Germany’s Colonial Policy in German South-West Africa in the Light of International Criminal Law

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Abstract

The debate over whether Germany’s colonial policy toward the Herero and Nama...
constituted genocide suffers from two basic shortcomings: authors who are proficient in international criminal law (ICL) often have difficulties in getting the historical facts right, and historians with a good knowledge of primary sources lack knowledge about the evolving definition of genocide in ICL. As a result, the authors of many articles and books concerning the German atrocities committed against the Herero and Nama at the beginning of the 20th century either do not apply any precise definition of genocide at all or they quote the definition derived from the Convention for the Prevention and Punishment of Genocide, but without including the comprehensive jurisprudence about genocide that has emerged from international criminal tribunals. Because social science and history have not elaborated an undisputed and precise definition of genocide, this article proposes to apply the relatively narrow and precise ICL definition of genocide to the events in Germany’s South-West African colony at the beginning of the 20th century. This method sheds new light on some neglected aspects of Germany’s policy toward the Herero and Nama, which suddenly appear more important than those that until now have most frequently been regarded as genocidal.

Introduction

For more than 100 years, the Kaiserreich’s policy to repress the uprisings of the Herero and Nama by brute force in what was then German South-West Africa (and is today Namibia) has been the subject of scholarly and political disputes. A crucial point of these disputes has concerned the question whether Germany’s policy in its colony is rightly or wrongly described as genocidal. Most researchers dealing with this issue in Germany, South Africa, and Namibia tend to agree with the genocide claim, whereas a minority community disputes it, and some authors entirely refrain from using the g-word. The dispute suffers not so much from lack of sources – the basic facts are well-known and mostly undisputed – but from the different interpretations of the alleged intent of the perpetrators, and from the lack of a coherent and precise definition of genocide.
The latter is a general pitfall in social sciences and history, neither of which has managed to establish an undisputed notion of genocide, which could be applied to real world cases in order to find out whether they do or do not fulfil its criteria. Similarly, in popular media and popular science approaches, the genocide label is often used just to describe large massacres, as if the scope of killings was the only or the most important criterion for assessing whether a conflict is genocidal or not. For some authors, the decisive element of genocide seems to be whether the intent to annihilate another group can be ascribed to the perpetrators, and whether this intent could actually be achieved. Taking this approach, genocide occurs when one group manages to extinguish another group, and genocide does not occur if the victimised group survives the onslaught.

In the case of the German suppression of the Herero uprising, the mere use of notions such as annihilation or extermination is enough proof for some authors to conclude that genocide must have occurred. This is also the background of the irresolvable dispute among scholars concerning the number and percentage of Herero and Nama who died from German persecution: the higher the number of victims, the more likely it seems that genocide was committed. This line of argument underlies the attention so many authors pay to the Battle at Waterberg, the Omaheke campaign and Lieutenant von Trotha’s infamous speech; it is why much less space in the events’ analyses is dedicated to the later actions of the German authorities. Obviously, the dispute is overshadowed by the Holocaust, which is – consciously or not – taken as a reference point, sometimes together with other modern cases of state-induced mass atrocities, which are used as ideal–typical cases, bearing all the hallmarks of what allegedly makes a genocide a genocide.

By highlighting the ideological and political continuities between the Kaiserreich and the Third Reich, between colonial racism and the racism of the Third Reich, and between both regimes’ policies of social and racial engineering, such perspectives have contributed to a deeper understanding of the factors that drive and shape mass violence. But at the same time, they tend to infect the debate with broad, state-centric and imprecise definitions of genocide, making it
harder for their users to distinguish cases of genocidal violence from non-genocidal violence. Since claims about where and when genocide occurred are often normatively underpinned, such a mechanism is likely to lead to a specific kind of inflation: more and more cases of mass atrocities are regarded as genocidal, not because emerging empirical evidence sheds new light on the patterns and roots of mass violence, but because the way in which genocide is constructed has become more inclusive over time.  

In order to circumvent these pitfalls, a precise, narrow and coherent definition of genocide is needed, one that can then be applied to different cases from real life and that will then show whether an action has to be regarded as genocide or not; and if it does, which elements, decisions, and actors can be identified as genocidal. Such a definition of genocide has been formulated by the Convention for the Prevention and Punishment of Genocide (hereafter, the Genocide Convention). The Genocide Convention is quoted and applied to the events in German South-West Africa by some authors, but they usually fail to include the jurisprudence of international criminal courts that applied the Genocide Convention in their judgments and decisions, often deepening it and making it more precise. This article claims that applying such an updated definition not only provides more clarity and stringency in the debate on whether German colonial policy in what is now Namibia was genocidal or not, but it also enables us to distinguish which actions can rightly be regarded as genocidal and which cannot. The jurisprudence that is applied here comes from the Nuremberg Tribunal, the Tokyo Tribunal, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL). Their jurisprudence will be taken into account in order to show how far ICL genocide findings have evaluated and changed the original content of the Convention. International and internationalised tribunals that either did not deal with genocide, such as the Extraordinary Chambers in the Courts of Cambodia (ECCC), or did not (yet)
contribute to the development of the genocide doctrine in ICL, such as the International Criminal Court (ICC), are included in this analysis only if their rulings affected the genocide doctrine invoked by the other tribunals and courts. In the next step, the article applies the ICL definition of genocide, which is derived from the Genocide Convention and the international criminal tribunals’ (ICT) jurisprudence, to the events between 1904 and 1907 in German South-West Africa in order to demonstrate which actions actually can, and which cannot, be regarded as genocidal, and which fulfil criteria of international crimes other than genocide. In the end, it will become evident which episodes, policies and actions should be regarded as genocidal in the light of ICL, and whether such a narrow definition can serve as a reference point for social scientists and historians.

