PSI REPORTS

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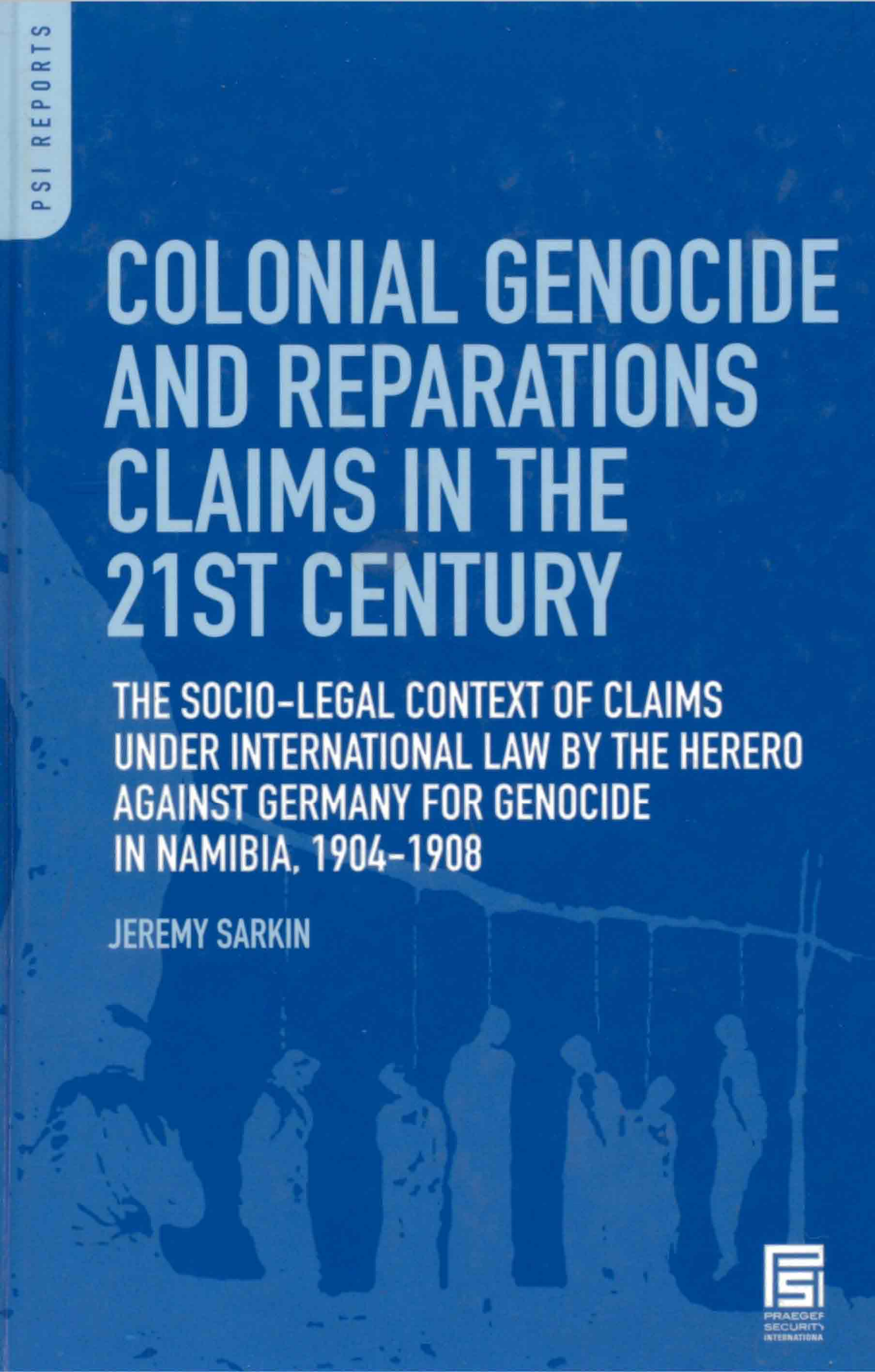
JEREMY SARKIN



PRAEGER SECURITY INTERNATIONAL

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PRAEGER SECURITY INTERNATIONAL
Westport, Connecticut · London

Library of Congress Cataloging-in-Publication Data

Sarkin-Hughes, 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 / Jeremy Sarkin.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-313-36256-9 (alk. paper)

1. Herero (African people)—Reparations. 2. Namibia—History—Herero Revolt, 1904–1907—Reparations. 3. Reparations for historical injustices—Namibia. 4. Germany—Trials, litigation, etc. I. Title.

KSY2695.S27 2009

345.6881'0251—dc22 2008033452

British Library Cataloguing in Publication Data is available.

Library of Congress Catalog Card Number: 2008033452
ISBN: 978-0-313-36256-9

First published in 2009

Praeger Security International, 88 Post Road West, Westport, CT 06881
An imprint of Greenwood Publishing Group, Inc.
www.praeger.com

Printed in the United States of America

The paper used in this book complies with the Permanent Paper Standard issued by the National Information Standards Organization (Z39.48-1984).

10 9 8 7 6 5 4 3 2 1

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Acknowledgments

THIS BOOK EMERGES out of my work in Namibia over a number of years, which came about as a result of a lecture I gave to the law faculty at the University of Namibia in Windhoek on transitional justice in 2001. I was visiting the country as an external examiner for the University of Namibia. A number of former students, including two former directors of the Legal Assistance Centre in Windhoek, attended that lecture and recommended that I pay the Chief of the Herero a visit at Namibia's Parliament, which I did. The Chief and I spent a number of hours talking then and on many subsequent occasions. I thank him for the information he has provided and the access he has granted me to the many Namibians who have provided insights and information.

This book is the product of extensive research, including numerous interviews I conducted in Namibia, Botswana, Germany, South Africa, and elsewhere. The interviewees included members of the Herero, Damara, and Nama communities in Namibia, South Africa, and Botswana.

The book itself emerges out of a paper I delivered at the Centenary Commemoration of the Ohamakari Battle of August 11, 1904. This event was commemorated on August 14, 2004 at Ohamakari, Namibia. At that event, the German Minister for Economic Development and Cooperation, Heidemarie Wieczorek-Zeul, delivered an apology to the Herero on behalf of the German government. When I was asked to deliver an address to that gathering I realized that there was little written about the issues with which the Herero court cases were concerned (see the Program for Commemoration of Ohamakari Battle on page 195). It was around that time that I was contacted by other groups who wished to take up issues concerning claims for historical human rights violations. I delivered a paper to the Hero's Day Commemoration in Okahandja,

Namibia in 2005 and also presented another paper to traditional chiefs in August 2005. I have also worked with the Namibian Human Rights & Documentation Centre at the University of Namibia in Windhoek on developing their National Human Rights Institution.

However, my involvement in the field of transitional justice began more generally when I played a role as commissioner (from 1991) and then national chairperson (from 1994 to 1997) of the Human Rights Committee (formally the Human Rights Commission and before that the Detainees' Parents Support Committee) in South Africa. This organization lobbied and focused part of its work on dealing with the past and the establishment, appointment processes, and workings of the Truth and Reconciliation Commission (TRC). During the life of the TRC, I had different interactions, including attending various hearings and meetings and running a monthly seminar (together with a TRC staff member) on topics related to the TRC's work. My work has also dealt with the past, and with other transitional issues, in a number of countries, including Rwanda, Angola, Burma, the Democratic Republic of Congo, Sierra Leone, and Ethiopia.

