



**Journal  
of  
Namibian Studies**

*History, Politics, Culture*

**32 / 2022**

Otjivanda Presse.Bochum

ISSN 1863-5954 (print)  
ISSN 2197-5523 (online)

**Journal of Namibian Studies**  
**History Politics Culture**

**Editor**

Andreas Eckl  
eckl@namibian-studies.com

**Language Editor**

Eoin Ryan  
ryan@namibian-studies.com

**Editorial Advisory Board**

Bruno Arich-Gerz, Institute of Linguistics and Communication Sciences, RWTH Aachen, Germany  
Medardus Brehl, Institute for Diaspora and Genocide Studies, Ruhr-University Bochum, Germany  
Tilman Dederig, History Department, University of South Africa, Pretoria, South Africa  
Gregor Dobler, Institute of Cultural and Social Anthropology, University Freiburg, Germany  
John Friedman, Socio-Cultural Anthropology and Development, University College Roosevelt, Middelburg, The Netherlands  
Wendi Haugh, Anthropology and African Studies, St. Lawrence University, Canton, NY, USA  
Matthias Häußler, Department of Sociology, University Siegen, Germany  
Dag Henrichsen, Basler Afrika Bibliographien, Basel, Switzerland  
Jonas Kreienbaum, Historical Institute, University Rostock, Germany  
Meredith McKittrick, School of Foreign Service, Georgetown University, Washington, D.C., USA  
Henning Melber, The Nordic Africa Institute, Uppsala, Sweden  
Andre du Pisani, Department of Political Studies, University of Namibia, Windhoek, Namibia  
Chris Saunders, Department of Historical Studies, University of Cape Town, Cape Town, South Africa  
Napandulwe Shiweda, Multidisciplinary Research Center, University of Namibia, Windhoek, Namibia  
Jake Short, Department of History, University of Georgia, Athens, USA  
Wolfgang Werner, Department of Land Management, Polytechnic of Namibia, Windhoek, Namibia  
Steven Van Wolputte, Institute for Anthropological Research in Africa, Katholieke Universiteit Leuven, Belgium  
Jakob Zollmann, WZB, Berlin Social Science Center, Germany

## Demanding reparations for colonial genocide using historical documents: Do the Herero of Namibia have legal evidence to support their demand for German reparations?

Seebal Aboudounya\*

### *Abstract*

*To receive reparations from Germany for the first genocide of the 20th century, the Herero of Namibia have been facing a legal challenge; they must demonstrate that the Herero genocide was illegal under international law during the colonial period. Through the analysis of historical treaties and documents, this article reveals that the Herero can make use of legal evidence to support their demands. The article demonstrates that Germany violated contemporaneous international law, i.e. the international law valid at the time. This revelation has significant implications for Namibia as well as for other victims of colonial genocides. The article then comments on the political context and suggests possible routes for the Herero to secure reparations for the tragedy their ancestors experienced.*

### Introduction

Despite the Herero massacre being the first genocide of the 20<sup>th</sup> century<sup>1</sup> and confirmation by the UN Whitaker report<sup>2</sup> that the label 'genocide' is applicable, the Herero of Namibia face a legal battle to assert their claim for reparations for this genocide. The main problem is that the massacre occurred *before* the 1948 Genocide Convention and thus there is the risk that Germany cannot be held accountable for the genocide because there was no international law prohibiting this crime at the time.

Under the Alien Tort Claim Act (ATCA), American courts may exercise jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a

---

\* Dr Seebal Aboudounya is currently an Associate Lecturer (teaching) in International Development at University College London (UCL). She holds a PhD in International Relations from the London School of Economics and Political Science (LSE) and she is an expert in areas including international institutions, international development, international law, deliberation, maritime affairs and diplomacy. Dr Seebal has recently been awarded the prestigious African Women Award for being a 'She Achiever in International Relations'. She received the award for her achievements, and specifically for being 'an outstanding African Woman Achiever in International Relations'. E-mail: s.aboudounya@ucl.ac.uk

<sup>1</sup> Dominik Schaller, "The Genocide of the Herero and Nama", in: Samuel Totten and William Parsons, (eds.), *Centuries of Genocide*, London, Routledge, 2013: 89-116 (101).

<sup>2</sup> UNCHR 'UN Whitaker Report on Genocide' (1985) E/CN.4/Sub.2/1985/6 [24].

treaty” the US had signed.<sup>3</sup> The Herero have resorted to the ATCA to hold Germany accountable for the genocide and to secure reparations, nonetheless, so far the cases filed in the early 2000s have been unsuccessful due to Germany’s refusal to submit to US jurisdiction.<sup>4</sup> Nevertheless, Germany’s claims to state immunity have not deterred the Herero who filed another case in January 2017<sup>5</sup> in an attempt to secure reparations for the murder of 80% of the Herero and 50% of the Nama at the hands of the German colonial forces in Namibia in the 1900s.<sup>6</sup> However, in 2019, the case was dismissed after US District Judge Laura Taylor Swain stated that “Germany was immune from claims by descendants of the Herero and Nama tribes, depriving her of jurisdiction over its role” in this genocide.<sup>7</sup>

This paper focuses on the Herero Genocide and argues that the Herero do have legal evidence to support the demand reparations from Germany because Germany violated valid international law *at the time*, i.e. contemporaneous international law. The paper emphasises that Germany’s actions were a breach of Germany’s obligations under various treaties as well as customary international law. Secondly, the paper contributes to the Herero case by analysing the options available to the Herero in light of those findings. It starts by outlining an option open to the Herero in theory, i.e. to approach the signatories of the General Act of the Berlin Conference who could then demand reparations *on behalf of the Herero*, as justified by the legal principle of *ensuring* the respect of the treaties signed. It then explains what the Herero can do in practice, given the current international political context and its influence on inter-state relations. Adopting a deliberative logic and taking a bilateral or a multilateral approach are the main recommendations from this section.

This paper consists of three main sections. Section one focuses on Germany’s violation of contemporaneous international law: both treaty and customary international law. Section two focuses on the signatories of the General Act of the Berlin Conference and whether they could hold Germany accountable for the genocide and liable for reparations to the Herero. Section three places the paper’s findings in the contemporary international political context to explore how the Herero can approach their case in today’s world.

---

<sup>3</sup> Alien Tort Act 1789, US.

<sup>4</sup> Sarkin, Jeremy and Carly Fowler, “Reparations for Historical Human Rights Violations”, *Hum Rights Rev*, 9, 2008: 331-360 (358).