For the sake of clarity, an important disclaimer has to be added: the argument made in this article essentially pertains to the realm of social sciences and history; it is not legal or judicial. Deriving a tool from ICL, which enables us to distinguish clearly between genocidal and non-genocidal atrocities from the past, is not the same as adjudicating these events and their actors. Judging the atrocities committed against the Herero and Nama is currently impossible, because no court and no tribunal that is currently empowered to prosecute and judge genocide has the necessary jurisdiction over events that unfolded at the beginning of the 20th century in German South-West Africa. The reader should also bear in mind that even perfectly substantiated conclusions about the genocidal character of certain actions undertaken by the Kaiserreich and its organs in its colonies cannot be invoked in order to draw a line of legal state responsibility from the Kaiserreich’s colonial administration to the Federal Republic of Germany, for example, in order to claim compensation for victims or reparations for Namibia. ICL is first and foremost concerned with individual criminal responsibility and punishment, not with the liability of states or other collective bodies for past wrongdoings. Establishing the latter would require a
different argument, which would hardly be useful for the purposes of social science and history. Some authors claim, for example, that the German policy toward the Herero during and after their uprising in 1904 constituted a violation of international agreements already at the time, because Germany was bound by colonial treaties that conferred certain rights upon the Herero as a ‘third party beneficiary’, according to the Vienna Convention on the Law of Treaties. 12 By conflating the notion of ‘nation’ with the notion of ‘state’, this approach treats the Herero as a state party to a treaty, whose rights were subsequently violated by Germany and for which the Herero would be able to claim compensation. Dealing with this argument would exceed the scope of this article, especially as the alleged violation would concern obligations between states, whereas ICL deals with violations of international humanitarian law by individuals. 13

Genocide in ICL

The legal concept on which the definition of genocide is based in ICL is derived from the notion of crimes against humanity as it was developed and adjudicated by the International Military Tribunal for Germany (hereafter, IMT), also known as the Nuremberg Tribunal. The IMT did not prosecute genocide; however, genocidal acts were included in its judgments as crimes against humanity. According to the final version of the ‘Convention on the Prevention and Punishment of the Crime of Genocide’, which was elaborated by the UN and presented for ratification to the member states, genocide was defined as follows:

[...] any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in
whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

At Nuremberg, the prosecution of war crimes and crimes against humanity was subordinated to the prosecution of crimes against peace and the *de facto* jurisdiction of the trial limited to the time of war. The IMT did not deal with crimes committed before 1939. In the Genocide Convention, the definition of genocide was completely detached from war, and article 1 explicitly stated: ‘[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish’. Since then, crimes against humanity – as well as their specific form, genocide – can be deemed legally to occur in times of armed conflict or without. The most recent exemplification stems from the statutes of the ICC, the ICTY and the ICTR, which all detach genocide from armed conflict. It is therefore no longer necessary for trial chambers to establish whether an armed conflict occurred at a given time in order to be able to prosecute a person for genocide. This is needed only in order to prosecute war crimes. In the latter case, the judges need to decide whether the underlying conflict was an international or internal one, because the protection of civilians and prisoners of war differs slightly depending on whether a conflict is international or internal.

Article 6 of the ICC’s Rome Statute replicates the Genocide Convention’s definition word for word. A close look reveals that – contrary to the way the g-word is used in popular science accounts and the media – a high number of victims in itself is no reason to regard an atrocity as genocidal. As Schabas has pointed out, the violent death of two members of an ethnic, religious, racial or national group would be enough to make a genocide finding with regard to count a), and that a conviction for the remaining counts would be possible, even without any casualties. The ICTY and ICTR statutes additionally criminalise conspiracy to commit genocide, direct and public incitement to commit genocide,
the attempt to commit genocide and complicity in genocide, which would theoretically enable the prosecution even of persons who jointly planned to commit genocide but never executed their plans. In other words, it is definitely not the number of casualties that decides whether an atrocity constitutes a genocide or not. But, in some cases, trial chambers required the number of victims to be ‘significant’ in order to speak of genocide. They did so, however, not in order to link the genocide concept to a certain number of victims, but in order to narrow down what it means to destroy a group only ‘in part’.

It is well established that where a conviction for genocide relies on the intent to destroy a protected group ‘in part’, the part must be a substantial part of that group. The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough to have an impact on the group as a whole.

The trial chamber in the Prosecutor v. Jelisić and in the Prosecutor v. Sikirica required the number of victims to be ‘substantial’. This is neither an absolute number, nor a percentage threshold. In real life, judges will therefore have to delve into the context of a crime in order establish whether the death of a certain number of members can be regarded as ‘substantial’ for that group. It is worth mentioning here that the trial chamber in the Prosecutor v. Krstić found the death of approximately 7,000 inhabitants of Srebrenica (out of several million Bosnian Muslims) substantial enough to regard their killings as genocide. In some judgments of the ICTR, the threshold was lowered, and trial chambers found that, in order to satisfy the requirements for ‘killing members of a group’ as a count of genocide, it was enough to kill one person.

Projecting this argument on to the debate about Germany’s colonial policy toward the Herero and Nama demonstrates the redundancy of disputes about the number or percentage of Herero and Nama that perished during the conflict.
No matter which casualty numbers one agrees upon with regard to the Herero and Nama uprisings (and the subsequent repressions against their populations), it can hardly be disputed that the part that perished in the conflict was ‘substantial’, especially as the conflict reduced the strength and influence of both groups with regard to other ethnic groups. But this alone does not make the mass atrocities against them a genocide. What is more important in the light of the definition quoted above is the intent of the perpetrators of the enumerated acts, because intent is the most important factor distinguishing a genocide from a crime against humanity and from war crimes. While in the latter cases a perpetrator may strive to obtain military or political advantages from persecuting his enemies, a genocidal perpetrator aims at ‘destroying in whole or in part’ another group. In other words, the same action (for example a mass execution) can be a war crime (if an international armed conflict is taking place at the same time), a crime against humanity (during war or without it) or genocide, depending on the intention of the perpetrators. But the distinction between genocide and other international crimes requires not only proof of a perpetrator’s intention to kill (or hurt) other people, but proof of his or her intention to kill them as members of their group in order to destroy that group either as a whole or in part. While ordinary murder knows only one type of victim – the human that is killed – genocide concerns two separate types of victims: the individual group members who have perished, and the group as such, which is targeted by the perpetrator through the killing of its members.

The Genocide Convention’s inclusion of non-lethal violence and its failure to protect groups other than racial, national, ethnic, and religious ones was subject to critique from social scientists, who favoured a state- and mass violence-centred approach to genocide. In the meantime, ICT jurisprudence has stood by a genocide definition which does not restrict the concept to state violence, addressing the latter concern in the first verdict of the ICTR. The requirement to adopt one of the four characteristics to the target group of a genocide
constituted a problem for the trial chamber in *the Prosecutor v. Akayesu*, because the divide between Hutu and Tutsi did not fit into any of the four group definitions. The ICTR never decided ultimately whether Tutsi and Hutu were different ethnic or racial groups, but the *Akayesu* trial chamber ruled that the Tutsi, ‘like any stable and permanent group’, enjoyed the protection of the Genocide Convention. In the context of German persecutions of Herero and Nama, the ICTR's problems with fitting the Tutsi–Hutu divide into the group definition of the Genocide Convention are not really relevant, since Herero and Nama undisputedly constituted ethnic groups distinct from all other groups in the colony, including the Germans, and they constituted ‘stable and permanent’ groups, which would have enjoyed the protection of the Convention if the Convention had already been in force.