There are many people who have helped in the process of writing this book. One person who assisted me enormously on the Herero issues in general is Malcolm Grant, who has assisted the Herero for many years. He has been generous with his time and his knowledge of the issues. Others who have assisted include Ryan Schneeberger (photographs), Casper Erichsen, Bob Kandetu, Werner Hillebrecht (Namibian National Archives), Ester Muinjangue, Kae Matundu-Tjiparuro, and Jatah Kazondu. William Kentridge graciously provided his artwork for use in the book. Attorney Phil Musolino, who has represented the Herero in the United States, has been a pleasure to work with. Maresa de Beer assisted with the editing, and I owe her a debt of gratitude.

I would like to thank my former home institution, the University of the Western Cape, in Cape Town, South Africa, and the Fletcher School of Law and Diplomacy at Tufts University in Medford, Massachusetts, where I was Visiting Professor of International Human Rights from September 2006 to June 2008. I would also like to thank the Law School at Washington and Lee University in Lexington, Virginia, who appointed me Scholar-in-Residence from January to April 2006. The then-Director of the Law Center, Professor Blake Morant, and Administrator Terry Evans were extraordinary in their hospitality and assistance to me and my family. I thank them enormously. The months I spent there gave me a considerable amount of time to research and write. I had access to a superb library, where the staff assisted me, above and beyond the call of duty, in working on this and other projects. I also want to thank the following people whose assistance was invaluable: Yousri Omar and Stephanie Yost at Washington and Lee University and Amy Cook, Joie Chowdhury, and Amy Senier at the Fletcher School at Tufts University. I would also like to thank the United Nations Development Program and the Sur Human Rights University Network for funding this project.

Greenwood Press has been wonderful, and I am indebted to them for their professionalism. I thank Robert Hutchinson for pushing this project and being a pleasure to work with.

Finally, I would like to thank my family, Rosanne, Eryn, and Hannah for their love and support.

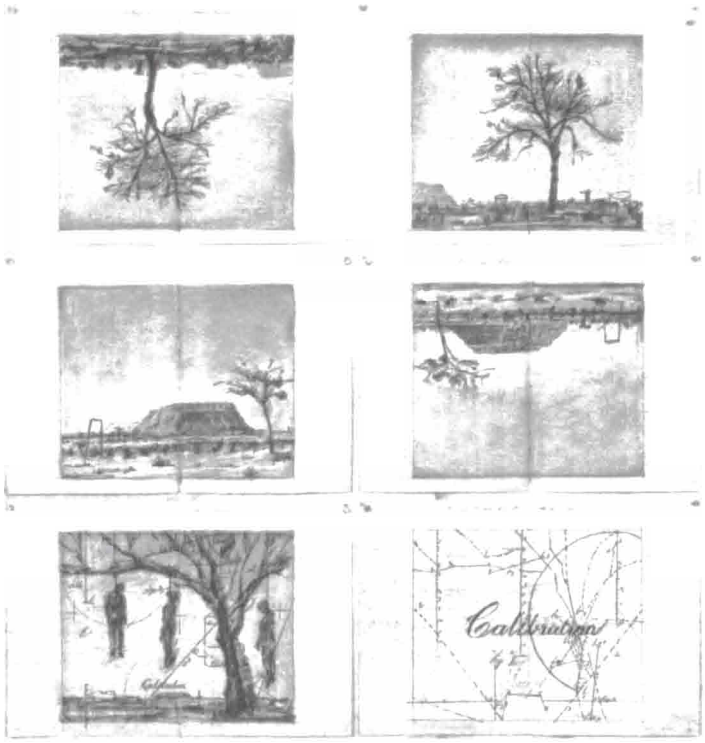
Jeremy Sarkin
May 2008

Introduction

Until relatively recently colonial human rights abuses were regarded as morally problematic, but they did not seem to have any legal relevance. The treatment of colonial subjects was largely seen as part of the lawful process of "civilizing." Yet today there is a growing acceptance that colonial abuses may have belated legal implications, and that some of the colonizers' actions do not merely retrospectively qualify as violations but were already violations under the laws of that time.

While specific codified instruments were in their infancy in international law in the nineteenth century, international agreements existed even in international criminal law instruments such as the 1878 Lima Treaty to Establish Uniform Rules for Private International Law and the 1889 Montevideo Treaty on International Penal Law. Already at that time various branches of international law, especially international humanitarian law (1864 Geneva Convention), provided protection for individuals and groups. Additionally, international protection for individuals and groups at the time was found not only in international humanitarian law but also in other international legal regulations such as those governing slavery and piracy. The possibility of humanitarian intervention where human rights violations were occurring in other states also existed. Accordingly, there is considerable acceptance today that a number of historical occurrences are actionable as gross human rights and/or humanitarian law violations. In this regard, Elazar Barkan has stated: "Indigenous peoples have only recently become candidates to be considered victims of genocide, rather than merely vanishing people."[1]

Some would argue that colonialism's main intention was often the annihilation of indigenous peoples, but colonialism was primarily about control. The



Drawing for Black Box/Chambre Noire 2005. Courtesy of William Kentridge.

predominant objective was not to exterminate, but to bring the local population under control of the colonial administration using the quickest, cheapest, and most deterring forms of violence. However, on occasion, part of the objective was to take land, and in these cases the removal or extermination of the local population was part of the intent. Interestingly, some commentators do not consider colonialism itself as a violation of international law until at least 1945,[2] and probably much later. In an attempt to establish control, the colonialists often killed hundreds of thousands of indigenous peoples as they brutally squashed rebellions. In most cases the intent of the colonialists does not meet the criteria for genocide, but their behavior could qualify today as crimes against humanity.

This book will explore issues of historical human rights violations and the possibility for reparations through the case of German colonial abuses against the Herero in then-German South West Africa (GWSA) at the turn of the twentieth century. This work will examine whether there is support in international law for the Herero claims for accountability and reparations at the time the atrocities occurred. What will be explored is whether, as some claim, by the beginning of the twentieth century various forms of genocide were already

proscribed in customary international law as well as various international instruments.[3] The present work examines these issues against the background of the socio-political issues in Namibia today.

DEALING WITH THE PAST

The end of the twentieth century brought major advancements in democratization around the world. In Europe, Africa, Asia, and Latin America huge changes in the political landscape occurred, including—and partially because of—the fall of the Berlin Wall. The initial euphoria was soon counterbalanced by the imperative to address pressing and thorny issues, including how to deal with the past. For some countries, this legacy occurred recently, while in others the legacy of violence, dispossession, and abuse was of a much older vintage. The latter, those newly democratic countries with centuries-long histories of occupation and abuse, are and were forced to choose whether to deal with the past, and, if so, how.

Addressing the past is in many ways unavoidable due to its dramatic influences on the present. In the words of Faulkner: "The past is not dead. It is not even past."[4] In Namibia, as in other countries, history pervasively colors the current political landscape. As Jared Diamond has stated, Namibia "is struggling to deal with its colonial past and establish a multiracial society. Namibia illustrated for me how inseparable Africa's past is from its present."[5] Pertinent issues concern the rights, roles, and needs of minorities, especially indigenous communities; access to land and the need for land reform; and the nature of the state.

In the wake of democratization, countries with histories of undemocratic, authoritarian, and repressive rule typically have had to address past human rights violations. How the former authoritarian regimes in Eastern Europe, Latin America, and Africa were dealt with has become an international issue. Some countries, such as Chile, El Salvador, Argentina, Burundi, the Democratic Republic of the Congo, South Africa, Ghana, Morocco, Peru, Sierra Leone, and others set up truth commissions to reckon with the past. Truth commissions are constructive as they encourage victims, offenders, and the community as a whole to confront the past, and each other, in order to gain new or more comprehensive insights into what happened and why. Other countries have prosecuted violators of human rights, and some have done nothing at all.