<sup>5</sup> Guardian, “Germany sued for damages of ‘forgotten genocide’ in Namibia”, *The Guardian*, London 5 January 2017, <https://www.theguardian.com/world/2017/jan/05/germany-sued-forgotten-genocide-namibia-herero-nama>

<sup>6</sup> Sarkin and Fowler, “Reparations”: 333.

<sup>7</sup> Jonathan Stempel, “Lawsuit against Germany over Namibian genocide is dismissed in New York”, *Reuters*, New York, 6 March 2019, <https://www.reuters.com/article/us-namibia-genocide-germany-idUSKCN1QN2SQ>

## Section 1: Contemporaneous international law

This section focuses on Germany's obligations under the international treaties it had signed and customary international law; two sources of international law as outlined in the International Court of Justice's (ICJ) Charter.<sup>8</sup>

### Treaties

The crime of Genocide is defined in Article 2 of the 1948 UN Genocide convention<sup>9</sup> as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" through murder and other means contributing to their "physical destruction". What happened with the Herero was indeed genocide according to this definition. Indeed, they were targeted as a nation and almost exterminated.<sup>10</sup> What is unusual about the Herero genocide is that it was not concealed in any way as it was announced prior to its implementation.<sup>11</sup> The intent of the genocide is best illustrated in Lothar von Trotha's declaration to the Herero in 1904:

I the Great General of the German troops send this letter to the Herero people. The Hereros are no longer German subjects. [...] All the Hereros must leave the land. If the people do not do this, then I will force them to do it with the great guns. Any Herero found within the German borders with or without a gun, with or without cattle, will be shot.<sup>12</sup>

Despite this evidence, the German argument is<sup>13</sup> that the Genocide Convention cannot be used retrospectively for the 1904 Herero genocide.<sup>14</sup> However, while it is true that genocide was first defined in the 1948 Convention, actions falling under the definition of genocide were already outlawed in pre-existing treaties.

Indeed, in massacring the Herero, Germany had violated its obligation under article 6 of the Berlin Conference Act it signed in 1885. This article obliged the colonial powers to protect the natives by stating that:

---

<sup>8</sup> United Nations, *Statute of the International Court of Justice*, 1946, Art. 38.

<sup>9</sup> Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948, entry into force 12 January 1951), 78 UNTS 277, Art. 2.

<sup>10</sup> Jeremy Sarkin, *Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia, 1904-1908*, Westport, Praeger Security International, 2009: 102.

<sup>11</sup> Adam Rothschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa*, Boston, Houghton Mifflin Harcourt, 1999: 281.

<sup>12</sup> Schaller, "Genocide": 89.

<sup>13</sup> Allan Cooper, "Reparations for the Herero Genocide: Defining the limits of international litigation", *African Affairs*, 106 (422), 2007: 113-126 (117).

<sup>14</sup> *Herero v. Germany* (2017) 1:17 CV 00062 USA [55].

All the Powers exercising sovereign rights or influence in the aforesaid territories bind 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.<sup>15</sup>

That Germany then chose to annihilate instead of preserve the Herero nation was a violation of Article 6 and Germany's duty to protect the natives of Namibia.<sup>16</sup> The Herero can use this violation to support their legal position in the American courts.<sup>17</sup>

The idea of using the Berlin Conference Act to support the Herero's claims may seem quite ironic as this was a *colonial* treaty. The treaty itself had the malign purpose of providing a "legitimizing cover" for colonial expansion.<sup>18</sup> As Judge Ammoun<sup>19</sup> best explains, the Berlin conference was a "monstrous blunder", erasing the natives' pre-colonial sovereignty. However, despite its troubled past, the Berlin Conference should not be overlooked simply because it led to a colonial treaty. The Berlin Conference could provide some of the best evidence in support of the Herero's claim for reparations.

Secondly, Germany's policies broke the 1899 Hague convention on the laws of war. Article 23 prohibited certain strategies during warfare such as killing and wounding "treacherously individuals belonging to the hostile nation or army", killing those "having no longer means of defence," and declaring that "no quarter will be given".<sup>20</sup> Similar provision were included in the Geneva Convention of 1864 that included articles on the humane treatment of the wounded enemies. For example, article 6 stated that "Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for."<sup>21</sup> By killing the Herero indiscriminately, Germany violated both The Hague and the Geneva conventions.<sup>22</sup> No quarter was given as most of the Herero people were forced into the Kalahari Desert to die of starvation.<sup>23</sup>

One potential weakness in using The Hague convention to support the Herero case is that under Article 2, the treaty is binding only on the parties to that convention. The Herero were not signatories to The Hague convention and so it might be argued that Germany

---

<sup>15</sup> General Act of the Berlin Conference (signed 26 February 1885), Art. 6.

<sup>16</sup> Sarkin and Fowler, "Reparations": 340f.

<sup>17</sup> Rachel Anderson, "Redressing Colonial Genocide under International Law: The Hereros' Cause of Action Against Germany", *Cal. L. Rev.*, 93, 2005: 1155-1190 (1174).

<sup>18</sup> Matthew Craven, "Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade", *Lon. Rev. Int. Law*, 3, 2015: 31-59 (42).

<sup>19</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion), Separate Opinion of Vice-President Ammoun, ICI Reports (1971) 55 [86].

<sup>20</sup> Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague (signed 29 July 1899, entered into force 4 January 1900), Art. 23.

<sup>21</sup> Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva (signed 22 August 1864), Art. 5-6.

<sup>22</sup> Sidney Harring, "German Reparations to the Herero Nation", *W. Va. L. Rev.*, 104, 2001: 393-417 (400).

<sup>23</sup> Sarkin, *Colonial Genocide*: 80.

did not violate its obligations towards the European signatories. Nonetheless, as Sidney Harring explains “the issue is not the literal application of the Hague Convention to the Herero War. Rather, it is the Convention as a statement of international customary law.”<sup>24</sup>

### Customary international law

Jeremy Sarkin shows that the Hague convention was a reflection of customary international law that was codified in documents like the 1868 St. Petersburg declaration.<sup>25</sup> Analyzing this document shows that there are many parallels between its prohibition of weapons that would “aggravate the sufferings of disabled men, or render their death inevitable;” and the prohibitions in article 23 of the Hague convention.<sup>26</sup> The significance of this declaration is that it confirmed the customary rule that the use of such arms designed to cause unnecessary suffering is forbidden.<sup>27</sup> Sarkin then explains that Germany violated these contemporaneous customary standards of warfare as the Germans aimed at the complete destruction of the Herero.