Social science concepts tend to become narrower, more precise, and more specific over time as a result of scholarly discussion and their application to empirical research. This is sometimes different in ICL because, there, such concepts evolve not only as a result of academic discussions but also because of new jurisprudence issued by courts. A court, like every bureaucracy, has the tendency to expand and extend the scope of its jurisdiction, which often inclines judges to act as occasional legislators, create legal novelties, or broaden the meaning of definitions in law. A good example is the requirement for a genocidal perpetrator to have the intention to destroy such a group in part or entirely. In the practice of prosecutions and trials, this requirement usually proves to be the most difficult one for the prosecutor, because it requires him to present evidence for something that took place in the perpetrator’s mind. In cases where no documentary evidence is available or where perpetrators used coded language, such a ‘guilty mind’ (*mens rea*) can only be inferred from actions. But actions tend to be ambiguous, even when it comes to massacres and armed conflicts. In Rwanda, the ICTR has never managed to rule whether the genocide of 1994 was the result of an unintended escalation of a power struggle between
Hutu and Tutsi, which spun out of control and ended in genocide, or a carefully planned operation under a central command. But occasional legislation by ICT judges has made it easier for prosecutors to invoke genocide, even when evidence of genocidal *mens rea* is difficult to obtain.

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**Genocide without Genocidal Intent?**

This happened thanks to the development of the so-called joint criminal enterprise (JCE) doctrine, which was tailored in order to hold large, non-hierarchical and strongly decentralised organisations accountable for the criminal actions of their members. The concept stems from the fight against organised crime, but it was introduced into ICTY jurisprudence during the ICTY’s first case, *the Prosecutor v. D. Tadić*. Since then, it has become one of the most controversial concepts in ICL, and has caused confusion even among judges as to whether it is a mode of liability or a new crime.

In *the Prosecutor v. D. Tadić* at the ICTY, the accused was, among other acts, charged with being responsible for the deaths of five men, who had been chased out of a village and then killed. The question was whether the accused was responsible only for their forcible removal, or whether he could also been held liable for their killing, without any evidence that he had intended for them to be killed. On appeal, the defence had argued that Tadić could be convicted only if the prosecution managed to show that the common plan to expel the five men from the village had included their murder. The prosecution held that such evidence was not required under the concept of a common plan. This dispute was taken up by the appeals chamber in order to conduct a comprehensive discussion of the question whether Tadić could be held responsible for acts that exceeded the common plan he had agreed to. The appeals judges set out three types of JCE.
The first type of JCE, the appeals chamber wrote, ‘is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention’. This enables prosecutors to hold people accountable for crimes in which they did not personally take part, if they had voluntarily participated in one aspect of a common plan, and if they had ‘intended the result’.  

The second type of JCE was applied by international and national courts with regard to the personnel of concentration camps. Here, the courts held guards responsible for the torture of prisoners, although they had only guarded the camps, but not personally mistreated prisoners. It was alleged that, as prison guards, they had had knowledge of the abuse of prisoners and had shared the intent to harm those prisoners, as could be inferred from their behaviour. Holding them criminally accountable for the crimes committed in the camps was justified, because if a system of ill-treatment (exceeding only incidental ill-treatment) existed, the accused were aware of it and therefore contributed in some way to the commission of these crimes (for example, by preventing prisoners from escaping or simply by failing to improve the lives of the prisoners). This category of JCE was also rather firmly established in the law when the Tadić appeals chamber quoted it. Then, the judges proceeded to solve the excess issue: could a member of a group be held liable for actions of others if they exceeded the elements of the plan he had agreed to beforehand? For the appeals chamber in *the Prosecutor v. D. Tadić*, the answer was yes, if such an excess crime had been the ‘natural and foreseeable consequence’ of the common purpose. In an interlocutory appeals decision in *the Prosecutor v. Karadžić*, the ICTY appeals chamber decided that a JCE member, whose colleagues had deviated from the plan and committed crimes which had not been approved by him beforehand, could also be punished for those excess crimes if he ‘must have known that they were possible’. Until then, some trial chambers had applied the lower threshold of possibility, while others had applied
the higher threshold – that of probability. Replacing ‘natural and foreseeable’ by ‘possible’ lowered the standard of proof for the prosecution considerably. The SCSL later found that the common plan need not be criminal per se, but that it needed to include the commission of crimes under the SCSL’s jurisdiction as a means of achieving the goals of the common plan. 28

The third (extended) version of JCE was in use at the ICTY, the ICTR and the SCSL, but it was far from uncontroversial. The prosecution used it extensively in order to avoid evidential problems with command responsibility (which requires proof of a superior–subordinate relationship among the perpetrators) for the prosecution of leadership cases, where nothing connected a bureaucrat behind his desk with a mass grave in the field. In the Prosecutor v. Milošević, the prosecution alleged that the accused had been a member of a JCE, which geographically covered Serbia, Republika Srpska, Kosovo, and the traditional Serb settlements of Croatia, and whose common purpose had been the creation of ‘Greater Serbia’, understood as the assembling of all Serb-inhabited territories of the former Yugoslavia into one Serb state, ruled from Belgrade. In the operative Milošević indictment, type-3 JCE became the vehicle by which Milošević could be linked to the genocide in Srebrenica, notwithstanding the fact that he had never wielded any formal power over the Bosnian Serb leadership and that the prosecution had great problems proving that he had instigated, aided, or abetted the massacre, or even known of its preparation. The mens rea proof for genocide would have been necessary if Milošević had been indicted for genocide alone, for example under superior responsibility. If he was indicted for genocide as the ‘natural and foreseeable consequence’ 29 of a type-3 JCE, whose goal was to achieve ‘Greater Serbia’, then no proof of his personal genocidal intent was required. 30