The advent of independence for Namibia in 1990 introduced the possibility of undertaking this process and righting the wrongs committed in its past. Namibia's past reflects an atrocious history of human rights abuses as a result of German colonialism and South African apartheid that spanned more than a century. This legacy continues to haunt Namibia in many and varied ways, yet the country has chosen not to deal with the past directly, supposedly for the sake of reconciliation between the resident communities.

For a variety of political, economic, and logistical reasons the possibility to pursue claims for what had happened in the past did not present itself for Namibians before 1990. In terms of the development of relevant law at international, regional, and local levels the possibility did not exist, and such precedents as the claims of Nazi victims from WWII had not yet occurred. The arrival of independence, however, overlapped with major growth in international justice, including justice and reparations for past human rights violations in the domestic context. Accordingly, independence brought rights, and with them responsibilities, for the rehabilitation of the communities of Namibia. Among the most in need of this reckoning with the past are the Herero, who suffered severe human rights violations at the hands of their German colonizers.

For many, the need to deal with Namibia's past human rights abuses and the issue of the historical claims cannot be wished away. There have been various calls for a truth commission,[6] but the new government has resisted this pressure, claiming that dredging up the past would negatively affect the reconciliation process.[7] They even denied a request by the South African Truth and Reconciliation Commission, in 1997, to hold hearings in Namibia.[8] Some believe that the ruling party's (the South West African Peoples Organization; SWAPO) disinclination was motivated by a fear that their position might be compromised if the atrocities committed by members of their group during the fight for liberation, especially in their treatment of detainees, were exposed. Some years after independence, the fight for a truth commission has died away. As Gwen Lister argued, "The time for Namibia to have a truth commission along the lines of that in South Africa has long passed."[9] The only resurgence of this idea came in 2005 when mass graves were uncovered near the border with South Africa. These graves are believed to hold the bodies of SWAPO soldiers killed by South African security forces, although the circumstances behind the killings and the identities of those buried there remain shrouded.

Most Namibians see the land issue in Namibia as political: because the ruling party has a seventy-five percent majority and were not as affected by dispossessions as the Herero, they are not as consumed by matters of land access. The minority groups, on the other hand, are, but their position as the political opposition has allowed the ruling party to dismiss these complaints as political tactics. In truth, land questions from a hundred years ago are still very relevant today in many ways. Access to land is not only an economic issue for those dispossessed during colonial times, it is also psychological and should be interpreted within the context of "reclamation and restitution of identity and history."[10]

THE HERERO GENOCIDE

In this context, it is nearly unanimously agreed upon today that between 1904 and 1907/1908 Germany committed genocide, as legally defined, against the Herero of then-German South West Africa (GSWA), today Namibia.

The Herero genocide is unique in that the order to annihilate the Herero was publicly proclaimed and specifically made known to the target group in their own language. The official proclamation initially sought the extermination specifically of the Herero. However, other groups, especially the Nama, were later targeted because of their rich land holdings and their intransigence against the Germans. The severe treatment meted out to the Nama and the major reduction in their population numbers may also fit the definition of genocide.

German settlers in the territory who wanted the land and cattle of the indigenous Herero, and the public in Germany, incited by propaganda that the Herero were conducting a race war, bayed for Herero blood. German troops, many of whom had previously exercised brutal treatment on indigenous populations in different parts of the world, killed men, women, and children without distinction. Many other atrocities were also committed, including the rape of Herero women. These events initially occurred under the command of General Adrian Dietrich Lothar von Trotha, most likely at the instruction of Kaiser Wilhelm II—both had a history of ordering and conducting brutal extermination-type practices. von Trotha embarked on a planned, announced, systematic, and indiscriminate extermination of the Herero community.

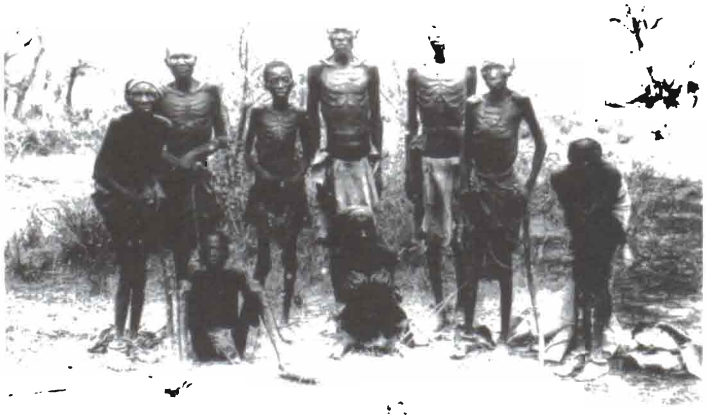
The order to wipe out the Herero community became the first genocide of the twentieth century.[11] Between 60,000 and 100,000 people, almost all civilians and non-combatants, many of whom were women and children, were executed by German troops in various ways or were forced into the desert to die of starvation and thirst or by drinking water at water wells poisoned by German troops.

Maybe 20,000 of the original Herero population of about 100,000 were left in the end. The extermination order (*Vernichtungsbefehl*) was issued on October 2, 1904. Due to pressure on him, Kaiser Wilhelm reluctantly, and after a

German soldiers at a waterhole. Courtesy of National Archives of Namibia.

Herero hangings. Courtesy of National Archives of Namibia.

long delay, rescinded the order in December 1904; however, the acts of genocide were not limited to those few months from October 1904 to December 1904, when the official extermination order was operative. A policy of taking no Herero prisoners was in force before the official order was proclaimed, and the genocide began at least as early as August 1904. Furthermore, the eradication of the Hereros continued after the genocide order was lifted.



Herero emerging from the desert. Courtesy of National Archives of Namibia.

Initially, the genocide of the Herero would be achieved by means of German bullets and clubs, by hanging, by burning the huts where they lived, or by forcing them into the desert to die.[12]

When the order was amended, the extermination continued in a less overt manner. A few thousand Herero were captured and placed in concentration camps, where thousands died due to ill treatment, disease, and starvation. Different and smaller diet rations were given to Herero prisoners than to prisoners from other communities.

In addition, Herero prisoners were used as slave labor for both public and private enterprise. Some of the concentration camps were run by the colonial authorities, whereas others were run by private companies, such as Woermann shipping lines and Arthur Koppel Company (companies now being sued by the Herero).[13] The latter ran their own concentration camps and paid a rental fee to the German authorities for the right to use Herero slave labor in their own enterprises.

