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6. Paying for colonial atrocities. The paradoxical outcome and the unexpected adverse consequences of the German-Namibian settlement concerning the genocide against the Herero and Nama[1]

Introduction

In 2015 Germany and Namibia started to negotiate a settlement concerning German atrocities committed under colonial rule on the territory of what was then German South West Africa and is now Namibia.[2] Since Namibia's declaration of independence from South Africa in 1990, Germany has been an important sponsor of development aid in Namibia, which became a major holiday destination for German tourists. In recent years, the German public has paid increasing attention to colonial issues. Namibia plays the most prominent role in these German discussions about how to deal with the colonial past, because it was Germany's only settler colony in Africa. The negotiations have triggered numerous legal and historical analyses which inquire about the character of these atrocities, their links with mass atrocities committed later by the Nazis in Central and Eastern Europe,[3] the scope and limits of international litigation and the applicability of international law and international criminal law to events which took place at the beginning of the twentieth century.[4] There are also analyses which examine

[1] Research for this article was sponsored by the National Science Centre, Poland (NCN grant no. 485447 2020/37/B/HS3/00643 ('Transnationalism and Colonialism. Settler communities in Southern Africa between NS-ideology and apartheid').

[2] The territories of the German colony (in German: *Schutzgebiet* or "protection territory") German South-West Africa and today's Namibia do not entirely overlap. At the time of German rule, Walfis Bay was a British port, which was run by South Africa after Germany had lost the colony in World War I. South Africa returned the port city to Namibia in 1994.

[3] Zimmerer, Jürgen (ed): *Von Windhuk nach Auschwitz? Beiträge zum Verhältnis von Kolonialismus und Holocaust*, (Münster: Lit Verlag, 2011); Madley, Bejamin: "From Africa to Auschwitz: How German South-West Africa Incubated Ideas and Methods Adopted and Developed by the Nazis in Eastern Europe", *European History Quarterly*, 35, 3 (2005), 429–464; critically about these theses: Zollmann, Jakob: "From Windhuk to Auschwitz – old wine in new bottles?", *Journal of Namibian Studies*, 14 (2003), 77–122; Bachmann, Klaus: "From German Southwest-Africa to the Third Reich. Testing the Continuity Hypothesis", *Journal of Namibian Studies: History Politics Culture 23 (2018)*, 29–52.

[4] Sarkin, Jeremy: *Colonial Genocide and Reparations in the Twenty-First Century: The Socio-Legal Context of Claims Under International Law by the Herero against Germany for Genocide in Namibia 1904–1908*, London: Westport 2009, 107–111.

whether and eventually how litigation contributes to historical distortions.[5] Many articles and books considered the Namibian (and respectively the Nama and Herero) claims against Germany, and whether these are substantiated in international law,[6] whether the atrocities fulfil the requirements of the Convention for the Prevention and Punishment of Genocide,[7] whether Germany is legally accountable for atrocities committed by the German Empire and whether Namibia is a legal successor to the victims of the German atrocities.[8] Under pressure from ethnic constituencies in Namibia, international media coverage and public opinion in Germany, Germany's political establishment has slowly moved from denialist positions, which downplayed or ignored the scholarly and media debate about colonial atrocities, to an acceptance of the genocide label to characterise the colonial-era atrocities. And thus, a settlement with Namibia was reached in 2021, six years after the official start of the negotiations.

Different from the above-mentioned studies, the current article examines why negotiations lasted for such a long time, even though the main issue was never contentious in Germany, neither was it an issue between the German government and the Namibian government. Furthermore, it needs probing whether the result fulfils the German government's most important objective: to provide an efficient shelter against similar demands. We proceed in the following way. First, we present a short overview of the underlying conflict – Germany's colonial conduct in its colony German South-West Africa between 1904 and 1907, for which actors in Namibia, supported by civil organisations in Germany sought compensation. Then we present the main international law concepts, which could theoretically be invoked by the negotiators to address the Namibian claims. Next, we analyse the course of the bilateral negotiations with a special emphasis on the legal character of the Namibian demands and of the German response to it and how they relate to the earlier presented legal concepts. In the conclusion, we show that the ultimate settlement between both countries does not fit into any of these concepts and is also different from earlier settlements, which provided financial transfers to claimants and secured Germany from legally enforceable demands for reparations or compensations. We argue that exactly because of the novel and formally non-binding character of the settlement's financial consequences, the Namibian-German negotiations might trigger similar claims involving other former colonies and colonisers.

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[5] Bargueño, David: "Cash for Genocide: The Politics of Memory in the Herero Case for Reparations", *Holocaust and Genocide Studies* 26, no. 3 (2012), 394–424.

[6] Eicker, Steffen: *Der Deutsch-Herero Krieg und das Völkerrecht. Die völkerrechtliche Haftung der Bundesrepublik Deutschland für das Vorgehen des Deutschen Reiches gegen die Herero in Deutsch-Südwestafrika im Jahre 1904 und ihre Durchsetzung vor einem nationalen Gericht*, Frankfurt/M.: Peter Lang 2009.

[7] Bachmann, Klaus: Germany's Colonial Policy in German South West Africa in the Light of International Criminal Law, *Journal of Southern African Studies* (43/2) 2017, 331–347.

[8] Eicker, *der deutsche Herero Krieg*, passim.

Germany's colonial atrocities in its only settler colony

Germany colonized the territory of Namibia at the end of the nineteenth century, but until 1904, it only exercised effective control over several harbours and smaller towns inside the country, excluding the Northern part of the country close to the border to Portuguese-held Angola, which remained under the rule of the Ovambo kingdoms. Central Namibia was mostly populated by Herero, a cattle-raising nomadic group, and the much smaller group of Damaras. Nama (then mostly called Hottentots) and Basters, a group with mixed-race ancestors that had migrated from the Cape Colony and settled among the Nama lived in the Southern part.[9] Different from the other German colonies in Africa, the government in Berlin regarded Namibia as a settler colony and supported Germans, who went there to establish farms or work for the administration.[10] Despite generous subsidies for emigrants the German settler community remained weak in German South-West Africa and suffered from a big female deficit.[11] A fragile peace characterised the years before 1904, policed by a small German colonial army, the *Schutztruppe* which employed locals, mostly Baster and Nama, to keep riots and uprisings at bay.

