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ARTICLE

Minimum Legal Standards in Reparation Processes for Colonial Crimes: The Case of Namibia and Germany

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Abstract

In 2021, the German and Namibian governments published a Joint Declaration as a result of their negotiations on reparations. Ovaherero and Nama representatives strongly criticized the violation of their participation rights during the negotiations and the reproduction of colonial racism. In 2023, a lawsuit was filed with the Namibian High Court. This litigation could become a milestone in the history of legal struggles for reparations for colonial crimes worldwide. In addition to the litigation, several United Nations Special Rapporteurs were contacted and published their joint communication in April 2023, essentially confirming the lack of effective participation and the obligation to grant reparations.

This Article gives an overview of the most important historical events during German colonial rule and the most significant efforts to legally come to terms with it since 2006. It analyzes the main legal issues in this context: Have the acts committed by German colonial troops violated the laws in force at the time? Is the current application of the doctrine of intertemporal law by the governments a reproduction of racism? Might it be a new act of racism? What challenges and limits do courts face when they attempt to retrospectively reconstruct legal systems and legal norms in force 100 years ago? Does the German state have a legal obligation to enter into negotiations over reparations? What participation rights do affected communities have in processes of legal reappraisal of colonialism?

In view of the growing demands for reparations worldwide, it is timely to deal with the underlying legal issues in an exemplary manner. The legal intervention of the German-Namibian reappraisal could set a precedent. The Article aims at establishing minimum legal standards for reparations processes for colonial crimes worldwide.

Keywords Reparations; Colonialism; Intertemporal Law; Decolonization; Namibia; Germany

A. Introduction

> It goes without saying that war in Africa cannot be waged solely according to the Geneva Convention .... A nation does not perish so quickly. My proclamation to the Herero nation had the purpose of making them aware of only one thought, namely that their rule was over.[1]

On January 19, 2023, Namibian lawyer Patrick Kauta filed an application with the Namibian High Court to review and set aside the Joint Declaration, initialed and published in May 2021 by the German and Namibian governments following their negotiations on reparations for the colonial

[1]Lothar von Trotha, *Politics and Warfare*, BERLINER NEUESTE NACHRICHTEN, Feb. 3, 1909, at 1.

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crimes committed by Germany in what is today Namibia.[2] Kauta and his team of lawyers are seeking to have the Joint Declaration designated as unlawful. And to prevent the agreement from being implemented. This lawsuit may well mark a milestone in the history of legal struggles for reparations from colonial wrongs worldwide. For the first time, the procedure and content of an interstate agreement on the reappraisal of colonial historic injustice could be adjudicated by a court in a former colony. The lawsuit is part of a long-term legal intervention designed together with the affected communities that aims at reparations and at the decolonization of international law. In addition to the domestic litigation, the affected communities and the team of lawyers contacted several United Nations Special Rapporteurs in autumn 2022. After having conducted their own research, they wrote two letters to the German and Namibian governments in February 2023. On April 24, 2023, they published their joint communications—confirming that participation rights have been violated and that Germany has to grant reparations.[3] If the two governments agree to refrain from signing and further implementing the Joint Declaration as a result of the growing political pressure or if the High Court decides to set aside the Joint Declaration, the German and Namibian governments would have a historic opportunity to begin new negotiations—this time in accordance with minimum legal standards.

It is thus timely to have a look at colonial legacies in current international law. The analysis of the decades-long tug-of-war between German and Namibian actors on reparations is of general interest for international law scholars and for scholars interested in history of law. It allows us to trace how racist exclusion formed the backbone of European colonization, and in which ways this racist exclusion continues to be reproduced in today's—hegemonic—interpretations of international law. It also allows us to clarify in an exemplary manner which minimum legal standards have been violated and need to be respected, protected, and fulfilled in any process on reparations for colonial crimes henceforth.

Several legal issues play a key role. First, what laws were in force at the time of German colonization and which practical challenges do courts face today when they attempt to adjudicate acts that were committed 100 years ago and to reconstruct the laws at the time? Second, does the German state have a legal obligation to enter into negotiations over reparations? Finally, what participation rights of affected communities need to be respected, protected and fulfilled?

I begin my contribution with an overview of the historical events during German colonial rule, and of the most significant efforts to legally come to terms with them since 2006. In Part C, I analyze the three main legal issues pertaining to the German–Namibian reparations process. I address the question of the law in force at the beginning of the twentieth century, attempting to reveal colonial premises that have become hegemonic in international law. I propose a decolonial application of the intertemporal law doctrine that takes into account the existence of a pluralistic legal order before European international law became universal, and the challenges in retrospectively reconstructing pre-colonial legal orders. I analyze whether the participation

[2]The lawsuit is still pending in front of the Namibian High Court. The next Status Hearing will be on Nov. 8, 2023. The founding and supplementary affidavits as well as the reports submitted by the respondents can be accessed over the Namibian e-justice-system, using the case number CH-MD-CIV-MOT-REV-2023/00023. The author acts as a legal consultant for Patrick Kauta on matters of international law in the lawsuit and is part of the team of lawyers that designs and implements the overall legal intervention.

[3]Office of the United Nations High Commissioner for Human Rights ("OHCR"): Mandates of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; the Special Rapporteur in the field of cultural rights; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on the rights of indigenous peoples; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the Special Rapporteur on violence against women and girls, its causes and consequences. The joint communication to Germany (AL DEU 1/2023) was sent on February 23, 2023 (available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27875). The one to Namibia (AL NAM 1/2023) was also sent on February 23, 2023 (available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27878).

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rights of the Ovaherero and Nama have been violated during the German–Namibian interstate negotiations so far, and in which ways the two governments will have to include the affected communities in future negotiations. I conclude by outlining minimum legal standards for negotiations on reparations for colonial crimes worldwide.

B. German Colonial Crimes and the German–Namibian Reparations Process

I. The Colonial Crimes Committed by Germany

When the first, outnumbered, German traders arrived in what is today Namibia, they signed treaties to purchase land and trade agreements with the local Gaogu and Traditional Authorities. At that time, Bismarck still favored the idea of chartered companies as a central feature of German colonialism. Ovaherero, Nama, San, Damara and Ovambo were racialized and racially despised. Yet they were perceived as political and social entities with effective control over land and cattle, with whom alliances could be established in view of armed conflicts against others.[4] At that time already, the German military had committed massacres of the civilian population and there were already armed resistance against the colonial invasion and violence.[5]

By the end of the 19th century, nationalist rivalries between the European empires intensified, and in 1884, Bismarck took the step of formal colonial rule in Namibia.[6] The increasing number of settlers and traders led to more land grabbing, expropriation of livestock and of other natural resources, and massive racial discrimination and sexual violence against women and girls. Impoverishment resulting from the systematic colonial transfer of wealth, a rinderpest epidemic in 1897, and drought years between 1899 and 1902 led to the conflict's intensification.[7] After a battle at the Waterberg, the fugitives were deliberately pushed into the Omaheke. The desert was sealed off and springs were systematically poisoned. The German military established concentration camps, including one at Lüderitz, where people were forced to labor until death. Women and girls were systematically raped, and forced to scrape flesh from skulls. These were subsequently shipped to Germany for "research purposes."

A distinct body of laws applied exclusively to "non-white" inhabitants of the German colony. This apartheid system enabled the inclusion of the indigenous inhabitants as German "subjects" but not as "citizens."[8] The colonial laws were not created by a legislative body but by the colonial administration. The same colonial administration had authority to execute the regulations and to act as judges. The system was openly racist and it was practically impossible to achieve a review of arbitrary decisions in local courts. It was designed to convey a sense of lawlessness, inferiority and impotence to non-white persons and their representatives.[9]

[4]*See* Jürgen Zimmerer, German Rule, African Subjects: State Aspirations and the Reality of Power in Colonial Namibia 20–26 (2021); *see also* von Trotha, *supra* note 1; *see also* Felix Hanschmann, *The Suspension of Constitutionalism in the Heart of Darkness*, *in* Constitutionalism, Legitimacy, and Power: Nineteenth Century Experiences 243 (Kelly Grotke & Markus Prutsch eds., 2014).

[5]One example is the Hornkranz Massacre in 1893 under Curt von François, see Zimmerer *supra* note 4, at 22–26; *see also* Werner Hillebrecht, *The Nama and the War in the South*, *in* Genocide in German South-West Africa: The Colonial War of 1904–1908 and its Aftermath 143, 143–58 (Jürgen Zimmerer & Joachim Zeller eds., 2008).

[6]Reinhart Kössler, Namibia and Germany: Negotiating the Past 49–58 (2015).

[7]Zimmerer, *supra* note 4, at 17–35.

[8]Martti Koskenniemi, *Colonial Laws: Sources, Strategies and Lessons*, 18 J. Hist. of Int'l Law 248, 275 (2016).

[9]For more detail on this racist dual legal system, *see* Hanschmann, *supra* note 4; Andreas Fischer-Lescano, *Deutschengrundrechte: Ein kolonialistischer Anachronismus [German basic rights: A Colonialist Anachronism]*, *in* (Post-) Koloniale Rechtswissenschaft. Geschichte und Gegenwarte des Kolonialismus in der deutschen Rechtswissenschaft [(Post-)Colonial jurisdiction. History and Present of Colonialism in German Law] 351–54 (Philipp Dann, Isabel Feichtner, & Jochen von Bernstorff eds., 2022). On the hybrid character of these laws between international public law and domestic laws, see Koskenniemi, *supra* note 8, at 249–51 and 275–77.