DEALING WITH THE GENOCIDE

Very little has been written about the events in then GSWA, today's Namibia, from a legal point of view. Instead, most studies have emanated from an historical or sociological standpoint.[14] Similarly, until quite recently there has been limited evaluation of historical human rights issues from a reparations and claims point of view. While the literature has grown in recent years, much work remains to be done, especially by those directly affected by the legacy of abuse. Because there are often few survivors, victims are generally neglected in genocide studies. They are hardly ever primary subjects in these studies and rarely share equal subject status with perpetrators. Referring to the lack of legal writing on the Herero genocide, Comevin has asserted that

> studies published before World War I were almost all by German authors and have essentially a documentary and didactic character. They aim at instructing the metropolitan country about the economic importance of these colonies, so rapidly acquired during the course of 1884 and 1885. Those published after 1918 are written by Germans, English, French, Americans, and Belgians, who are all more or less biased and pass moral judgements on German colonization of Africa. From 1945 onward the communist writers of East Germany come to confirm, in works written from the archives in Potsdam, the charges against German colonialism published between the two wars by English and French authors, and to utter a cry of alarm against the neocolonialism of West Germany.[15]

This was noted in 1969, but it remains the case regarding scholarship on this matter. Equally relevant to this case is the recognition in reference to the Holocaust that neglect to study atrocities is extremely harmful:

> In some ways, the effect of this academic neglect may be comparable to the damage done by those who deny the Holocaust. While I am by no means suggesting a moral

> equivalency between those who, for various reasons, omit reference to genocide and those who actively work to mislead and repress truth, I am asserting that both behaviors have somewhat similar results. That is, the failure of social scientists to adequately address the study of genocide contributes to perceptions and attitudes that, through exclusion, minimize the importance and significance of genocide. That is essentially what Holocaust denial is all about.[16]

The court cases the Herero are bringing against Germany and other actors involved at the time have brought the issues of legality to the fore. This book therefore accentuates the use of law as a means of attaining redress and reparations in the absence of a political or negotiated resolution between the parties. It examines the specific political context, which precluded a negotiated settlement but which recently saw a few tentative steps towards finding some accommodation. For example, the German government offered an apology at the hundredth anniversary of the major battle between the Herero and Germany at the Waterberg on August 11, 1904. Yet the apology was tentative and limited in scope, as Germany sought to avoid opening a Pandora's Box of possible legal consequences, which a comprehensive apology admitting guilt might have caused. The apology is examined against the theoretical and contextual issues that surround apologies and forgiveness. Despite the attention brought by the Herero court cases, the plethora of research on the genocides of Europe over the last century would indicate that European genocide is thought more worthy of study than genocide in other, often less developed, regions of the world.[17]

The present study surveys the legal interpretations of the events that took place between 1904 and 1908, acknowledging that much research remains to be done. While many studies address the question of whether the events constitute genocide, they do not evaluate these claims in terms of legal principles and international law. This book aims to rectify the common misconception that genocide and other international crimes did not constitute crimes at the time they were perpetrated on the Herero.

The historiography on Germany and GSWA has often been biased against the Herero by relying almost exclusively on German sources. Even authors with a more expansionist and critical view have often relied on German sources. Bley, for example, noted that the sources for his 1971 book were "almost entirely derived from the European side."[18] Since then there has been a growth in research on colonialism and specifically on the Herero War, but many of the accounts still depend and focus on the writings and testimonies from the German side. Very recently, a more balanced picture has emerged, drawing from a wider array of sources, including the accounts of indigenous persons. However, a distinguishing feature of the Herero genocide (and most other African genocides or those that occurred in the political south[19]) is the absence of accounts given by victims. Among the European examples, such as the Armenian genocide, survivors on the other hand often constitute the main source material on the genocide.[20] In this case, the German efficiency and penchant for good administration yielded numerous reports. Until recently, this documentation

formed the bulk of source material available to authors. Because they are perpetrator accounts they are accompanied by justificatory rationalizations as well as insight into the thinking and intent behind specific deeds.

A few eyewitness accounts do exist, and some victim accounts are found in the Blue Book that recorded accounts of the atrocities committed during the Herero War.[21] Since the British produced the Blue Book during World War I, in which they fought against the Germans, reservations about its objectivity remain. However, the sentiments contained in the 1918 report were already present in a British report of 1909, which stated:

> The great aim of German policy in German South West Africa, as regards the native, is to reduce him to a state of serfdom, and, where he resists, to destroy him altogether. The native, to the German, is a baboon and nothing more. The war against the Hereros, conducted by General Trotha, was one of extermination; hundreds—men, women, and children—were driven into desert country, where death from thirst was their end; whose [sic] left over are now in great locations near Windhuk, where they eke out a miserable existence; labour is forced upon them and naturally is unwillingly performed.[22]

In August 1912, another British foreign office official commented:

> In view of the cruelty, treachery, [and] commercialism by which the German colonial authorities have gradually reduced their natives to the status of cattle (without so much of a flutter being caused among English peace loving philanthropists) the [Portuguese] S. Thome agitation in its later phases against a weak [and] silly nation without resources is the more sickening. These Hereros were butchered by thousands during the war & have been ruthlessly flogged into subservience since.[23]

Given that many British government reports predating World War I mention these same issues, the contents of the Blue Book cannot solely be regarded as the propaganda of a nation at war. Certainly, the timing of the report directly relates to the war. If the war had not taken place, the reports of the atrocities might not have been collected and chronicled in this way, but the war context per se does not reduce the veracity of its findings.

Thus, this book examines the legal and socio-legal issues around these matters. The analysis is guided by the position that the killings were not only international crimes from a present-day perspective, but were already international crimes at the time. Therefore, reparations for what occurred are due to the victims today. The present study views these atrocities in the context of the developing norms of reparations internationally, regionally, and domestically, and the development of historical claims in general. It appraises the Herero genocide events in light of the current critical legal issues regarding the extent to which international law affects historical claims for reparations.

The book also examines the effect of the genocide on Namibia today and what the Herero are doing to attain redress. It will explore the state of reparations theory and practice around the world, as well as the role of apologies in

coming to terms with the past, referencing the apology Germany gave to the Herero in 2004. Critically, the genocide had a major effect on Herero population numbers. Today Herero number about 100,000, roughly the same as they did before the genocide. As a result of the genocide, they constitute less than ten percent of the Namibian population, which puts them in a hugely inferior position in relation to the majority Owambo group, which constitutes about fifty-five percent of the population and is the predominant support base of the ruling SWAPO political party. It is estimated that had the genocide not taken place, Herero numbers would be four or five times greater today, and they would thus be a major political force in Namibia.[24] In this way the genocide dramatically influenced current political power positions in Namibia. It has had, and still has, major economic effects on the land and cattle, and the identity of those groups who depend on them. Clearly and inevitably, the genocide has had dramatic effects on the Herero and on Namibia. As a result, the possibility of reparations for historical violations of human rights has emerged. In determining the likelihood that this could become reality, the reasons for the genocide, how it took place, and the impact it has had and continues to have today are all highly relevant factors.

INTERNATIONAL LAW TODAY AND IN 1904

In light of the cases the Herero have filed in the United States of America against Germany and German corporations, this book focuses on the legal interpretations of the terms and events that are likely to be applied by the various courts or tribunals. It looks at the legal definitions of genocide, crimes against humanity, and other international crimes, and both factually and legally considers whether the events indeed constitute genocide and/or other international crimes. This consideration involves determining whether the intentions were genocidal, whether genocide actually occurred, and what crimes the events would represent in today's legal terms. The central question is accordingly addressed: were the atrocities committed against the Herero by Germany already violations of international law and thereby considered international crimes at the time? It will be argued that they indeed were, both in terms of customary law and the various international treaties that were in force at the time. The present study argues that applicable international law, international human rights law, international humanitarian law, and international criminal law existed by 1904.

The classical view of the protection of the rights of individuals is that while international humanitarian law and international human rights law have much in common, they stem from completely different roots. Humanitarian law originates from the relations between states, whereas human rights law is derived from the relations between a government and the people of a particular state.[25] It is often argued that human rights law only recently developed, out of the

conduct that occurred during World War II. Others counter this extremely limited view of the development of international law and proclaim that the origins of human rights law go back a few hundred, if not a few thousand, years. Although one could refine the argument by stressing that it was only since World War II that a formal system for enforcing the protection of individual rights existed, the rights themselves have had a long vintage. Thus, while few international mechanisms to protect rights or prosecute perpetrators existed before World War II, it was accepted that rights were protected at the very least in customary law. The mechanisms predating World War II will be explored later.