Thanks to the Tadić appeals judgment and the lowering of the standards of proof by other chambers, the prosecution was given an instrument that enabled it to circumvent the difficult requirement of proving a perpetrator’s genocidal mens
rea in a genocide case. Together with the SCSL decision, it was enough to link a crime committed by one perpetrator with genocidal intent to a common plan (even if that plan was not *per se* criminal, but constituted a political programme for dismembering, annexing, or destabilising another country), and every supporter of that common plan could be prosecuted for genocide, if genocide had been only a ‘possible’ consequence of the common plan. There was no longer any need to prove that all participants in the JCE had agreed to commit genocide. It would exceed the scope of this article to retrace all the meanders of the legal debate that the JCE doctrine triggered among judges and lawyers. Some judges at the ICTY openly refused to apply it. The ECCC denied the applicability of the extended JCE concept in both of its two cases. The ICC’s Rome Statute does not contain JCE, but instead refers to co-perpetratorship, which was adjudicated in the judgement against Ituri warlord Thomas Lubanga for war crimes. In order to be held liable as a co-perpetrator, an accused at the ICC needs to wield control over the crime.

What is more important for the purpose of this article’s argument is the fact that the introduction of JCE into ICL has very much lowered the threshold for prosecuting genocide in cases where it is difficult to prove a perpetrator’s genocidal *mens rea*. Genocide is no longer what it appears to be to the wider public. In the light of ICL, a crime whose scope and degree of atrocity remains considerably below the scope and atrocity of a war crime can still be called a genocide. On the other hand, a huge massacre of civilians that is carried out deliberately and extinguishes an entire ethnic group, may be ‘only’ a war crime or a crime against humanity if none of the perpetrators had the intent to target the victims as a group. War crimes often tend to be more atrocious and heinous than genocide, but the wider public and the media still tend to consider genocide the worst of all crimes.
Was Quelling the Herero Uprising a Genocide?

From the perspective of ICL, it would be futile to examine whether the German reaction to the Herero uprising was a genocide, since the Genocide Convention was not yet in force and none of the conflict parties were bound to comply by its rules. What undisputedly bound Germany at the beginning of the Herero uprising was the Red Cross Convention of 1864 and the Second Hague Convention of 1899 (hereafter Hague 2). The first regulates the treatment of the sick and wounded; the second deals with the protection of prisoners of war (POW). For Germany, which adhered to Hague 2, the Convention imposed humanitarian constraints. Article 1 of Hague 2 stipulates that not only armies enjoy the protection of the convention, but also units that are ‘commanded by a person responsible for his subordinates; [... which] have a fixed distinctive emblem recognisable at a distance; [...] carry arms openly; and [...] conduct their operations in accordance with the laws and customs of war’. Since such units do not necessarily belong to a state party to the convention, one may infer that the Herero – who fulfilled these criteria – might have been protected by it, even if not regarded as a state party. Otherwise the inclusion of non-state belligerents in Hague 2 does not make much sense. Article 2 clearly points to this: ‘[t]he population of a territory which has not been occupied who, on the enemy’s approach, spontaneously take up arms to resist the invading troops without having time to organise themselves in accordance with Article 1, shall be regarded a belligerent, if they respect the laws and customs of war’. If the intention of those who drafted Hague 2 was to restrict the convention’s protection only to state parties, articles 1 and 2 would have been superfluous. 33 While it is therefore possible (and even quite compelling) to argue in favour of the Herero and Nama being protected by Hague 2, it is undisputed that the genocide norm did not yet exist during the conflict.

In the historical literature about the Herero and Nama uprising, there are two main bones of contention usually invoked to substantiate the genocide claim.
The first concerns the *Schutztruppe*'s tactic at Waterberg, where the Herero, together with their families, were surrounded and shot at from a distance. There is some dispute among scholars concerning the question of whether the Herero managed to escape to the Omaheke desert by accident or whether this was the result of a German war ruse. This, however, is not really relevant in order to assess the course of the battle in legal terms: it was certainly not forbidden (as is still the case in current ICL jurisprudence) to let an enemy escape a siege, no matter in what direction. It was forbidden, though, to deny the Herero the right to surrender as POWs and to kill (or even abuse) them after they had laid down arms. In terms of ICL, it was up to the Herero to make the decision whether to surrender or to flee. If they had surrendered, they would have been entitled to the privileges of POWs according to Hague 2, together with their families.

Things changed with von Trotha’s famous ‘extermination order’, which is the second important argument of the genocide claim. On 2 October 1904, standing in front of his soldiers and some Herero, German commander Lothar von Trotha ordered his soldiers not to take prisoners (a clear contravention of Hague 2’s article 23), to shoot at Herero men approaching any waterholes (which were besieged by the German troops), and to shoot over the heads of women and children who approached the waterholes, in order to make them flee rather than drink. The announcement not to take any more prisoners and to shoot every Herero, no matter whether armed or not, was a clear violation of Hague 2 and – if it applied to wounded or surrendering Herero – of the Red Cross Convention of 1864, no matter whether the order was carried out in practice by von Trotha’s soldiers or not, because article 23 deems the mere declaration ‘that no quarter will be given’ a crime. The second problematic aspect concerns von Trotha’s statement, according to which the Herero ‘must leave the country, and if the nation does not, I will make them leave using the big barrel’. It is clear from von Trotha’s later correspondence with Chancellor Bernhard von Bülow and the General Staff of the Army that his intention was to force the Herero to escape to
British Bechuanaland. According to today’s ICL standards, this must be regarded as deportation and a war crime, if one assumes that the hostilities were still ongoing. But because von Trotha had already admitted that the Herero no longer intended to continue fighting, it is more than doubtful whether German South-West Africa was still the theatre of an armed conflict. The October declaration can therefore be treated only as a plan for a crime against humanity, whose objective was the deportation of the Herero. Von Trotha’s cables to Berlin also contain several confessions of his objective to ‘annihilate’ or ‘exterminate’ the Herero. Some authors claim that ‘extermination’, which frequently shows up in the cables between von Trotha, the General Staff and the Chancellor, is to be interpreted in purely military terms as the destruction of an enemy’s military structure, but which does not include the physical destruction of the enemy as a distinct social organisation. It is true that the word was often used in such a way in purely military contexts (as, for example, when speaking about a battle of extermination, Vernichtungsschlacht). After von Trotha’s notorious declaration in early October, the context of the cables ceased to be a merely military one. When the General Staff and von Trotha wrote about ‘extermination’, they had in mind the Herero as a nation and they said so explicitly: ‘[t]hat he [von Trotha] intends to annihilate the whole nation or chase them out of the country, with that one can only agree’, wrote General Alfred Graf von Schlieffen, the Chief of Staff of the Army on 23 November 1904 to Chancellor von Bülow. He continues:

\[t\]he coexistence of whites and blacks will, after all that has happened, be very difficult if the latter are not to be kept in a permanent state of forced labour, which means slavery. The racial hatred can only be contained by either extermination or the enslavement of one party. In the present circumstances, the latter is not feasible. The intent of General von Trotha shall therefore be approved.

