Review: Steffen Eicker, Der Deutsch-Herero-Krieg und das Völkerrecht. Die völkerrechtliche Haftung der Bundesrepublik Deutschland für das Vorgehen des Deutschen Reiches gegen die Herero in Deutsch-Südwestafrika im Jahre 1904 und ihre Durchsetzung vor einem nationalen Gericht, Schriften zum internationalen und zum öffentlichen Recht 80, Frankfurt am Main, Lang, 2009.

Can international law deal with historical injustices? Under which premises would that be possible? The recent rise in the number of claims for reparations is inextricably linked to growing globalisation and it is not only courts and parliaments that are facing such questions. Academic literature is also becoming more and more occupied with this issue. In his impressive dissertation submitted in 2008 to the Faculty of Law in Marburg, Germany, Steffen Eicker chooses as an example the German-Herero-war of 1904. He examines the Federal Republic’s liability under international law for imperial Germany’s war against the Ovaherero. The questions which inform the book have become the basis of court proceedings in the United States, where, in 2001, a group of Ovaherero filed claims against the German state and several private companies, demanding reparations.

This convincingly argued book is made up of four main parts. In part one Eicker details the “facts” of the case, i.e. the historical background of German rule in Namibia from 1885 onwards, the Ovaherero rising against their colonial masters and the ensuing war of 1904 and its aftermath. Part two describes the efforts — and their political background — of several Ovaherero groups to gain reparations. Part three analyses the German state’s liability for violations of international law during the war in 1904. The claims filed in the USA by Ovaherero to date and their prospects for success are evaluated in part four.

The situation of the Ovaherero at the end of the 19th century and early German colonial rule up to 1904 is comprehensively recounted by Eicker (pp. 37-80), who refers mostly to secondary literature by D. Henrichsen, G. Krüger, I.B. Gewald, U. Kaulich, J. Schildknecht, J. Zimmerer and others. It is laudable that in a legal treatise the socio-historical background of the case is detailed to such an extent. Thus it becomes clear even to those readers who have little or no knowledge of Namibian history that throughout most of the 19th century there was no single entity known as “the Ovaherero” obeying one chief (omuhona), but many Ovaherero-groups living in central Namibia, coming increasingly under the influence of missionaries, traders and — after 1884 — German administrators. Eicker narrates the historical development from the “protection treaties”, through the first German military onslaughts under Commissioner Curt von François and Theodor Leutwein, the German settlement and the results of the Rinderpest and the trading system; all which resulted in the increasing impoverishment of the Ovaherero groups. The war of 1904 is analysed briefly but precisely, with particular attention paid to the objectives (“Einsatzziele”, pp. 65f.) of the Schutztruppe. Eicker concludes that
General von Trotha intended to annihilate the Ovaherero, but he also makes clear that other officers and Chancellor Bernhard von Bülow did not agree with Trotha’s policies in the colony. He also examines the concentration camps erected by the Germans and the ensuing forced labour and sexual exploitation of Africans.

In part two ongoing attempts by several Ovaherero groups to obtain reparations from Germany for the war of 1904 are analysed by Eicker in the context of the German-Namibian relations since Namibian independence in 1990. German governments have so far rejected claims for reparations, but have recognized a “special responsibility” for Namibia which is manifested in development aid (more than 500 million euros since 1990) and other forms of assistance. Calls for particular support for one group (Ovaherero) have been rejected by Germany, a special ‘reconciliation initiative’ granting technical assistance to Ovaherero, Damara and Nama since 2005 notwithstanding. The Namibian government (dominated by Ovambo and the ruling SWAPO party) takes the position that all Namibians were victimised by the German colonisers, thus, no particular group must be singled out and receive reparation payments. However, in recent years a more open policy adopted by ruling Namibian politicians towards the Ovaherero efforts has emerged. In 1998 Chief Kuaima Riruako — whose position is not undisputed in Namibia (pp. 91f.; 499) — filed claims against Germany with the International Court of Justice (ICJ) for reparations. The court however did not accept the claim, since only states not individuals or groups can be plaintiffs according to Article 34 of the ICJ.

Part three forms the legal basis of the book, analysing the liability of the German state under international law for the German conduct during the war in 1904. Eicker evaluates contemporary international law and explains that at the start of the 20th century there was no universal international law. The (European) international law provisions and customs on inter-state relations at the time only applied to “civilised nations”, which included only a few non-European states. Relations between European states and political entities which did not constitute — according to European notions — “civilised nations” were governed by the barely defined rules of so-called “overseas international law”. Relations and dealings between imperial Germany and the Ovaherero communities were thus governed by this “overseas international law” (pp. 133; 285).

The German empire was bound by neither the contractual law of war (e.g. Geneva Conventions of 1864 and 1906; Hague Convention of 1899), according to Eicker, in its war efforts against the Ovaherero nor by the customary ius in bello, since the Ovaherero — as a “non-civilised nation” — were not subjects of (European) international law. Based on secondary literature, Eicker deems the war against the Ovaherero genocidal; arguments pointing to von Trotha’s “excess of authority” are refuted (p. 298). However, pointing to the general legal principle which precludes the retrospective application of international law in matters of state
responsibility, he emphasises, similarly to Jörn A. Kämmerer and Jörg Föh that international law was not violated by imperial Germany in 1904. “Humanity” per se was not yet a principle of international law (p. 226) and the convention against genocide of 1948 or other humanitarian conventions cannot be applied retroactively. The “protection treaties” of 1885 and 1890 became obsolete in January 1904 (p. 291).

