

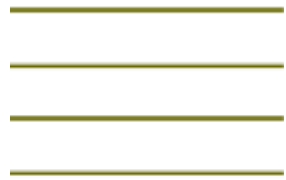
Race, Racism and the Law
Speaking Truth to Power!!

The Legal Claim for German Reparations to the Herero Nation

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**Sidney
Harring**



Excerpted from:
Sidney Harring,
German
Reparations to the
Herero Nation: an
Assertion of Herero
Nationhood in the
Path of Namibian



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Development? ,
104 West Virginia
Law Review
393-497,
393-398, 401-410
(Winter 2002) (132
Footnotes Omitted)

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German
Chancellor
Helmut Kohl
probably
expected a
pleasant and
uneventful visit
to Namibia in

September of 1995. Formerly the German colony of South West Africa, the new nation of Namibia is visibly proud of its German heritage, evident everywhere in its capital at Windhoek, in stoutly built brick and stone colonial buildings. Germany, in turn, is Namibia's largest provider of foreign aid and equally proud of its role in Namibian development. However, while Kohl was visiting a German community in Namibia, around three-hundred "members of the Herero tribe

led by
Paramount
Chief Kuaima
Riruako
marched on the
German
embassy in
Windhoek and
handed in a
petition for
Kohl." As it
turns out, the
Herero wanted
to meet Kohl
during his visit
to Namibia.
However, Kohl
refused and
instead visited
the coastal
town of
Swakopmund.
The petition
was a demand
for reparations
resulting from
the near
extermination
of the Herero
by the Germans
during the
Herero War of
1904–07. The
war, although
not well known
in a world of far
more deadly
wars, was

among the
twentieth
century's
bloodiest
colonial wars,
killing at least
sixty thousand
of the eighty-
thousand
Herero and
resulting in the
German seizure
of all Herero
lands and
cattle. As a
result, Central
Namibia was
swept clean of
black
occupation,
setting the
stage for the
creation of the
European
agricultural
economy that
prevails today.

Herero
Paramount
Chief Kuaimi
Riruako
demanded
reparations of
\$600 million
(US). After
delivering the
petition,
Riruako stated,

"We think we have a legitimate claim for reparations as a result of the war and genocide committed against the Hereros by the German army." The Herero Traditional Authority, he continued, was prepared to take its case to the United Nations if Bonn rejected the claim. And, in a surprising move, Chief Riruako, through the Chief Hosea Kutako Foundation, recently filed a lawsuit against three German companies in the Superior Court of the District of Columbia, asking for \$2 billion (U.S.) in

reparations,
asserting the
companies were
in a "brutal
alliance" with
imperial
Germany in the
Herero War.

The Namibian
government has
opposed the
Herero claim
for reparations.
Heavily
dependant on
German aid,
and dominated
by the rival
Ovambo tribe,
the South West
Africa People's
Organization
(SWAPO), the
ruling party,
has taken the
position that all
Namibian tribes
were victimized
by colonial
exploitation,
and therefore,
no group in
particular
should be
singled out to
receive
reparation
payments. But

the Herero, now numbering about 125,000, and the leading opposition tribe, have persisted in pursuing their claim. It has served to define Herero identity within Namibia, setting the Herero people apart.

In a modern Africa, with many different development regimes competing, the Herero claim deserves careful analysis. A model of "reparations" has an obvious historical root in the colonization of Africa. In addition, a pattern of violent land seizures in Zimbabwe underscores the need for

effective land reform programs that, in turn, are blocked throughout southern Africa by a lack of funds. German reparations would allow the Herero, still a cattle herding people, to repurchase a substantial portion of their "stolen" lands and return their cattle to their traditional range. Ironically, under the colonial law of conquest, the Herero cannot recover nor be compensated for their "stolen" lands because the German conquest of their lands provides a legal basis for German land

ownership. But their claim for reparations for genocide is based on broader rights in international and natural law and therefore may provide a better chance for success.

The Herero did not "invent" their demand for reparations. Rather, it is derived entirely from their careful reading of modern German history. Germany is making reparations to both individual Jews and the State of Israel for acts of genocide in the 1930s and 1940s, scarcely thirty years after the Herero War. The Herero ask an obvious question: what

is the legal – or
moral –
distinction
between
German
genocide
directed at Jews
and German
genocide
directed at
Africans?
Surely, in the
modern world,
a racial
distinction
cannot account
for this
difference in
policy. Or is the
distinction
based on some
meaningful
difference
between
genocide in the
Herero War and
World War Two?
As it was simply
put by
Mburumba
Kerina, a
Herero activist,
"(T)he concerns
of the Hereros
must be seen in
the same light
as that of the
Jewish people."