In January 1904 the Herero staged an uprising which was first and foremost directed against German traders and farmers. Many of the farmers had mistreated their Herero staff while traders had engaged in a business comparable to pawn laying after the abolition of serfdom in Europe. They used to sell goods to local Herero for credit and then execute the debts against Herero land, often by means of violence and exaggerating the goods' value and underestimating the land's value.[12] This way, more and more land had ended up in the hands of traders and subsequently settlers, who bought it. In 1903, the government imposed a ban on this kind of real estate swaps and negotiated land reserve boundaries with Herero leaders. The anticipated ban on loan – equity swaps inclined the traders to press their Herero clients even harder to repay and therefore increased the tensions between German traders and farmers on the one hand and Herero on the other hand. In January 1904, the Herero fled from the farms,

[9] Wallace, Marion (with John Kinahan), *A History of Namibia. From the Beginning to 1990*, London: Hurst and Company 2011, 131–154. There were also, scattered across the country, the San people, then often called bushmen, which (alike the Damara) do not play any role in this article. The San later became indirect victims of the genocide, but today lack any effective representation in the political system and are not involved in the negotiations with Germany.

[10] Walther, Daniel S.: *Creating Germans abroad. Cultural Policies and National Identity in Namibia*, Athens: Ohio University Press 2002, 9–45.

[11] Walther, *Creating Germans abroad*, 10–43

[12] Pool, Gerhard: *Die Herero-Opstand 1904–1907*, Pretoria: Hollandsch Afrikaansche Uitgevers Maatschappij 1979, 84–117.

withdrew into the bush and returned armed, attacking German settlements, farms and laying siege to towns. The *Schutztruppe* retaliated, but without much success.[13]

Until the 1904 Herero uprising, German governors had managed to respond to uprisings with a tactic of *divide-and-impera* and negotiations about the conditions of the protection treaties which the German state had concluded with the leaders of the local communities. Most likely, the Herero leaders expected a similar move, when they started the uprising. After several indecisive battles which proved costly for the Germans, the Herero withdrew to the Waterberg, a water-rich and densely overgrown mountain area north of Windhuk, where they could hide their cattle, shelter their families and prepare negotiations with the governor.[14] Governor Theodor Leutwein was ready for such negotiations, but he – and the Herero – underestimated the influence of popular outrage and racist propaganda which had infuriated public opinion in Germany after the beginning of the uprising.[15] Under its influence, the German government in Berlin deprived Leutwein of the command over the colonial army, sent additional troops and a ruthless colonial commander without any knowledge of the situation on the ground to quell the uprising by force. Lothar von Trotha, who had served in China and East Africa, imposed a state of war on the colony and deprived the Herero of any rights, to which they were entitled under international humanitarian law and German domestic law.[16] From then on, German troops just could kill any armed person, without distinguishing between surrendering and wounded soldiers, civilians and prisoners of war. At the Waterberg, they circled the Herero with the intention, as von Trotha wrote to Berlin, to annihilate them as a nation.[17] He failed, because the Herero managed to sneak out of the area under the

[13] Nuhn, Walter: *Sturm über Südwest. Der Hereroaufstand von 1904 – ein düsteres Kapitel der deutschen kolonialen Vergangenheit Namibias*, Bonn: Bernard & Graefe Verlag, (3. Edition) 1996, 169–181.

[14] Throughout the article, the geographical names of places, towns and regions will be used in the same version as they were used during the time of the events which are described. Therefore, today's capital of Namibia, Windhoek, will be written "Windhoek" during South African rule and after independence, and "Windhuk" during German colonial rule.

[15] Leutwein, Theodor: *Elf Jahre Gouverneur in Deutsch-Südwestafrika, (4*. Auflage Windhoek: Namibia Wissenschaftliche Gesellschaft, 1997) (reprint of the original edition from 1908), 465–525; on public outrage and racism see also: Sobich, Frank Oliver: „*Schwarze Bestien, rote Gefahr*". *Rassismus und Antisozialismus im deutschen Kaiserreich*, Frankfurt/M., New York: Campus 2006.

[16] Bachmann, Klaus: *Genocidal Empires. German Colonialism in Africa and the Third Reich*, Berlin: Peter Lang 2019, 66–87.

[17] Von Trotha wrote about his intent to "annihilate the Herero as a nation" to his superiors in Berlin and in his diary (which is held by his descendants and to which Pool had ac- cess). The records about the correspondence

cover of the night and escaped to the Omaheke desert, hoping to reach Botswana, where they had probed the British for asylum.[18] Herero paramount chief Samuel Maherero managed to get there, but most of his people perished in the desert from illness, malnutrition, starvation and lack of water. The harsh conditions in the desert forced the German troops to withdraw without any major battles.[19] Von Trotha's plan to annihilate the Herero at the Waterberg had failed. The Herero were out of his reach and his troops were stuck in the waterless desert, their horses dying and the soldiers starving and decimated by diarrhoea and fever. From a remote waterhole, von Trotha issued an order, in which he threatened the Herero to "drive them out of the country" and urged his troops to shoot any surrendering Herero and to chase away Herero civilians from waterholes to prevent them from getting water for the fighters.[20] The order, which was cabled to Berlin as a proof of von Trotha's heavy-handed approach, was kept confidential by the government and became public only a year later. Weary about the possible impact von Trotha's antics could have on public opinion, Chancellor Bernhard von Bülow ordered von Trotha to rescind the order two months after von Trotha had issued it. Today, it is mostly referred to as von Trotha's "extermination order."

The revocation of the order forced the colonial army to take prisoners, rather than to just shoot anyone carrying arms. Most Herero fighters had died, either from wounds, starvation and diseases, others had fled to British-held territories, mostly Bechuanaland and Walvis Bay. Those who surrendered were mostly civilians, often ill and weak, who had not much chance to survive in the bush. They gathered in mission compounds and prisoner of war camps organized by the army. Although death rates in most of these camps were relatively low (they oscillated around 5 percent of the inmates) they soon became notorious because of one camp. On Shark Island, an island in Lüderitzbucht in the South, more than 40 percent of the inmates died, almost entirely from scurvy and malnutrition. Many of them were Nama who had joined the fight against the Germans after the Waterberg battle.[21] When the Emperor lifted the

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with the general staff and the Chancellery are held in BArch R1001.2089. The diary note is in Pool, Gerhard: *Samuel Maherero*, Windhoek: Gamsberg MacMillan 1991, 272–273.

[18] This is what Samuel Maherero later told South African writer and ethnologist Eugène Marais, "Die Woestynvlug van die Herero's" in: Marais, Eugène N. (ed): *Sketse uit die Lewe van Mens en Dier*, Kaapstad, Stellenbosch, Bloemfontein: Nasionale Pers Beperk 1928, 1–21.

[19] Eckl, Andreas: „*S'ist ein übles Land hier*". *Zur Historiographie eines umstrittenen Kolo- nialkrieges. Tagebuchaufzeichnungen aus dem Herero-Krieg in Deutsch-Südwestafrika 1904 von Georg Hillebrecht und Franz Ritter von Epp*, Köln: Rüdiger Köppe Verlag, 2005.