Another important document that Sarkin references is the 1874 Brussels Conference. He explains that “while the Conference resolution was never ratified, it certainly indicates the customary position at the time”.<sup>28</sup> What is notable is that article 13 of the Brussels Conference is an exact replica of The Hague’s Article 23 which supports the idea that these were all customary principles guiding state practice.<sup>29</sup> Indeed, the ICJ confirmed this in its *Advisory opinion on the legality of nuclear weapons* when it stated that:

The “laws and customs of war” [...] were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874.<sup>30</sup>

Furthermore, Germany *knew* it was breaking international law during the genocide. When news about Germany’s ruthless colonial policy reached the British Press, a German general wrote in a private message: ‘However ruthless one’s colonial policy, it is necessary to give one’s actions a *semblance* of legality.’<sup>31</sup> More importantly, von Trotha himself admitted that his actions violated international law in an article he wrote in 1909 on the Herero Genocide when he stated: “It goes without saying that war in Africa cannot be

---

<sup>24</sup> Harring, “German Reparations”: 407.

<sup>25</sup> Sarkin, *Colonial Genocide*: 78.

<sup>26</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg (signed 11 December 1869).

<sup>27</sup> ICRC, “Commentary on St. Petersburg declaration”, 2017, <https://ihl-databases.icrc.org/ihl/INTRO/130?OpenDocument>

<sup>28</sup> Sarkin, *Colonial Genocide*: 78f.

<sup>29</sup> Project of an International Declaration concerning the Laws and Customs of War, Brussels (signed 27 August 1874), Art. 13.

<sup>30</sup> Legality of the Threat or Use of Nuclear Weapons, (Advisory Opinion), ICJ Rep 1996, 226 [75].

<sup>31</sup> Horst Drechsler, *Let us Die Fighting*, London, Zed, 1980: 81.

waged according to the Geneva Convention. A nation doesn't perish so quickly."<sup>32</sup> Thus, international law prohibiting genocide clearly existed in 1904, yet Germany chose to ignore it.

## Reparations

The Herero's claims for reparations faces a significant challenge. Dinah Shelton explains that 'Namibia has received some 1 billion DM in German aid, "which may be seen to constitute a type of reparation."<sup>33</sup> Thus, there is the view that German aid to Namibia has already 'cancelled-out' the Herero's claims for Reparations.

This aid, however, does not invalidate the claim for reparations. In the *Chorzow Factory Case*, the Permanent International Court of Justice (PICJ) explained in its judgement that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation" and more importantly, that such reparations "must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".<sup>34</sup>

In the case of the Herero, no reparations have been made for the violations of contemporaneous international law.<sup>35</sup> Secondly, no steps have been taken by Germany to remove the consequences of the Herero genocide. Instead, Germany has insisted that it will not make reparations specifically to the Herero in future payments to Namibia.<sup>36</sup> Thus, given that no aid has reached the Herero, their reparation claims are actually strengthened rather than weakened.

## Herero as third-party rights holders?

Before ending this section, it is important to mention Rachel Anderson's argument that states that the Berlin Conference gave the Herero third-party beneficiary rights.<sup>37</sup> As rights holders, they can therefore demand reparations from Germany for violating those rights. A third party under international law is a state that has not signed an agreement.<sup>38</sup> Such

---

<sup>32</sup> Quoted in: Gerhard Pool, *Samuel Maharero*, Windhoek, Gamsberg, 1991: 273f.

<sup>33</sup> Dinah Shelton, "The world of atonement: Reparations for historical injustices", *Miskolc Journal of International Law*, 1, 2003: 259-285 (283).

<sup>34</sup> Chorzow Factory Case Germany v Poland (1928) PCIJ (Judgement) (ser. A) 17, 29 & 47.

<sup>35</sup> Lynn Berat, "Genocide: The Namibian Case Against Germany", *Pace Int'l L. Rev.*, 5, 1993: 165-210 (207).

<sup>36</sup> Guardian, "Germany sued for damages of 'forgotten genocide' in Namibia", *The Guardian*, London 5 January 2017, <https://www.theguardian.com/world/2017/jan/05/germany-sued-forgotten-genocide-namibia-herero-nama>

<sup>37</sup> Anderson, "Redressing": 1185-1189.

<sup>38</sup> Hans Ballreich, "Treaties, Effect on Third States", in: Rudolf Bernhardt, (ed.), *Encyclopedia of Public International Law*, 7, Amsterdam, North-Holland, 1984: 476-479 (476).



third parties may be granted rights under a treaty “if the parties to the treaty intend the provision to accord that right”, as is stated in the 1969 Vienna Convention on the Law of Treaties.<sup>39</sup> Anderson argues that the signatories of the Berlin Conference Act did imply this intent in the protocols of the treaty which may serve to indicate that the natives (including the Herero) were given a right to protection from colonial harm.<sup>40</sup> She points out that Hereroland was actually a state and therefore a valid third party to the conference.<sup>41</sup>

Nonetheless, although the Herero had some of the characteristics of a state such as a population<sup>42</sup>, territory<sup>43</sup> and a tribal government<sup>44</sup>, it is not clear that they had the “capacity to enter into relations with other states”; the fourth criteria stated in the Montevideo Convention<sup>45</sup> codifying customary international law on the requirements for statehood.<sup>46</sup> Anderson views the bilateral protection treaties signed between the Herero chiefs and the Germans as evidence of the Herero exercising this capacity and emphasising their sovereignty.<sup>47</sup> However, as Matthew Craven explains in his work on “unequal treaties”, many of the protection treaties were concluded under “a dint of coercion” by the colonialists and more importantly, they were “non-reciprocal” because they placed all the duties on the natives.<sup>48</sup> Craven questions whether such treaties can be used as evidence for state sovereignty. The Herero protection treaties<sup>49</sup> feature many of the weaknesses that Craven identifies.<sup>50</sup> Finally, Anderson’s argument does not include evidence that the legal concept of third-party rights existed at the time of the Berlin Conference.<sup>51</sup> Thus, although Anderson provides a very interesting and a potentially game-changing argument that still has the potential to support the Herero demands for reparations, there are still issues that must be addressed to fully support the argument

---

<sup>39</sup> Vienna Convention on the Law of Treaties (signed 23 May 1969, entry into force 27 January 1980), 1155 UNTS 331, Art. 36.

<sup>40</sup> R.J. Gavin and J.A. Betley, *The Scramble For Africa: Documents On The Berlin West African Conference*, Ibadan, Ibadan University Press, 1973: 172.