The Herero claim for reparations is directly grounded in the characterization of Germany's history as particularly violent and as a former racist imperialist and colonial power, with a history of acknowledging this violence by paying reparations. Indeed, there is evidence that the virulent racism that promoted the holocaust not only the characterized German colonization of Africa, but was also partially formed there: 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. Herero prisoners of war were the subjects of these experiments. Similarly, Germany's sudden and late entry into the colonial enterprise in Africa was prompted by its military victories in the Franco-Prussian War, prompting further expansion of German authority through military power. Consequently, the Herero seem to have a strong argument that they too

deserve
reparations
from Germany.
However,
before one can
completely
understand the
true nature of
their claim for
reparations, a
closer look at
the Herero War
is necessary.

...

Like most
colonial
histories, the
colonial history
of Namibia is
complex and
still, from the
standpoint of
the black
people who live
there, largely
unwritten. The
Herero War, an
exception to
this history, has
been the
subject of a
number of
books, with
scholars drawn
to the unique
character of
German

colonial
violence.
Although a
number of
meanings can
be drawn from
the war, the
central
outcome in
terms of land
law is clear:
Germany
terminated by
conquest all
Herero land
rights in South
West Africa,
leaving the
nation with no
land at all.
Herero lands
were then
"sold" to
settlers – ninety
percent of them
German – on
favorable
terms, with
long- term
loans
subsidized by
the
government.
These farms are
now the heart
of Namibian
agriculture,
occupying a

wide swath
from Omaruru
to Gobabis and
the Botswana
border, the
entire country
to the west,
north, and east
of Windhoek.

...

The census of
1911 gives the
Herero
population in
South West
Africa as
15,130, down
from about
80,000 before
the war. A few
thousand
additional
Herero,
including Chief
Samuel
Maharero, had
sought refuge
in western
Bechuanaland
(now
Botswana).
Perhaps a few
hundred to a
thousand more
had fled to
Kaokoland, a
remote area

beyond the
police line but
still in German
South West
Africa, and a
few more
escaped to
Angola. Thus,
at most 20,000
Herero survived
the war,
possibly no
more than
17,000, leaving
at least 60,000
to 63,000 dead
– seventy-five
to eighty
percent of their
pre-war
population.
Within Namibia,
Herero cattle
were all lost
and their
herding culture
was decimated.
These
remaining
Herero survived
as refugees,
living in
absolute
poverty in
camps or near
mission
stations. High
death rates

continued in the postwar years, as the result of disease and starvation. Thus, the German act of genocide against the Herero was striking and deliberate, intended both to free their lands for white settlement and also to deter similar uprisings by other Native tribes in South West Africa.

III. THE LEGAL BASIS OF THE CLAIM FOR HERERO REPARATIONS

The Herero claim for reparations began within the context of the next ninety years of colonial history. Modern

Namibia looks much the way the Germans left it in 1915, when German rule suddenly ended. After a brief period of British administration following the capture of South West Africa in World War One, the colony was turned over, under the provisions of a League of Nations class "c" mandate, to South African administration. The British plans were for a well-ordered agricultural colonial-settler state. German farmers were left on their lands, including most of the Herero lands, the agricultural heartland, with new, often very

marginal, lands
to the north
and south
opened up to
Boer settlers.
South West
Africa became a
rich agricultural
land, heavily
subsidized by
the
apartheid-era
South African
state.

The Herero,
who joined the
British forces in
the invasion of
South West
Africa, began a
cultural
renaissance
under the South
Africans. By all
sorts of means,
including
large-scale
squatting and
various
sharecropping
agreements
with white
farmers, they
regained their
cattle and
re-occupied
vast tracts of
their former

lands, albeit in the more remote and undeveloped regions. This history is remarkable, given the racist, and later apartheid-era policies of South Africa, but it sets the political stage for the position of the Herero in modern Namibia and for their claim for reparations.

This history is important because it structures the logic of Herero reparations. The underlying issue is the forcible deprivation of their lands which, in turn, means that there is no place to graze Herero cattle, the center of their culture.