[20] Von Trotha's 'extermination order' is quoted in many works. Jan-Bart Gewald claims to have found the original version in Botswana: Gewald, Jan Bart: "The great general of the Kaiser", *Botswana notes and records, 26*, 1994, 67–76.

[21] Kreienbaum, Jonas: „*Ein trauriges Fiasko*". *Koloniale Konzentrationslager im südlichen Afrika 1900–1908*, Hamburg: HIS Verlagsgruppe, (Neue Edition) 2015.

state of war in 1907, approximately 80 percent of the Herero population and half of the Nama population had disappeared.[22]

The Germans then had to set the surviving prisoners of war free, but were confronted to rising fear among the settlers about another uprising. Therefore, they decided to deport the leading Nama and Herero families to other German colonies, to deprive them of contact with their local followers. About 150 prisoners were brought to Togo and Kamerun, where approximately half of them died, before the government in Berlin agreed to repatriate the remaining survivors to German South-West Africa, pressured by German doctors and missionaries in Togo and Kamerun.[23]

In the historical literature, there has been a lot of controversy about the German war conduct, which the overwhelming majority of scholars regard as genocidal.[24] There still is a lot of controversy about which German policies fulfil the criteria of the Genocide Convention and whether the Convention should materially and normatively be applied to this case or not.[25] Some authors regard the entire German war conduct as genocidal, seeing the Herero escape from the Waterberg into the desert as a German "war

[22] Many authors estimate the death toll for the Herero at 80 000 and 3⁄4 of the pre-war population, while it is estimated that half of the Nama population died in the fighting with the Germans. It must be kept in mind that these numbers are tainted by a high, but unaccounted for number of Nama and Herero who did not die from the fighting, but from malnutrition, diseases and starvation in the desert. Many Herero also fled to British territory (but were not counted either) and diminished the population numbers in the German colony, but did not die after their escape. The fatalities in prisoner- of-war camps mostly did not die from violence, but from starvation and diseases.

[23] The records about the deportations are held at the Bundesarchiv Lichterfelde, Berlin, in the box R1001 2090.

[24] Bley, Helmut: *Kolonialherrschaft und Sozialstruktur in Deutsch-Südwestafrika 1884– 1914*, Hamburg: Leibniz Verlag, 1968; Wassink, Jörg: *Auf den Spuren des deutschen Völkermords in Südwestafrika. Der Herero/Nama-Aufstand in der deutschen Kolonial- literatur. Eine literarhistorische Analyse*, München: Meidenbauer 2004; Zimmerer, Jürgen and Zeller, Joachim (eds): *Der Kolonialkrieg (1904–1908) in Namibia und seine Folgen* Berlin: Ch. Links, 2008; Sarkin, Jeremy: *Germany's Genocide of the Herero; Kaiser Wilhelm II, His General, His Settlers, His Soldiers*, Cape Town: James Curry, 2011; Gewald, Jan-Bart: *Herero Heroes. A Socio-Political History of the Herero of Namibia 1890–1923*, Athens, Oxford, Cape Town: Ohio University Press and David Philip and James Currey, 1999.

[25] The intertemporal principle in international law holds that the Genocide Convention, adopted in 1948, cannot be applied retrospectively. The debate is, however, if the notion of genocide as contained in the Genocide Convention could serve as a normative framework for purposes of a historical evaluation of an atrocity as potentially constituting genocide.

ruse" intended to kill the Herero through the desert rather than in direct combat,[26] while others see the Waterberg battle as a legitimate war strategy and the escape as part of a Herero plan to get out of the siege and seek refuge in Bechuanaland.[27] For some, von Trotha's extermination order, which clearly constituted a violation of Germany's international humanitarian obligations, is proof of genocide,[28] while for others, it is a propaganda stunt intended to impress von Trotha's superiors in Berlin (which it did, but differently from what he expected).[29] There is much less controversy about Shark Island and the deportations, which clearly constituted violations of the Red Cross Convention and the Hague Conventions, by which Germany was bound then, and, under the Genocide Convention, would also fulfill the criteria of "creating conditions to bring about the destruction of the Nama and Herero" and "deportation" as a count of genocide.[30]

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[26] Drechsler, Heinz: „*Let us die fighting.*" *The struggle of the Herero and Nama against German imperialism (1884–1915)* London: ZED Press, 1980; Drechsler, Heinz: *Südwestafrika unter deutscher Kolonialherrschaft. Der Kampf der Hereros und Namas gegen den deutschen Imperialismus (1884–1915)*, Berlin: Akademie Verlag (zweite Auflage), 1984 (which does, in moral and legal terms, not at all exonerate the German authorities that were responsible for 'treating them humanely'). For the latter see: Kreienbaum, *ein trauriges Fiasko*, 76. The fatalities in the camps are summoned up in a document in the Bundesarchiv Berlin-Lichterfelde, B Arch R 1001 2140.

[27] Bachmann, Klaus: *Genocidal Empires. German Colonialism in Africa and the Third Reich*, Berlin: Peter Lang 2019, 57–88.

[28] Drechsler, *let us die fighting*, 182–183.

[29] Bachmann, Klaus: *Genocidal Empires. German Colonialism in Africa and the Third Reich*, Berlin: Peter Lang, 78. Several diaries of von Trotha's officers confirm this version: Eckl, 116; Tagebuch von Viktor Franke, Archive of the Sam Cohen Library, Swakopmund, 373–380.

[30] The death toll for the different camps stems from the statistic of an unknown German officer, held in BArch R1001.2140 as "Bericht über die Sterblichkeit in Kriegsgefan- genenlagern", written on 23.3.1908. There is a statistic about prisoners of war camps in 1906 in the National Archives of Namibia, NAN D-N-I-3-2.

The main international law concepts for reparations and compensation for past atrocities committed by states and state-like actors

International law generally recognizes three basic consequences of an internationally wrongful act committed by a state or other subject of international law.[31] In the event of an internationally wrongful act (breaches of treaty and other international obligations),[32] the wronged party has the right to respond. Such a response can take various forms, notably: invocation of the responsibility of the wrongdoer, demanding cessation and/or reparations, and taking countermeasures.[33]

While domestic legal systems normally have sophisticated and often rigorous procedures and institutions in place to deal with breaches of the law, the inter- state and international consequences of internationally wrongful acts should be seen as functions of both international relations and international law, rather than legal responsibility analogous to domestic law. Many factors, including the type of wrongful act (a treaty violation, an obligation to prevent genocide, the unlawful use of force, and so on)[34] and the lapse of time will impact on the choice of response to the wrongful act in question. Leaving aside the temporal and factual context, it is important to briefly consider the basic elements of the various consequences of an internationally wrongful act.