<sup>41</sup> Anderson, “Redressing”: 1178.

<sup>42</sup> Karl Doehring, “State”, in: Rudolf Bernhardt, (ed.), *Encyclopedia of Public International Law*, 10, Amsterdam, North-Holland, 1987: 423-427 (424).

<sup>43</sup> Helmut Bley, *South-West Africa under German Rule*, London, Heinemann, 1971.

<sup>44</sup> Jan-Bart Gewald, *Herero Heroes*, Ohio, Ohio University Press, 1999: 27.

<sup>45</sup> Convention on Rights and Duties of States, Montevideo (signed 26 December 1933) 165 LNTS 19, Art. 1.

<sup>46</sup> David Harris and Sandesh Sivakumaran, *Cases and Material on International Law*, London, Reuters, 2015: 88.

<sup>47</sup> Anderson, “Redressing”: 1182.

<sup>48</sup> Matthew Craven, “What Happened to Unequal Treaties? The Continuities of Informal Empire”, *Nordic J. Int'l L.*, 74, 2005: 335-82 (351f.).

<sup>49</sup> Pool, *Maharero*: 60-62.

<sup>50</sup> Drechsler, *Die Fighting*: 27.

<sup>51</sup> Sarkin and Fowler, “Reparations”: 342f.

that the Herero were rights holders under this treaty. If such evidence can be provided, the Herero demands for compensation will become more convincing.

## Section 2: Approaching the signatories

The previous section has shown that Germany violated article 6 of the Berlin Conference Act. This raises the question: *was there anything that the signatories could have done to stop it?* The answer is yes. Indeed, they had a duty under customary international law to ensure that the treaty was not violated by any of the parties, i.e. they had a duty to *ensure* respect for the treaty.

### Common article 1

This principle is codified in Common Article 1 of the four Geneva conventions of 1949 that are now used as the foundations of international humanitarian law; establishing standards for state conduct in times of war.<sup>52</sup> Article 1 states that:

The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.<sup>53</sup>

It is notable that this article appears in the first Geneva convention of 1949 on the *Amelioration of the Condition of the Wounded and Sick in the field*, which is the fourth updated version of the 1864 Geneva Convention and which von Trotha admitted to violating.<sup>54</sup>

The significance of Article 1 is that it places an obligation on the parties to those conventions to not only respect the treaty themselves within their jurisdiction, but to ensure that the *other* signatories also comply with its provisions. The article therefore creates obligations *erga omnes partes*, i.e. "obligations towards all of the other High Contracting Parties."<sup>55</sup> Thus in the event of a party failing to fulfill its treaty obligations, the other signatories should 'endeavor to bring it back to an attitude of respect for the Convention' as Jean Pictet explains in his analysis.<sup>56</sup>

The obligation of ensuring respect can be fulfilled in several ways. The High Contracting Parties may, at the request of any of the signatories and with the approval of the majority

---

<sup>52</sup> Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (signed 12 August 1949) 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (signed 12 August 1949) 75 UNTS 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War (signed 12 August 1949), 75 UNTS 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (signed 12 August 1949), 75 UNTS 287; common Art. 1.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> ICRC, "Commentary: Article 1: Respect for the Convention", 2016: 119, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD#37>

<sup>56</sup> Jean Pictet, (ed.), *Commentary on the First Geneva Convention*, Geneva, ICRC, 1952: 26.

of those parties, convene a meeting to “consider general problems concerning the Application of the Conventions” as stated in Article 7 of the first Protocol to the Geneva conventions.<sup>57</sup> The signatories can then decide how to react and may for example, create an ad hoc tribunal if they wish. The obligation can also be fulfilled through the principle of universality of jurisdiction, which allows states to try cases regardless of there being a direct link between the state and the case.<sup>58</sup>

It might be argued that this obligation did not exist during the Berlin Conference and thus the applicability of Article 1 to the Herero genocide may be called into question. Indeed, Dormann and Serralvo argue that Common Article 1 introduced a new principle in international law by creating an ‘unprecedented’ legal duty on the signatories to “take action in order to safeguard the compliance with the Geneva Convention”.<sup>59</sup> In their view, the article goes a ‘step further’ beyond the basic principle of *Pacta sunt servanda* codified in article 26 of the Vienna Convention on the law of treaties which states that “every treaty in force is binding upon the parties to it”.<sup>60</sup>

Nonetheless, Dormann’s and Serralvo’s analysis is misguided in presenting the obligations in Article 1 as a new creation. Indeed, the International Committee of the Red Cross<sup>61</sup> commentary on Article 1, effectively explains that it was not a new concept for it was already ‘implicit’ in Article 8 of the 1864 Geneva Convention that instructed the signatories’ Commanders-in-Chief to implement the convention.<sup>62</sup> More importantly, in the ICJ’s judgement in the *Nicaragua v United States case*<sup>63</sup>, the court stated that the obligation in Article 1 came not only from the 1949 Geneva conventions, “but from the general principles of humanitarian law to which the Conventions merely give specific expression.” Thus, in the opinion of the World Court, this obligation of ensuring that treaties are respected has always been *independent* of the Geneva conventions.

---

<sup>57</sup> Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977), 1125 UNTS 3, Art 7.

<sup>58</sup> Laurence Chazournes and Luigi Condorelli, “Common Article 1 of the Geneva Conventions revisited: Protecting collective interests”, *International Review of the Red Cross*, 82, 2000: 67-87.

<sup>59</sup> Knut Dormann and Jose Serralvo, “Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations”, *International Review of the Red Cross*, 96, 2014: 707-736 (711).

<sup>60</sup> Vienna Convention (n 39) Art. 26.

<sup>61</sup> ICRC, “Commentary: Article 1: Respect for the Convention”, 2016: 122, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD#37>

<sup>62</sup> Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva (signed 22 August 1864), Art. 8.

<sup>63</sup> Military and Paramilitary Activities in and against Nicaragua, *Nicaragua v. United States* (1988) Merits (Judgment) ICJ 14 (220).