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II. The Namibian Parliamentary Resolution and the Idea of an Interparliamentary Forum

On October 26, 2006, the Namibian National Assembly unanimously adopted a Motion on Genocide and Reparations,[10] originally introduced by Kuaima Riruako on September 19, 2006.[11] Riruako was a member of parliament at the time, as well as Paramount Chief of the Ovaherero. In his motion and during the parliamentary debates, he described the colonial crimes committed against the Ovaherero, Nama and Damara and asked the National Assembly to take up the matter of reparations. The parliamentary motion contains three pillars: genocide recognition, reparations by the German state, and the participation of the affected communities. In 2007, several members of the Namibian Parliament traveled to Germany and met representatives of the German Bundestag. During these meetings, the idea of an interparliamentary forum was developed.[12] The Namibian government informed the German government about the parliamentary resolution, making it clear that it saw itself only as a mediator,[13] and was in favor of this idea of an interparliamentary forum—at least until 2011.[14] On September 19, 2011, Utoni Nujoma, then Minister of Foreign Affairs reiterated that "we see the role of the Namibian Government as a mediator between the German Government and the affected communities and we do wish to facilitate a process of reconciliation."[15]

III. The Interstate Negotiations and the Second US Court Case

Under strict secrecy, interstate negotiations started in 2015. Ruprecht Polenz and Zedekia Ngavirue were appointed as special envoys. According to Nicky Iyambo, then Vice-President of the Republic of Namibia, several negotiation frameworks were discussed.[16] From the onset, the Ovaherero Traditional Authority ("OTA"), representing a considerable number of the Ovaherero in Namibia and in the diaspora, and the Nama Traditional Leaders Association ("NTLA"), which also represents a high number of the Nama in Namibia, said they were not adequately and appropriately involved.[17] Furthermore, they said the parliamentary resolution was not respected. However, the Namibian executive emphasized that Ovaherero and Nama could have joined the Technical Committee that it created for advising the Special Envoy. As a consequence of the strict secrecy the two governments had agreed upon, up until recently, it was practically impossible to gather information on which people were involved in the negotiations, and for what reasons.

Disappointed by the perceived deadlock in negotiations and their exclusion, the OTA, under the leadership of Paramount Chief Vekuii Rukoro, and the NTLA, under the leadership of Gaob David Frederick, decided to go to court again. On January 5, 2017, several representatives of the Ovaherero and Nama filed a complaint in front of the United States District Court for the

[10]The Hansard, Republic of Namibia. Debates of the National Assembly, 2006, Fourth Session of Fourth Parliament, 12 October 2006 – 7 November 2006 (Volume 95), 226–27. Partly available at: http://genocide-namibia.net/wp-content/uploads/2015/02/2006_09_Order_Paper_Genocide_Motion_.pdf.

[11]*Id.* at 32-43.

[12]3rd Session of 5th Parliament (15 Feb.–23 Mar.) 131 Hansard 2011 (Namib.) at 231.

[13]*Id.* at 232.

[14]4th Session of 5th Parliament (13 Sept.–1 Nov.) 131 Hansard 2011 (Namib.) at 358.

[15]*Id.* at 359.

[16]Press Release by Nicky Iyambo, Vice-President of the Republic of Namibia, on the commencement of formal negotiations between the Governments of the Republic of Namibia and the Federal Republic of Germany on the 1904–1908 Genocide, paras. 4–5 (Sept. 2n 2016).

[17]Press Statement on Reparation for the 1904–1908 Genocide Committed by Imperial Germany on the Herero and Nama People/Nations, (Feb. 17, 2016), http://genocide-namibia.net/wp-content/uploads/2015/03/PRESS-CONFERENCE-17-FEBRUARY-2016.pdf; Genocide, Apology and Reparation—Meeting with German Members of Parliament Okahandja Republic of Namibia, (May 25, 2016), http://genocide-namibia.net/wp-content/uploads/2016/05/The-Dichotomy-of-Historic-Responsibility-and-the-Quest-for-Restorative-Justice.pdf. Daniel Pelz, *Namibian Activists Want to Take Germany to Court*, DEUTSCHE WELLE (May 24, 2016), https://www.dw.com/en/namibian-activists-want-to-take-germany-to-court/a-19279700.

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Southern District of New York against the Federal Republic of Germany. They based this complaint on the Alien Torts Statute, 28 U.S.C. § 1350, federal common law and The Law of Nations.[18] Their primary objective was to force the German government to include them as participants in the negotiations with the Namibian executive and to receive reparations for dispossession of property and for the genocide committed against them. The German government first tried to refuse receiving the notice. It then reluctantly prepared and filed two motions to dismiss, primarily based on the US District Court's lack of subject matter jurisdiction.[19]

IV. The Joint Declaration and Debate Within Namibian Parliament

In June 2021, the German and Namibian governments presented their negotiation results. A text that before had been referred to as an "agreement"—was now a "Joint Declaration."[20] This wording and the text's emphasis on the German Government's solely moral responsibility clearly shows its intention to avoid any legal responsibility or justiciability. Instead of reparations, the Joint Declaration provides for the payment of 100.5 million euros in development aid. 50 million euros are dedicated to projects on reconciliation, remembrance, research and education. Clause 20 of the agreement states that these amounts "settle all financial aspects of the issues relating to the past addressed in this Joint Declaration."[21]

In Namibia, the publication of the Joint Declaration sparked vehement protests from the affected communities and civil society. The reasons were mainly the lack of participation, the lack of transparency, the refusal by the German state to recognize the injustice in legal terms, the reinterpretation of the obligation to make reparations into a patronizing gesture of development aid, and the fact that the South West Africa People's Organization (SWAPO)-led Namibian government had accepted all of that. In light of upcoming presidential elections with a SWAPO candidate in 2024, internal resistance to the agreement increased. Some members of the SWAPO-led government feared losing votes if the Joint Declaration was implemented despite the strong opposition within the population. In September 2021, Defense Minister Frans Kapofi tabled a motion in the National Assembly to debate the Joint Declaration and sought a vote to ratify. For ten weeks, members of Parliament heatedly debated the motion. In December 2021, the Speaker of the National Assembly noted the debates without taking a vote and the Namibian Executive promised further engagements with their German counterpart. The newly elected German government however affirmed that it considered the initialed text as final. On august 30, 2022, it announced that the funds were available but could only be released once the Joint Declaration was signed.[22] It was unclear if and when the Joint Declaration would be resubmitted to the Namibian Parliament for a vote, or whether the Namibian executive would simply proceed to sign and execute it.

V. The Litigation in Namibia in Front of the High Court

On September 13, 2022, Patrick Kauta wrote to the Attorney General and to the Minister of Foreign Affairs to ask if and when they would seek approval from the Namibian Parliament. He did so on behalf of Bernadus Swartbooi as a member of the National Assembly, and on behalf of

[18]Rukoro v. Ger., 363 F. Supp. 3d 436 (SDNY 2019) (filed on January 05, 2017 with an amended complaint was filed on February 14, 2018 by the Plaintiffs).

[19]Mem. of L. in Supp. of Def.'s Mot. to Dismiss at 2, *Rukoro*, 363 F. Supp. 3d (No. 17 CV 62-LTS), 2018 U.S. DIST. CT. MOTIONS LEXIS 380175 (filed original Motion to Dismiss on January 12, 2018).

[20]United in Remembrance of our Colonial Past, United in our Will to Reconcile, United in our Vision of the Future, Ger.—Namib., 2021, https://www.dngev.de/images/stories/Startseite/joint-declaration_2021-05.pdf [hereinafter Joint Declaration].

[21]*Id.* at para. 18.

[22]Daniel Pelz, *Germany Rejects New Negotiations Over Namibia Genocide*, DEUTSCHE WELLE (Sept. 2, 2022), https://www.dw.com/en/germany-rejects-new-negotiations-over-namibia-genocide/a-63002889.

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the OTA and the NTLA as representatives of the affected communities.[23] The legal arguments pertaining to the unlawfulness of the proceedings in the National Assembly, the lack of participation according to customary international public law, and the emphasis on the Namibian executive having made itself complicit in the reproduction of colonial racism by accepting the legal reasoning that no legal norms were violated during German colonial rule, sparked great interest in Namibian society. It put the Namibian SWAPO-led government under pressure to act. In October 2022, the Namibian Vice-President announced that they wanted to renegotiate. In November 2022, a Namibian government delegation traveled to Germany to negotiate an Addendum to the Joint Declaration.

On January 19, 2023, the Namibian law firm Dr. Weder, Kauta & Hoveka submitted a motion, a foundational affidavit, and several complementary affidavits to the Namibian High Court. In his foundational affidavit, Patrick Kauta argues that conduct of international relations is still subject to Namibian constitutional control. With regard to the Joint Declaration, he contends it has domestic legal consequences and that the appropriate forum to hold the Executive accountable for those consequences has been cut out of the debate. He seeks the court to review and set aside the Speaker's decision to note the Joint Declaration. He also seeks to declare the Joint Declaration unlawful, because it is inconsistent with several constitutional obligations and the parliamentary resolution of 2006.[24] He acts on behalf of Bernadus Swartbooi, the Landless Peoples Movement, and the affected communities. Respondents are the speaker of the National Assembly, the National Assembly, the President, the Cabinet and the Attorney General.

One of his legal arguments is of particular interest for the legal debate on reproductions of colonial racism. According to Article 63(2)(i) of the Namibian Constitution, the National Assembly has the duty to counter colonial patterns and legacies and to support those affected in this regard.[25] According to Article 40(l) of the Constitution, members of the Cabinet have the same legal obligation.[26] Kauta argues that the Namibian executive failed to comply with this duty by consenting to clause 10 of the Joint Declaration. For the first time, the current racist interpretation of the intertemporal law doctrine by the German, and Namibian, executive could be unraveled before a court in a former colony. Furthermore, he argues that participation rights of the affected communities have been violated. Pursuant to receipt of records in autumn 2023, further legal arguments might be included at a later stage in the proceedings.