The first concept to consider is that of cessation. This can be regarded as a baseline response, because it refers to a state's basic obligation to comply with international law.[35] Secondly, and more pertinent for present purposes is the notion of reparation, which should be considered as a remedy in the real sense, that is, a demand over and above the baseline insistence that a state acts in compliance with international obligations (cessation). A demand for reparation as a response to an internationally

[31] Crawford, James: *Brownlie's Principles of Public International Law* Oxford: Oxford University Press, 2008, 566.

[32] The Permanent Court of International Justice held as follows: 'It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation. ... The Court has already said that reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.' (1928) PCIJ Ser A No 17, 29. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Second Phase, ICJ Reports 1950 221, 228.

[33] Crawford, 566.

[34] See, for instance: Uganda/DRC (ICJ) on the Unlawful Use of Force; Application of the Genocide Convention (*Bosnia v Serbia*).

[35] Crawford, 567.

wrongful act can take many forms. It includes restitution, compensation, and satisfaction.[36] *Restitution* as a remedy refers to a restoration of the disturbed status quo. As a remedy restitution may not be the most satisfactory, hence the possibility to use compensation as a means to ad- dress a past wrong. *Compensation* is constructed in monetary terms. The quantification of compensation for an internationally wrongful act is informed by a complex mixture of moral, political, and economic considerations, but it is still premised on the breach of a legal duty.[37] For instance, where a state wages an illegal war against a victim state, leading to total or significant collapse of the victim state's economy, the quantification of damages may very well be based on war as the proximate cause of the economic losses.[38] Since domestic courts are limited by rules on sovereign immunity,[39] the issue of compensation for internationally wrongful acts by states are normally dealt with at the inter-state or international levels by commissions and arbitral tribunals established by treaties or other international instruments.[40] Thirdly, we have the remedy of *satisfaction*, which is rather open-ended and can range from symbolic gestures like apologies,[41] to declaratory judgments,[42] to promises not to repeat the wrongful act in question,[43] to more drastic measures like criminal trials for individuals responsible for the

[36] Crawford, 567.

[37] Crawford, 567.

[38] The Eritrea-Ethiopia Claims Commission held as follows: '[If] a State initiating a conflict through a breach of the jus ad bellum is liable under international law for a wide range of ensuing consequences, the initiating State will bear extensive liability whether or not its actions respect the jus in bello...Imposing extensive liability for conduct that does not violate the jus in bello risks eroding the weight and authority of that law and the incentive to comply with it, to the injury of those it aims to protect.' Final Award—Eritrea's Damages (2009) 26 RIAA 505, 600–601.

[39] Recently: South Korean war crimes victims' claims against Japan in the courts of South Korea (Daniel Franchini, 'South Korea's denial of Japan's immunity for international crimes', 18 January 2021 *Völkerrechtsblog*, available at: https://voelkerrechtsblog.org/ de/south-koreas-denial-of-japans-immunity-for-international-crimes/.) Also: *Germany v Italy*; *Germany v Greece* (ICJ) 2012 – the International Court of Justice con- firms the principle of sovereign immunity. See also See: Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford: Oxford University Press, 2004), 118–128.

[40] Prominent examples are: Iran-US Claims Tribunal, the UN Compensation Commission, and the Eritrea-Ethiopia Claims Commission.

[41] See also *Rainbow Warrior* affair, and France's "formal and unqualified apology" to New Zealand or the Belgian prime minister's apology to Rwanda for the Belgian role in the genocide in Rwanda 1994.

[42] For instance, the International Court of Justice in: *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Reports 2007, 43 at 239. The findings concerning Serbia's violations of the Genocide Convention were considered appropriate forms of satisfaction.

[43] In *Arrest Warrant of 11 April 2000 (DRC v Belgium)* ICJ Reports 2002, 3 at 32, the International Court of Justice recognized that Belgium had to do more than just to confirm to the DRC that it would discontinue the

internationally wrongful act (the creation of internationalized criminal chambers in the domestic courts of states comes to mind[44]).

Whatever form reparations may take, it is in essence a backward-looking remedy aimed at restoration. The Permanent Court of International Justice articulated the basic principles as follows:

> The essential principle contained in the actual notion of an illegal act...is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[45]

The interests at stake may vary, thus informing the form of reparation. Often the wrongful act will only affect two parties, but sometimes the interest at stake is more collective in nature. This is especially true in the context of human rights and other universal norms.[46]

Intra-state reparation claims (for example for victims of state-sponsored persecution and other systemic or mass human rights violations) typically fall within the domain of transitional justice. Truth and Reconciliation Commissions are often mandated to determine the relevant moral, factual and legal contours of reparation schemes for past atrocities.[47] As we have seen, the international law consequences of an internationally wrongful act can take different forms, and this is true of intra-state post-conflict and post-atrocity remedies as well. The typical modalities include: public apologies and

internationally wrongful act. The ICJ considered a positive act, the cancellation of the arrest warrant, to be the appropriate remedy.

[44] Examples: Sierra Leone; Cambodia; Lebanon; Scottish Criminal Court sitting in the Netherlands (Lockerbie).

[45] *Factory at Chorzów (Merits)* (1928) PCIJ Ser A No 17, 47.

[46] International Court of Justice: *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, ICJ Reports 1970, 3, 32.

[47] Many examples to list/discuss here (e.g. South Africa; Colombia; Guatemala).

truth telling, expressions of sorrow, land restitution, monetary compensation and pensions, development and education, and so forth.[48]

Dealing with past atrocities, whether at the inter-state or intra-state levels, is legally, politically and morally complex, but it helps if there is an existing legal framework in place. From the brief discussion above it is clear that both international law and transitional justice provide potentially appropriate and even enforceable rules and principles relevant to reparation claims for past atrocities.

But there are also significant problems and obstacles, compounded by the lack of international frameworks dealing specifically with colonial-era atrocities. Many of the relevant legal frameworks (for instance, the Genocide Convention) only came into existence in the post-Second World War era when colonialism was already fading. Nevertheless, and despite the problems presented by the intertemporal principle, there seems to be renewed interest in reparations as a means to address past wrongs, including colonial-era atrocities. The German-Namibian negotiations regarding reparations for the genocide against the Herero and Nama, is a case in point.

