

Transitional Justice: Court Cases and Reparations

Rachel Carlson, J.D.

Benjamin B. Ferencz Fellow in Human Rights and Law

Transitional justice consists of judicial and non-judicial measures to redress legacies of human rights abuses. Measures include criminal prosecutions, truth commissions, reparations programs, and institutional reforms.

The Nama and the Herero have brought claims of genocide against the government of Germany for the colonial genocide of 1904-1908. The two groups are demanding that reparations be paid. Special envoys from the governments of Namibia and Germany have begun to coordinate negotiations. However, the Herero and Nama were not able to send representatives to voice the specific concerns of their groups. The government of Namibia, led by a party known as SWAPO, has appointed the teams and representatives to speak on behalf of the affected populations without consultation with Herero or Nama leaders.

Namibia was formerly a territory colonized by the German Second Reich in its efforts to increase land availability for its increasing population, a policy known as *lebensraum*. German colonization of what was then known as German South West Africa began in 1884 and continued through 1915.

During the period from 1904-1908, Germany perpetrated a genocide against the indigenous Nama and the Herero people. These were two different tribes with agricultural knowledge, land, and cattle. While violent acts in the struggle for land took place prior to 1904, the Herero and the Nama point to Lothar von Trotha's order of extermination as the beginning of the genocide. It reads:

I, the great general of the German troops, send this letter to the Herero... The Herero people must leave the land. If they do not do this I will force them with the Groot Rohr [Cannon]. Within the German Borders Every Herero, without or without a gun, with or without cattle, will be shot. I will no longer accept women and children, I will drive them back to their people or I will let them be shot at. These are my words to the Herero People. Signed: The Great General of the Mighty Kaiser, von Trotha.¹

While von Trotha's proclamation explicitly targets the Herero, cattle-owning people, the Nama were also targeted because they owned and occupied desirable land.² In the years following the genocide, fully 85% of the Herero population and nearly 50% of the Nama population were killed. Before the conflict, the German census recorded a Nama population near 20,000.³ By 1908, only 13,000 remained.⁴ Similarly, the German Census calculated the Herero at 80,000 prior to 1904 and only 16,363 remained after the genocide, 5,373 of whom were children.⁵

¹ David Oluoof and Casper W. Erichsen, *The Kaiser's Holocaust: Germany's Forgotten Genocide*. Faber and Faber Ltd., London, 2010 (149-150).

² 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*, Praeger, 2008, p. 5.

³ Oluoof and Erichsen, *The Kaiser's Holocaust*, at (229).

⁴ *Ibid.*, p. 229.

⁵ *Ibid.*, p. 230.

Long-standing Impunity

No trials, none even *in absentia*, were ever held to prosecute the perpetrators of this genocide. In fact, at the time the Herero and Nama were killed, the world did not yet have a word for the crime of a targeted mass slaughter of an ethnic or racial group. This would finally come in 1948, with the United Nations' adoption of the *Convention on the Prevention and Punishment of the Crime of Genocide*.

Less than forty years after the Herero genocide, Germany's Third Reich perpetrated another genocide, this time in Europe. The methods used to exterminate Jews and other targeted groups in the Holocaust of the 1940s were eerily similar to the strategies used decades earlier to annihilate the Herero and Nama.

After World War II, the Nuremberg trials created a precedent of *ad hoc* tribunals to prosecute criminals who had perpetrated genocide. In addition to this retributive justice, Holocaust victims sought and received reparations for Germany's actions.

However, to this day no reparations have been paid to the Herero and the Nama peoples. The government of Germany delayed recognition of responsibility, in fact, for a century. An acknowledgement by way of apology was not issued until 2004, a hundred years after the start of the killings.⁶ Even then, the German Minister of Development aid who issued the statement was hotly criticized and her remarks were denied as any admittance of government culpability.⁷ In July of 2016 it was finally announced that German Prime Minister Angela Merkel would formally apologize on behalf of the nation.⁸ Despite the apology, there has been no financial acknowledgement, unlike Germany's reparations to both the state of Israel and to individuals for what occurred during the Holocaust. The situation has, indeed, been quite the opposite; Germany has consistently claimed that German foreign aid to Namibia for development is, in essence, a type of reparations.⁹

Legal History

Reparations are a legal tool used as a form of redress to a harmed or legally wronged party. *Black's Law Dictionary* defines reparations as "compensation for an injury or wrong, especially for wartime damages or breach of an international obligation."¹⁰ Historically, reparations have been awarded to victims for the crime of genocide, and today reparations are recognized as a form of redress under Article 75 of the Rome Statute of the International Criminal Court.¹¹ Of

⁶ Meldrum, Andrew. "German minister says sorry for genocide in Namibia." *The Guardian*, 15 August 2004. <<https://www.theguardian.com/world/2004/aug/16/germany.andrewmeldrum>>.

⁷ Sarkin, op.cit., p.8.

⁸ Chutel, Lynsey. "Germany finally apologizes for its other genocide-- more than a century later." 16 July, 2016 <<https://qz.com/733463/germany-finally-apologizes-for-its-other-genocide-more-than-a-century-later/>>.

⁹ Sarkin, op.cit., 60-6).

¹⁰ REPARATION, *Black's Law Dictionary*, 10th ed., 2014.

¹¹ United Nations General Assembly, The Rome Statute of the International Criminal Court, 17 July 1998, Article 75. <https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf>

notable mention as an example in the Rome Statute is the German government's payment of reparations for genocide-related harms to Holocaust victims.