VI. The Joint Communication by the United Nations Special Rapporteurs

In addition to the domestic litigation, the team of lawyers and representatives of the NTLA and the OTA contacted several United Nations Special Rapporteurs in autumn 2022. After having undertaken their own research on the matter, the Special Rapporteurs wrote two letters to the German and Namibian governments on February 23, 2023.[27] On April 12, 2023, the German government announced it would need more time to draft its reply. The Namibian government did not respond at all. On April 24, 2023, the Special Rapporteurs published their joint communications confirming that participation rights of Ovaherero and Nama have been violated during the interstate-negotiations, that the Joint Declaration does not contain adequate reparative measures, and that Germany has to grant reparations.[28] Both domestic (FAZ, DIE ZEIT) and international newspapers (Guardian) reported about the legal assessment by the

[23]The letters lie with the author.

[24]*Foundational Affidavit in the matter Swartbooi et al.*, Case No. HC-MD-CIV-MOT-REV-2023/00023 at 6–76.

[25]Constitution of the Republic of Namibia [Const.], Mar. 21, 1990, art. 63(2)(i) (Namib.).

[26]*Id.* at art. 40(l).

[27]OHCHR, supra note 3.

[28]Karina Theurer, *Germany Has to Grant Reparations for Colonial Crimes: UN Special Rapporteurs Get Involved Right on Time*, Völkerrechtsblog (Feb. 5, 2023), https://voelkerrechtsblog.org/de/germany-has-to-grant-reparations-for-colonial-crimes/#.

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Special Rapporteurs, which increased political pressure. The Namibian government responded on May 30, 2023[29] and the German government submitted its reply on June 1, 2023[30].

C. The Main Legal Issues in the German–Namibian Reparations Process: Between Practical Challenges to Legally Evaluate and Repair Acts Committed 100 Years Ago—and Legal Attempts to Overcome Eurocentrism, Colonial Racism, and Transgenerational Social Economic and Cultural Exclusion

The role of international law has always been ambivalent. On the one hand, European international law became hegemonic during colonialism and played a crucial role in formally legitimizing the systematic and excessive racist violence perpetrated by the colonial powers. On the other hand, there has always been interpretations of the law that were counter hegemonic. One should also remember that a pluralistic legal order existed before European international law became universal. Legal scholars such as Antony Anghie, Makau Mutua, or Patrick Robinson seek to deconstruct the colonial racism and Eurocentric bodies of knowledge inscribed in international law, reconstruct 'other' readings of law that have been forgotten, and to create law that seeks material equality and social justice by eliminating the remnants of colonial racism in law and by including those subjects and knowledges that were formerly excluded.[31] Other legal scholars such as Axel Jörn Kämmerer acknowledge that a polycentric legal order existed and that there might have existed a "birth defect" of universal international law because it was based on exclusion, but argue, that international law is structurally incapable to denounce its roots, and that one should not retrospectively impose today's legal standards on acts committed 100 years before.[32]

In this section, I look in detail at the main legal issues in the German–Namibian reparations process. These are: First, what laws were in force at the end of the 19th and the beginning of the 20th century and were these laws violated? Second, do former colonial powers have an obligation to enter into negotiations on reparations? And third, what participation rights do affected communities have if negotiations on reparations are undertaken? I examine the legal arguments that oscillate between practical challenges and inherent limits of law in evaluating and repairing acts that were committed 100 years ago—and legal attempts to finally overcome eurocentrism, colonial racism and transgenerational social, economic and cultural exclusion that were inscribed in or are reproduced by international law.

[29]Republic of Namibia, Office of the Deputy Prime Minister and Minister of International Relations and Cooperation, Response of the Government of the Republic of Namibia to the Joint Communication from Special Procedures, Dated 23 February 2023, (May 30, 2023), https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=37541.

[30]Permanent Mission of the Federal Republic of Germany to the Office of the United Nations and to the other International Organizations Geneva, Note Verbale, No. 159/2023 (June 1, 2023), https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=37548.

[31]*See generally* Anthony Anghie, Imperialism, Sovereignty and the Making of International Law (2005); Makau Mutua, *Reparations for Slavery: A Productive Strategy?*, *in* Time for Reparations 19 (Jacqueline Bhabha, Margareta Matache & Caroline Elkins eds., 2021); Patrick Robinson, *The Ascertainment of a Rule of International Law Condemning Transatlantic Chattel Slavery: Final Observations and Concluding Remarks*, *in* Reparations Under International Law for Enslavement of African Persons in the Americas and the Caribbean 171, 171–88 (Justine Stefanelli & Erin Lovall eds., 2021).

[32]Jörn Axel Kämmerer & Jörg Föh, *Das Völkerrecht als Instrument der Wiedergutmachung? Eine kritische Betrachtung am Beispiel des Herero-Aufstands [International Law as an Instrument of Reparation? A Critical Examination Using the Example of the Herero Uprising]*, 42 Archiv des Völkerrechts [Archive Int'l L.] 294, 294–328 (2004); Jörn Axel Kämmerer, *Introduction. Imprints of Colonialism in Public International Law: On the Paradoxes of Transition*, 18 J. Hist. of Int'l Law 239, 239–47 (2016).

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I. Determining the Laws in Force at the Time and Whether Rights Were Violated Back Then According to the Doctrine of Intertemporal Law

In a nutshell, the German government—both in front of the US District Court as well as in the Joint Declaration—argues that from today's point of view, the acts committed by the German military in its former colony may well be classified as genocide, but not on the basis of the law applicable at the time. This is because the crime of genocide did not exist at the time.[33] With regard to other possible violations of law, such as the laws of war or international humanitarian law, the German government argues that these rules were only applicable to international conflicts between states and only between those states that had ratified the relevant treaties.[34] The Ovaherero or Nama—according to the German government's interpretation of the laws at the time—were incapable of signing treaties that might have granted international legal protection for their citizens, because they had no legal subjectivity within international law.[35] It argues that specific rules on humanitarian protection in non-international armed conflicts came to exist only some forty years later, when they were first enshrined in Article 3 common to the Geneva Conventions of August 12, 1949.[36] For these reasons—according to the German government—international law did not apply. It argues that the Ovaherero and Nama were living under German jurisdiction and that German public law in a special sense applied.[37]

Some German scholars share this legal assessment and come to the conclusion that the acts committed during colonialism were morally and ethically reprehensible but did not constitute legal violations at the time.[38] However, in the meantime, there are also more voices, both in Germany and worldwide, challenging some of the main legal premises underlying the German government's position.[39] Legal scholars and also the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance call for a decolonial application of the doctrine of intertemporal law.[40] This includes further research into when exactly the polycentric legal order was substituted by a universal European international law and which legal norms were in force before the German colonialists imposed their own legal system by force. The German legal scholar Matthias Goldmann for instance

[33]Joint Declaration, *supra* note 20, at clause 10.

[34]Mem. of L. in Support of Def.'s Mot. to Dismiss at 7, *Rukoro*, 363 F. Supp. 3d (No. 17 CV 62-LTS), 2018 U.S. DIST. CT. MOTIONS LEXIS 380175 (filed original Motion to Dismiss on January 12, 2018).

[35]*Id.*

[36]*Id.*

[37]*Id.* at 4–5.

[38]*See generally* Kämmerer and Föh, *supra* note 32; STEFFEN EICKER, DER DEUTSCH-HERERO-KRIEG UND DAS VÖLKERRECHT [THE GERMAN-HERERO WAR INTERNATIONAL LAW] 531 (2009).

[39]*See generally* Andreas Fischer-Lescano, *Das Pluriversum des Rechts*, 74 MERKUR, 22, 22–32 (Apr. 2020); Matthias Goldmann, *The Ambiguity of Colonial International Law: Three Approaches to the Namibian Genocide*, LEIDEN J. INT'L L. (forthcoming); Karina Theurer & Wolfgang Kaleck: *Dekolonisierung des Rechts: Ambivalenzen und Potenzial*, *in* DEKOLONIALE RECHTSKRITIK UND RECHTSPRAXIS 11, 39–41 (Karina Theurer & Wolfgang Kaleck eds., 2020); Makau Mutua, Professor of Law, SUNY Buffalo School of Law, Keynote Speech at Goethe Institut Symposium: Colonial Repercussions in Windhoek (Mar. 25, 2019); JEREMY SARKIN, 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 (2009); Ntina Tzouvala, *The Alibis of History, or How (not) to Do Things with Inter-temporality*, NAT'L UNIV. OF SING. (Feb. 8, 2023), https://cil.nus.edu.sg/blogs/the-alibis-of-history-or-how-not-to-do-things-with-inter-temporality/; Mamadou Hébié, *CIL Dialogues*: *International Law and Reparations for Colonial Harms: What way forward?*, NAT'L UNIV. OF SING. (Apr. 28, 2023), https://cil.nus.edu.sg/event/cil-dialogues-international-law-and-reparations-for-colonial-harms-what-way-forward/.

[40]Robinson, *supra* note 31; Hébié, supra note 39; Fischer-Lescano, *supra* note 39, at 22; Goldmann, *supra* note 39; Karina Theurer, *CIL Dialogues*: *International Law and Reparations for Colonial Harms: What way forward?*, NAT'L UNIV. OF SING. (Apr. 28, 2023), https://cil.nus.edu.sg/event/cil-dialogues-international-law-and-reparations-for-colonial-harms-what-way-forward/; Karina Theurer, *Litigating Reparations: Will Namibia Be Setting Standards?*, INT. L. BLOG (Jan. 25, 2023), https://voelkerrechtsblog.org/de/litigating-reparations/; U.N. GAOR, 74th Sess., 321d Mtg., U.N. DOC. A/74/321 (Aug. 21, 2019), paras 48-50.

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proposes to closely read letters by representatives of Ovaherero and Nama, such as letters by Hendrik Witbooi or Samuel Maharero.[41]

At the core of the legal analysis of the applicable law at the beginning of the 20th century lies the application and interpretation of the doctrine of intertemporal law. Therefore, I first analyze how this doctrine is understood and interpreted in legal academic debate and by the International Court of Justice (ICJ) and then proceed to examine the German government's legal position and the legal arguments brought forward by those legal scholars who challenge that position.