The ICJ in its *Wall* advisory opinion further emphasises that the idea of having “obligations which are essentially of an *erga omnes* character”<sup>64</sup> (i.e. obligations towards all) had already been incorporated in many rules of international humanitarian law; once again giving support to the idea that the nature of the obligation in Article 1 was never new, but rather a reflection of customary international law.<sup>65</sup>

For the Herero to support their case with Article 1, they would need solid evidence that this obligation existed prior to the 1949 Geneva Conventions. They could possibly resort to the 1919 Versailles treaty which held Germany responsibly for “a supreme offence” against the “sanctity of treaties” and consequently obliged it to pay reparations.<sup>66</sup> By establishing a “special tribunal” composed of international judges to try Germany,<sup>67</sup> the Allied powers were effectively *ensuring* respect for the treaties that Germany had signed and then violated. Nonetheless, even if this example is rejected based on the idea of victor’s justice, there is further evidence for the existence of the obligation in Article 1 with regards to the Berlin Conference Act itself.

### Berlin Conference

In 1903, a year before the Herero genocide, Belgium had committed mass-murder in the Congo;<sup>68</sup> a clear violation of its obligation to preserve the native population as per Article 6 of the Berlin Conference Act. Its violations were well documented in the report compiled by Roger Casement, the British Consul in Congo at the time. The Casement report documents a “great decrease in population” resulting from Belgium’s colonial policy.<sup>69</sup>

What is highly significant is how this report was received in the UK, a signatory of the Berlin Conference Convention. Following discussions, the House of Commons passed a resolution requesting the government to “*confer with the other Powers, signatories of the Berlin General Act [...] in order that measures may be adopted to abate the evils prevalent in that State.*”<sup>70</sup>

---

<sup>64</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) (Advisory Opinion) ICJ 136 (157).

<sup>65</sup> Carlo Focarelli, “Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?”, *EJIL*, 21, 2010: 125-171 (127).

<sup>66</sup> Peace Treaty of Versailles (28 June 1919), Art. 227 and 232.

<sup>67</sup> Edoardo Greppi, “The evolution of individual criminal responsibility under International law”, *International Review of the Red Cross*, 835, 1999: 531-553, <https://www.icrc.org/eng/resources/documents/article/other/57jq2x.htm>

<sup>68</sup> Rothschild, *King Leopold's Ghost* : 283.

<sup>69</sup> Casement Report 1903 and Diplomatic Correspondences in *Accounts and Papers, Colonies and British Possessions* (1904) Vol LXII, 33-56 (33), <https://ia601006.us.archive.org/14/items/CasementReport/CasementReportSmall.pdf>

<sup>70</sup> Congo Free State HC Resolution (05-1903), 1332, emphasis added, [http://hansard.millbanksystems.com/commons/1903/may/20/congo-free-state#column\\_1332](http://hansard.millbanksystems.com/commons/1903/may/20/congo-free-state#column_1332)

What is more significant is that the British government did indeed send a letter in August 1903 to the signatories, including Germany, stating that:

His Majesty's Government are of the opinion that it is *incumbent* upon the Powers parties to the Berlin Act to confer together and to consider whether the obligations undertaken by the Congo State in regard to the natives have been fulfilled; and, if not, whether the Signatory Powers are not *bound* to make such representations *as may secure the due observance of the provisions contained in the Act*.<sup>71</sup>

This extract is highly important because it reveals that the UK believed that there was an obligation making it “incumbent” upon the signatories to “secure the due observance” of the Berlin Act, which emphasises that Article 1 of the Geneva Conventions was already a customary legal principle in the early 1900s. The UK then suggested that the signatories may even resort to a “Tribunal at the Hague” to fulfil their legal obligation.<sup>72</sup>

There is no evidence that a meeting took place, perhaps because Belgium’s strongly worded response which indirectly threatened the UK that a case against Belgium could have meant a case against the UK regarding Britain’s involvement in “wars against native populations”.<sup>73</sup> Nonetheless, the attempt itself at conveying a meeting between the signatories emphasises that there existed *opinio juris* or a sense of legal obligation among the signatories, which imposed a duty on them to *ensure* the compliance with the resolutions of the Berlin Conference across all the parties to this convention.

The letter between the Nama Leader Hendrik Witbooi and the British Magistrate of Walvis Bay (a port in Namibia that was under British control) is perhaps the strongest proof that ensuring the respect for treaties was widely understood in international relations discourse. Significantly, Witbooi urges the Magistrate to forward his letter outlining the Germany’s violations in Namibia to the UK:

So British politicians may hear about this, and hold *another conference* and deliberate about these Germans, to recall them if possible from our country; for they do not *abide* by the Agreement and conditions under which you allowed them to enter this country. Since these men came under your agreement, *you can hold them to it, or call them back if they are not abiding by your decisions*.<sup>74</sup>

Witbooi’s requests when read in the legal context indicate that Article 1 of the Geneva Convention was alive and well during the Herero genocide. Witbooi was effectively calling on the UK to enforce Article 1 and convene a meeting of the signatories to hold Germany accountable for the violation of the Berlin Act. The act of convening a meeting to ensure

---

<sup>71</sup> Marquess of Lansdown, *Despatch to certain of His Majesty's Representatives abroad in regard to alleged Cases of Ill-treatment of Natives and to the Existence of Trade Monopolies in the Independent State of the Congo* (1903), 2, emphasis added, <https://ia601006.us.archive.org/14/items/CasementReport/CasementReportSmall.pdf>

<sup>72</sup> Ibid 3.

<sup>73</sup> Casement Report and Diplomatic Correspondences in *Accounts and Papers, Colonies and British Possessions* (1904) Vol LXII, De Cuvelier correspondence, 16.

<sup>74</sup> Annemarie Heywood and Eben Maasdorp (trs.), *The Hendrik Witbooi Papers*, Windhoek, National Archives, 1990: 92, emphasis added.

the respect of treaties was codified in Article 7 of the 1949 Geneva Protocol, as explained previously.<sup>75</sup> Witbooi's reference to a 'conference' further supports the idea that holding meetings between the signatories to ensure the respect of treaties was already understood as an international legal obligation at the time.

### Theoretical implications

Following a 1999 General Assembly resolution<sup>76</sup> recommending a meeting, a short conference was held amongst the signatories of the 1949 Geneva Conventions to ensure Israel's respect for its treaty obligations regarding its military actions in Palestine.<sup>77</sup> There is no legal obstacle preventing the Herero from approaching the signatories today and calling for a similar meeting.

A successful meeting between the signatories of the Berlin Act could issue a declaration calling on Germany to pay compensation to the Herero for the violation of this treaty. The high contracting parties may also wish to establish an ad hoc court or even exercise universal jurisdiction to try a case against Germany in their national courts and, ultimately, to secure reparations for the Herero. This could be a successful route if Germany then accepts the jurisdiction of such courts and does not uphold its state immunity.