Von Schlieffen then argues that von Trotha’s forces were too weak to enforce such a policy of annihilation, and therefore had to confine the Herero to the
Omaheke desert, leaving it to them whether they would flee to Bechuanaland or live in the desert. Von Schlieffen – the same who had developed the military doctrine of battles of annihilation earlier – regarded the Hereros’ survival as possible, assuming that there would be enough waterholes unknown to the German troops. This version was later replicated in the official report of the General Staff about the clashes in the colony. Drechsler and others who see the tactic at Waterberg as part of a genocidal strategy pursued by von Trotha interpreted some paragraphs from the report as proof that the Schutztruppe command wanted the desert to finish ‘what German arms had started – the annihilation of the Herero nation’. But those paragraphs do not describe the General Staff’s intention, but the situation that the fights had led to. The original wording, ‘die wasserlose Omaheke sollte vollenden, was die deutschen Waffen begonnen hatten: die Vernichtung des Hererovolkes’, is preceded by several detailed accounts of Herero groups who starved to death while ‘hunted like wild animals from waterhole to waterhole’ by relentless and brave German soldiers. However, the authors of the report regard this as the outcome of a ‘fatal fate’ (vernichtendes Schicksal), which was the result of tactical errors of the Schutztruppe at Waterberg, not as the consequence of an intended policy. But, for the purpose of this article’s argument, it is unnecessary to decide whether von Trotha and the general staff wanted to downplay the cruelty of the Schutztruppe or to compensate for tactical errors by emphasising the hunt of starving Herero. More important for deciding about the genocide claim are the perpetrators’ intentions. Both, von Schlieffen and von Trotha wanted to destroy the Herero as an ethnic group (and not only an enemy army), but they did not implement such a policy, because they saw their troops unfit to carry out the necessary hunt of Herero in the desert. In the light of von Trotha’s and von Schlieffen’s cables, there can hardly be any doubt about their intention to exterminate the Herero not only as a military enemy but as an ethnic group. However, von Trotha failed to do that during the Waterberg battle, and, due to the relative weakness of his troops, he had to refrain from pursuing his goal of hunting the Herero in the desert. Instead,
the army command and the Chancellor ordered von Trotha to withdraw his threat that no mercy would be given, increase the ransom for apprehending Herero chiefs, and induce the Herero to surrender. Afterwards, the Herero could surrender without being shot.

The documents provide a graphic example of a JCE, the aim of which was the extermination of the Herero as an ethnic group, and the perpetrators of which abandoned the common plan because they saw themselves unfit to carry it out. Genocidal intent was obvious, but was not (yet) channelled into a policy. Instead, Schutztruppen officers sent out captured Herero with messages to their comrades in the field, calling on them to surrender and promising that they would not be killed upon surrender. This was in line with contemporary humanitarian law. When the German troops hanged surrendering Herero during the short time span between von Trotha’s declaration and its revocation, it was a war crime, not an instance of genocide, since the intent was to punish the fighters, not to destroy the group. Usually in such cases, women and children were spared and sometimes had to watch the executions.  

This does not yet exonerate the German military and civilian authorities of the genocide accusation. In the light of ICL’s genocide definition, the latter is entirely justified, but not with regard to the Waterberg siege, the sealing off of the Omaheke desert, or the October order not to take prisoners. What made Germany's colonial policy genocidal was the follow-up to the uprising, when the Herero, and later the Nama, were no longer able to resist, had surrendered, and were then treated in a way that made their survival almost impossible. It was only after the uprising, when the German authorities imposed upon the two groups ‘conditions of life calculated to bring about their physical destruction in whole or in part’, that there is a count of genocide.  

Destroying the Herero and Nama as Ethnic Groups
The attempt to destroy the Herero and Nama after their uprisings took shape in several ways and differed for each group. The Herero were forced into unconditional surrender, confronting them with the dilemma of either dying in the desert or becoming German prisoners of war. Those who were suspected of having killed German civilians during the uprising were court-marshalled and, if found guilty, shot. The others became prisoners, but did not enjoy the privileges of POWs according to Hague 2: they were used as forced labour, although the German authorities (civil and military) made it abundantly clear in their internal correspondence that they were well aware of the rights and obligations that POWs enjoyed according to Hague 2.

For example, they treated Nama captured during a battle differently from those who had first co-operated with the Schutztruppe against the Herero, and then had been provisionally detained after their nation had taken up arms too. The Nama had managed to obtain better surrender conditions, which left them some of their cattle and foresaw their resettlement to places where they could live freely if not suspected of having killed German civilians. It must be mentioned that depriving the Herero and Nama of their cattle also constituted a violation of Hague 2, which forbids confiscation of materials other than military from POWs. The most important violation of Hague 2 was the German authorities' attitude towards article 4, which simply urges: ‘[t]hey must be humanely treated’.

As even the internal correspondence between the commander of the Schutztruppe, Ludwig von Estorff, the Army command in Berlin, and the civilian authorities in Windhoek reveals, the German authorities admitted to having broken the peace agreement with the Nama, confining them to camps and holding them captive on Shark Island near Lüderitz. But it was not so much the mere fact of imprisoning them that created unbearable conditions likely to destroy both groups as such, but the detention conditions. Low food rations, almost no access to any kind of health care, detention on a cold and wet island: all this led to a high death rate among the POWs (who were living with their wives
and children). In April 1907, von Estorff decided on his own to relocate the Shark Island prisoners to the mainland, because, as he wrote in an affidavit, the prisoners would otherwise face rapid death. At the time, only 25 out of 245 men were ‘partly’ able to work. Since September of the previous year, 1,032 out of 1,795 had already died. 51

