

BOFAXE

New Ways to Deal With Old Crimes? (Part 1)

A LEGAL ANALYSIS OF PAST INJUSTICES FROM TODAY'S PERSPECTIVE

— Do countries take responsibility for grave violations of current international law committed in the past? This question has once again been raised in the negotiations between Germany and Namibia over what was hoped by the German government to be a “reconciliation agreement”. The final Joint Declaration (JD) was designed to settle disputes over reparations for the colonization and end reparation claims concerning the 1904-1908 genocide “from today’s perspective” (JD, Art. 10). In Namibia, the civil society and representatives of the victim groups strongly opposed this agreement. Recently, a lawsuit has been filed at the High Court of Namibia by lawyer Patrick Kauta to challenge the lawfulness of the JD. His critiques, the lacking participation of the groups targeted during the genocide and also the question of reparations for the crimes committed during the colonial period, are shared by the Namibian Parliament which has not ratified the agreement yet. Despite being the first former colonial power to enter such negotiations with the ex-colony, Germany wants to take only moral and no legal responsibility for its past. The sum agreed upon to settle “all financial aspects relating to the past” (Art. 20 JD) is to be seen as development aid and not as reparations.

Nevertheless, scholars like Karina Theurer see in the case of Namibia – and the lawsuit against the Declaration – the potential to set legal standards worldwide in terms of participation rights of affected communities and a “decolonialization” of international law. While Theurer discusses Kauta’s case and its potential with regard to further reparation processes, our contribution seeks to explore the possibilities for states to gain reparations for past injustices. Differing from her analysis, we think that existing international law gives little hope to find a legal basis for successful reparations claims. By identifying existing loopholes in the international legal order, we then propose an alternative approach focusing on new political-legal initiatives. In order to tackle this issue, the true will of the international community to decolonize international law is required.

A Right to Reparation Under International Law?

Today, the international legal order prohibits several crimes such as genocide and, in case they occur nevertheless, offers criminal proceedings or inter alia reparations. According to the Draft Articles on State Responsibility, when an internationally wrongful act is committed, international responsibility arises automatically (Art. 1). Invoking international responsibility and requesting reparations for actions that could be classified as crimes today, but which were legal at that time, is more complicated. Several scholars argue that this is not possible because of the prohibition of retroactivity as enshrined in the Rome Statute (Art. 24) in international (criminal) law. For example, Jörn Axel Kämmerer points out that the genocide of the Ovaheroo and Nama is not punishable under today’s international law because there was no norm prohibiting genocide (especially in colonies) and because the victims of 1904-08 were not considered as subjects of international law (Kämmerer, pp. 408, 417-419, 420-423). Moreover, even what is now Namibia was not recognized as a state, and thus a subject of international law capable of requesting reparations for the ancestors of its citizens (Kämmerer, p. 419). While Germany can be held liable for the deeds of the “Deutsche Reich”, there is no clear legal descendant for the Ovaheroo and Nama in consequence (Kämmerer, p. 419-420). Kämmerer, therefore, concludes that international law is simply “overstrained” to heal the wounds it caused (Kämmerer, p. 423). This might be frustrating and “racist”. But recognizing the incapability of international law to fill its loopholes afterwards (Kämmerer, p. 424), opens the door to a more honest way: Acknowledging that the Westphalian world order does root in racist ideas coming from the powerful elites in the Global North, and decolonizing it not by looking for non-existent legal bases to heal former injustice, but by creating new ones.



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New Ways to Deal With Old Crimes? (Part 2)

A LEGAL ANALYSIS OF PAST INJUSTICES FROM TODAY'S PERSPECTIVE

How to Deal With Our Racist Legacy

The difficulties of international law regarding reparations for what is now considered as a genocide leave us with two basic options: First, we could negate this insight and try to reveal the racist “legacy” ([Theurer](#) and [ECCHR](#)) of existing international regulations like [Kauka](#) tries in his lawsuit against the JD. Using the existing system seems reasonable and promising, but in the case of former injustice, it is questionable if this suffices. Second, we could accept the existence of these loopholes in international law. This could mean just forgetting about the genocide and accepting that we can do nothing to heal it – but that would be outrageously unfair. Alternatively, we could rely on political and moral obligations between states. This would be in line with the JD and [its questionable legal effect on the parties](#). Or, third, we could change international law by filling the loopholes left by international law with bi- or multilateral legally binding agreements ([Kämmerer](#), p. 424). For example, [Makau Mutua](#) points to the Nuremberg Trials arguing that the principle of retroactivity can be set aside when powerful countries wish to ([Mutua](#), p. 21).