1. The Doctrine of Intertemporal Law

The intertemporal law doctrine was developed in international jurisprudence and is widely recognized today. Its objective is to provide legal certainty. Most legal scholars and the International Court of Justice—partly without naming them explicitly—invoke two elements when they determine what laws existed prior to the point in time that the facts can be adjudicated. Max Huber, who was a Judge at the Permanent Court of Arbitration in 1929, was tasked with adjudicating a situation in legal terms that dated back several decades and defined the first element as follows: "[A] juridical fact [is] appreciated in the light of the law contemporary with it, and not the law at the time when a dispute in regard to it arises."[42] The second element reads as follows: "The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law."[43]

Some legal scholars argue that its scope of application is limited to territorial disputes,[44] others highlight the specific context of Huber's decision.[45] Steven Wheatley convincingly argues in favor of a dynamic interpretation of law that is inscribed in the second element of the doctrine of intertemporal law.[46] Wheatley's reading is backed up by two advisory opinions that the ICJ issued. In both cases two of the governments had relied their legal assessment heavily on the first element of the doctrine of intertemporal law, arguing that one had to determine the laws at the time solely with the knowledge that was available at that point in time. In both cases, the ICJ affirmed that it was necessary to take into account how legal principles and legal norms had developed further. In 1971, the ICJ had to interpret the notion of "sacred trust" contained in the League of Nations Convention in its advisory opinion on the continued presence of South Africa in Namibia. The South African government had based its argument on the colonial reality at the time the Convention was concluded, and thus strongly on the first element of the doctrine of intertemporal law.[47] The ICJ however, focused on the development towards the right of peoples to self-determination. It concluded that the notion of "sacred trust" in the League Convention was to be interpreted according to present day ideas about self-determination.[48] In 2019, the ICJ issued an advisory opinion in a sovereignty dispute between the United Kingdom and Mauritius over the Chagos Archipelago, which the British had detached from the territory of Mauritius in 1965 before its independence. According to the ICJ, the right to self-determination was in the process of being

[41]Goldmann, *supra* note 39, at 8–30.

[42]Island of Palmas (U.S. v. Neth.), II R.I.A.A. 829, 845. (Perm. Ct. Arb. 1928) https://legal.un.org/riaa/cases/vol_II/829-871.pdf.

[43]*Id.*

[44]*See* Rosalyn Higgins, *Time and the Law: International Perspectives on an Old Problem*, 46 Int'l & Comp. L. Q. 501, 510–20 (1997).

[45]*See* Ulf Linderfalk, *The Application of International Legal Norms Over Time: The Second Branch of Intertemporal Law*, 58 NILR. 147, 147–72 (2011).

[46]Steven Wheatley, *Revisiting the Doctrine of Intertemporal Law*, 41 Oxford J. Legal Stud. 484, 484–509 (2021).

[47]Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 53, 14, paras. 42–58.

[48]Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 31, paras. 52–53 (June 21).

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established during that time. It subsequently held that the British couldn't rightfully argue that this right didn't exist yet back then.[49] In both cases the ICJ applied a dynamic interpretation of the laws in question when it determined the laws in force at the time.

2. Practical Challenges to Determine the Laws at the Time in Cases of Colonial Crimes

Because international law is constantly evolving and changing, any determination of the law in effect at the time of the relevant acts or facts needs to be based on rigorous legal historical research.[50] Such legal historical research must also take into account that international law as we know it today was only beginning to emerge during European colonialism. Martti Koskenniemi and other legal historians comprehensively describe the transition from regionally applicable European international law (1648–1815) to international law, the universality of which is widely recognized worldwide today.[51] During the 19th century there was no single international law with universal applicability and validity, but multiple different legal orders that existed at the same time.[52] With regard to the application of the doctrine of intertemporal law, one can say that any legal historical research concerning this period—or any other until today—must include the complex —regionally differing—shifts from hegemonic to counter-hegemonic, and vice versa, interpretations of the applicable law and legal principles. It at least has to examine the question, whether at the concrete point in time several legal orders were still co-existing or whether one of the legal orders—the European international legal order—already superseded those other legal orders that might have existed. It also needs to take into account non-written law, including oral traditions.[53]

The second problem any court must face when dealing with historical wrongs more than 100 years in the making, is the lack of texts and transmitted—oral—knowledge of the law in effect prior to colonization. The diary and letters written by the Nama Captain Hendrik Witbooi, and letters written by the Ovaherero Chief Samuel Maharero are among the few historical sources on humanitarian laws or the laws of war still circulating in German and Namibian legal research.[54] In one of Hendrik Witboois' letters to Hermanus van Wyk, dated April 18, 1893, he described the massacre of Hoornkrans:

> And the Captain [von François] entered the camp and sacked it in so brutal a manner as I would never have thought a member of a White civilized nation capable of—nation which knows the rules and ways of war. But this man robbed me, and killed little children at their mother's breast, and older children, and women, and men. Corpses of people who had been shot he burned inside our grass huts, burning their bodies to ash. Sadly and terrifyingly Captain went to work, in a shameful operation.[55]

In a letter to Tjamuaha Maharero dated January 5, 1890, Hendrik Witbooi describes the difference between soldiers and civilian population:

[49]Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 169.

[50]Edward Martin, The Application of the Doctrine of Intertemporality in Contentious Proceedings, 12–24 (2021); Robinson, *supra* note 31.

[51]*See* Martti Koskenniemi, *Histories of International law: Dealing with Eurocentrism*, 19 Rechtsgeschichte [Legal Hist.] 152, 153–55 (2011); Martti Koskenniemi, The Gentle Civilizer of Nations (2002).

[52]On the historic international legal order as being polycentristic at the time, see Kämmerer, *supra* note 32, at 240–41; *see also* Goldmann, *supra* note 39, at 13 ("The pluralism of international laws appears to be a fact.").

[53]*See also* Martin, *supra* note 50, at 11–24, 38–44.

[54]Hendrik Witbooi, The Hendrik Witbooi Papers (Brigitte Lau ed., 1995); Werner Hillebrecht, *Hendrik Witbooi & Samuel Maharero: The Ambiguity of Heroes*, *in* Re-viewing Resistance in Namibian History 38 (Jeremy Silvester ed., 2014); for references and quotes by further Nama and Ovaherero traditional leaders *see* Goldmann, *supra* note 39, at 12–16.

[55]Witbooi, *supra* note 54, at 126.

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> While I was away you came and destroyed my settlement. You killed women and abducted children. Concerning the death of the men I will not say anything .... Now I ask you seriously: What moved you to kill my women and to carry my children away as prisoners? ... Women and children are innocent of our conflict.[56]

It would go beyond the scope of this Article to systematically search through as many historical, also oral, sources as possible and to reconstruct the law in force at the time amongst Ovaherero and Nama, Damara and San. However, it must be emphasized that it would not be a legally correct application of the doctrine of intertemporal law to blanketly ignore the existence of these legal norms prior to colonization and prior to European international law becoming universal. One cannot simply act as if these norms had never existed. Decolonial scholars, such as Aníbal Quijano, Walter Mignolo, María Lugones or Gayatri Spivak convincingly describe the forceful imposition of European knowledge and the subsequent erasure of "other" knowledges and societal conceptions as one of the main axes of colonialism known as coloniality of power,[57] or as epistemic violence,[58] and partly demand that the bodies of knowledge prior to colonization need to be reconstructed.[59] On that basis, legal scholars rightfully demand that courts must take special care not to reproduce—colonial—epistemic violence by retrospectively imposing European bodies of knowledge at a time when they might not yet have become hegemonic or universally accepted.[60] However, legal scholars rightfully also point to the "blurring" of legal and social norms when one tries to reconstruct laws in force 100 years ago,[61] and rightfully doubt whether legal proceedings are the adequate way of assessing historical injustices. In any case, much more legal historical research on the social and legal standards of the Ovaherero and Nama, but also Damara and San at the time of colonization must take place.[62]

The third problem, which is of course closely linked to the knowledge erasure described above, is the factual impossibility of reconstructing retrospectively which legal norms and principles really were in force in the southwestern part of Africa at the end of the 19th century, before European colonization and the forceful imposition of *their* understanding of international law. This is even more true for concepts and cosmogonies that we are not familiar with today, as Silvia Rivera Cusicanqui convincingly describes.[63] With respect to legal concepts and histories of international law, Koskenniemi writes: "But legal and political concepts are parts of the legal language of each period; their meaning cannot be grasped without a grasp of that language .... [H]istories of international law come to us through the historian's own conceptual prejudices ...."[64]

He also points to the problem of conceptual imperialism:

[56]*Id.* at 39.

[57]Aníbal Quijano, *Colonialidad del poder, eurocentrismo y America Latina [Coloniality of Power, Eurocentrism, and Latin America*, *in* COLONIALIDAD DEL SABER, EUROCENTRISMO Y CIENCIAS SOCIALES [COLONIALITY OF KNOWLEDGE, EUROCENTRISM AND SOCIAL SCIENCES] 777 (Edgardo Lander ed., 2000); Walter Mignolo, *Epistemic Disobedience, Independent Thought and De-Colonial Freedom*, 26 THEORY, CULTURE & SOC'Y 1, 1–23 (2009); Maria Lugones, *Heterosexualism and the Colonial/Modern Gender System*, 22 HYPATIA: A J. FEMINIST PHIL. 186, 186–209 (2007).

[58]Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 66, 66–111 (Cary Nelson & Lawrence Grossberg eds., 1988).

[59]SILVIA RIVERA CUSICANQUI, CH'IXINAKAX UTXIWA. UNA REFLEXIÓN SOBRE PRACTICES Y DISCURSOS DESCOLONIZANTES (2010).

[60]Robinson, *supra* note 31; MARTIN, *supra* note 50; Theurer & Kaleck, *supra* note 39.