Zimmerer has shown that detaining the Herero and Nama did not really solve Germany’s problem. 52 The German authorities were caught between a rising settler paranoia about another uprising and the settlers’ demand of cheap labour. The fear of a new uprising inclined the German authorities to resort to extreme measures, such as the deportation of whole families and leadership groups of Nama to other German colonies, in order to deprive them of any contact with their followers in German South-West Africa and to isolate them from the local population. This could be achieved in an environment where even the native population would speak a different language and where no communication channels would link them to their homes. It was also predictable – but originally entirely ignored by the German authorities – that the living conditions in other German colonies would endanger the survival of the deportees. In German South-West Africa, the Nama and the Herero were predominantly settled in areas without any life-threatening diseases such as malaria. In Togo and Cameroon, the climate was very different, and malaria was widespread. In addition, the Nama were treated with the utmost disdain and negligence during and after their transfer to Cameroon. The only person who cared was a senior physician of the Schutztruppen general staff in Cameroon, a certain Ziemann, who time and again wrote letters and protests to the Governor and the authorities in Berlin in order to improve the prisoners’ fate. His interventions brought only slight improvements. 53 In August 1910, the German government in Buea agreed to resettle the prisoners to Dschang, a place in the highlands with a drier climate, which was free of malaria, and where, as the report claims, ‘they may be saved from certain death in Duala’. 54 In Dschang, the
prisoners contracted tuberculosis, which killed 25 out of 67 Nama. It took the authorities in Cameroon, Swakopmund and Berlin one more year to make the decision to send the Nama back to where they belonged. But even then, 7 out of 48 prisoners who were to be resettled to German South-West Africa were excluded, because they allegedly constituted too big a security threat. Compared to the overall number of Nama and Herero prisoners kept in custody in camps and on Shark Island, the number of deportees was relatively small. But they were deported because they were regarded as leaders of their nation and as potential instigators of protests and future uprisings. It was the German authorities’ intention, which lay behind the deportation and the creation of unbearable life conditions, to deprive the Nama of their leadership. This also becomes apparent in the decision-making process concerning the seven remaining prisoners whose return to German South-West Africa had been denied for security reasons. Berlin sought to send them to one of Germany’s overseas colonies in the Pacific in order to isolate them. To put it in the language of the Genocide Convention: the German authorities deported a number of Nama and Herero and exposed them to unbearable conditions in order to deprive both groups of their leaders. These measures had (and were intended to have) a significant impact on the functioning of both groups, and this impact was expected to affect their ability to make collective decisions and organise the internal structure of the groups. The Herero and Nama were to become an amorphous population of isolated individuals and families, deprived of larger cohesion and easy for the German authorities to govern. This is why even the relatively small number of group members affected by deportations turn the matter into a count of genocide.

Conclusion

The crucial argument supporting the genocide claim with respect to Germany’s
policy towards the Herero and Nama usually consists in the death toll among both groups, caused by the war and the subsequent persecutions. Estimations are difficult, because the initial number of Herero and Nama remains unknown and the number of those who survived the war, the camps, and the deportations is disputed. Approximations range from 60,000 to 100,000 casualties, which means that between 50 per cent and more than 80 per cent of the pre-war Herero population perished.  

But in the light of the current ICL genocide doctrine, a high number of casualties is not necessary in order to establish whether a genocide took place. What is of utmost importance is the intention of the perpetrators and whether this intention was carried out in some way, regardless of its success. In the light of modern ICL, it is enough to prove the existence of a JCE among different German players (in Berlin, Cameroon, and German South-West Africa) whose common plan was to remove the Herero and Nama as an obstacle to German policy. Some of these (among them von Trotha) had such an intent, and it was apparent for the others that genocide would be a possible consequence of implementing such a plan. Various institutions contributed to the commission of this crime, some by actively engaging in the persecution of Nama and Herero, others by omission of crucial measures that would have prevented the Herero and Nama from perishing in camps and during deportation.

As set out above, JCE is highly controversial. But even under more traditional and less disputed notions, such as command or superior responsibility, the government of the Kaiserreich would be criminally liable for the genocide carried out in German South-West Africa. Sarkin has tried to establish whether the Kaiser, as the head of state at the time, had knowledge of the events or had even issued the orders. But, under current ICL, there is no need to establish whether von Trotha’s superiors ordered him to exterminate the Herero. It is not even necessary to prove that they knew about it. Under modern ICL jurisprudence, it is enough to prove that they had reason to know about those acts and did not
prevent them, or, if they learned about them \textit{post factum}, that they did not punish the perpetrators (despite having the \textit{de facto} power to do so). 61 Here, documents also speak louder than words: the comprehensive documentation in the German Federal Archive is the best proof that von Bülow and even the Kaiser knew what was going on. They ordered von Trotha to revise his ‘extermination order’, but they did nothing to prevent the Nama and Herero from perishing in the camps, and they did not punish anyone for executing such measures. Beyond that, the Kaiser not only refrained from punishing von Trotha, he even rewarded him explicitly for ‘the quashing of the uprising in German South-West Africa’ by increasing his pension. 62

Genocide took place in German South-West Africa, but, contrary to the predominant tendency in research on German colonial policy, it happened after the Nama and Herero uprisings had been quelled by the Schutztruppe. During the Waterberg battle and the sealing off of Omaheke, von Trotha revealed his genocidal intent, but he did not execute it, because he lacked the means to do so. This changed after the Herero and the Nama had surrendered. Now the German authorities were able to carry out the genocidal intent, which transpires in the correspondence between von Trotha and the General Staff of the Army in Berlin, and so they did – instead of applying the regulations from Humanitarian Law, 63 which required them to regard the Nama and Herero as POWs and to treat them humanely.

Applying the ICL definition of genocide instead of Holocaust-centred notions or popular science approaches, which attribute genocidal features to every massacre with many victims, not only facilitates the distinction between different kinds of mass atrocities, but also helps to disentangle genocidal actions from non-genocidal ones within the same course of events. It is likely to shed new light on well-known and thoroughly researched events, some of which will no longer appear as genocide, whereas others may be regarded as such. For example, the German military campaign against the Maji Maji in German East Africa (today
Tanzania), but the huge casualty numbers on the Maji Maji side as an escalation of violence in a guerrilla war. Here again, it is neither the high number of victims nor the lack of genocidal intent that could make the quashing of the Maji Maji uprising a genocide under today's ICL concepts, but the aftermath of the war, when the German-led Askari troops devastated the country by applying a scorched earth policy, devastating and depopulating vast parts of their colony and ‘deliberately inflicting conditions of life calculated to bring about the physical destruction’ of the Maji Maji. Even without proof of genocidal mens rea, modern ICL would interpret the German policy as a common plan of a JCE, which included the commission of war crimes, and whose possible consequence was genocide. The high victim numbers (which are still contested today) are almost irrelevant here, although they are quite significant when compared with massacres that have been adjudicated as genocide by international criminal courts.