However, this analysis pleads for a fourth way, a combination of the political-moral and the legal approach for closing international law's loopholes: More precisely, we need former colonial powers to open their eyes towards the moral injustice they did in the past and to stop hiding behind international law's objectivity. This is only possible with the political will to design and implement legal mechanisms which will cover for injustices that happened in the past. For example, claims of different former colonies could be discussed together at a global conference where the representation of the affected indigenous groups could be assured as well (e.g. [here](#)). In part, that was already tried.

Earlier Attempts to Reparations

The demand for reparations for historical injustice in the context of colonialism is not new and no individual case. In [many countries](#), movements have emerged in recent decades to request compensation for the damages suffered through colonization and the slave trade.

On the international level, the ball was set in rolling in 1993 with the “First Pan-African Conference on Reparations”. In the [Abuja Proclamation](#) adopted there, the participants called on “States in Europe and the Americas which had participated in the enslavement and colonization of African peoples [...] to desist from any further damage and start building bridges of conciliation, co-operation and through reparation” (Abuja Proclamation, Preamble). In their demands, they referred to a frequently cited case of the right to reparations outside of the area of colonialism: Seven years after the end of the Second World War, the Federal Republic of Germany (FRG) agreed to pay comprehensive reparations to the Jewish people for the Holocaust. Although the persecuted Jews were not a [legal entity](#), the FRG recognized their representatives of the Jewish Claims Conference (JCC) and paid collective reparations to the Jewish people without a legal obligation to do so. The JCC as well as the Luxembourg Agreement setting reparations between Israel and the Federal Republic of Germany were [precedents](#) in international law.

While the reparations were agreed upon through [voluntary negotiations](#), the pressure on the FRG to present itself as a reliable partner in a new international context should not be underestimated. Additionally, during the Allied occupation of Germany, the United States initiated “[zonal restitution laws](#)” which are likely to have been influential in the further development concerning the FRG's commitment to make up for the atrocities committed by its predecessor state. An attempt to concretize the claims for reparations in the case of colonial crimes was initiated by the Caribbean Community (CARICOM) in 2014. The [10-point reparations agenda](#) was adopted [unanimously](#) by the CARICOM nations. This document has become very influential in demands for reparations and has for example been presented as a guideline for possible new negotiations between Germany and Namibia by [Theurer](#). However, neither the agenda nor the Abuja Proclamation have resulted in legally binding documents and have not been recognized by governments of ex-colonial powers. This could be due to the missing participation of powerful states which could be itself a result of their unwillingness to acknowledge the racist foundation of international law and to decolonize it by modifying it.

Outlook

The flaws of international law and the unwillingness of former colonial powers to face their international moral responsibility are disappointing. However, they highlight problems of power hierarchies in our current world order ([Mutua](#), p. 20). We can hope for the Ovaheroo and Nama that their [case](#) in Namibia will bring in new negotiations. However, the moral right to reparations cannot be satisfied by existing international law provisions alone. We need to find new political-legal means – beyond the former attempts – to heal the wounds caused by racist international law provisions in the past. In this broader context, the German government is required to take full legal responsibility for the genocide “from today's perspective” and needs to engage internationally in the true decolonization of international law.

More concretely, approaches on an international level such as those of CARICOM and the signatories of the Abuja Proclamation are to be welcomed and represent a good way of addressing these difficulties. What is lacking so far, however, is the willingness of the Global North to really change the status quo and design an international legal order based on true equality. This is the requirement for initiatives like Abuja to bear fruit. As far as the possibilities of addressing these claims are concerned, the possibility of organizing an international conference is suitable, as described above.