However, no direct reparation for land is likely because, historically, indigenous lands taken by European settler societies have rarely been returned. Although the Herero often talk about "land" in the context of reparations, the actual demand for economic reparations is based on genocide and on the merciless and systematic killing and starvation of the Herero during the 1904–07 war. This demand is grounded in the logic of reparations for Jews and other peoples victimized by

the Germans
before and in
World War Two,
analogizing the
Herero War to
German
genocide
against the
Jews and not to
other African
and Asian
colonial wars.

It would be
both a futile
and
dishonorable
discourse to
venture into
any kind of a
comparative
analysis of
genocide – and
such a
discussion is
irrelevant for
purposes of the
Herero
position.
Genocide is
genocide:
murdering an
African tribe
cannot be
rotely
compared to
murdering a
European
people, or a

European nation. Nothing that the Herero say in any way dismisses or diminishes the unique crimes that Germany committed against Jews. Modern international law of reparations is dominated by extensive Jewish claims for reparations against Germany and other countries, but this is not the limit of reparations claims. Even in the context of World War Two, reparations have been paid to others, including \$1.2 billion to Americans of Japanese descent for their imprisonment and loss of

their lands.

Also

reparations

have been

made in a

parallel

settlement to

Japanese

Canadians, and

a case is

pending against

the Japanese

for reparations

for Korean

"comfort

women," forced

into

prostitution by

the Japanese

army. Other

European

claims,

including that

of the Romani

people, raised

by other

peoples

subjected to

mass

extermination

in

concentration

camps, have

failed. None of

these claims for

reparations

compare to the

Jewish

holocaust, but
their success,
nevertheless,
represents
important
advances in
human rights
law.

The Herero are
very aware of
these legally
recognized
reparation
claims and base
their claim
accordingly.

Mburumba
Kerina, a
Herero leader,
commented on
the forced
sexual slavery
of Herero
women by
Germans.
Comparing this
to the case of
the Japanese
"comfort
women," Kerina
explained,
probably with
more than a
touch of irony:
"Hey, that's my
grandmother –
a comfort
woman. . . If

the Japanese could pay for that, the Germans could." This careful attention to the existing international law of reparations distinguishes the Herero claim for reparations. The narrow discussion is a more general inquiry into the appropriateness of reparations as a political and legal remedy to the damage to various peoples caused by twentieth century colonial wars. If these situations are reasonably analogous to existing reparations claims, to dismiss them out of hand

must turn on considerations that can only be called racist. If these claims are well grounded legally, then broader policy issues may be implicated and must be heard.

There is no consistent legal basis for any of the modern reparations regimes. The concept of reparations is rooted in natural law, the common law, and international law; it is an equitable principle that the beneficiary of an ill-gotten gain should make restitution, both as an act of contrition and good will, but also simply to restore the

victim to some part of their previous life. As a political matter when related to the specific context of war reparations, it is generally "winners" who demand restitution from "losers." The original post World War Two German reparations law, Law Number 59 on Restitution of Property Stolen in the Course of the Aryanization of the Economy, was adopted by the U.S. military government and imposed on Germany in November, 1947. However, within the modern world, liberal democracies have used the language of

reparations in making voluntary payments through various statutory regimes to their own indigenous or minority populations. American and Canadian payments to Japanese citizens as reparations for wartime injustice are the most extensive example, although many payments to indigenous peoples are broadly of this type. Although these Japanese reparation claims included complex litigation strategies, these ultimately failed and the final reparations settlements were political,

voted by the
U.S. Congress
and the
Canadian
Parliament.

The Jewish
claims against
Germany also
avoided
litigation and
began with
ally-ordered
regimes to
return stolen
Jewish property
but proceeded
to a formal
claim, filed on
behalf of the
State of Israel,
as the lawful
representative
of the Jewish
people, with the
German
government. A
series of
negotiations
followed, with a
final agreement
resulting
through
political
processes, and
voted on by the
German
Parliament. The
original

reparations
legislation has
been revised
and expanded
several times,
with substantial
opposition
within
Germany.