Despite this classical view of the distinct geneses of international humanitarian law and international human rights law, the two sets of legal principles actually derive from similar origins and overlap to a large degree. In this regard, the African Commission on Human and Peoples Rights has observed that both types of laws are based on the same principles and that "human rights and IHL [international humanitarian law] have always, even in different situations, aimed at protecting human beings and their fundamental rights."[26] Similarly, Mazzeschi argues that "the protection of human rights is, after all, the ultimate goal of the rules of international criminal law and humanitarian law."[27] Consequently, the principles of both may apply simultaneously in the sense that the law relating to international and domestic human rights protection remains in force even in times of war "as long as it is not superseded by the law of armed conflict or derogated according to the applicable rules of international human rights law."[28] There are crucial reasons why the laws of war and those that apply during times of peace differ and require distinct legal classifications. Yet it must be understood that they overlap and that, at times, both sets of principles may apply. Dolzer suggests, "The special status of the laws of war in international law entails that damages arising out of war must also be considered to be distinct and separate from damages that occur in peacetime."[29] However, damages are obtainable for harm that occurs during both.

This book will argue that crimes against humanity and genocide already constituted crimes at the time of the Herero genocide, although they were not known by those names. The word "genocide" entered usage in the 1940s, but the concept of the crime dates back thousands of years and was certainly an internationally accepted violation by the turn of the twentieth century. Furthermore, although crimes against humanity and genocide did not lead to criminal liability, specifically for individuals, civil liability and state responsibility for their commission were already in existence. The principles from which these crimes emerged existed in international law, were acknowledged by the international community, and were called upon periodically by 1900. This does not mean that the law only applies retrospectively (although it can), but that these norms were applicable at the time either through treaty or customary law obligations. Select supporters of historical reparations argue that some legal rules ensure retrospective liability for states, as they have become *jus cogens* norms.[30]

According to Jochnick and Normand, "Until the nineteenth century, the residual remains of chivalry, the non-binding theoretical treatises of the publicists, and the slow accretions of customary restraints derived from state practice comprised the legal framework governing conduct in war."[31] The various Hague Conventions and Geneva Conventions including those of 1864, 1899, 1906, and 1907, all of which were signed and ratified by Germany, as well as customary law already in force, protected against certain types of conduct during wartime. Although treaty law was somewhat deficient at the time, customary law was a critical component of these protections.

Although the 1949 Geneva Conventions and their "Common Article 3" detailing basic humanitarian rules, which must be respected in internal armed conflicts,[32] were not in force, the Conventions are a codification of customary law that existed long before 1949. These rules offered protection to those who had already laid down their arms and to others, including civilians, who were never part of the conflict.

Another question the book will examine is the jurisdiction of various courts and tribunals to deal with and apply laws to crimes that supposedly did not exist at the time of their commission, and whether such treatment is a retrospective application of the law. A number of courts, including the International Court of Justice and the European Court of Human Rights, have determined that they will examine issues predating their founding. While the Human Rights Committee (HRC), the treaty body of the International Covenant on Civil and Political Rights (ICCPR), has not been willing to apply its jurisdiction quite so widely, it has been willing to examine matters which occurred even before a particular state party accepted its jurisdiction to do so, provided that the violation is ongoing. The possibility of approaching such bodies is evaluated in Chapter Three in order to gauge the probability of success for the Herero claims, as well as for historical claims in general.

Germany's international obligations were governed by the many treaties it was party to, including the Hague Conventions of 1899 and its regulations as well as the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of July 6, 1906 (updating the 1864 Convention), which Germany signed on July 6, 1906 and ratified on May 27, 1907. The effects of those treaties are examined in the context of the Herero killings to establish what obligations were violated at the time.

The context and content of the Martens Clause in the 1899 and 1907 Hague Conventions are examined in detail to determine its effect on the development of protections available at the time, specifically as it represented the origin of the notion of crimes against humanity and genocide. By 1899 (and before), there were major concerns about the growing horrors of war, so much so that the 1899 Peace Conference was regarded as "epochmaking."[33] The various treaties that entered into force were designed to regulate what types of war states could conduct and to ensure that certain types of warfare were prohibited. In the 1950s, Hersch Lauterpacht noted: "We shall utterly fail to understand

the true character of the law of war unless we are to realize that its purpose is almost entirely humanitarian in the literal sense of the word, namely to prevent or mitigate suffering and, in some cases, to rescue life from the savagery of battle and passion. This, and not the regulation and direction of hostilities, is its essential purpose."[34] Similarly, Josef L. Kunz emphasized that "the whole law of war, including the norms regulating its actual conduct, is humanitarian in character; it is in the truest sense a part of the law for the protection of human rights."[35] In light of the Hague Conventions, Chapter Two will probe whether the *si omnes* clause, which provided that the treaty would not apply if one of the parties in a conflict was not party to it, renders the Convention inapplicable to the Herero situation—given that the Herero were not a party to that treaty.

Some additional questions the book takes up are whether the events happened in the context of a war and whether the conflict was international or domestic in nature. This is important because the status of the conflict (i.e., whether it was an international armed conflict) governs which protections apply. Humanitarian law is widely seen to apply in international armed conflict, but insurgent groups involved in non-international armed conflict are not entitled to the same protections as combatants.[36] It is proposed that the war was indeed an international armed conflict because most of the peace treaties signed with the local inhabitants, including some of the Herero chiefs, never entailed the loss of sovereignty. The concept of sovereignty and its relevance to the Herero at the beginning of the twentieth century will be discussed in Chapter One. Although Germany claimed control over the territory under international law, clearly the whole territory was not under its sovereignty. For example, the area in the North where the Owambo live, which Germany was not able to bring under control, other territories where specifically negotiated protection treaties applied—with limited effect, and areas in which no protection treaties were in force were not subject to German authority. At least until 1904, many parts of GSWA were not under German sovereignty. In many parts of the territory, even within German-controlled areas, a dual legal system operated. In fact, the Germans were still signing protection treaties for tracts of land with various communities in GSWA in 1908.[37] The issue of sovereignty is further discussed below.

The debate over whether events constitute a crime against humanity when the armed conflict is of an international character (and not merely an internal one) is, thus, ongoing.[38] Previously, an international war context might have been a prerequisite for violations to be considered crimes against humanity, but that is no longer the case. The link to war is no longer necessary. In fact, the very existence of such a requirement in the past is currently questioned. This nexus requirement emerges from interpretations of the Nuremberg Charter, the statutes of the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for Yugoslavia (ICTY), and the International Criminal Court (ICC). While the debate often centers on the way these statutes have changed the requirement over the years, only the Nuremberg Charter, which

was drafted after World War II, contained the war nexus requirement, as the crimes to be prosecuted at Nuremberg were those that had occurred specifically during that war. Furthermore, as Fenrick has argued: "No treaty or statutory instrument defines crimes against humanity in such a way that the offence specifically applies to conduct of hostilities situations."[39]

WAS IT A REBELLION OR A WAR?

Much of the debate in the academic literature centers on the reasons for the Herero rebellion, specifically whether it was a planned revolt. Most writers accept that what happened between 1904 and 1908 constitutes genocide. Yet a few denialists maintain that the events in question were no different from what happened to other indigenous groups in various colonial territories occupied by the French, Dutch, Belgians, British, Italians, and the people in today's United States. Given these opposing views, the precise nature of these events is evaluated.