Using article 1 of the Geneva Conventions to allow the signatories of the Berlin Act to secure reparations on behalf of the Herero would have large implications for other colonial genocides. The Congolese could seek to hold Belgium accountable in the courts of the signatories for the murder of 5-10 million people<sup>78</sup> during its colonisation. Similarly, the descendants of the Armenian genocide<sup>79</sup> may approach the signatories to help them with their claims for reparations against Turkey; another signatory of the Berlin Act under Ottoman Rule.

### Section 3: The current context and practical implications

Although the above scenario makes legal sense and can potentially proceed, there remains the question whether such a scenario would be practically possible in today's world. If the Herero or the Namibian government do approach the signatories of the Berlin Act, would they be willing to hold Germany accountable for its historical actions?

---

<sup>75</sup> Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977), 1125 UNTS 3.

<sup>76</sup> UNGA Res ES-10/6 (9 February 1999) [6].

<sup>77</sup> Ardi Imseis, "On the Fourth Geneva Convention and the Occupied Palestinian Territory", *Harv. Int'l L.J.*, 44, 2003: 65-138 (135-137).

<sup>78</sup> Sarkin, *Colonial Genocide*: 155.

<sup>79</sup> Rouben P. Adalian, "The Armenian Genocide", in: Samuel Totten and William Parsons, (eds.), *Centuries of Genocide*, London, Routledge, 2012: 116-155.

## The political context

Significantly, most of the signatories of the Berlin Act are European countries which have amicable diplomatic relations with Germany, as exemplified by their membership and interactions in the European Union. Issuing a declaration or establishing an ad hoc court for the Herero case may then impact the diplomatic relations among those European states. Considering also the colonial history of the signatories, they may want to avoid taking legal steps against Germany simply because this may then require them to also pay reparations to the descendants of victims during their colonial rule.<sup>80</sup>

From a Namibian perspective, and considering the asymmetric power relations, Namibia may refrain from taking a *legal* approach against an established European power, which is also Europe's largest economy and a pivotal state that is often referred to as 'the leader of Europe'.<sup>81</sup> It is also important to note that contemporary Namibian-German relations are strong and friendly. Germany already recognises "its special responsibility on account of the two countries' shared colonial past (1884-1915)" and has been playing an active role in supporting Namibia's Development.<sup>82</sup> Germany's Federal Foreign Office states that its development cooperation with Namibia provides funding for "local development in parts of the country that are home to ethnic groups particularly adversely affected by German colonial rule."<sup>83</sup>

It is important to note that it is within this political context that the demands for reparations are taking place and it is this same context that has been influencing the developments and the progress in the Herero's demands for reparations.<sup>84</sup> In a notable step in recognition of its historical past in Namibia, Germany has recently officially recognised that what happened in Namibia under colonial rule was genocide.<sup>85</sup> Germany's then foreign minister, Heiko Maas, has stated following negotiations with Namibia that: "We will now officially call these events what they are from today's perspective: a genocide."<sup>86</sup> This recognition also included an announcement of aid:

---

<sup>80</sup> Henning Melber, "Germany and reparations: the reconciliation agreement with Namibia", *The Round Table*, 111 (4), 2022: 475-488 (477).

<sup>81</sup> AFP, "As Merkel bows out, Europe seeks new leader", AFP, Berlin, 1 December 2021, <https://www.france24.com/en/live-news/20211201-as-merkel-bows-out-europe-seeks-new-leader>

<sup>82</sup> Federal Foreign Office, "Germany and Namibia: Bilateral relations", German Federal Foreign Office, 16 October 2019, <https://www.auswaertiges-amt.de/en/aussenpolitik/laenderinformationen/namibia-node/namibia/209094>

<sup>83</sup> Ibid.

<sup>84</sup> Franziska Boehme, "Reactive remembrance: The political struggle over apologies and reparations between Germany and Namibia for the Herero genocide", *Journal of Human Rights*, 19 (2), 2020: 238-255 (249f.).

<sup>85</sup> BBC, "Germany officially recognises colonial-era Namibia genocide", *BBC*, 28 May 2021, <https://www.bbc.co.uk/news/world-europe-57279008>

<sup>86</sup> Federal Foreign Office, "Foreign Minister Maas on the conclusion of negotiations with Namibia", German Federal Foreign Office, 28 May 2021, <https://www.auswaertiges-amt.de/en/newsroom/news/-/2463598>

As a gesture of recognition of the immeasurable suffering inflicted on the victims, we want to support Namibia and the victims' descendants with a substantial programme to the tune of 1.1 billion euro for reconstruction and development. The communities affected by the genocide will play a key role in shaping and implementing this programme. Legal claims for compensation cannot be derived from it.<sup>87</sup>

However, as Marina Adami notes, "The statement notably avoids the term reparations, and Maas underlined that this funding did not open the door to 'legal claims for compensation.'"<sup>88</sup> The labelling of the money pledged is significant since this choice has political implications; aid gives the donor the ability to dictate where the money will go, whereas reparations give the victims the authority to control how the money will be used.<sup>89</sup> It is therefore no surprise that some of the Herero and Nama people have criticised this agreement, describing it as "a PR stunt by Germany".<sup>90</sup>

The Chairman of the Namibian Genocide Association, Laidlaw Peringanda, said that this aid offer was insufficient and added in a statement to BBC World Service that: "we're actually not accepting that offer because our people have lost lands, they have lost their culture and a lot of them have fled to Botswana, South Africa and some of them were taken to Togo and Cameroon."<sup>91</sup> He further added that "Germany should buy back ancestral lands now in the hands of the German-speaking community".<sup>92</sup> Land restoration is a popular demand in Namibia especially given the fact that most of the Herero and Nama people today live in "small overcrowded areas of communal land".<sup>93</sup>

## Practical approaches

Given that Germany has not provided reparations to the descendants of the Herero genocide, it is clear that this issue has not been closed. So what can the Herero and Nama people do in today's world to secure reparations from Germany? The first step is for the Herero and Nama people's representatives to make a diplomatic approach to Germany and call for new negotiations to specifically discuss the demand for reparations. The support of the Namibian government would strengthen their position as Germany would

---

<sup>87</sup> Ibid.

<sup>88</sup> Marina Adami, "Germany recognizes Herero and Nama genocide", *Politico*, 28 May 2021, <https://www.politico.eu/article/germany-recognizes-colonial-herero-nama-genocide/>

<sup>89</sup> Tom Bentley, *Empires of Remorse: Narrative, Postcolonialism and Apologies for Colonial Atrocity*, Oxon, Routledge, 2016.

