 29, 1899, 32 Stat. 1803, Treaty Series 403, available at <http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm> [hereinafter Hague Convention (II)].

114. Anton Schlögel, *Geneva Red Cross Conventions and Protocols*, in 3 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 183 (Rudolf Bernhard ed., 1982).

115. Hague Convention (II), *supra* note 113.

116. *Id.*

war between parties to the Convention,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,¹¹⁸ restricted the permissible use of force,¹¹⁹ required permission for combatants to surrender,¹²⁰ and prohibited the use of poison or killing of enemies who surrendered.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.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."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.¹²⁴ Third, contemporaneous customary international law should not apply to Germany's acts against the Hereros because the Hereros were an "uncivilized" people.¹²⁵ Fourth, the Berlin West Africa Convention should

117. *Id.*

118. *Id.* § I, ch. II, art. 4.

119. *Id.* § II, ch. I, art. 22.

120. *Id.*

121. *Id.* § II, ch. I, art. 23.

122. See Kämmerer & Föh, *supra* note 3.

123. See, e.g., *id.* at 306.

124. *Id.* at 308-09.

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 climate wherein the outbreak of war became inevitable.").

not be read to confer rights on the indigenous peoples of Africa.¹²⁶ 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.¹²⁷

Modern international law does not apply to the German-Herero War. Twentieth-century codifications of international humanitarian law, such as the Nuremberg 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.¹²⁸

Germany signed and ratified the Berlin West Africa Convention in 1885.¹²⁹ Article VI of the Convention explicitly bans annihilation by requiring its signatories to protect African peoples.¹³⁰ Under Article VI, all

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* GAVIN & 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* GAVIN & 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."¹³¹ The Convention also contains a dispute-settlement clause.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."¹³³ At the same meeting, Sir Edward Balwin 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.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

West Africa Conference, see Protocol No. 4 to the Berlin West Africa Conference, Dec. 1, 1884, reprinted in GAVIN & BETLEY, *supra* note 80, at 160-62.

131. Berlin West Africa Convention, *supra* note 80.

132. *Id.* art. 12 (reserving a right to mediation or arbitration of disputes before "serious dissention" is resolved through the use of force).

133. Protocol No. 1 to the Berlin West Africa Conference, Nov. 15, 1884, reprinted in GAVIN & BETLEY, *supra* note 80, at 129.

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.”¹³⁵

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.¹³⁶

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,¹³⁷ 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 VIth Article regulates various matters, all of which, however, [apply to] moral interests.”¹³⁸ 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.

136. Declaration Relative to the Freedom of Commerce in the Basin of the Congo, its Mouth, and Surrounding Countries, Annex 1 to Protocol No. 4 of the Berlin West Africa Conference, Dec. 1, 1884, *reprinted in* GAVIN & BETLEY, *supra* note 80, at 167-70.

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.*

138. Report Made in the Name of the Commission Charged with Examining the Project of Declaration Relating to Freedom of Commerce in the Basin of the Congo and its Affluents, Annex 1 to Protocol No. 4 of the Berlin West Africa Conference, Dec. 1, 1884, *reprinted in* GAVIN & BETLEY, *supra* note 80, at 172.

freedom.¹³⁹ 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.¹⁴⁴ 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."¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷ Even though Germany's acts of genocide took place during wartime, actions such as poisoning wells,¹⁴⁸ committing rape,¹⁴⁹ killing women and children,¹⁵⁰ and wounding and killing prisoners of war¹⁵¹ 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 europäischen "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.

145. Declaration of the General Act of the Brussels Conference, July 2, 1890, 27 Stat. 886, T.S. No. 383, 173 Parry's T.S. 293 (1968), reprinted in HENRY WELLINGTON WACK, THE STORY OF THE CONGO FREE STATE 552 (1905), <http://www.zum.de/whkmla/documents/wack/wackapp10.html> [hereinafter General Act of the Brussels Conference]; see also MAX FLIESCHMANN, VÖLKERRECHTSQUELLEN IM AUSWAHL 226 (1905); VON LISZT, *supra* note 79, at 288.

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.¹⁵² In international law, this doctrine applies to treaties and other international agreements.¹⁵³ A third party is "a subject of international law [such as a state] which has not subscribed to the agreement."¹⁵⁴ Third parties are usually not affected by agreements to which they are not a party.¹⁵⁵ The basic rule, known by the phrase *pacta tertiis 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."¹⁵⁶

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

152. Vienna Convention on the Law of Treaties, May 23, 1969, art. 34, 1155 U.N.T.S. 331, available at <http://www.un.org/law/ilc/texts/treaties.htm> [hereinafter Vienna Convention]; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 324(1) (1986) [hereinafter RESTATEMENT THIRD]. The scope of the third-party beneficiary doctrine has become more limited under modern international law. The principles governing third-party beneficiary rights had emerged by the early eighteenth century. See Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1360-61 (1992).