[61]Andreas von Arnauld, *How to Illegalize Past Injustice: Reinterpreting the Rules of Intertemporality*, 32 EUR. J. INT'L L. 401, 420 (2021).

[62]The Basel Archives (Namibia Resource Center) and the National Archives in Windhoek hold an immeasurable treasure of original documents.

[63]RIVERA CUSICANQUI, *supra* note 59.

[64]Koskenniemi, *Histories of International law: Dealing with Eurocentrism*, *supra* note 51, at 166.

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> But as Onuma has pointed out, to the extent that [early postcolonial works by C.H. Alexandrowicz, R.P. Anand and T.O. Elias, for example] have been written in the vein of 'they, too, had an international law,' they ended up, once again projecting European categories as universal.[65]

The difficulty of reconstructing a legal situation that existed a hundred years ago without retrospectively imposing views that are informed by those European preconceptions that became hegemonic over the course of those hundred years is illustrated by the ICJ's 2002 judgment on a dispute between Nigeria and Cameroon over the Bakassi Peninsula.[66] On September 10, 1884, the Kings and Chiefs of Old Calabar signed a "Treaty of Protection" with Great Britain. The question to be decided by the ICJ was whether or not the former had legal subjectivity under international law and thus transferred title and sovereignty over the Bakassi Peninsula to Great Britain or not. The ICJ concluded that transfer had occurred because the Kings and Chiefs had no legal subjectivity:

> Some treaties were entered into with entities which retained thereunder a previously existing sovereignty under international law. This was the case whether the protected party was henceforth termed "protectorate" (as in the case of Morocco, Tunisia and Madagascar (1885; 1895) in their treaty relations with France) or "a protected State" (as in the case of Bahrain and Qatar in their treaty relations with Great Britain). In sub-Saharan Africa, however, treaties termed "treaties of protection" were entered into not with States, but rather with important indigenous rulers exercising local rule over identifiable areas of territory .... In relation to a treaty of this kind in another part of the world, Max Huber, sitting as sole arbitrator in the Island of Palmas case, explained that such a treaty "*is not an agreement between equals; it is rather a form of internal organization of a colonial territory, on the basis of autonomy of the natives .... And thus suzerainty over the native states becomes the basis of territorial sovereignty as towards other members of the community of nations.*"[67]

Edward Martin rightly, and a bit sarcastically, points out that "sub-Saharan ... rulers" were quite likely to have had a different view on that matter at the time and most probably accorded each other legal subjectivity in international affairs and statehood. He adds that they in fact had exercised effective control over their territories and the inhabitants at the end of the 19th century.[68] In his separate opinion to this decision, ICJ Judge Al-Khasawneh also condemned the findings of the court as Eurocentric and as a reproduction of colonial stereotypes.[69] Both argue that courts are to refrain from conceptual imperialism.

After having identified the challenges determining the laws at the time in accordance with the doctrine of intertemporal law, I proceed to analyze the legal argumentation of the German government with respect to the law in force in what is today Namibia at the end of the 19th century.

[65]Koskenniemi, *Histories of International law: Dealing with Eurocentrism*, *supra* note 51, at 168; DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE 28 (2001).

[66]Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Judgement, 2002 I.C.J. 94, 303–458.

[67]*Id.* at 405–06, para. 205.

[68]MARTIN, *supra* note 50, at 27; *see also* Land and Maritime Boundary between Cameroon and Nigeria, at paras. 52–56.

[69]*See* Land and Maritime Boundary between Cameroon and Nigeria, Judgement, at para. 496 ("[S]uch an approach is clearly rooted in a Eurocentric conception of international law based on notions of otherness, as evidenced by the fact that there were at the time in Europe protected principalities without anyone seriously entertaining the idea that they had lost their sovereignty to the protecting Power and could be disposed of at its will.").

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3. The German Government's Legal Reasoning and Attempts to Overcome Eurocentrism and Colonial Racism That Were Inscribed into Law During European Colonialism

The German official legal position described above[70] and the 2002 ICJ decision show that the distinction between "civilized" and "uncivilized" nations is the bottleneck of determining the legal norms in force at the time. This is because this distinction determines whether or not legal subjectivity was "granted" to non-European nations and subsequently treated as "equals" within the international legal order.[71] It depends on this distinction, whether the European, customary, laws of war and humanitarian laws of the time are applicable—or only hybrid colonial law. The latter case carries the consequence that non-white persons were basically denied any legal protection in practice.[72] A document published by the academic service of the German Bundestag illustrates this bottleneck clearly. First, it points out that the Hague Convention of 1899 codified the rules of the law of war that were part of customary law at that time.[73] It states explicitly that, in particular, the so-called Martens clause in paragraph 7 of the preamble of the Hague Convention was interpreted such that the precepts of humanity and civilization prohibited genocide, regardless of the existence of a war between two states. Examples for a corresponding legal conviction are—according to the academic service of the German Bundestag—the condemnation of the Turkish massacre of the Armenians in the years 1894–1896 by France, the United Kingdom and Russia as "crimes against humanity and civilization." Kaiser Wilhelm II had also distanced himself from the actions of the Ottomans.[74] Then the document reads as follows:

> However, this legal view was limited to members of the community of international law, which at the time consisted largely of European states. Indigenous peoples were, according to the prevailing view, "uncivilized" and thus excluded from the aforementioned principles . . . . Only a minority considered indigenous peoples as subjects of international law of their own kind. [75]

In its reply to the District Court in May 2018, the German Foreign Office also relied on this application and interpretation of the doctrine of intertemporal law and the racist distinction of civilized and uncivilized nations.[76] As evidence for this prevailing opinion though, the German Scientific Service and the German Foreign Office quote only a scarce number of legal scholars who published at the beginning of the 20th century. Both quote European sources exclusively. And they do not critically examine whether European international law could already back then be seen as having become universal or whether the polycentric legal order still prevailed.

Legal scholars show that even if one took into account only those European legal scholars who succeeded in getting their texts published amidst growing imperialism, their legal assessment of the laws at the time might have been more ambiguous than the Scientific Service and the German Foreign Office so far assume. Koskenniemi and Goldmann point out that the criteria of different "stages" of "civilization"—savage, barbarian, and civilized—was far from being clear at the end of the 19th century.[77] The Belgian Institute of International Law abandoned a corresponding attempt

[70]Mem. of L. in Support of Def.'s Mot. to Dismiss at 5, *Rukoro*, 363 F. Supp. 3d (No. 17 CV 62-LTS), 2018 U.S. DIST. CT. MOTIONS LEXIS 380175 (filed original Motion to Dismiss on January 12, 2018)

[71]Goldmann, *supra* note 39, at 6–16; ANGHIE, *supra* note 31; Kämmerer & Föh, *supra* note 32.

[72]Fischer-Lescano, *supra* note 9; Hanschmann, *supra* note 4; Theurer & Kaleck, *supra* note 39, at 36–41.

[73]Der Aufstand der Volksgruppen der Herero und Nama in Deutsch-Südwestafrika (1904–1908): Völkerrechtliche Implikationen und haftungsrechtliche Konsequenzen [The Uprising of the Herero and Nama Ethnic Groups in German West Africa: International Law Implications and Liability Consequences], 112 WISSENSCHAFTLICHER DIENST DES BUNDESTAGES [RSCH. SERV. BUNDESTAG] 1, 9 (Sept. 27, 2016).

[74]*Id.* at 13.

[75]*Id.* at 13–14.

[76]Mem. of L. in Support of Def.'s Mot. to Dismiss, *Rukoro*, 363 F. Supp. 3d (No. 17 CV 62-LTS), 2018 U.S. DIST. CT. MOTIONS LEXIS 380175 (filed original Motion to Dismiss on January 12, 2018).

[77]*See* KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 51, at 127–43; Goldmann, *supra* note 39, at 7–9.

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at a legal definition.[78] In his expert affidavit to the United States District Court, Goldmann further demonstrates that the question of territorial sovereignty and international legal subjectivity of indigenous peoples was, still, controversial at the beginning of the 20th century.[79] He convincingly argues that the contradictions with regard to the legal nature of protection treaties concluded by the German Empire with Samuel Maharero or Nama captains at the time indicate that the question of legal subjectivity was at least unresolved.[80]

Moreover, some European scholars at the time did assume that "savage" or "uncivilized" peoples were entitled to certain basic rights as human rights. One of the most renowned theorists of the newly developing international law was Johann Caspar Bluntschli. Otto von Bismarck himself had appointed him as Delegate of Germany to the Brussels Conference of 1874, which codified rules of war. In one of his major publications, he concludes that even peoples who were considered uncivilized were entitled to legal protection and bore fundamental human rights they could not be deprived of.[81] With regard to genocide, the legal assessment is ambiguous as well. In his dissenting opinion to the *Germany v. Italy* proceedings before the ICJ, Judge Antônio Cançado Trindade points out that the German government itself, in its 2009 Memorial, drew the legal prohibition of genocide from customary international law well before 1948. He argues that genocide was already illegal at the beginning of the 20th century and mentions the Martens Clause of the 1899 Hague Convention as an example of "the dictates of the public conscience."[82] Bluntschli had written that "wars of extermination and annihilation against peoples and tribes that are capable of life and culture are violations of international law"[83] in 1868.

In relation to the retrospective reconstruction of ethical and legal principles, Andreas von Arnauld rightly speaks of semantic struggles and of a "pluralist blurring of the lines between *lex lata* and *lex ferenda*, between legality and illegality."[84] In any case, these examples indicate that comprehensive historical research needs to be done. The few references quoted by the German government and by the Scientific Service of the Bundestag are definitely not sufficient to prove a prevailing opinion with regard to the lack of legal subjectivity of Ovaherero and Nama, the inapplicability of customary international rules of war and humanitarian laws, or the inapplicability of the basic principles of humanity.