The categorization of the German-Herero conflict has significant legal ramifications. Whether it was a rebellion, a war, an uprising, civil war, or an international armed conflict affects what legal principles apply. The term "rebellion" is especially problematic, as it implies that German supremacy and sovereignty existed.[40]

Gewald argues that the conflict was the result of misunderstandings prompted by the panic of a colonial official and "the self-fulfilling prophecy of Herero War that existed within the mind of settler paranoia."[41] According to him, the Herero did not initiate the war, but took up arms in response to actions taken against them. Melber concurs that the "uprising" was an act of self-defense.[42] Lundtofte also remarks that "it may be advanced that it was not the Herero, but the Germans themselves who conjured up the conflict."[43] Gewald further contends that the Germans not only instigated the "war" without provocation or cause, but also prolonged it after the conflict had essentially spent itself.[44] The uprising concluded by April 1904, but negotiations between the parties were barred because von Trotha and German troop reinforcements had yet to arrive. In effect, the war restarted after von Trotha arrived in June 1904. If these views have any validity, then the indigenous population did not rise up or capriciously prolong the war. If the Germans had indeed started the war in January 1904, Germany would certainly be liable for violations of the terms of various protection treaties. As Shelton has noted, this would fall under the state action doctrine.[45]

Regardless of whether the Herero started or continued the war, they had cause to rise up. Not only were they poorly treated, but they were rapidly losing their land, and the threat of losing even more land and being forced into small reserves loomed large.[46] Some recent literature contends that the Herero were not in danger of losing their land, but this danger was no mere perception on their part. There were clearly moves afoot to place at least some of the Herero in reserves. While it might be argued that placing the Herero in reserves was

for their protection, Berlin and the settlers undoubtedly envisioned a much more drastic land policy. In fact, the settlers in GSWA and Germans back home generally demanded a much more draconian policy towards the African population than the more humane and accommodating policy adhered to and enforced by Governor Theodor Leutwein. The colonialists vociferously attacked him and his lenient policies, and demanded his replacement. Leutwein recognized that his political strategies were in danger,[47] and the Herero knew of the demands for change. They were aware of the meetings taking place in GSWA and Germany, and they knew about the public pronouncements. With the knowledge that it was only a matter of time before Leutwein would be removed, the threat to the Herero land holdings intensified. Perhaps the settlers' objectives would not have been carried out immediately, but the manifest intent was to dispossess increasingly more Herero and give their land to the settlers. The threat perceived by the Herero preceding the rebellion was not paranoia but a certainty that materialized swiftly and to such an extent that the Herero lost all their land and cattle, and the majority lost their lives. As Pakendorf has noted, Germany sought to take the Herero's land for white settlers, because theirs was the most suitable for agriculture. Documents in the Windhoek Archives indicate that this was the intention of the colonial administration from early on, when various initiatives were aimed at subjugating those living in the territory.[48]

As stated earlier, establishing whether the events legally constituted a war, and if so whether it was international or domestic, will determine what laws are applicable. If there were no war, the laws of war would clearly not apply. In historical documents, the German authorities referred to the events as a war, but also described the insurrection as a rebellion and the Herero as rebels. An important factor in determining the legal status of the conflict is whether GSWA was under the sovereignty of Germany. The determination is complicated because of the many peace treaties signed between chiefs and the German authorities, some of which permitted the chiefs to retain authority. Questions arise as to the extent of those treaties and whether they permitted sovereignty to be exercised over the Herero. Certainly the treaties permitted trade and other types of developments and gave the Germans authority over the white people in the area, but whether they extended or limited control over the Herero is debatable. GSWA was a German protectorate, but it is questionable whether all of its parts were considered German territory. One could make the argument that it was under German control because the territory had been given to Germany at the Berlin Conference. Were this the case, the hostilities would have constituted a non-international armed conflict and the Herero warriors would be considered rebels. Under the law of war, they could not be classified as combatants. Of importance is that martial law was declared over the whole of the protectorate,[49] even before von Trotha arrived. It would appear, therefore, that the German authorities considered the conflict a war.

Melber has termed the events between the Germans and the Herero the "German-Namibian War."[50] Acknowledging that the use of the word "Namibia"

did not emerge until the 1960s, his preference is motivated by political reasons.[51] Alexander has called it "the first war of anti-colonial resistance."[52] It was undeniably a resistance conflict, but given the size of the force that was eventually pitted against the Herero and the type of arms and methods used against them, one can hardly classify such a one-sided affair as a war. Other terms, such as "massacre," "slaughter," and "annihilation" seem more apt, as would the term "genocide." Although the first few months of the conflict might fit the description of a war, thereafter the conflict involved a superior force hunting down its opponents and wiping them out by all means possible. As von Trotha stated, "any means fair or foul" were used. Thus, some analysts, the Herero, and others in Namibia regard the conflict as a war of resistance, but for the Germans it was a war of conquest and subjugation.

The issue over labeling the Herero conflict as a war has other consequences. Were it defined as a war, then if the Herero were thought to also violate the rules of war, Germany could claim that Herero warriors could lawfully be denied various protections afforded by the law of war. Thus, captured Herero would not have had to be treated as prisoners of war, for example, because they did not conduct operations in accordance with the laws and customs of war as laid down in article 1 of the 1899 Hague Convention (11).

von Trotha insisted all along that Germany was fighting a "race war."[53] However, the veracity and extent of the alleged Herero atrocities on settlers and German troops are questionable. In fact, evidence shows that the Herero went out of their way to avoid killing women and children. In the first months of 1904 the colonial authorities and the government in Berlin went on a propaganda offensive in Germany regarding the conduct of the Herero. The alleged widespread mutilation of German corpses seems to have been mere propaganda. The Rhenish Missionary Kuhlman investigated the majority of such reports and found them to be false. Even Hauptman Francke, who in a 1920 lecture stated that he had seen many corpses, argued that the allegations had no basis. Although there might have been isolated cases of such conduct, it would appear that these allegations were predominantly racist propaganda.[54] It is likely that members of the German media propagated these supposed mutilations in order to promote a racial dimension to the events in GSWA, thereby ensuring support for the intended actions of the German authorities.

In reality, the abuse and mutilation came mostly from the German forces. Bringing back severed hands and other body parts was a method approved by the field commanders and sanctioned by German officials, uniformly carried out by soldiers under German control as a way of proving to their commanders that they had killed who they said they had.[55] In an unpublished manuscript titled *The Germans in Africa*,[56] Raphael Lemkin, thought by many to be the author of the word genocide and the impetus behind the Genocide Convention, notes that before the events in GSWA in 1904, mutilations practiced by local soldiers against the indigenous population were sanctioned by the German officials who ordered the soldiers to bring back the ears of those they killed to prove the

number killed. Lemkin writes that because the ears of women were used to increase the numbers, German commander Dominik ordered that the heads of those killed be brought back instead. The difficulty of accomplishing this led to the use of genitals instead. This practice so horrified the British government that it complained to the German Ambassador in London in 1902. The Imperial Chancellor wrote to the Governor of the Cameroons asking for an end to this practice and "to abstain in all instances from illegal acts and cruelties towards the natives and during any necessary punitive expeditions to abstain from all habits incompatible with the civilized state, such as the mutilation of corpses."[57]

WHEN DID THE WAR START AND FINISH?