The legal basis
of Herero
reparations is
rooted in both
of these
traditions,
although it
lacks support
from the
Namibian
government.
The Herero
reparations
claim has never
been formally
acted on by the
German
government,
but it was
dismissed out
of hand in a
speech by
Roman Herzog,
President of
Germany. In a
1998 trip to
Namibia,
Herzog was
quoted as

saying that "no international legislation existed at the time under which ethnic minorities could get reparations." Herero activist Mberumba Kerina countered by claiming that the Hague Convention of 1899 outlawed "reprisals against civilians on the losing side." In the same exchange, Herzog dismissed the idea of an apology because too much time had passed to make sense – and also fired his translator for misinterpreting his statements.

To the extent that this exchange

begins to structure the Herero case and the German response to it, several important issues emerge leaving an unclear legal basis for their reparations claim. President Herzog describes the legal basis for reparations differently than do the Herero. Herzog put his response in the language of colonialism, with his clear historical reference to the colonial domination of ethnic minorities serving as a basis for reparations as supported by no "international legislation at the time." Thus,

for Herzog,
colonialism was
"legal" in 1905
under
international
legislation,
therefore
ending the
discussion of
Herero
reparations.

This analysis,
however, is not
the basis of the
Herero claim.
Rather, the
Herero locate
their claim in
terms of the
international
laws of war as
defined in the
Second Hague
Convention of
1899, a
convention at
which the
Germans were
represented
and which
binds the
European
powers as they
go about their
"business" of
civilized
warfare, that is
warfare

between
signatory
nations. Unless
Germany seeks
to argue, in the
twenty-first
century, that
there was, after
1899, one set
of rules for
European
nations
conducting
wars with each
other and a
completely
different set for
those same
nations
conducting
"colonial" wars,
or even more
bluntly put,
wars against
"ethnic"
peoples, it is in
an untenable
moral position.

The Hague
Convention on
the Laws and
Customs of War
by Land was
signed on July
29, 1899 and
took effect on
September 4,
1900. Intended

to regulate
modern
warfare, the
Convention
contains a
number of
provisions that,
in their plain
language, were
apparently
violated by
Germany in the
Herero War.
Article 4
requires that
"prisoners of
war in the
power of the
hostile
government . . .
must be
honorably
treated." Article
7 provides that
"the
government
into whose
hands prisoners
of war have
fallen is bound
to maintain
them." Article
23 states that
"it is especially
prohibited to
kill or wound
treacherously
individuals

belonging to
the hostile
nation or army;
to declare that
no quarter will
be given; to
destroy or seize
the enemies
property,
unless such
destruction or
seizure be
imperatively
demanded by
the necessity of
war." Finally,
Article 46
states that
"family honors
and rights,
individual lives
and private
property . . .
must be
respected."

It would follow
that a systemic
violation of that
Convention, for
example, in an
order to kill all
the Herero and
starve their
women and
children, clearly
a declaration
that "no quarter
will be given,"

would be
legally
actionable
under whatever
regime of
international
enforcement
the Hague
Convention
recognizes, but
for the fact that
the Herero were
not represented
at the Hague,
and could not,
therefore, sign
the convention.
Thus, 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.
Importantly for
the Herero,
their claim can
be analogized
to Jewish and
Japanese
reparation
claims, which
are also not
based on the

Hague
Convention, but
on more
general
principles of
human rights.

This leaves
unanswered
President
Herzog's
defense: that
colonialism
and,
apparently,
colonial
genocide, was
legal in 1905.
Although his
position may
literally be true,
that, again, is
not the issue.
The political
and legal
reasons for not
opening up
four hundred
years of
colonialism to
broad claims of
reparations are
clear,
regardless of
the justice of
the claims.
Such a claim
parallels other
equally broad

based claims,
most
prominently in
the growing
discussion of
reparations for
African slavery.
There is a
substantial
literature –
including in law
reviews – on
these legal
arguments.
Representative
John Conyers
has introduced
a resolution
into the House
of
Representatives
requiring the
exploration of
the issue of
reparations for
slavery in the
United States. A
Pan-African
Congress on
Reparations
was held in
Nigeria in 1993
and claims of
reparations
underscore
some of the
discourse on
the rebuilding

of African economies. Although these efforts have most often been dismissed as politically impossible, existing legal doctrines of equity and natural law, as well as the thirteenth and fourteenth amendments of the U.S. Constitution, lend both moral and legal credibility to the case for black reparations for both slavery, primarily involving the tens of millions of overseas blacks, and for the devastation of colonialism, primarily involving blacks still living on the African continent.