There has been a growing realization that the traditional modalities and doctrines of international law are not always suitable vehicles for accountability and reparations for colonial-era atrocities. Even transitional justice modalities are increasingly criticized for being too narrowly focused on violations of individual rights, rather than with underlying structural and historical grievances. The rigidity of inter-state reparations modalities, generally governed by the principles of international law referred to above, and the narrowness of individualistic (as opposed to systemic) transitional justice mechanisms, prompted the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, to identify colonial contexts as particularly challenging.[49]

The Special Rapporteur examined two contexts: settler states, and former colonies that are now independent states. The latter context is of particular relevance for our purposes. Indeed, the Special Rapporteur, having examined various case studies, notes in his report that the "[2021] agreement between Germany and Namibia includes acknowledgement of the genocide against the Herero and Nama peoples (albeit with some reservations), public apologies and development assistance as compensation". However, the Report also notes that the Germany-Namibia agreement "was negotiated

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[48] Gilmore, Sunneva & Moffett, Luke: "Finding a way to live with the past: 'self-repair', 'informal repair', and reparations in transitional justice'", *Journal of Law and Society* 2021, 455–480.

[49] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Salvioli, Fabián: "Transitional justice measures and addressing the legacy of gross violations of human rights and international humanitarian law committed in colonial contexts", UN Doc A/76/180, 19 July 2021.

without the participation of the affected communities".[50] The Report continues that in a scenario such as the Germany-Namibia negotiations, the premise is that two sovereign states are involved, thus requiring compromise, and management of obligations and expectations of response by both parties. The Report posits that the moral duties to "provide effective remedies to victims, ensure accountability, contribute to truth and memory, facilitate unrestricted access to archives and grant reparations to victims are clearly incumbent on the former colonizing Power".[51] According to the Report, the post-colonial, independent state also has certain obligations. These obligations do not stem from moral responsibility for the atrocities committed by the former colonial state, but can be viewed as agency in various forms, including rehabilitation, socioeconomic reintegration and guaranteed access to justice, education, and the quest for truth and memorialization.[52]

The Special Rapporteur's Report identifies several transitional justice modalities that can be utilized in post-colonial contexts, the most important of which are the following: accountability, truth, reparation, memorialization, guarantees of non-recurrence, and participation of victims. The element of reparation can take various forms, including restitution,[53] rehabilitation,[54] satisfaction,[55] and compensation.[56] Reparations, then, "must be accompanied by recognition of responsibility, be aimed at remedying the harm suffered by the victims and be linked specifically to truth, justice and guarantees of non-recurrence."[57]

There is a well-established international legal foundation for the right to a remedy and reparation. A UN General Assembly resolution of 2005 codified the various principles and guidelines already

[50] Special Rapporteur Report, 18.

[51] Special Rapporteur Report, 19.

[52] Special Rapporteur Report, 20.

[53] This element can include the restitution of land, repatriation of plundered cultural heritage, and the return of human remains.

[54] Including medical and psychosocial rehabilitation.

[55] Including public apologies and acknowledgements. For instance, in 2013 the United Kingdom offered an apology to Kenya regarding the Mau-Mau claims, and Belgium apologised for the colonial-era crimes in the Congo, however the Belgian apology was not linked to any reparations, and were thus found to be insufficient by some of the affected communities. See Special Rapporteur Report, para 73.

[56] Including the possibility of debt cancellation and other forms of financial compensation as reparation. See Special Rapporteur Report, para 74.

[57] Special Rapporteur Report, para 55.

recognized by the international community via the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and other human rights, humanitarian, and international criminal law instruments.[58] While these principles are now widely accepted as part of the body of international human rights and humanitarian law, rights violations in the context of colonialism and other systemic racist injustices, seem to present particular challenges, as recognized by the UN Special Rapporteur. In settler-colonial contexts, for instance, it is very difficult to give effect to the principle of restitution, to the extent that this form of reparations is premised on a restoration of the status quo ante, that is, a restoration of the pre-colonial socio-economic and political reality. Of course, some forms of restitution would be more practical, feasible and realistic than others. A country like South Africa, for instance, has embarked on a program of land reform to address the racist and systemic legacies of colonial and apartheid land laws and expropriations. But the systemic nature of colonial-era atrocities makes it difficult to identify specific individual victims who would benefit from the applicable reparation modalities. This is so because of the massive scale of the crimes and, in the case of many colonial-era atrocities, because of the passage of time. Former colonial powers are at any rate very reluctant to link any of the reparation modalities to explicit or even implicit recognitions of *legal* responsibility. The typical approach is for the former colonial power to acknowledge that rights violations and atrocities have occurred in the past and that these may even be responsible for contemporary systemic inequalities and other socio-economic problems, but the acknowledgement only extends to historical, moral, and political responsibility, but not to any legal responsibility. The UN Special Rapporteur thus identifies this reluctance of the former colonial powers to accept the reparations modality as a deliberate strategy to avoid legal responsibility. Former colonial powers would rather give effect to their purported acceptance of moral and political responsibility in the form of "development aid".[59] The Report identifies the problem with this approach: development aid is not a form of reparation, because development aid addresses the general socio-economic rights of people as citizens of a country, not because of their status as victims of systemic crimes. Indeed, development aid is not only conceptually and logically the opposite of reparations, it can even be seen as a reinforcement of relations built on colonial hierarchies and power structures, and neocolonial economic and political submission.[60] The Special Rapporteur puts the Germany-Namibia declaration in the category of "development aid", because this agreement, even though it is premised on an

[58] UN General Assembly, 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, G.A. Res. 60/147, 16 December 2005.

[59] Special Rapporteur Report, paras 59–60.

[60] Special Rapporteur Report, para 60.

acknowledgement of genocide, makes no mention of reparations and acknowledges only "moral responsibility".[61]

The negotiations

German-Namibian negotiations about compensation for the German genocide against the Herero and Nama between 1904 and 1907 did not start when Namibia became independent in 1990 and the German Democratic Republic requested to join the Federal Republic of Germany. Following reunification of the two countries, the Allied Powers from World War II agreed to revoke their powers in the so-called 4+2 process, which gave rise to a new treaty granting Germany full sovereignty. But regarding German-Namibian relations, nothing changed. For the latter, it was more important, when in 1994 a US citizen of Jewish descent and former forced labourer in Nazi-Germany, who had not been covered by the numerous West German compensation schemes for victims of the Third Reich, filed a lawsuit against the German government in an US court. The court granted state immunity to Germany. Nevertheless, a year later, the German government agreed to a payment to the Jewish Claims Conference, declared voluntary and humanitarian, whose aim was to cover the remaining unsettled claims of Jewish survivors in the US. The German government had explicitly demanded the payments not to be regarded as formal compensations, because it wanted to avoid any discussion about war reparations and regarded the underlying legal claims as unfounded. As the 1994 court verdict had shown, Germany enjoyed state immunity for the Third Reich's actions anyway. But German enterprises did not. In 1998, several Jewish organizations in the US filed another lawsuit, but that time not against the German state, but instead against German corporations with considerable assets in the US, which were legal successors of corporations, which had benefitted from forced labour during World War II. The Jewish plaintiffs did not demand compensation because they had suffered (such claims would have been covered by earlier compensation schemes) but – under US labour law – for lack of remuneration for the work they had done for these enterprises. By doing so, they circumvented the obstacle of state immunity and the argument, according to which their claims had already been dealt with in earlier bilateral agreements with Germany.[62] The possible outcome was unpredictable enough to incline the German government to step in and negotiate directly with the plaintiffs about an out of court settlement. Other governments, whose countries had provided forced labour to Nazi Germany during World War II, joined the negotiations. In July 2000, the German lower house, the Bundestag, approved a bill which created a

[61] Special Rapporteur Report, para 61, referencing the Germany-Namibia Joint Declaration (2021).