Considering his findings Eicker concludes that relations between the Ovaherero and the German empire were more or less exempt from law. The war was thus waged in an area virtually untouched by (international) law (p. 293).

Even if the norms of international laws were violated by the German empire, the Ovaherero would not be entitled to reparations from the German state, according to Eicker. The individuals affected (e.g. Ovaherero) could not claim under international law. Only states whose citizens have been victims may take action. However, Namibia, as the potential plaintiff, has not filed any claims for reparations in the last 17 years and would violate the principle of equity and good faith if she were to raise such claims now (“estoppel”) (p. 323).

The claims filed against the German state (the claim against German companies is dealt with in an “excursus” [pp. 325-328]) in the United States by a group of Ovaherero and several individuals are evaluated by Eicker in part four. Claiming 2 billion US-Dollars in damages for “violation of international law, crime against humanity, genocide, slavery and forced labour” the case was brought before the District Court of the District of Columbia in 2001 under the “Alien Tort Statute” of 1789, which reads: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Thereby US federal courts are permitted to hear cases of violations of international law, e.g. human rights cases, brought by foreign citizens for conduct committed outside the United States. However, the justice ministry of the city state of Berlin (“Senatsverwaltung für Justiz”) did not serve the writ to the District Court, pointing out that international law imposes a general condition that foreign states should not be sued (“state immunity”). By the rules of state immunity a state is protected from being sued in the courts of other states. Since the writ was not served the respite set by the District Court lapsed and the plaintiffs withdrew their action in 2003 (p. 329). Apart from his legal analysis of the formal reasons for the failure of the claim, Eicker also assesses the matter by examining a wealth of US-case law. He concludes that even if the claim had been admitted, it would have had no prospect of success due to “state immunity” as well as the lack of jurisdiction for the case (private claims for damages due to war; “political question doctrine”) (pp. 415; 419).

Since redress cannot – according to his evaluation – be obtained under law, Eicker considers in his final chapter the question of “political reparations” (“Entschädigung auf politischer Basis?”) and discusses the comparison between the war against the Ovaherero and the German persecution of European Jewry which has been made in the statement of their case and elsewhere by Ovaherero. Whereas Riruako and others have repeatedly drawn analogies between the two historical events (an issue also disputed by historians) Eicker points out the differences and the reasons why reparations have only been paid for the latter (p. 496). He concludes that international law is not suited to the task of coming to terms with the colonial past. It is an inadequate tool to deal with colonial injustices. To weaken the legal principle which precludes the retrospective application of international law or to resort to “natural law” would result in a loss of legal certainty. Therefore, political channels rather than legal procedures are more likely to lead to a successful redress of historical grievances as sought by several Ovaherero groups since the 1990s.

In this thought-provoking book Eicker rightly contextualises his case within the growing demands for reparations by formerly colonised peoples or states.

3 Martha Bondi, “The Rise of the Reparations Movement”, Radical History Review, 2003, 87: 5-18; Dinah Shelton, “The world of atonement: (pp. 34f.). His research is thus based on a growing body of literature on questions of atonement as well as on (human rights) cases in international law. The case brought by the Ovaherero against the German state and German companies had until now attracted very little attention outside Namibia. Eicker can take credit for having written the first comprehensive treatise on this case. His conclusions are well founded and the precedents he quotes are convincingly presented. However, as in all legal cases, the summary of the facts and rulings and the resulting analysis and conclusion can never be wholly undisputable. Reference to other precedents necessarily leads to different conclusions as can be seen in Jeremy Sarkin’s book on the Ovaherero reparations claim, also published in 2009. Whereas Eicker has compiled a

highly sophisticated legal dissertation, Sarkin’s book includes more socio-political findings. In contrast to Eicker, Sarkin’s reading of the precedents of 19th century (humanitarian) interventions in the Balkans and elsewhere leads him to the conclusion, similar to those of Linn Berrat and Sidney Harring before him,\(^5\) that contemporary Germans could have been aware that they were violating international norms and/or customary law of conducting war.\(^6\) Though a comparison between Eicker and Sarkin is beyond the scope of this review, it is clear that until now no consistent and reliable legal foundation for reparation claims based on historical/colonial injustices has been developed in international law. Only in recent decades has international law developed into truly universal rules recognizing not only states but also (ethnic) groups or even individuals as legal entities endowed with inherent rights. However, such norms, as Eicker – in contrast to Harring – emphasises, can hardly be applied to the German war atrocities committed one hundred years ago, since retrospective application of current international law is precluded, a fact to which the German Minister for Economic Cooperation Heidemarie Wieczorek-Zeul also indirectly pointed in her speech in 2004, when asking the Ovaherero for forgiveness (p. 293).

On the one hand Eicker’s conclusions on the Ovaherero reparation claims reveal the progress made in international law in one hundred years; on the other hand Eicker’s book may have implications for the Ovaherero claim, or for other groups who were victims of colonisation, in so far as it points out that judges have almost completely ruled out the possibility of resorting to court: Not only have formal hurdles to be overcome to make colonial atrocities judiciable, but more substantial issues such as state immunity, prescription, estoppel or the objection that international law does not operate retroactively also have to be dealt with in a more convincing manner than hitherto. Apart from legal undertakings, the German moral obligation towards the Ovaherero remains undisputed, as Eicker also emphasises (pp. 296; 502), and it is not unlikely that the reparation claims might be one day settled politically.

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