Determining the beginning and end dates of the war is legally relevant, as the regulations of the 1899 Hague Convention and the 1907 Hague Convention may be applicable. Under these two instruments, which demarcated permissible behavior during wartime, certain types of conduct perpetrated in 1904 or later might have already been illegal. The relevant question is whether these regulations could apply, given that the Convention required both parties in the conflict to be party to it. Although Germany was a party to the Convention, the Herero were not. Having said that, these issues must, and will be, examined through a much wider lens. The Hague Conventions, as well as other instruments from before 1899, were indicative of customary international law. Thus, the principles contained in the treaties were already proscribed in both treaty law and customary law. Even if one successfully argues that the treaties did not apply, customary law did. Furthermore, the Martens Clause is applicable, given that it was considered the minimum standard that must be applied in the absence of treaty law provisions.

Another important question is whether international law covered conflicts of a non-international nature. The war certainly had international dimensions because many of the Herero were not under the sovereignty of Imperial Germany. The fact that the Herero were supplied arms by other countries also affords the conflict international status. Even if all the above arguments are cast aside, the protection treaties render the war "state action" and Germany is therefore liable in terms of its domestic law.

The end date of the war is significant because Germany adopted the 1907 Hague Convention while the war was ongoing. The Convention makes provision for individual reparations to civilians for damage suffered during wartime. Ironically, the German delegation to the conference proposed this provision.

The generally accepted dates of the Herero War (or genocide), derived from German reports and accounts, are 1904 to 1907. But these dates are questionable. Although the genocide primarily occurred in 1904, the extinction continued well into 1905 through actions such as maintaining the military cordon, which forced the Herero into the desert to starve. Even though the war officially

ended in 1907,[58] killings of Herero and other indigenous people took place until 1908. Only at that time were Herero prisoners released. In fact, the period from 1907 to 1915 is described as a period of suffering and misery.[59] Dreschler described it as the "peace of the graveyard."[60] By then, Herero society had collapsed and the Germans "made sure that the Herero were widely dispersed, that all tribal connections, both political and cultural, were destroyed, and that their symbols, the oxen, the insignia, and chiefs were destroyed. Towns and settlements which had carried Herero names were renamed."[61]

The traditional view is that the Herero rose up in revolt in January 1904. According to Du Pisani the war occurred between 1902 and 1907, though he groups the Nama[62] and Herero rebellions together.[63] However, the questions of who instigated the war and when it commenced are further complicated by earlier instances of indigenous resistance to German occupation. In March 1896, the Mbanderu and the Khaus, two other indigenous groups living in Namibia at the time, rebelled. Other tribes also rebelled, including the Bondelswartz in 1903.[64] In 1904, in addition to the rebellions by the Herero, Nama, and Bondelswartz, the Franzmanns, the Red Nation, and the Veldschoendragers also rebelled. For strategic reasons, others, like the Berseba and the Keetmanshoop, refused to participate. The Bethanie chief initially refused to participate as well, but his tribe defied him and joined in. The Rehoboths, however, decided it was more advantageous for them to support the Germans.[65]

Despite the general belief that the Owambos did not rebel or participate in the uprising, they in fact did. On January 28, 1904, 500 Owambo attacked Fort Namutoni, which was defended by seven German soldiers. These seven soldiers managed to defend the fort; only one of them was wounded, but 150 Owambos were killed. Presumably this crushing defeat caused the Owambos to withdraw from further participation in the rebellion.[66]

As mentioned before, the supposed end date of the war—1907—is subject to debate. Sole, for example, claims that the war ended in 1908.[67] Although the Bondelswartz stopped fighting in late 1906, others, such as the Franzmanns, continued thereafter. In February 1907, the commander of the German troops stated that he was not against the "lifting of the state of war in South West Africa until the end of March."[68] This decision was motivated by the negative impact that the war was having on the economy and the belief that the protracted nature of the war was denting the pride and prestige of the German military. Therefore, even though combat continued, the state of warfare was publicly rescinded on March 31, 1907. However, resistance leaders such as Jakob Morenga and Simon Kooper continued their attacks.[69] In fact, the battle waged by Jakob Morenga continued until he was killed on September 20, 1907. Masson notes this date and the death of Jakob Morenga, arguing that this was "to the Germans the final act in the suppression of the great Herero-Nama insurrection of 1904–7."[70]

Yet a further viewpoint is that of Jan-Bart Gewald, who argues that 1908 is the more accurate end-of-war date because it marked the last activity against

Chief Witbooi, Governor Leutwein, and Chief Maherero. Courtesy of National Archives of Namibia.

Simon Kooper[71] and the closure of the concentration camps.[72] The war certainly continued into 1908 when the Bondelswartz resumed attacks and carried out numerous operations. On December 22, 1908, Deputy Governor Oskar Hintrager noted that there was a "current state of constant insecurity".[73] Simon Kooper only agreed to enter into a peace agreement brokered by the British Bechuanaland police in February 1909. Furthermore, there is even evidence of German patrols against the Herero in the Omaheke desert until 1911.[74] In summary, the evidence and viewpoints cited above clearly challenge claims that the war ended definitively in 1907.

Part of the difficulty in determining when the war ended is the question of what constitutes an end to a war. Does it require all hostilities to have been concluded or only the major conflicts? What does it mean when no end to a war is announced or no peace treaty is signed? Alternatively, does the closing of

concentration camps signify the end of a war? Even if the latter applies, in this case it is still problematic as hostilities and acts of aggression continued beyond 1908. One further bit of evidence pointing to 1908 as the end of the war is Germany's own position as reflected in the 2005 announcement, in which Germany had agreed to give Namibia $25 million for development and reconciliation "in order to heal the wounds left by the brutal colonial wars of 1904 to 1908."[75]

INDIGENOUS RIGHTS

In recent years, attention to the rights of indigenous people has dramatically increased. On September 13, 2007, the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples.[76] Further, the fate of indigenous groups, specifically the continuing impact of historical legacies, is frequently addressed in contemporary academic writing. Determining which groups should be classified as indigenous people remains controversial, but Paul Keal argues that such groups define themselves and are defined by others "in terms of a common experience of subjection to colonial settlement."[77] Thus, the link to colonial times is viewed as a critical component. The effect of that common denominator, as James Anaya has noted, is that today indigenous peoples around the world usually live in circumstances of severe disadvantage in relation to others living around them. He argues that "historical phenomena grounded on racially discriminatory attitudes are not just blemishes of the past but rather translate into current inequities," and that common to most indigenous peoples was the dispossession of their enormous landholdings and other resources.[78]

Anaya's comments apply directly to the situation of the Herero in Namibia today. Although this study does not squarely address the rights of contemporary indigenous peoples, it explores the pervasive impact of the German-Herero conflict on Namibia and specifically on the Herero in terms of land, poverty, and development. It evaluates the status of indigenous states during the colonial era to determine the relationship between colonialism and international law. The present book looks at the effects of the historical events and how they pertain to the Herero's rights and current claims for reparations.

REPARATIONS

While the literature emerging from former colonized countries remains limited, there have been momentous developments for victims' reparation theory over the last few years. However, these theoretical advances have not always translated into real payments to victims of gross human rights abuses, particularly of historic human rights violations. Despite growing sentiment about the need to prosecute the perpetrators, even in states other than where the abuse occurred, victim compensation has not received much practical attention, especially not

for historical claims. Although victims are able to sue, a range of obstacles hamper the prospects of success in any case. Additionally, victims in the less privileged parts of the world have difficulty raising the necessary finances to bring such cases, as few systems permit lawyers to act on contingency fee arrangements, and where they do, lawyers often refuse to enter into such arrangements unless there is some guarantee of success. Even if victims successfully sue a perpetrator, the likelihood that they will be able to collect on such a judgment is very small. Hardly any of the few successful cases brought in a small number of jurisdictions have resulted in specific payments to the victims.