[62] From a civil law perspective, the victims decided not to demand compensation as victims but as partners in a contractual relationship. Legally, they did not claim to be victims of human rights abuses, but instead claimed to be workers whom their employer, the German enterprises, had cheated by withholding their salaries.

German foundation, which would distribute 10 billion DM (half from the state budget and half from the German industry) to national foundations in each of the participating countries to former forced workers. Again, those payments were declared voluntary and humanitarian and the respective governments signed agreements, which relieved Germany from the burden to compensate forced labour in a legally enforceable way.[63]

In 2001, shortly after the *Bundestag* had voted on the bill creating the forced labour foundation, a group of Herero filed a lawsuit against *Deutsche Bank* and the *Deutsche Afrika Linien* in the US, also under the Alien Torts Act in two district courts. The Herero claimed these enterprises were the legal continuer of enterprises who had taken part in Germany's war against the Herero and the Nama and the *Deutsche Bank* had financed German colonial endeavours and the *Woermann Line*, which had transported soldiers to the colony to quash the Herero and Nama uprising and had taken part in the deportations.[64] Both cases, the forced labour lawsuit and the Herero demands, looked similar, but there were also some differences. The Herero had no political support from the US establishment and the German government did not step in, because there were no significant German assets at stake in the US. The underlying atrocities had happened much earlier and the Herero had no chance of proving a causal effect between the atrocities and an actual tort for themselves, which a court verdict in the US could possibly repair. And finally, the applicable statute of limitations for the alleged crimes was ten years under US law and the Herero were unable to provide a compelling argument why their complaint had not been raised during the ten years after the end of colonial rule in Namibia. The case was dismissed in the state courts and subsequently also in a federal court.[65] In all cases, the plaintiffs had pled the atrocities committed between 1904 and 1907 had been crimes against humanity and were justiciable under universal jurisdiction.[66]

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[63] The whole process, the legal background and the negotiations are best described in Kranz, Jerzy; Jałowiecki, Bartosz; Barcz, Jan: *Między pamięcią a odpowiedzial- nością. Rokowania w latach 1998–2000 w sprawie świadczeń za pracę przymusową*, Warszawa: Wyd. Prawo i Praktyka Gospodarcza, 2004.

[64] The Woermann steamers connected the German mainland with its African colonies and had indeed transported soldiers and supplies for the war against the Herero to German South-West Africa. To guarantee the profitability of the Africa-routes, the German government had created a monopoly for Woermann and subsidized the (private) ocean carrier.

[65] The respective verdicts can be found on: https://casetext.com/case/hereros-v-deut-sche-afrika-linien-gmblt-co and https://casetext.com/case/herero-peoples-rep-arations-v-deutsche-bk#p1195 as well as: http://caselaw.findlaw.com/us-dc-cir- cuit/1054653.html.

[66] The problem with this argument was, however, that universal jurisdiction, a notion which describes the obligation of countries to punish international crimes (without a statute of limitations) regardless of whether they

During and after the hearings in the US courts, negotiations started between the government of Namibia and the government of Germany about two main issues: an official apology by the German government, which would include an admission that the atrocities in 1904 had been genocide, and financial compensation. In 1998, German president Roman Herzog had expressed "regret" for the atrocities committed by German soldiers, but without admitting genocide and without a formal apology. A few years later, the German minister for development aid, Heidemarie Wieczorek-Zeul, had already issued such an apology on her own behalf, from which the government had disassociated itself afterwards. The representatives of the Herero and Nama communities wanted the German government to admit genocide and apologize for it, but they also wanted the German government to pay what they called "reparations", which were in fact individual compensations. Germany refused to pay individual compensations fearing this would create a precedent, which could expose Germany to claims for past atrocities without any timely limit. As a German interlocutor who has been directly involved in the negotiations explained: "If the German government consented to individual compensation, this could trigger similar claims from other countries for atrocities from a more distant past and it would re-open the negotiations with the Jewish Claims Conference about forced labour." During the latter, Germany had only agreed to pay individual compensation to descendants of victims if the direct victims had died during the negotiations, but not to any relatives of workers, who had died before.

The negotiation position of the Namibian government was different. After 1907, the Ovambo ethnic group became the dominant one in Namibia. When the Germans started to develop the diamond mines, which had been discovered in 1908, their need for labour pulled Ovambo from the North into Central and Southern Namibia, where they filled the gap the Herero and Nama had left when they had perished during the war or fled abroad. When South Africa took over Namibia from German rule after World War I, the Ovambo became South Africa's main collective opponent, organized first in trade unions and then in the South-West African People's Organisation (SWAPO), which the UN recognized as the sole political representative of the Namibian people. After the transition to democracy and independence in 1990, the Ovambo remained the dominant ethnic group. Since then, SWAPO has held a comfortable majority in parliament and has controlled the government. Despite Ovambo dominance, SWAPO is – like the African National Congress in South Africa – no ethnically homogenous party, it includes members of all ethnic communities and the current president of the country, Hage Geingob, stems from the Damara group.

occurred under the country's timely or territorial jurisdiction, is a concept from criminal, not private law. The lawsuit in the U.S. was a civil one, and though it asked for compensation, it did not seek to establish individual criminal responsibility.

The Namibian government, which is Germany's sole partner in the bilateral negotiations, preferred to see Germany's development aid increased, rather than to bolster the Nama and Herero, which are, to some extent, in opposition to SWAPO. The latter suspected SWAPO to monopolize the payments and use it for patronage.