153. See generally Hans Ballreich, *Treaties, Effect on Third States*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 945-49 (Rudolf Bernhardt ed., 2000) (discussing the effect of treaties on third parties under international law).

154. *Id.* at 945.

155. See *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 préparatoires, 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

157. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 139(1) (1965) [hereinafter RESTATEMENT SECOND].

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.

160. Luke T. Lee, *The Law of the Sea Convention and Third States*, 38 AM. J. INT’L L. 541, 545 (1983).

161. *Free Zones Case*, *supra* note 159, at 147-48.

162. Lee, *supra* note 160, at 547.

163. Vienna Convention, *supra* note 156, art. 36, ¶ 1; George D. Haimbaugh, *Impact of the Reagan Administration on the Law of the Sea*, 46 WASH. & LEE L. REV. 151, 188-89 (1989). See also RESTATEMENT THIRD, *supra* note 156, § 324(3).

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.¹⁶⁶ The essential factor underlying a state's government is that it is capable of acting independently of foreign governments.¹⁶⁷ The state has jurisdiction over its own people and territory.¹⁶⁸ Foreign governments require the consent of the state to exercise jurisdiction over their nationals in its territory.¹⁶⁹ However, a state may partially limit its jurisdiction by concluding treaties with other states.¹⁷⁰ 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.¹⁷¹

States have certain rights under international law. States are entities that have exclusive jurisdiction over their territory and nationals.¹⁷² One of the rights of states under international law is the competence to conclude treaties.¹⁷³ In other words, states have "the legal possibility of conferring rights and duties on other subjects of international law."¹⁷⁴ Such rights and duties could include jurisdiction over its nationals in the signatory nation's territory and the obligation to provide military aid.¹⁷⁵

The terms "state" and "nation" are often used synonymously in international law.¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸ Thus, the key difference between states and nations is the element of government.¹⁷⁹ Where nations have the added element of a government, they should be treated as states under the third-party beneficiary doctrine.

166. See Karl Doebling, *State*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 601 (Rudolf Bernhardt ed., 2000) (discussing Georg Jellinek's doctrine of the three elements).

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; Doebling, *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.¹⁸⁰ 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.¹⁸¹ The Hereros, a Bantu speaking people,¹⁸² formed a distinct population group comprising the Mbandjeru and the Tjimba.¹⁸³ 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.¹⁸⁴ Nations can be "understood as cultural groups with a common language, a common cultural identity[,] and common traditions . . ."¹⁸⁵ In the late 1800s, Herero society became "strongly centralized and centred upon a number of specific urban centres"¹⁸⁶ and "specific geographical areas."¹⁸⁷ 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."¹⁸⁸ Before 1870, "the Hereros' socio-political organization was a complex system of . . . groupings."¹⁸⁹ The approximately 80,000 Hereros in Hereroland (now Central Namibia) were governed by four principal Herero chiefs¹⁹⁰ and a "new form of centralized Herero polity" was created and maintained.¹⁹¹ 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, Haring, *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 STAATSBILDUNG 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 Doebling, *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 treaties²⁰³ with the Herero Nation is proof of their recognition of the Herero Nation as a subject of international law²⁰⁴ with the "general competence to conclude treaties."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.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 Convention²⁰⁷ and the Anti-Slavery Convention.²⁰⁸ The plain language of both of these international agreements requires "the preservation of the native populations."²⁰⁹ This language shows an intent to protect indigenous Africans not only as individuals but also as distinct socio-political groups.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,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."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.²¹³ Further, these obligations were framed in the form and language of guarantees,

203. BLEY, *supra* note 4, at 6.

204. See Doebling, *supra* note 166, at 601; Ballreich, *supra* note 153, at 945.

205. See Doebling, *supra* note 166, at 601.

206. See *id.*

207. See Berlin West Africa Convention, *supra* note 80, art. VI.

208. See General Act of the Brussels Conference, *supra* note 145, art. II.

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.

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 IPSEN, VÖLKERRECHT: EIN STUDIENBUCH 1071 (4th ed. 1999)).

211. See Lee, *supra* note 160, at 545.

212. Berlin West Africa Convention, *supra* note 80.

213. See VON LISZT, *supra* note 79, at 287.

supporting the interpretation that these documents provide third-party beneficiary rights.²¹⁴

The Herero Nation was a third party to the 1885 Berlin West Africa Convention²¹⁵ and the 1890 Anti-Slavery Convention.²¹⁶ The Hereros were subjects of international law as discussed above and were not signatories.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.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.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."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.

214. Report Made in the Name of the Commission Charged with Examining the Project of Declaration Relating to Freedom of Commerce in the Basin of the Congo and its Affluents, *supra* note 138, at 173.