Applying the ICL concept of genocide and JCE to real-world cases of mass atrocities is likely to create new insights, to provide a narrow, precise and coherent definition of genocide, which can be applied in comparative research and avoids the pitfalls of debates, during which authors disagree about the genocidal character of the same events, because each of them uses his own definition of what genocide is. The ICL definition of genocide is precise and detailed, but it is not stable over time. The evolution of ICL’s genocide concept from Nuremberg to the ICC, and the debate about JCE, show that ICL is exposed to social and political influences too, and therefore unable to develop a perfectly stable definition of what genocide is. Advocacy by international human rights groups and lobbying by victims’ organisations have already elicited, and will further elicit, a broadening of the concept. ICL jurisprudence, however, has been relatively isolated from approaches that limit the concept of genocide to episodes resembling the Holocaust, and which strive to confine the definition of genocide
to top-down state policies.

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Notes


4 See, for example, Vahakn Dadrian’s definition as reported by A. Jones, *Genocide: A Comprehensive Introduction* (London and New York, Routledge, 2006), pp. 15–16. Jones provides a whole number of definitions, some of which would make German colonial policy genocidal, while others would not.


6 J. Sarkin, *Germany’s Genocide of the Herero: Kaiser Wilhelm II, His General, His Settlers, His Soldiers* (Cape Town, James Currey, 2011), pp. 136–41, provides the most comprehensive overview of the different casualty estimations.


11 In ICL, international crimes are crimes which are under the jurisdiction of ICTs, such as genocide, crimes against humanity and grave breaches of the Geneva Conventions (also often called war crimes). They need not cross state borders in order to be regarded as international.


13 This argument does not solve the problem that, notwithstanding violations of Herero rights stemming from whatever treaty, genocide had not yet been codified as a crime in 1904. The article also remains silent about the problem of legal continuity between the Herero then and now. Even if one accepts the argument that the Herero constituted a sovereign state in 1904, it leaves open
the question as to whether they can rightly be regarded as a state party today and are therefore entitled to file a lawsuit against Germany. It seems that even the Herero do not agree with that point of view, since they decided to act as a private plaintiff under the US Alien Torts Act and to sue German enterprises rather than the German state. More about the US lawsuits can be found in Sarkin, *Colonial Genocide and Reparations*, pp. 148–54.


15 In practice, this is hardly imaginable, since in such a case no tribunal would be established to judge a genocide that has not taken place.

16 This criterion of ‘significance’ pertains to the realm of the perpetrator’s intent (*mens rea*), not to his deeds (*actus reus*). It is therefore necessary to establish whether he had in mind the destruction of a ‘significant’ number of members of a group protected under the Genocide Convention. This does not mean that it is necessary to establish whether he actually killed such a significant number of group members.


18 The trial judgement in *the Prosecutor v. Jelisić*, at the ICTY, and *the Prosecutor v. Sikirica*, ICTY trial chamber decision on defence motion to acquit (under rule 98 bis).

19 *The Prosecutor v. Mpampara* and *the Prosecutor v. Ndindabahizi* at the ICTR, as quoted in Schabas, *Genocide in International Law*, p. 179.

The politicides and some of the (state-organised) genocides that the authors refer to would actually be regarded as crimes against humanity under ICL.

21 The difference between Hutu and Tutsi is essentially a functional one between cattle raisers and land owners, but it became institutionalised during Belgian colonial rule, when the different notions were introduced into Rwandan identity cards. From then onwards, it was also possible for foreigners to distinguish between Hutu and Tutsi, but this did not change the fact that both groups' members do not differ in terms of culture, language, religion, nationality, or race.


25 Modes of liability (for example superior or command responsibility and complicity) describe the link between a crime and the perpetrator and are not crimes in themselves.


27 At the core of the dispute was a trial decision at the ICTY in the Prosecutor v. Karadžić to grant the prosecution leave to correct the indictment and to replace ‘probable’ by ‘possible’ in the description of Karadžić’s alleged liability. Karadžić had opposed the correction on trial. The trial chamber agreed with him, and the
Prosecution lodged an appeal, which was granted. The appeals decision stipulated that ‘the ICE III mens rea standard does not require an understanding that a deviatory crime would probably be committed; it does, however, require that the possibility a crime could be committed is sufficiently substantial as to be foreseeable to an accused’. Decision on the prosecution’s motion appealing trial chamber decision on JCE 3 foreseeability, _The Prosecutor v. Karadžić_, 25 June 2009.

28 _The Prosecutor v. Brima_ et al., judgment, SCSL Appeals Chamber (Case No. SCSL-04-16-A), 22 February 2008, paragraph 80. The prosecution was confronted with the dilemma whether attempts to gain control over Sierra Leone by forces of the internationally recognised government could be labelled a common plan as part of a JCE. For a discussion of the issue and the just war argument linked to it, see W. Schabas, _The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone_ (New York, Cambridge University Press, 2006), pp. 309–14.

29 At the time the operational indictment against Milošević was drafted, the lower threshold requiring only proof that the JCE consequence was ‘possible’ did not yet apply.


32 Trial chamber Case File Dossier No. 002/19-09-2007/ECCCITC, Decision on the applicability of Joint Criminal Enterprise, 12 September 2011, available at
33 J. Sarkin also points to the inclusion of the so-called Martens Clause into Hague 2, which stipulates: ‘until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience’, Sarkin, *Colonial Genocide and Reparations*, pp. 63–70.


35 Article 3 of Hague 2 states, ‘the armed forces of the belligerent parties may consist of combatants and non-combatants. In case of capture by the enemy both have a right to be treated as prisoners of war’. This also applies to people who accompany belligerents with the latter’s consent, but do not carry arms and do not take part in the hostilities, as stipulated in article 13: ‘individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers, contractors, who fall into the enemy’s
hands, and whom the latter think fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying’.