<sup>90</sup> Deutsche Welle, "Germany officially recognizes colonial-era Namibia genocide", *Deutsche Welle*, 28 May 2021, <https://www.dw.com/en/germany-officially-recognizes-colonial-era-namibia-genocide/a-57671070>

<sup>91</sup> BBC, "Germany officially recognises colonial-era Namibia genocide", *BBC*, 28 May 2021, <https://www.bbc.co.uk/news/world-europe-57279008>

<sup>92</sup> Ibid.

<sup>93</sup> Tim Whewell, "Germany and Namibia: What's the right price to pay for genocide?", *BBC*, 1 April 2021, <https://www.bbc.co.uk/news/stories-56583994>



be more likely to open negotiations with another sovereign state, rather than with groups *within* a state.

Adopting a deliberative approach here, characterised by providing reasoned justifications for the demands during inclusive deliberations, and arriving at a common understanding and consensual agreements, would be a highly desirable outcome.<sup>94</sup> This deliberative approach would enable the Herero and Nama people to present their arguments and explain why they are entitled to reparations. The historical legal evidence discussed above would have to be brought into the discussion to make it clear that the Herero are not seeking financial *help* from Germany, but rather the implementation of a legal *right* to reparations. Thus, even if a legal route is not taken, it does not mean that a legal *argument* cannot be used to support the Namibian people's position. Making use of historical legal evidence will provide added strength to the Herero position because the law is on their side, even if diplomatic rather than legal channels are sought.

In the event of the above bilateral approach proving fruitless, the Herero and Nama people, along with the Namibian government, can resort to multilateral channels. Taking their demand for reparations to the United Nations or the African Union would be options. Discussing this issue with other African states and peoples, who have their own interests in the issue, would likely translate into added support for the Herero's position. The impact of colonialism has been felt in almost every African country, as well as in developing countries in groups such as the G77, and there is likely to be much sympathy for the Herero's demands among such countries. Such calls for reparations from the people of Namibia may then turn into collective demands for victims of colonial genocides across a number of developing countries. A multilateral approach would also have the added benefit of correcting some of the asymmetry in the power relations, especially if other countries joined Namibia in demanding reparations.

## Conclusion

The Herero have strong legal evidence to support their demands for reparations from Germany. Section one showed that von Trotha's genocidal declaration was a violation of Germany's treaty obligations and contemporaneous customary international law. Section two contributed to the Herero case study by showing that, in theory, the Herero could approach the signatories of the Berlin Conference Act to sue Germany for reparations based on the principle of ensuring the respect for the treaties signed. Section three then considered the current political situation and why a legal approach, despite remaining possible, may present some challenges. The section explained the current political context and then highlighted feasible approaches available to the Namibian people today. A bilateral or a multilateral approach are both recommended. It is hoped that the findings and discussions in this article will result in progress on this important case.

---

<sup>94</sup> Jürgen Habermas, *Moral Consciousness and Communicative Action*, translated by Christian Lenhardt and Shierry Nicholson, Cambridge, Polity Press, 1990; idem, *Justification and Application: Remarks on Discourse Ethics*, translated by Ciaran Cronin, Cambridge, Polity Press, 1993.

## Bibliography

### Books and Articles

- Adalian, Rouben P., "The Armenian Genocide", in: Samuel Totten and William Parsons, (eds.), *Centuries of Genocide*, London, Routledge, 2012: 116-155.
- Anderson, Rachel, "Redressing Colonial Genocide under International Law: The Hereros' Cause of Action Against Germany", *Cal. L. Rev.*, 93. 2005: 1155-1190.
- Ballreich, Hans, "Treaties, Effect on Third States", in: Rudolf Bernhardt, (ed.), *Encyclopedia of Public International Law*, 7, Amsterdam, North-Holland, 1984: 476-479.
- Bentley, Tom, *Empires of Remorse: Narrative, Postcolonialism and Apologies for Colonial Atrocity*, Oxon, Routledge, 2016.
- Berat, Lynn, "Genocide: The Namibian Case Against Germany", *Pace Int'l L. Rev.*, 5, 1993: 165-210.
- Bley, Helmut, *South-West Africa under German Rule*, London, Heinemann, 1971.
- Boehme, Franziska, "Reactive remembrance: The political struggle over apologies and reparations between Germany and Namibia for the Herero genocide", *Journal of Human Rights*, 19 (2), 2020: 238-255.
- Chazournes, Laurence and Luigi Condorelli, "Common Article 1 of the Geneva Conventions revisited: Protecting collective interests", *International Review of the Red Cross*, 82, 2000: 67-87.
- Cooper, Allan, "Reparations for the Herero Genocide: Defining the limits of international litigation", *African Affairs*, 106 (422), 2007: 113-126.
- Craven, Matthew, "Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade", *Lon. Rev. Int. Law*, 3, 2015: 31-59.
- Craven, Matthew, "What Happened to Unequal Treaties? The Continuities of Informal Empire", *Nordic J. Int'l L.*, 74, 2005: 335-82.
- Doehring, Karl, "State", in: Rudolf Bernhardt, (ed.), *Encyclopedia of Public International Law*, 10, Amsterdam, North-Holland, 1987: 423-427.
- Dormann, Knut and Jose Serralvo, "Common Article 1 to the Geneva Conventions and the obligation to prevent international humanitarian law violations", *International Review of the Red Cross*, 96, 2014: 707-736.
- Drechsler, Horst, *Let us Die Fighting*, London, Zed, 1980.
- Focarelli, Carlo, "Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?", *EJIL*, 21, 2010: 125-171.
- Gavin, R.J. and J.A. Betley, *The Scramble For Africa: Documents On The Berlin West African Conference*, Ibadan, Ibadan University Press, 1973.
- Gewald, Jan-Bart, *Herero Heroes*, Ohio, Ohio University Press, 1999.
- Greppi, Edoardo, "The evolution of individual criminal responsibility under International law", *International Review of the Red Cross*, 835, 1999: 531-553, <https://www.icrc.org/eng/resources/documents/article/other/57jq2x.htm>
- Habermas, Jürgen, *Moral Consciousness and Communicative Action*, translated by Christian Lenhardt and Shierry Nicholson, Cambridge, Polity Press, 1990.