215. See Berlin West Africa Convention, *supra* note 80, art. VI.

216. See General Act of the Brussels Conference, *supra* note 145, art. II.

217. See Ballreich, *supra* note 153, at 945.

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

219. See *supra* note 142.

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 aid²²⁶ and the Hereros are an ethnic minority²²⁷ 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

221. See Hinz, *supra* note 15, at 6.

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 Haring, *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); Haring, *supra* note 4, at 406 (citation omitted); Kuteeue, *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."); Haring, *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 Haring, *supra* note 4, at 393 (citation omitted).

227. See Central Intelligence Agency, *supra* note 6.

228. Haring, *supra* note 4, at 410.

against the Hereros.²²⁹ 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.²³⁰ 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"²³¹ 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.²³² Germany cannot be brought into court in the United States without its consent.²³³ Since Germany refused to accept service of process, the Hereros voluntarily dismissed the case without prejudice.²³⁴ 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.²³⁵ 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.²³⁶ 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. See *supra* note 16.

230. See Anthony J. Sebok, *Slavery, Reparations, and Potential Legal Liability: The Hidden Legal Issue Behind [t]he U.N. Racism Conference*, Sept. 10, 2001, at <http://writ.corporate.findlaw.com/sebok/20010901.html>.

231. Sarkin, *supra* note 69, at 452.

232. Complaint, Herero People's Reparations Corp. v. Federal Republic of Germany (D.D.C. filed Feb. 2003) (on file with author) (alleging violations of international law, crimes against humanity, genocide, slavery, and forced labor).

233. See *Argentine Republic v. Amarada Hess Shipping Corp.*, 488 U.S. 428 (1989).

234. Other jurisdictional and forum issues are beyond the scope of this Comment.

235. Telephone Interview with Philip M. Musolino, Counsel for Plaintiffs, Musolino & Dessel (Oct. 23, 2003).

236. 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

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) (Nov. 15, 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*.

238. Complaint, *Herero People's Reparations Corp. v. Deutsche Bank AG* (S.D.N.Y. filed Feb. 13, 2003) (on file with author).

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

240. *Id.*

241. See *The Herero [I]ssue [W]ill [N]ot [S]top*, MAIL & GUARDIAN ONLINE (Aug. 11, 2004), http://www.mg.co.za/articlepage.aspx?area=/breaking_news/breaking_news_africa&articleid=134579 ("[A] German law professor, Manfred Hinz, has proposed the establishment of a reconciliation commission comprising leaders of the Herero people and Germany 'to work out an appropriate form of apology and possible reparation, and hopefully, an out-of-court settlement.'").

colonial rule. The Damara²⁴² 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 1908.²⁴³ The Congolese could sue Belgium for perpetrating genocide in Congo under King Leopold's reign.²⁴⁴ The Bunyoro²⁴⁵ 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 Damara²⁴⁶ began to seek similar recognition for their own claims.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.

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).

243. The German suppression of the rebellion led to the "murder of approx[imately] 200,000 in the region." PAULETTE REED-ANDERSON, *REWRITING THE FOOTNOTES: BERLIN AND THE AFRICAN DIASPORA* 18 (2000). A bibliography of sources from direct observers of the Maji-Maji Rebellion is available at the Maji Maji Bibliography Project, at <http://www.mhudi.de/maji/Bibliography.html> (last visited Apr. 13, 2005).

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).

245. See Sarkin, *supra* note 69, at 452.

246. See *supra* note 242.

247. See Christof Maletsky, *Damaras Demand German Answers*, *THE NAMIBIAN*, Jan. 26, 2005, <http://www.namibian.com.na/2005/January/national/05901ED968.html>.

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 descendants an opportunity to "cope with the financial deprivation that they have suffered,"²⁴⁸ (2) providing "an official recognition of the past,"²⁴⁹ and (3) "detering 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.

248. Sarkin, *supra* note 69, at 429. As recently as 1998 hundreds of Hereros were living under poor conditions in a refugee camp at Gam, 600 kilometers northeast of Windhoek. See Harring, *supra* note 4, at 401 (citing Christof Maletsky, *Returned Hereros "Dumped" Says Report*, MAIL & GUARDIAN ONLINE, Mar. 23, 1998, at <http://www.mg.co.za/mg/news/98mar2/23mar-herero.html>). The German government paid several million marks beginning in 1904 to compensate white settlers in South West Africa for their property losses. Deutschen Kolonialgesellschaft, *Rückblick auf die Entwicklung Deutsch-Südwestafrikas im Jahre 1904*, in DEUTSCHER KOLONIAL-ATLAS MIT JAHRBUCH 1905, at 12-13 (1905), <http://www.zum.de/psm/imperialismus/kolonialatlas05/atlas001.php>.

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 BLACK L.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.*