An ambiguous result

In June 2021, the German government and the Namibian government agreed on a scheme, which foresees the payment of 1,1 billion euro from Germany to Namibia in the form of a 'voluntary humanitarian' transfer from the German budget to a joint foundation, whose aim is to channel these payments into projects, from which shall first and foremost benefit organisations working on the development of the Nama and Herero communities in Namibia. While Herero and Nama organisations in Namibia have already declared this scheme 'reparations' for the genocide, the German government denies any link between the scheme and the genocide. Nevertheless, it was also agreed that the German president will apologize for the genocide in Namibia and that both parliaments will pass a declaration about mutual reconciliation. Germany therefore explicitly labels the atrocities between 1904 and 1907 genocide, but denies the payment scheme to be a compensation for it. The new scheme is similar to – and tailored according to – a construction, which the German government used during the negotiations with the Jewish Claims Conference and governments of Central and East European countries at the end of the last century. Back then, private Jewish claims before US courts were settled through bilateral agreements about similar foundations, whose aim it was to pay "voluntary and humanitarian" aid to former forced labourers who had been employed by the German industry (whose legal successors had faced lawsuits for outstanding payments in the US courts). In exchange for these payment schemes, the respective governments took over their citizens compensation claims towards Germany, legally sheltering the German government from future lawsuits. Despite all these similarities, there is an important difference between the forced-labour scheme and the one agreed upon now by Germany and Namibia. In the framework of the former, only the victims themselves (and, in rare cases, descendants of victims who had died between the settlement and the beginning of the payment scheme) were eligible for these payments. Because there are no direct victims of the German colonial atrocities alive any more, the construction from the last century was impossible to adopt. The German government wanted to avoid a scheme, which would compensate descendants, because it feared precedence which could be invoked by descendants of much earlier atrocities and would potentially also lead to additional claims by descendants from the forced-labourer negotiations. After the forced-labour negotiations, the German government had agreed only to pay for those forced workers who were still alive or who had died between the start of the negotiations and the settlement. If the German government had agreed to directly compensate descendants of Herero and Nama genocide victims, those descendants of forced workers, whose relatives had died before the negotiations (and hence their biggest part) could claim

payments invoking the Namibian precedence. The new mode of channelling money not to individuals (no matter whether direct victims or descendants of those) but instead to projects carried out on behalf of ethnic communities tries to address this problem. It reconciles the wish to compensate the genocide victims with the wish to avoid a precedent. Or at least, that is, what the German government wanted to achieve: to compensate for the genocide, to acknowledge the genocide but without admitting that the payments actually were compensations for the genocide. For the Namibian government, decoupling the genocide from the payments is no major problem. It is, though, for the Nama and Herero committees that oppose the deal exactly because of the decoupling. According to a report of the German Radio for foreign audiences, Deutsche Welle from 21.8.2021, when German president Frank-Walter Steinmeier arrives in Windhoek with an apology, he is likely to be greeted by protest rather than gratefulness. By concluding the deal with the Namibian government the German government could acquiesce its domestic and international audience by pointing to the payments, while rejecting similar claims elsewhere by stating that these payments had not been linked to the genocide but were just another "humanitarian scheme'" like the forced-labour agreement.[67] This is where the quagmire starts that may well constitute a precedent, and which may trigger more rather than less financial compensation claims for colonial atrocities.

The puzzle: Why did Germany agree to pay without an apparent legal case?

Germany and Namibia did not reach a settlement because Namibia or the Namibian Herero and Nama genocide committees had any legal leverage over Germany. Unlike the Jewish Claims Conference's lawsuits, the Namibian court actions in the US failed. Despite their announcement, the Herero and Nama committees never followed through with a complaint against Germany at the International Court of Justice, where they at any rate had no legal standing (only Namibia as a state had the necessary standing). They could have undertaken court action before Namibian courts, but there, Germany would have enjoyed state immunity from court action. Suppressing an uprising of two ethnic groups more than a hundred years ago in Namibia may certainly be viewed as a moral outrage today, but would arguably fall under the *actione juris imperii* reservation of international law, even if such action was accompanied by acts of genocide (which, of course, were not yet codified under international law). No verdict from a Namibian court would be enforceable in Germany. German courts would reject any such lawsuit invoking state immunity. While all members of the Council of Europe agreed in 1967 in a convention to settle their disputes at the International Court of Justice, there is no such mechanism in force for

[67] The parliament of Tanzania raised such claims in 2018, but the German and the Tanzanian government decided not to pursue them. See: Bachmann, Klaus and Kemp, Gerhard: "Was quashing the Maji-Maji uprising genocide? An Evaluation of Germany's Conduct through the Lens of International Criminal Law", *Holocaust and Genocide Studies* 35/2 (2021), 235–249.

conflicts between Council of Europe members and third countries.[68] Even the government of Namibia, acting on behalf of the country, could not sue Germany at the ICJ without the latter's consent. In other words – with the US courts reneging, no court wields jurisdiction over the Herero and Nama claims against Germany. And here comes the great puzzle: so why did Germany pay then?

The above-mentioned categorization of possible interstate settlements after violent conflicts in cessation, reparation, restitution and satisfaction is derived from the logic of international law and international relations as spheres regulating the relationships between states, represented by their governments in the first place. Cessation means to bring to a stop an illegal state action against another state, reparation describes the actions undertaken by one state to satisfy another one, restitution and compensation include one state's actions towards another with the objective to reinstate the status quo ante or, when this is impossible, to pay compensation. All of these involve one state undertaking action against another state. According to this logic, if restitution is impossible to provide satisfaction to the demanding state, compensation must be paid, but the respective transaction takes place between the governments of the two states and the receiving state is unconstrained to use the compensation according to its will. This is how reparation claims were dealt with before and immediately after World War II: the victor either takes reparations in kind from the vanquished, or uses a forfeit, which he frees after the other side agrees to pay the requested amount. No matter which option the victorious state chooses, its government is free to spend the obtained assets for war victims, the reconstruction of the country, re-armament or something else. Reparations after World Wars I and II used to be paid from state to state and often took the form of territorial annexations, the confiscation and removal of factories and infrastructure and the seizure of foreign financial assets. While the receiving state was free to distribute the seized assets among its population at will, the sending state had to care for a just distribution of its losses, either by increasing sovereign debt, taxes or by reducing budget expenditure. With the expansion of liberal, participative democracy, increasing awareness for victims (rather than for heroes), and social individualisation after World War II, compensation as means to repair large scale harm done to the population of another state has undergone a transformation, too. Now, as annexation and confiscation are no longer possible, but many grievances from World War II and other conflicts are still unsettled, the focus is on the individual victims rather than the state level and more often than not have governments engaged in negotiations about satisfaction in the form of financial compensation for individual victims rather than state-to-state payments. Discussions and policy papers urging states to compensate the harm done to other states' citizens emphasize this new trend at the level of the UN as well as regionally and supranationally at the EU and the AU (especially as it pertains to transitional and

[68] European Convention for the Peaceful Settlement of Disputes (established in the framework of the Council of Europe in 1957), available at: https://rm.coe.int/168 0064586.

post-conflict justice).[69] As the case of Germany and the forced-labour negotiations show, these payments take place in the absence of any legal framework that would force governments to make them. Literally all payments the Federal Republic of Germany made to other countries to alleviate grievances resulting from World War II were individual payments, not reparations in the sense of state-budget – to state-budget payments.[70] When the government of the United Kingdom agreed in 2013 to satisfy Kenyan torture victims from the Mau-Mau revolt in the 1950s, it paid individual compensation to 5228 Kenyans, not to their government. And it continued to deny (different from the German position towards Namibia), liability for the actions of its colonial administration and declared to defend claims brought from other former British colonies. "We do not believe that this settlement establishes a precedent in relation to any other former British colonial administration," foreign secretary William Hague said at the time.[71] There, too, a colonial power had agreed to pay compensation without any legal obligation forcing it to do so.