It might well be that at the beginning of the 20th century, there was a discrepancy between what was formally considered to be lawful amongst European legal scholars and whether these legal norms were complied with.[85] In this vein, it is interesting to recall the quote by Lothar von Trotha with which this contribution begins. If really he had thought that no legal norms applied, why would he have explained his reasons for not complying with them?

Another aspect the German Scientific Service and the German Foreign Office neglected is the significance of the second element of the intertemporal law doctrine and of court decisions protecting fundamental values and *jus cogens*, as they have evolved over the course of the 20th century. In his separate opinion to the 2002 ICJ decision, Judge Al-Khasawneh stated:

[78]Koskenniemi, The Gentle Civilizer of Nations, *supra* note 51, at 132–36.

[79]*See* Decl. of Matthias Goldmann at 18–20, *Rukoro*, 363 F. Supp. 3d (Apr. 24, 2018) (No. 17-0062), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3169852, [hereinafter Declaration of Matthias Goldmann].

[80]Hanschmann, *supra* note 4, at 243; Goldmann argues that the protection agreements have to be qualified as international treaties, *see* Declaration of Matthias Goldmann, *supra* note 79, at 25.

[81]Johan Caspar Bluntschli, Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt § 535 at 299 (1868).

[82]Jurisdictional Immunities of the State (Germ. v. It.), Dissenting Opinion Judge Antônio Augusto Cançado Trindade, 2012 I.C.J. 99, paras. 156–60 (Feb. 3).

[83]Bluntschli, *supra* note 81, § 535 at 299.

[84]von Arnauld, *supra* note 61, at 420.

[85]See the debate on that topic with Mamadou Hébié, Ntina Tzouvala, Martin Paparinskis and Karina Theurer, *CIL Dialogues: International Law and Reparations for Colonial Harms: What way forward?*, Nat'l Univ. of Sing. (Apr. 28, 2023), https://cil.nus.edu.sg/event/cil-dialogues-international-law-and-reparations-for-colonial-harms-what-way-forward/.

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> At any rate, intertemporal law as formulated by Max Huber is not as static as some would like to think, for it should not be forgotten that its elusiveness is further increased by his immediately following statement that "the existence of the right, in other words, its continued manifestation, shall follow the conditions required by the evolution of law."[86]

As described above, the ICJ in 1971 and 2019 took into account developments of law that occurred after the facts it had to adjudicate. Steven Wheatley convincingly summarizes the content and scope of the second element:

> During the transition period from the old rule to the new, when there is some evidence that the law is changing, but not sufficient evidence to show that the law has changed, the old rule must be applied, because there is no guarantee that the law will change. Once the law has changed, however, we must apply the new rule from the moment of its crystallization. (. . .) In other words, the second branch explains that our conclusions about the applicable law on a given day, during a period of transition in the law, can change, depending on when we examine the available evidence of state practice and opinio juris.[87]

With regard to the German–Namibian reparation process, and more concretely with regard to whether the Ovaherero and Nama were exempt from legal protection due to them being considered as an uncivilized nation, it needs to be highlighted that even if one assumed that this racist distinction had become a part of international law, it rightly disappeared quickly again. One could thus argue that it does not meet the requirements of the second element of intertemporal law. Making such an argument would require more historical research into how and when the distinction began to be brought forward and when exactly it disappeared.

International law is based on consent. It is possible to decolonize it by agreeing to not reproduce racist patterns. In this vein, it is interesting that in 1993, the Inter-American Court of Human Rights decided that, as an exception to the rule of prohibition of retroactive application of peremptory norms to treaties, no treaty that contained provisions on slavery and thus today "contradicts the norms of *ius cogens superveniens* . . . may be invoked before an international human rights tribunal."[88] This decision mirrors a recent trend in international law to recognize a basic core of *jus cogens* as hierarchically superseding to general legal norms. One could argue, that in accordance with international *ius cogens*, no state today should invoke this profoundly dehumanizing racist distinction in any proceeding worldwide. If not for legal, then at least for ethical reasons.[89] In her report on human rights obligations of Member States in relation to reparations for racial discrimination rooted in slavery and colonialism in August of 2021 the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance, then Tendayi Achiume, affirmed that the pursuit and achievement of reparations for slavery and colonialism required a genuine decolonization of the doctrines of international law that remained barriers to reparations. She explicitly named the doctrine of intertemporal law.[90]

4. Conclusion

The legal question of which laws were in force at the time of German or other European processes of colonization is a crucible of deconstructing eurocentrism in international law today. In order to deconstruct the Eurocentric bias that is still prevalent in most of the histories of international law,

[86]Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Judgement, 2002 I.C.J. 94, para. 13 (Oct. 10) (discussing separate opinion by Judge Al-Khasawneh).

[87]Wheatley, *supra* note 46, at 509.

[88]Aloeboetoe et al. v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 15, para. 57 (1993).

[89]Already in 2020: Theurer & Kaleck, supra note 39, at 41.

[90]U.N. GAOR, 74th Sess., 321d Mtg. at paras. 48–51, 7–10, 32–35, U.N. Doc. A/74/321 (Aug. 21, 2019).

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it is of foremost importance to engage in more legal historical research and to attempt to reconstruct when the polycentric legal order was substituted and what social and legal norms were in force before the colonialists arrived. These bodies of knowledge were partly eliminated by the violent imposition of "universal" European international law and European colonial laws and have partly evolved into differing new bodies of knowledge. The processes of reconstruction always run the risk of reproducing present day conceptions of law and thus need to be done in a careful manner.

In contentious court proceedings—such as the one with respect to the acts committed by the German colonialists in what is today Namibia—the scarcity of historical documents and the limits of historiography might cause serious challenges to a reconstruction of those social norms and legal standards. This thus complicates a correct application of the doctrine of intertemporal law. For this reason, some legal scholars convincingly conclude that there might be no conceivable way in a polycentric global legal order to set one legal order above the other. Edward Martin mentions that such constellations might constitute one of the rare examples of *non liquet* in contentious proceedings.[91] With respect to the challenging task of courts to determine the laws that were in force a long time ago, and in a context of clashing legal views of European and non-European peoples, he writes in general terms:

> When two conflicting broader narratives of the historical context, and the therefore applicable law, collide—as is the case in contentious proceedings with an intertemporal dimension with a European and non-European legal point of view—it is of utmost importance that the process and method reaching a judgement does not *a priori* confirm the legal argument of one of the parties, while neglecting the others'. [...] In more concrete terms, using the example of the *Cameroon v. Nigeria* judgement of the ICJ: if the methodology applied by the ICJ to establish the historic facts, and the historic rules governing the dispute already confirms the position of one of the historic signatories to the "Treaty of Protection," while negating the other, a situation of *différend* would have been created.[92]

The latter could mean that a court might be unable to decide the case in a legally binding manner and that a political solution would have to be sought at the negotiation level.

What must be stated, at any rate, is that referring to only three or four European legal scholars when determining the prevailing opinion and the laws at the time is no legally correct application of the doctrine of intertemporal law. Therefore, the unambiguous assessment of the laws in force by the German government and the scientific service so far is not tenable. Assuming a racist prevailing opinion that might not have existed in such extent if one really engaged in thorough historical research might even amount to a new act of racism and to a human rights violation in terms of Article 2 ICCPR (International Covenant on Civil and Political Rights) and Articles 1 and 2 of the International Convention on the Elimination of Racial Discrimination (ICERD.

Finally, the reproduction of the racist distinction between civilized and uncivilized nations should be avoided at all costs in any legal proceeding that takes place today. The prohibition of racialization and racist discrimination is one of the core principles of international law, forms part of *jus cogens*, and is one of the basic human rights enshrined in several human rights treaties. The Inter-American Court of Human Rights rightly confirmed an exception to the principle of non-retroactive interpretation. Furthermore, the racist distinction between civilized and uncivilized nations disappeared from the international legal order at the beginning of the 20th century. It thus might not fulfill the requirements of the second element of intertemporal law. As a consequence, it

[91] MARTIN, *supra* note 50, at 60, 78–85.

[92] *Id.* at 20–22 (referring to Jean-François Lyotard on page 21, who used the term "*différend*" for a situation in which accepting a method reaching settlements means accepting the position of one of the disputing sides while negating the other side's position).

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cannot rightfully be taken as a basis to determine the laws in force at the beginning of the 20th century—at least not without further historical legal research.

II. The Legal Obligation to Enter Into Negotiations on Reparations for Colonial Crimes and the Applicability of Basic Principles of Transitional Justice During These Processes

In recent decades, an increase in international codifications and soft law documentation on the right to reparations in cases of serious human rights violations and breaches of humanitarian law can be observed. Amongst those texts are the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[93] and Article 75 of the Rome Statute of the International Criminal Court.[94]

Whether there is an obligation under international law to reparations for colonial crimes or whether such an obligation is in the making, though, continues to be a matter of controversy. Those legal scholars who argue that the acts committed during colonialism were morally and ethically reprehensible but did not constitute legal violations at the time regularly also reject the obligation to reparations.[95] This is logical as they deny the existence of a violation of rights. Those who affirm a violation of rights at the time tend to derive from it also a duty to redress and to enter into negotiations on reparations. [96] In this respect, the question on which laws were in force at the time, is closely linked to the question of reparations for colonial crimes. But even among those who concede that there may have be no violation of rights at the time, or that it might be impossible to determine it retrospectively, some argue for an obligation to reparations in the case of colonialism and transatlantic slavery, or at least for a state obligation to negotiate with the victims of historical injustice or their descendants—in order to acknowledge their status and dignity and to listen to their version of history.[97] They draw their conclusion from ethical principles—or consensus. With respect to reparations for transatlantic slavery, Makau Mutua argues:

> The existence of positive law *ex ante* is not necessary for accountability for these heinous crimes and other historical abuses. As the Nuremberg trial clearly showed, global powers can will accountability *ex post facto* for gross abuses even where no extant law prohibited such actions. Nuremberg is a great example of a constitutional moment in which society realizes that certain abuses, though not criminalized, are so inimical to morality and decency that leaving them unpunished sets an untenable precedent. In such a situation, dispensing with the general prohibition against retroactive laws is the more plausible option. The most exceptional circumstances may dictate an expedient waiver of this particular legal formality —or an aversion to retroactivity—as was the case in Nuremberg. Actions that shock the human conscience, such as slavery, should follow suit.[98]

Based on ethical principles as part of positive law of the time, Andreas von Arnauld suggests a state obligation to negotiate with the victims of historical injustice or their descendants as a form of satisfaction "in order to guarantee due acknowledgment of their human dignity and to

[93]G.A. Res. 60/147 (Dec. 15 2005).