Nama and Herero descendants have used the precedent of German reparations to Holocaust victims to seek reparations from Germany for the 1904-1908 genocide. The descendants have brought several U.S.-based court cases against entities still in existence today that profited or were culpable in that genocide. Between 2001 and 2007 the Nama and the Herero brought nearly identical legal cases under the Alien Torts Claims Act in the states of New York and New Jersey and in the District of Columbia. In each action the defendants were either Deutsche Bank, a German shipping company known today as Woermann Line, or both entities. Each case was unsuccessful due either to a court finding of lack of jurisdiction over the defendant or a general failure to state a claim on behalf of the plaintiffs.¹²

While legally these cases did not produce the plaintiffs' desired outcome, the cases did call international attention to their efforts for reparations. In 2016 the governments of Germany and Namibia announced that special envoys would be assigned from their respective governments to negotiate a possible settlement.

Although this seemed like progress, the Nama and the Herero did not perceive it as such because they were largely left out of the process. In January 2017 they filed two actions against the German government for failure to include the voices of the victims in these negotiations for reparations. The first action, filed on January 5, 2017 in United States District Court of the Southern District of New York, alleges that Germany is in violation of international law for excluding the Nama, the Herero, and their respective legal representatives from participating in the negotiations based on the United Nations Declaration on the Rights of Indigenous People.¹³ This case is ongoing and as of this writing¹⁴ has only heard procedural motions.

The second action taken in 2017 is a complaint filed on behalf of the Nama and the Herero with the United Nations Office of the High Commissioner of Human Rights. This action calls for review of Germany's decision to deal solely with the government of Namibia during negotiations while excluding the participation of the Nama and the Herero. This case, too, will be examined under the United Nation's Declaration on the Rights of Indigenous People, specifically Article 18 of the Declaration which states,



¹² See: Herero People's Reparations Corp. v. Deutsche Bank, A.G., 370 F.3d 1192 (D.C. Cir. 2004); Herero People's Reparation Corp. v. Deutsche Bank, A.G., 543 U.S. 987, 125 S. Ct. 508, 160 L. Ed. 2d 371 (2004); Herero People's Reparations Corp. v. Deutsche Bank AG, No. 03 CIV. 0991 (RLC), 2006 WL 903197, at *1 (S.D.N.Y. Apr. 5, 2006); Herero People's Reparations Corp. v. Deutsche Bank AG, No. CIV. 01-01868 CKK, 2003 WL 26119014, at *1 (D.D.C. July 31, 2003); The Hereros v. Deutsche Afrika-Linien GMBLT & Co., No. CIV.A.05-1872(KSH), 2006 WL 182078, at *1 (D.N.J. Jan. 24, 2006); Hereros ex rel. Riruako v. Deutsche Afrika-Linien GmbLt & Co., 232 F. App'x 90 (3d Cir. 2007)

¹³ Rukoro et al v. Federal Republic of Germany, 1:17CV00062

¹⁴ September 27, 2017

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.¹⁵

Since the filings of these actions the governments of Germany and Namibia have cooperated to become more inclusive of Nama and Herero representatives at negotiation proceedings. However, the Nama and Herero were denied the ability to appoint their own representation and were not extended power to either approve of or deny the government-appointed representative. Many are unsatisfied with this solution and still consider the actions of the special envoys to be in violation of international law.

In May 2017 the government resumed discussions with Nama and Herero representatives to determine next steps. No clear resolution has been reached, begging the question of whether the Namibian government's chosen representatives can or will properly represent the voices of the Nama and the Herero people.

Desired outcomes as perceived by various Constituencies

On an investigative trip to Namibia in summer 2017,¹⁶ I met with individuals from various government offices, political parties, survivor organizations, and other groups to hear their expectations for the negotiations and the outcomes. As anticipated, their expectations reflected the range of their political and social positions. These included the following:

- Resolution of the U.S. court case in favor of the Herero, to bolster the Namibian claims against the German government and to bring closure to the matter through negotiations.
- Acknowledgement of the genocide and legal remedies through reparations, as those reparations shall be defined by the Herero and Nama communities.
- International recognition of the cultural genocide perpetrated upon the Herero and the Nama.
- International support for reparations claims, based on customary law.
- Reallocation and return of land to descendants of the original inhabitants.
- Involvement of the Herero and Nama in the negotiations.
- Education of government officials about the full history of the genocide.

¹⁵ United Nations General Assembly, United Nations Declaration on the Rights of Indigenous People, 29 June, 2006. <http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

¹⁶ Personal interviews, May 27-June 7, 2017.

- Restoration and marking of unmarked Nama gravesites by the German government.
- Equal representation of the Nama and Herero in the lawsuits and in negotiations.
- Establishment of a trust fund for Nama and Herero development if reparations are forthcoming.
- Commitment to an expansion of land rights and human rights.
- Designation of May 28 as a national day of recognition for the genocide.
- Availability of victim remedies.
- Support for the Namibian government to continue to act as a mediator between the Herero people and the German government, because the issues are political and should be addressed as such.

Conclusion

It is clear that special interests create a range of hoped-for outcomes, as one would expect. This makes unanimity about the mechanisms of transitional justice quite unlikely, without which a concerted pressure cannot be brought to bear on either the German or the Namibian government. Some people believe that significant progress has been made, and they trust that both governments are engaged in good-faith negotiations, while others have the opposite view of the very same negotiations. Similarly, there is no consensus on goals; some advocate for an apology, some for land redistribution, others for money, others for specific actions that largely benefit a single group, and some want international involvement.

Transitional justice is a challenging process, and for the Herero and Nama, this process has been a century-long in the making. The trauma of genocide endures across the generations, and efforts to move forward on several fronts with awareness, trials, etc. are necessary endeavors.