However, it is

important to see that the Herero claim is much more narrowly framed than the above claims are. While in the long course of human history there has clearly and unfortunately been an equally long history of genocide, the law of reparations is much more limited. Modern reparations claims, modeled after the Jewish claims against Germany, are most often very specific. The Herero are aware of this, explaining the precise basis for their claim as acts of genocide committed against their nation by the

German army,
acting under
specific orders
in carrying out
German
colonial policy
in the Herero
War of
1904–07. Thus,
the Herero
nation is the
injured party,
acting on
behalf of the
60,000 Herero
dead in
bringing the
reparations
claim. Although
these people
are clearly the
grandmothers
and
grandfathers of
every living
Herero person,
it is not their
families who
are making the
claim. This
formulation is
deliberately
designed to be
broadly
analogous to
the successful
war reparations
claims resulting

from German
genocide in
World War Two.
The Herero
nation is asking
for reparations
from roughly
the same
position as the
State of Israel.
Although, a
"tribe" is not a
"state," modern
tribes represent
their people in
world forums,
and nothing in
the
international
law of
reparations
requires that
the aggrieved
people be
represented by
a state.

This has two
equally precise
legal purposes.
No legal claim
for reparations
is likely to be
entertained
unless it is
possible to set
damages. The
"costs" of
colonialism and

slavery over
four hundred
years are
incalculable,
and this is
some barrier to
these claims.
But courts, in
tort cases, set
the price of
particular
human lives
every day. The
United States
paid \$1.2
billion to
twenty
thousand
Americans of
Japanese
ancestry for the
loss of their
property in
World War Two.
The Herero
have asked for
\$600 million
(US) – \$10,000
for each human
victim; nothing
for their land,
nothing for
their cattle. It is
likely to be
legally difficult,
even in a
culture with an
elaborate oral

history, to prove who among the Herero was killed, how, and where in the South West Africa of a hundred years ago. The nature of the Herero claim, as a nation, however, renders this unnecessary.

One final distinction between the Herero claim and the World War Two era claims also suggests itself: the Herero claim is at least thirty years older. Common sense suggests that there must be some time limit on reparations claims, although no law absolutely states what this might be. The

Herero claim is based on a twentieth century act of genocide and grounded in similar claims arising from other twentieth century wars. Modern South Africa permits native claims for restitution of land back to the Native Land Act of 1913, a period roughly the same as the Herero claim. Moreover, the apartheid-era policies of South Africa effectively blocked raising a reparations claim until independence in 1990, and the Herero raised their claim almost immediately thereafter. The United States and Canada, recognizing the

legal difficulties
Indian nations
had in the
nineteenth and
most of the
twentieth
century in
bringing land
claims, have
not limited the
time frame for
Native
American land
restitution
claims, and one
claim dating
from 1795 is
still being
litigated. For
policy reasons,
it makes no
sense to limit
reparations to
genocide to the
actual victims:
they are most
often dead, and
that is precisely
the nature of
the evil of
genocide. And,
for the same
reasons, it also
makes no sense
to require that
some modern
state represent
the interests of

a victimized
people.

But, there are
no formal legal
rules governing
the law of
reparations.
The Herero
have posed a
political claim
and are still
awaiting
political action
on the part of
the German
government.
The claim is not
justiciable in
Namibian
courts. While
there may
ultimately be
recourse to the
World Court,
the Herero are
aware that
reparations
regimes
operant in the
world today are
political and
not legal. But,
these political
actions have a
common
history of being
moved by
extensive legal

posturing,
creating a
powerful moral
climate
supporting
reparations,
and shaping
public opinion.
This has been
the main thrust
of the Herero
effort at the
present time;
the dramatic
confrontation
of Chancellor
Kohl with the
Herero chiefs
and
Truppenspieler
attracted good
press around
the world.

Note:. Anna
Dean Carlson
Professor of
Sociology,
School of
Applied Social
Sciences, West
Virginia
University;
Visiting
Professor of

Law, West
Virginia
University;
Professor of
Law, City
University of
New York,
College of Law.
This Article is
dedicated to my
colleague,
former dean,
and professor,
Carl Selinger,
whose life and
work reminds
us that the
broadest
concerns about
human rights
should inform
the study and
practice of law.

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Last Updated:
Friday, December 31, 2010

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Sinc January 1, 2008
Racism and GeoPolitical Regions

Thanks to Derrick Bell and his pioneer work:
[Race, Racism and American Law](#) (1993).