[94]Rome Statute of the International Criminal Court art. 75, July 17, 1998, 2187 U.N.T.S. 38544.

[95]Kämmerer & Föh, *supra* note 32; Kämmerer, *supra* note 32.

[96]Declaration of Matthias Goldmann, *supra* note 79; Jeremy Sarkin, *Reparations for Historical Human Rights Violations: The International and Historical Dimensions of the Alien Torts Claims Act Genocide Case of the Herero of Namibia*, 9 HUM. RTS. REV. 331, 347, 352–60 (2008).

[97]Mutua, *supra* note 31; Theurer & Kaleck, *supra* note 39; MARTIN, *supra* note 50; von Arnauld, *supra* note 61, at 401–32; Benno Zabel, *Politisches Erinnern als Menschenrecht, in* VERGANGENHEITSKONSTRUKTIONEN 131–61 (2023).

[98]Mutua, *supra* note 31, at 24.

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address their demand to be heard."[99] And Benno Zabel, departing from the ethical need to narrate colonial dehumanization from the perspective of those affected, argues for a human right to collective political remembering of the victims and their descendants.[100] Even those legal scholars who are skeptical that international law is structurally capable of healing the wounds of colonialism acknowledge that it might for instance be a step towards a more peaceful future to recognize that several pre-colonial legal orders existed before European international law was imposed on a global level.[101]

What becomes clear of today's legal debate on reparations for colonialism and transatlantic chattel slavery, is that processes of reappraisal of historical injustice are highly complex for the reasons described before and depend on the good will of all the parties involved. It is therefore important to highlight that the term "reparations" contains a wide range of possible measures and that it might be conducive to shift the focus from direct financial compensation towards structural measures. Processes of truth-finding, legal and political acknowledgement of the injustice or the acts committed, historical research to reconstruct those legal orders and political entities that were devalued and sought to be made invisible, an official apology that affected communities and descendants of victims can accept as such or positive actions against social, cultural, and economic transgenerational exclusion are amongst them. The Ten Point Action Plan, published by the Caribbean Community and Common Market (CARICOM) Reparations Commission in 2013 might be considered a blueprint for reparations as redress for transgenerational exclusion. It calls for full apology and reparations in a number of social, economic, and cultural sectors. The 2005 UN Basic Principles outline five types of reparation, with the first three being individual and the last two being structural: Restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. In July 2021, the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantees of Non-Recurrence, Fabián Salvioli, refers to these texts and emphasizes that experiences of transitional justice of the last 40 years should be taken into account as well. He clearly states that a top–down approach is unsuitable and that true restorative justice is impossible if affected communities are not part of these processes and do not feel included.[102]

What is interesting when one inquires about the motivations for the two court cases in the US and Namibia is that the persons involved primarily cite the reproduction of colonial arrogance and colonial racism, as well as the refusal to engage in a meaningful conversation at eye level.[103] It is therefore rather counter-productive that the current German government thinks it will be possible to achieve reconciliation by imposing an agreement that is perceived to reproduce colonial racism and white saviorism and that is rejected by the majority of the affected communities. On the contrary, it amounts to putting more fuel into the fire.[104] I will get back to the participation rights of affected communities in detail in the next section.

With respect to the practical challenges of determining the laws at the time by the courts above and taking into account recent studies on transitional justice contexts, including the Peruvian

[99]von Arnauld, *supra* note 61, at 426.

[100]Zabel, *supra* note 97.

[101]Kämmerer, *supra* note 32, at 245–47.

[102]Office U.N. High Comm'r for Hum. Rts., *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence. Report on Transitional Justice Measures and Addressing the Legacy of Gross Violations of Human Rights and International Humanitarian Law Committed in Colonial Contexts*, U.N. Doc. A/76/180 (2021).

[103]Personal conversations with several representatives of Ovaherero and Nama, amongst them Paramount Chief Mutjinde Katjiua, Johannes Gaob Isaack, Sima Luipert, Bernadus Swartbooi, Mac Hengari, and Patrick Kauta (Nov. 2019—Apr. 2023).

[104]Karina Theurer, *Die deutsche Regierung reproduziert den kolonialen Rassismus [The German Government Reproduces Colonial Racism]*, Die Zeit, (Jan. 14, 2023), https://www.zeit.de/kultur/2023-01/karina-theurer-kolonialismus-namibia-aufarbeitung?utm_referrer=https%3A%2F%2Fwww.google.com%2F.

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Reconciliation and Truth Commission,[105] it is important to reiterate that adversarial court proceedings might not be the adequate forum for reparation claims. Dialogue and negotiations on an equal footing seem to be the better forum in terms of actual restorative justice and in terms of ending the secondary victimization of the descendants of colonial crime victims. Mutua and von Arnauld explicitly argue in favor of a truth commission or direct talks on an equal footing, as a form of reparations for historical injustice.[106] Yet, it might be the strategic litigation at the Namibian High Court that might enable new negotiations on reparations, hopefully then respecting minimum legal standards and taking into account experiences of transitional justice processes of the last forty years, if the Joint Declaration is declared unlawful by the court or if the newly elected Namibian government will take the decision to refuse to sign the Joint Declaration.

III. Participation Rights of Affected Communities and Descendants of Victims in the German–Namibian Reparations Process

States must abide by human rights and international law. This applies to all state action and therefore also to intergovernmental negotiations. It is recognized today that participation rights of indigenous communities, such as the human right to free, prior, and informed consent, are part of customary international law. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[107] contains some of these rights in more detail. Article 11(2) of the UNDRIP stipulates that mechanisms aiming to redress colonial crimes have to be developed in conjunction with indigenous peoples.[108] Article 18 of the UNDRIP states that: "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions."[109] All of the participation rights need to be interpreted in light of the fundamental right to self-determination as laid out in Article 3 of the UNDRIP, Article 1 of the ICCPR, Article 1 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and in conjunction with Article 5 of the ICERD.

In his report on Transitional Justice Measures and Addressing the Legacy of Gross Violations of Human Rights and International Humanitarian Law Committed in Colonial Contexts, Fabián Salvioli clarified that states have a legal obligation to actively seek the effective participation of affected communities, including those in the diaspora.[110] In their joint communications to the German and Namibian governments, the Special Rapporteurs stated that this applied not only during negotiations but already before, when transitional justice mechanisms were designed, and later when the agreed measures were implemented. And they confirmed that the participation had to be direct and meaningful. They also clearly stated that the legal status of Ovaherero and Nama peoples was different and separate from that of the Namibian government itself, and thus required a place of its own in the negotiations.[111] This means that at least in negotiations on reparations for colonial crimes, the nation-state in which the affected communities live, might not have the sole authority to represent them in these matters, at least not if they reject, and that they have the right to speak on their behalf, as legal subjects of international law. Legal scholars such as Andreas Fischer-Lescano confirm this. He convincingly describes that Articles 11 and 18 UNDRIP reflect

[105]Kimberley Theidon, *Histories of Innocence*, *in* LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE 305 (Rosalind Shaw, Lars Waldorf & Pierre Hazan eds., 2010); *see also* Karina Theurer, *Literatura y Derecho en Adiós Ayacucho [Literature and Law in Adiós Ayacucho]*, *in* ADIÓS AYACUCHO [GOODBYE AYACUCHO] 123, 125–45 (Julio Ortega ed., 2018).

[106]Conversation with Makau Mutua and Author (Mar. 2021); Von Arnauld, *supra* note 61, at 423–34.

[107]G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

[108]*Id.* at art. 11(2).

[109]*Id.* at art. 18.

[110]OHCHR, supra note 102.

[111]OHCHR AL DEU 1/2023, supra note 3, at 6–8.

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an evolution in international law towards the legal recognition of the legal subjectivity of those excluded during colonialism.[112]

On November 8, 2021, the German Foreign Office confirmed that participation rights had to be respected in the German–Namibian process and declared its general commitment to further strengthen the rights and participation of indigenous peoples.[113] Despite this explicit commitment and despite the clear statements of the Special Rapporteurs on the legal status of the Ovaherero and Nama, the German government insists that the legal obligation to ensure participation in accordance with international law lies exclusively with the Namibian government.[114] This legal position violates the participation rights of Ovaherero and Nama, who have a right to direct and meaningful participation in negotiations on the reappraisal of colonial crimes committed against them

The Namibian executive also considers itself bound by participation rights, but argues that all affected communities were invited to join the Technical Committee of the Cabinet Committee on Genocide, Apology, and Reparations. Its role was to provide expertise and technical advice.[115] However, according to the OTA and the NTLA, this was done under conditions that were not acceptable. Due to the strict secrecy agreed between the states, it was practically impossible for years to find out which representatives of the affected communities were actually involved in the negotiations and, in particular, in what way. It is unclear whether they were involved in a purely advisory or substantive participatory way. During the press conference on November 8, 2021, the German Foreign Office finally listed the representatives involved.[116] In addition to information in a letter by the Namibian Attorney General to a law firm instructed by the OTA and the NTLA,[117] it appears that the following representatives were involved, at least during some stages of the negotiations: The Ovaherero, Ovambanderu and Nama Council for the Dialogue on the Genocide of 1904–1908 (ONCD), consisting of six royal houses, the Valgraas and Okakarara Traditional Authorities, the Zeraeua and Maharero royal houses, the Damara Gaobs Councils' Chiefs, and Epupa Chief Hikuminue Kapika. The legal question of course is whether they can be considered as legitimate representatives of the affected communities in terms of Article 8 and 11 UNDRIP. The fact that high number of Ovaherero and Nama both in Namibia and in the diaspora consider themselves to be represented by the OTA and the NTLA confirms the factual lack of effective participation of the descendants of the victims—independently of the reasons that led to this.