36 The latter order was probably meant to relieve the German soldiers from the stress and moral pressure of shooting women and children, but was nevertheless intended to achieve the same goal – the deaths of unarmed civilians. Under these circumstances, the Herero (no matter whether armed or unarmed) had the choice to die in the desert, to be shot at waterholes, or to surrender and become forced labourers. See von Weber, Geschichte des Schutzgebietes Deutsch-Südwest-Afrika, p. 169. The ‘extermination order’, which was later withdrawn, can be found in almost every publication dealing with the Herero uprising.

37 Article 23 of the 1899 Hague 2 Convention states, ‘[b]esides the prohibitions provided by special Conventions, it is especially prohibited: to employ poison or poisoned arms; to kill or wound treacherously individuals belonging to the hostile nation or army; to kill or wound an enemy who, having laid down arms, or having no longer means of defence, has surrendered at discretion; to declare that no quarter will be given [...]’.

38 The Herero had ceased to constitute a military threat to the German forces, but, in August, the uprising of the Nama had started in the southern part of the colony. W. Nuhn, Feind überall. Guerillakrieg in Südwest. Der große Nama-Aufstand 1904–1908 (Bonn, Bernard & Graefe Verlag, 2000), pp. 42–6.

39 The German verb is ‘vernichten’.


42 The German word used is ‘Knechtung’.


46 Anderson, ‘Redressing Colonial Genocide’, p. 1162, is wrong here. Hague 2 requires an occupier to conduct a trial before executing POWs (which also means that killing POWs for crimes was not in itself illegal, although the procedures carried out by the *Schutztruppe* hardly fulfilled any criteria of fair trials).

47 Article 2 of the ICTR statute and article 5 of the ICTY statute, as well as article 6 of the ICC statute, all contain the element of ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’ as a count of genocide.

48 Some officers of the *Schutztruppe* openly admit the phoniness of these procedures, the only purpose of which was to kill Herero and Nama, whether they had committed atrocities against civilians or not. The diary of Lieutenant Erich von Gilsa describes a scene from the war against the Nama, describing exhausted Nama and Herero, coming to waterholes held by the *Schutztruppe* and asking for water, who were immediately court-marshalled and shot. Knowing about the practice, many claimed to be Bushmen. P. Spätling (ed.), *Auf nach Südwest: Kommentiertes und illustriertes Tagebuch eines Leutnants über seine Erlebnisse in Deutsch-Südwestafrika 1904/1905* (Barleben, Docupoint Verlag, 2014), p. 10.
Article 6 of Hague 2 describes the rights of POWs with regard to labour and requires the relevant authorities to use their remuneration (if it is not directly paid to the POW) for the benefit of the prisoners: ‘[t]he wages of the prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance’.

According to Hague 2, POWs have the right to work if they wish to, but cannot be forced to work and cannot under no circumstances be forced to work for the military or for military purposes.

50 L. von Estorff, *Wanderungen und Kämpfe in Südwestafrika, Ostafrika und Südafrika 1894–1910*. Hausgegeben von Christoph-Friedrich Kutscher (Wiesbaden, Wiesbadener Kurier Verlag, 1968), p. 135. Von Estorff was appointed commander of the *Schutztruppe* and later transferred the starving and ill Shark Island prisoners to the mainland. The correspondence between von Estorff, the Gouvernement in Windhuk, and the government in Berlin about Shark Island and other camps is stored in BArch box R 1001.2040 and in the National Archives of Namibia in Windhoek, in the confidential political files concerning the Witbooi and Nama war (politische Geheimakten), in the files ZBU 2369 VIII G, VIII H and BLU 48 G3R (files from the Lüderitzbuch administration concerning the food supplies and housing conditions on Shark Island).

51 Oberstleutnant von Estorff an Schutztruppe, Berlin, 10 April 1907. BArch R 1001.2140.


53 Correspondence between Ziemann and the *Schutztruppe* in Duala, Cameroon, June–July 1910, in BArch R1001.2090.

54 Kaiserliches Gouvernement von Kamerun to Staatssekretär des Reichs-
55 According to a report from the medical station of the 8th company of the Schutztruppe in Dschang, in September 1911, 25 out of 67 had already died of tuberculosis. Sanitätsdienststelle der 8 Kompagnie, 14 September 1911, in BArch R1001.2090.

56 Bericht des Kaiserlichen Gouverneurs von Deutsch-Südwestafrika vom 23 September 1913, in BArch R1001.2091.

57 Most of the deportees were Nama; a minority were Herero.

58 Sarkin, Germany’s Genocide of the Herero, pp. 136–42, provides an overview of all quantitative claims about casualties in the literature. Numbers and percentages for Nama were lower and less intensely researched and debated.


60 Sarkin, Germany’s Genocide of the Herero, pp. 195–8.

61 According to the jurisprudence of the ICTY and the ICTR, a superior has the duty to inform himself about (possible) abuses committed by his subordinates, as long as such information is available to him. There is some dispute, however, on whether the failure to do so makes him liable for the very abuses or constitutes a different offence of negligence. See Meloni, ‘Command Responsibility’.

62 Von Trotha was a lieutenant general (Generalleutnant) when he retired, and the Emperor wanted to increase his pension to the amount that a general would be
entitled to. See the correspondence between the Reichskolonialamt, the Reichskanzler, and the Ministry of Finance about the intended reward, which the latter ministry regarded as a contravention of the pension law in force at the time. The correspondence stems from May 1906 and is included in BArch R 43.937.

63 It is worth mentioning here that in 1907, the Fourth Hague Convention on the Laws and Customs of War on Land (Hague 4) was signed, replacing Hague 2 for the states that ratified it. For all others, Hague 2 remained binding. Germany was a signatory to both.

64 Today’s Burundi and Rwanda, which also belonged to German East Africa, were less affected by the war.


66 The official German records estimate the number of Maji Maji casualties to be 75,000, Stenographische Berichte über die Verhandlungen des Deutschen Reichstages, Anlagenband 622 (Sitzung 1907–1909), p. 3693. Kamana Gwassa, p. 217, estimates the real number between 250,000 and 300,000. Bührer, p. 274, quotes 250,000 casualties, which were mostly due to hunger and disease. In the prosecutor v. Krstić, the ICTY found the massacre of 7,000–8,000 Bosnian Muslims from Srebrenica to be a genocide; the victim numbers of the Rwandan genocide, which was adjudicated as such by the ICTR in the prosecutor v. Karemera, oscillate between 500,000 (the number used in the immediate aftermath of the genocide by the UN) and 800,000. The Rwandan government and victims organisation have been publishing claims of more than 1 million victims.
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