As developments are occurring with regard to reparations, those who seek redress for historic human rights violations committed in the colonial era are examining the relevant origins and applicability of international law. As the number of such cases increases, various courts around the world have been asked to apply international law to these matters to determine whether reparations are due for atrocities committed long ago.

Claimants use international law in these court applications, partly for political reasons, partly because it is often easier to use international law when trying to comply with the jurisdictional requirements of certain courts and partly because claimants seek various alternative and novel routes to achieve success in such cases. Though the abuse of the Herero occurred decades before World War II and the protections that followed that war, complainants can use customary international law norms and early treaty law to show that the crimes committed against their ancestors were just that—crimes in violation of international law. Using this as a foundation, the descendants of the indigenous peoples who were exploited, abused, and even murdered on the command of foreign governments can seek redress and request reparations in the courts today.

While many claim that international law in its infancy failed to provide protections to individuals, it did in fact provide such protections more than a hundred years ago. International protection for individuals and groups was found then not only in international humanitarian law, but in other branches of the law as well, such as the international legal structures providing protection for minorities and against slavery and piracy. Humanitarian intervention in fact took place where human rights violations occurred against minorities within other states during the 1800s. Accordingly, there is considerable acceptance today that a number of historical occurrences are actionable as gross human rights and/or humanitarian law violations for what happened in the past.

Thus, by the turn of the twentieth century, the international community enjoyed the synergistic benefit of two forces at work. On one hand, there was increasing state practice in the domestic punishment of violations of the laws of war. Contemporaneously, the international community had reached an agreement at the Hague Peace Conference for the first multilateral conventions regulating the conduct of war. The combination of these developments resulted in a growing recognition and acceptance of the principle of individual culpability for violations of the international law of war crimes.[79]

The Herero cases, as well as the recent growth in the number of other claims relating to historic human rights violations, indicate that other such cases will likely be brought in the future. It is also probable that claimants will access other new forums besides the United States, as the courts there are generally conservative and relatively indisposed towards these types of cases. It is equally likely that the public relations aspects of these cases will increase as the lessons of the successful Holocaust litigation strategies of the 1990s are absorbed. It is already apparent that Germany has been forced to deal with the Herero because of the sustained pressure the Herero have brought to bear over at least the last ten years. The Herero realize that these cases may take time to succeed and are seeking alternative strategies and forums to bring their case. The Namibian government also has a key role to play in determining the direction of the case. While it has been historically unsympathetic to the case, there seems to have been a recent thaw due to new Namibian President Hifikepunye Pohamba's closer historical ties to the Herero. His unwillingness to sign an agreement with Germany over a reconciliation fund without first consulting the affected groups could indicate this new direction.

In this context the Herero claims for reparations are examined not only in terms of their historical validity but also in terms of the current political landscape. How does the historical and current relationship between Germany and Namibia impact the Herero claims for reparations from Germany? What priority do the Herero and their claims assume in present-day Namibia, given the precedence accorded by the Namibian government to issues of national reconciliation? The final chapter addresses the developing norm of reparations around the world and the cases brought by the Herero. It also looks at the possibilities of future cases by the Herero and other victims of international crimes in various fora. The chapter examines the developing norms of reparations for historical claims and argues that reparations by states to individuals are not new; they have existed in international law for at least a century. The belief that international law only applied between states, and that individuals must obtain reparations through their state, is re-examined revealing a contrary view, as is the notion that 100 years ago international law did not permit individuals to make claims directly to foreign states and other relevant bodies. The chapter also addresses the related issue of when claims become superannuated and shows that in cases where atrocities occurred more than fifty years ago it is relatively common for such claims to be paid. In addition, claims pertaining to events dating back to 150 years have recently been granted. While these payouts have occurred due to settlements and not court judgments, the process of court filings has assisted them. This is particularly true of the Holocaust cases filed in the 1990s, which saw huge payouts to victims of World War II. The Holocaust cases are significant given that Germany has paid over $100 billion to World War II victims. It continues to pay out more than a billion dollars annually. Furthermore, Germany even paid claims in 1904 to settlers living in GSWA.

The influence of the past and specifically the Herero-German war on the socio-economic climate of present-day Namibia cannot be overstated. Land holdings remain one of the major sources of tension and conflict in the country. German farmers still hold the majority of large arable farms. Land issues, the current political context, and the enduring effects of the genocide on the Herero, their memory, and identity are explored.

At present, gross human rights abuse is addressed globally with new vigor. The last ten years have seen major developments in international criminal processes.[80] Internationally, regionally, and domestically, accountability for these violations, a major problem in the past, has improved to some degree.[81] With the establishment of the ICTY,[82] the ICTR,[83] the ICC,[84] and the African Court of Human Rights[85] the prospects for prosecuting perpetrators of gross human rights violations are increasingly likely.

While it has virtually become a platitude, it bears repeating that colonialism, its ideologies, and its practices left indelible imprints on the physical, social, political, economical, and psychological landscapes of the colonized territories.[86] The colonial legacy is invariably one of poverty, underdevelopment, and marginalization.[87] Recently, human rights agendas have seen dramatic transformations, with apologies and reparation for the abuses of colonialism, slavery, and other violations firmly established. Due to these new sensibilities and possibilities, many former colonies are reappraising the past in order to establish what was done to whom, by whom, and at what cost. This retrospection has spawned a great number of truth commissions. In Africa alone truth commissions have been held in South Africa, Nigeria, Ghana, Chad, the Democratic Republic of Congo, Burundi, Liberia, Morocco, Sierra Leone, Zimbabwe, and Uganda. Algeria and Kenya are presently considering similar institutions.

Despite this push by once colonized peoples to seek reparations and compensation from past colonizers, it is unlikely that these countries will give effect to such claims.[88] Most regard such tactics as political rather than legal, and many believe that if there is in fact any liability, obligations are met through development aid. However, in many cases, including Namibia, development aid does not equal reparations. Moreover, aid is often used to fund projects in areas that are not primarily populated by the victimized groups, such as the Herero, the Nama, and the Damara.

Both the former-colonizers and their victims recognize that state immunity remains an encumbrance in exacting accountability. As a result, it has become practice for victims to target the multinational corporations that conducted business in these territories historically, claiming they benefited directly or indirectly from the violations. The increased likelihood that national courts even in third countries will permit this type of litigation has increased the number of cases targeting these institutions.

Finally, given that the Germans took much of the Herero's land before, during, and after the war, their claims not only relate to the atrocities perpetrated on them but also to land claims against the Germans and Germany. Certainly, major questions about the indigenous land rights of the Herero remain.[89]

TERMINOLOGY

The terms "reparation" or "compensation" are in use here, although other terms can and have been used. "Reparation" and "compensation" are appropriate in a legal context, as courts usually award victims damages for harm suffered in the form of a financial payment. "Reparation" can encompass a variety of concepts, including damages, redress, restitution, compensation, rehabilitation, and satisfaction. Each of these concepts has a unique meaning, although they are often used as general terms to encompass all the different types of remedies available to a victim. "Compensation" or "damages" typically signify an amount of money awarded by a court or other body for harm suffered. "Restitution" signifies a return to the situation before the harm occurred, "rehabilitation" denotes provision of medical or other types of treatment, and "satisfaction" indicates acknowledgements, apologies, and the like.

The word "reparation" was first used in the Versailles Treaty at the conclusion of World War I, but the notion of payment for harm caused is an old concept. Throughout the ages many peace agreements contained provisions that forced one side to pay the other some type of damages or give up land or some other item to compensate a state that suffered damage.