With regard to the argument by the Namibian executive, the OTA and NTLA voluntarily refrained from participating, the Special Rapporteurs clearly stated that the refusal to participate in ways which are not in accordance with international law, cannot be construed as a refusal to participate in general.[118] Furthermore, the Special Rapporteurs stated clearly:

> Since the subject matter of the negotiations between Germany and Namibia directly relates to and affects the right of the Ovaherero and Nama peoples and the determination of the remedies that would provide adequate justice for the harm suffered, no valid negotiations can be conducted and no just settlement can be reached without them.[119]

[112]Fischer-Lescano supra note 39, at 31.

[113]Press Release, German Foreign Office, German Foreign Office at the Federal Press Conference, Confirmation of Participation Rights in German Namibian Process (Nov. 8, 2021), https://www.auswaertiges-amt.de/de/newsroom/regierungspressekonferenz/2495066#content_5.

[114]Germany: Note verbal, supra note 30.

[115]Letter by the Namibian Attorney General Sakeus Shangala to a British law firm representing OTA and NTLA at paras. 20.1, 20.2 (Nov. 16 2016) (on file with author) [hereinafter Letter by Namibian Attorney General Sakeus Shangala].

[116]German Foreign Office, supra note 114.

[117]Letter by Namibian Attorney General Sakeus Shangala, *supra* note 116, at para 20.08.

[118]OHCHR AL NAM 1/2023, supra note 3, at 4.

[119]*Id.* at 8.

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Other United Nations committees and representatives also denounced the lack of adequate inclusion. In May 2018, the Human Rights Council Working Group on the Universal Periodic Review stated, that Nama and Ovaherero ought to be included in the ongoing negotiations.[120] In November 2018, the High Commissioner for Human Rights of the United Nations, Michelle Bachelet, asked the German state to ensure, "that Ovaherero and Nama peoples are included in the negotiations between the Governments of Germany and Namibia following the apology by Germany for the genocide of these people."[121]

What is interesting with regard to the German-Namibian process of reappraisal, oscillating between the reproduction of colonial patterns and decolonization of law is the change that occurred between the adoption of the parliamentary motion in October 2006 and the idea of an interparliamentary forum in 2007 and the interstate negotiations that started in 2015. As previously described, the participation rights of the affected communities were essential components of the parliamentary resolution. Until 2011, the Namibian executive, as shown above, emphasized that it saw its role as a mediator only. The shift towards a top-down and state-centered approach occurred when the interstate negotiations began.[122] According to Zed Ngavirue, the German negotiating delegation had strictly insisted on negotiations exclusively between states and thus governments.[123] Ruprecht Polenz, had stated that "the Federal Republic's direct counterpart is, of course, the Namibian government. I assume that the Namibian government wants to conduct the talks in such a way that the Namibian population as a whole is included—and thus also the descendants of those who suffered particularly under German colonial rule."[124]

It goes without saying that governments, as elected representatives, should be interlocutors in reparations processes. However, participation rights of affected communities are not a matter of political good will, but recognized in terms of international customary law as described above. Neither the German nor the Namibian government were in a position to exercise discretion on whom they were willing to include or not and in which ways. Ovaherero and Nama, including those in the diaspora, have a right to participate not only in the negotiations but already before, when transitional justice mechanisms are designed, and later when the agreed measures are implemented. Both governments have violated those participation rights.

D. Conclusion: Minimum Legal Standards in the German–Namibian Reparations Process and in General

The quote by Lothar von Trotha with which I began my Article reveals the blunt racism that was the legitimizing ideology for the violence deployed in European colonies. It sparks doubt with respect to the German government's assessment of the laws in force at the time because it seems

[120]Hum. Rts. Council, *Report of the Working Group of Experts on People of African Descent on its Mission to Germany*, para. 29, U.N. Doc. A/HRC/WG.6/30/DEU/2 (2017).

[121]Letter by the High Commissioner to the Foreign Minister (Nov. 2, 2018).

[122]Press Release, by Nicky Iyambo, Vice-President of the Republic of Namibia, on the commencement of formal negotiations between the Governments of the Republic of Namibia and the Federal Republic of Germany on the 1904–1908 Genocide (Sept. 2 2016) at para. 11 ("It should be emphasized that in terms of international law these negotiations can only take place between sovereign states. Both Governments are democratically elected, and are empowered to represent their citizens on the international platforms. In the case of Namibia, the Government is empowered under international law to represent the Ovaherero and Nama people in negotiations with Germany, another sovereign state. The Government of the Republic of Namibia is the only entity legitimately able to take steps on behalf of the people of Namibia, including the Ovaherero and Nama, under international law.")

[123]*On German-Namibian Negotiations,* Namibian Sun (Mar. 30, 2021), https://namibian21.rssing.com/chan-44586264/article29724.html.

[124]Theresa Krinniger, *Ich habe Erfahrung mit heikler Außenpolitik,* DW (Apr. 11, 2015), ßhttps://www.dw.com/de/polenz-ich-habe-erfahrung-mit-heikler-außenpolitik/a-18828724.

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that von Trotha took the deliberate decision not to respect the Geneva Conventions. This of course would mean that he thought they applied.

In my Article, I have described the colonial crimes committed in Namibia and shown to what extent they were formally legitimized by a specific interpretation of European international law, both in terms of legal subjectivity and by German colonial law. Both legal systems at the time were based on the racist devaluation of non-white people. The distinction between "civilized" and "uncivilized" nations was, however, controversial at the time, and some European legal scholars confirmed legal subjectivity of non-European nations and humanitarian legal protection. Only few decades after the genocides in Namibia, this racist distinction disappeared (at least as a formal legal criteria) and the recognition of the legal principle of self-determination of all peoples became predominant in international law.

With regards to the doctrine of intertemporal law, I have shown that the question of the laws in force at the time is a crucible in deconstructing eurocentrism in international law. With regard to the difficult task of adjudicating facts of a hundred years ago and determining the laws at the time, I have described the challenges of retrospective reconstruction due to the erasure of pertinent knowledge and sources and I have outlined the risks of conceptual imperialism. What is clear, however, is that an unreflective retrospective assumption of prevailing opinions without thorough historical research into when exactly European international law substituted "other" legal orders and standards is not sufficient for a legally correct application of the doctrine of intertemporal law. If such a retrospective assumption constructs prevailing opinions that turn out to be more racist than they actually were, this can amount to a new act of racism. In any case, it is deeply Eurocentric and a reproduction of colonial racism.

The German Foreign Office and any other representative of a former colonial power should refrain from reproducing the racist distinction between civilized and uncivilized nations in any legal proceeding that takes place today. The prohibition of racialization and racist discrimination is one of the core principles of international law, forms part of *jus cogens*, and is one of the basic human rights enshrined in several human rights treaties. Any process of reconciliation and reappraisal of colonialism can only be successful if this initial racist dehumanization at the core of colonialism is deconstructed and overcome in today's legal reasoning. Furthermore, the racist distinction between civilized and uncivilized nations disappeared from the international legal order at the beginning of the 20th century. It might thus not fulfill the requirements of the second element of intertemporal law, and as a consequence, might not rightfully be taken as a basis to determine the laws in force at the beginning of the 20th century.

The theoretical and practical challenges in applying the doctrine of intertemporal law that I analyzed in my Article could mean that a court might find itself to be unable to decide and thus might lead to a declaration of *non liquet*. Even if this was the case, the German state still has a legal obligation to enter into direct negotiations on reparations for its colonial crimes committed in what is today Namibia. This legal obligation can be derived from ethical principles, the racist dehumanization itself, or the basic principles of equality and human dignity which require a transformation of international law towards these guarantees. Participants in these negotiations can be the independent states, but for sure need to be the self-elected representatives of the affected communities in accordance with international customary law. I emphasized in my Article that it is of foremost importance to move away from equating reparations with financial payments and instead think of reparations as positive measures to tackle the transgenerational social, cultural, political and economic exclusion and to overcome colonial racism inscribed into laws.

With regard to the German–Namibian negotiation process, I highlighted the 2006 parliamentary resolution which plays a key role from a Namibian constitutional perspective. I have shown how there was initially consensus on an interparliamentary forum to deal with the past between Germany and Namibia. It is unclear why in 2015 the two governments started to negotiate in strict secrecy. I have also shown that in these negotiations, the participation rights guaranteed under customary international law of both the Ovaherero and the Nama have been

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violated. This violation is attributable to both the Namibian and the German governments, as both governments are originally bound by international law in this respect.

The lawsuit before the Namibian High Court could be a historical milestone, because it is the first time that an interstate agreement on the reappraisal of colonial crimes is being reviewed in a court of a former colony. It might lead to declaring the Joint Declaration as unlawful. This would pave the way for new negotiations—this time hopefully in compliance with minimum legal standards. With regard to international law, a decolonial interpretation and application of the doctrine of intertemporal law would certainly be central in this regard. Furthermore, the participation of the affected communities in a substantial way and through self-elected representatives could be facilitated. From a constitutional law perspective, the founding affidavit to the Namibian High Court clearly shows the legal obligation of Namibian state authorities to actively involve the Namibian Parliament. With respect to the German context, it would be interesting to research legal rights and obligations of the German Bundestag from a German constitutional law perspective.

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