- Habermas, Jürgen, *Justification and Application: Remarks on Discourse Ethics*, translated by Ciaran Cronin, Cambridge, Polity Press, 1993.
- Harring, Sidney, "German Reparations to the Herero Nation", *W. Va. L. Rev.*, 104, 2001: 393-417.
- Harris, David and Sandesh Sivakumaran, *Cases and Material on International Law*, London, Reuters, 2015.
- Heywood, Annemarie and Eben Maasdorp (trs.), *The Hendrik Witbooi Papers*, Windhoek, National Archives, 1990.
- Imseis, Ardi, "On the Fourth Geneva Convention and the Occupied Palestinian Territory", *Harv. Int'l L.J.*, 44, 2003: 65-138.
- Melber, Henning, "Germany and reparations: the reconciliation agreement with Namibia", *The Round Table*, 111 (4), 2022: 475-488.
- Pictet, Jean, (ed.), *Commentary on the First Geneva Convention*, Geneva, ICRC, 1952.
- Pool, Gerhard, *Samuel Maharero*, Windhoek, Gamsberg, 1991.
- Rothschild, Adam, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa*, Boston, Houghton Mifflin Harcourt, 1999.
- Sarkin, Jeremy and Carly Fowler, "Reparations for Historical Human Rights Violations", *Hum Rights Rev*, 9, 2008: 331-360.
- Sarkin, Jeremy, *Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia, 1904-1908*, Westport, Praeger Security International, 2009.
- Schaller, Dominik, "The Genocide of the Herero and Nama", in: Samuel Totten and William Parsons, (eds.), *Centuries of Genocide*, London, Routledge, 2013: 89-116.
- Shelton, Dinah, "The world of atonement: Reparations for historical injustices", *Miskolc Journal of International Law*, 1, 2003: 259-285.

### Reports and other electronic documents

- Adami, Marina, "Germany recognizes Herero and Nama genocide", *Politico*, 28 May 2021, <https://www.politico.eu/article/germany-recognizes-colonial-herero-nama-genocide/>
- AFP, "As Merkel bows out, Europe seeks new leader", AFP, Berlin, 1 December 2021, <https://www.france24.com/en/live-news/20211201-as-merkel-bows-out-europe-seeks-new-leader>
- BBC, "Germany officially recognises colonial-era Namibia genocide", *BBC*, 28 May 2021, <https://www.bbc.co.uk/news/world-europe-57279008>
- Casement Report 1903 and Diplomatic Correspondences in Accounts and Papers, Colonies and British Possessions, Vol LXII, 1904, <https://ia601006.us.archive.org/14/items/CasementReport/CasementReportSmall.pdf>
- Deutsche Welle, "Germany officially recognizes colonial-era Namibia genocide", *Deutsche Welle*, 28 May 2021, <https://www.dw.com/en/germany-officially-recognizes-colonial-era-namibia-genocide/a-57671070>

- Federal Foreign Office, "Foreign Minister Maas on the conclusion of negotiations with Namibia", German Federal Foreign Office, 28 May 2021, <https://www.auswaertiges-amt.de/en/newsroom/news/-/2463598>
- Federal Foreign Office, "Germany and Namibia: Bilateral relations", German Federal Foreign Office, 16 October 2019, <https://www.auswaertiges-amt.de/en/aussenpolitik/laenderinformationen/namibia-node/namibia/209094>
- Guardian, "Germany sued for damages of 'forgotten genocide' in Namibia", *The Guardian*, London 5 January 2017, <https://www.theguardian.com/world/2017/jan/05/germany-sued-forgotten-genocide-namibia-herero-nama>
- ICRC, "Commentary on St. Petersburg declaration", 2017, <https://ihl-databases.icrc.org/ihl/INTRO/130?OpenDocument>
- ICRC, "Commentary: Article 1: Respect for the Convention", 2016, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD#37>
- Marquess of Lansdowne, *Despatch to certain of His Majesty's Representatives abroad in regard to alleged Cases of Ill-treatment of Natives and to the Existence of Trade Monopolies in the Independent State of the Congo*, 1903, <https://ia601006.us.archive.org/14/items/CasementReport/CasementReportSmall.pdf>
- Stempel, Jonathan, "Lawsuit against Germany over Namibian genocide is dismissed in New York", *Reuters*, New York, 6 March 2019, <https://www.reuters.com/article/us-namibia-genocide-germany-idUSKCN1QN2SQ>
- Whewell, Tim, "Germany and Namibia: What's the right price to pay for genocide?", *BBC*, 1 April 2021, <https://www.bbc.co.uk/news/stories-56583994>

## Treaties

- Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague (signed 29 July 1899, entered into force 4 January 1900)
- Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva (adopted 22 August 1864)
- Convention on Rights and Duties of States, Montevideo (signed 26 December 1933) 165 LNTS 19
- Convention on the Prevention and Punishment of the Crime of Genocide (signed 9 December 1948, entry into force 12 January 1951), 78 UNTS 277
- Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg (signed 11 December 1869)
- General Act of the Berlin Conference (signed 26 February 1885)
- Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (signed 12 August 1949) 75 UNTS 31
- Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (signed 12 August 1949) 75 UNTS 85
- Geneva Convention (III) Relative to the Treatment of Prisoners of War (signed 12 August 1949), 75 UNTS 135

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (signed 12 August 1949), 75 UNTS 287  
Peace Treaty of Versailles (28 June 1919)  
Project of an International Declaration concerning the Laws and Customs of War. Brussels (signed 27 August 1874)  
Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977), 1125 UNTS 3  
Vienna Convention on the Law of Treaties (signed 23 May 1969, entry into force 27 January 1980) 1155 UNTS 331

### **(P)ICJ cases**

Chorzow Factory Case Germany v Poland (1928) PCIJ (Judgement) (ser. A) 17  
Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Separate Opinion) Vice-President Ammoun, ICJ (1971) 55  
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) (Advisory Opinion) ICJ 136  
Legality of the Threat or Use of Nuclear Weapons, (Advisory Opinion), ICJ Rep 1996, 226  
Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States (1988) Merits (Judgment) ICJ 14

### **United Nations documents**

UNCHR, "UN Whitaker Report on Genocide", 1985, E/CN.4/Sub.2/1985/6 [24]  
UNGA Res ES-10/6, 9 February 1999

**United Nations, *Statute of the International Court of Justice, 1946***

### **Domestic cases & legislation**

Alien Tort Act 1789, US  
Congo Free State HC Resolution (05-1903), UK  
[http://hansard.millbanksystems.com/commons/1903/may/20/congo-free-state#column\\_1332](http://hansard.millbanksystems.com/commons/1903/may/20/congo-free-state#column_1332)  
Herero v. Germany (2017) 1:17 CV 00062 USA [55]