Creating a precedent while trying to avoid one

These settlements came into being in the same way, which is, to some extent, typical for the way past harms are dealt with in interstate relations after the immediate post-war period, during which confiscation was still possible. Governments agree to pay not because there is any legally binding and enforceable framework, which would coerce them to do so, but because of the influence of transnational norm entrepreneurs, who manage to become agenda setters in domestic politics of other countries and to garner leverage over their public disputes. By doing so, they influence institutional decision making and public opinion in the same way, domestic and international lobby networks do.

The German-Namibian example is a particularly extreme and asymmetric one. While the British government acquiesced to the compensation for the Mau-Mau veterans before the British (domestic) Court of Appeal could rule on it, no such legal constraint was on the German government, when it approved the agreement with Namibia. And yet the amount at stake was much higher than in the British case. When German post-war governments negotiated individual compensation schemes they met fierce domestic resistance from social movements, media outlets and conservative opposition parties, because the issue was still salient and threatened to harm the material interest and political convictions of parts

[69] Elements of (international/inter-state) transitional justice mechanisms and approaches can be read into the Constitutive Act of the African Union, as well as other relevant African instruments. See: https://www.achpr.org/public/Document/file/English/ ACHPR%20Transitional%20Justice_ENG.pdf.

[70] Ruchniewicz, Krzysztof: *Polskie zabiegi o odszkodowania niemieckie w latach 1944/ 45–1975*, Wrocław: Wyd. Uniwersytetu Wrocławskiego 2007.

[71] *The Guardian*, 6.6.2013, available at: https://www.theguardian.com/world/2013/jun/ 06/uk-compensate-kenya-mau-mau-torture.

of the population. When the German-Namibian negotiations started in 2015, no organized political party or pressure group opposed it. This changed slightly after 2017, when the negotiations were already underway and the right-wing populist and nationalist *Alternative für Deutschland* (AfD) entered the Bundestag and some of its members of parliament denied the genocide label for the colonial atrocities in the German colony and opposed compensation. Due to the other parties' complete isolation of AfD, the party did not have any leverage over the negotiations, though. Because the negotiations started more than a hundred years after the underlying events, there were no German stakeholders like pressure groups of former colonial settlers or militaries, who could oppose the apology and the principle of compensation. On the other side of the barricade, there were many local initiatives, who pushed the government to make concessions to Namibia and the respective Herero and Nama communities and, due to the most recent immigration from Africa to Germany, there were considerable networks of transnational activists, putting pressure on the German government. Therefore, the entire setting was asymmetric: media outlets (even conservative ones), the political establishment (minus the AfD after 2017) and the local post-colonialist pressure groups pushed the government to apologize and pay, while next to no-one opposed their demands. In other words: the Herero and the Nama committees had managed to create a transnational activist network, which put the topic on Germany's political agenda and created the necessary momentum to push the government into negotiations.[72] And then, in the absence of any legal obligation, the German government agreed to an apology and a compensation scheme. And here comes the next crucial element: for the reasons set out above, the scheme did not envisage individual compensation, but instead a kind of collective compensation, which assumes today's Nama and Herero communities – no matter their organisational structure – to be entitled to the legacy of the Herero and Nama who fell victim to the genocide after 1904.

Claims which fit well into the well-known international concepts described above usually concern relatively recent events and therefore trigger opposition from parts of the populace who sides with the perpetrator side of the conflict (or openly denies the atrocities took place). In these cases, direct victims are still alive and international courts may wield jurisdiction over the crimes, like, for example, the different lawsuits of countries emanating from the former Yugoslavia at the ICJ.[73] Such claims, if successful in court, are more easily legally enforceable, but politically more difficult to sustain on the level of the respective colonial centre's domestic political system. With the kind of settlement Germany concluded with Namibia, the opposite is true: the more distant in time such claims are, the less likely is successful litigation in court. On the other hand, though, the weaker will be domestic opposition against

[72] More information about these post-colonial initiatives, see: Schilling, Britta: *Postcolonial Germany: memory of empire in a decolonized Nation*, New York, London: Oxford University Press, 2014.

[73] Mistry, Hemi: "The International Court of Justice's Judgment in the Final Balkans Genocide Convention Case." *Human Rights Law Review* 16.2 (2016), 357–369.

them in the colonial centre. The pressure on perpetrator states, to agree to such settlements, will most likely not come from legally enforceable international court verdicts, but from non- binding regulations, such as, for example, the 2001 United Nations project of a Convention on the Responsibility of States for Internationally Wrongful Acts, which, if it enters into force, creates a responsibility for a state to repair unlawful acts. In art. 13 it excludes retroactivity if the state was not bound "by the obligation in question at the time the act occurs." Applied to the German situation back in 1905–1907, the convention would create an obligation to remedy the harm done because Germany was then bound by the Hague Convention on the Laws and Customs of War on Land (Hague II) and the Red Cross Convention. Germany ratified the former in 1899 and the latter in 1906. The obligation to compensate harm done by a belligerent party (which is already enshrined in art. 3 of Hague II) will then no longer be restricted to a state party and the question of whether the Nama or Herero enjoy legal continuity with regard to Namibia would no longer be relevant. So far, without continuity, litigation of non-state actors against a state for atrocities which took place beyond the timely jurisdiction of international tribunals and courts was blocked. The 2001 project would change that and then become the perfect tool for strategic litigation of transnational networks working on behalf of descendants of colonial atrocities.

Neither jurisdictional nor political obstacles will therefore prevent the German – Namibian case from becoming a precedent for this new kind of strategic litigation, which uses courts (even when they don't have the necessary jurisdiction) to raise public awareness and set the agenda of public disputes in order to achieve a political solution to a problem framed in legal terms. Soon, former colonial centres might be forced to pay for past atrocities not because of international courts' verdicts but because of political and moral entrepreneur- ship from transnational actors and organisations that find a fertile ground for their claims in the domestic public of the former colonial centre. This ground, we argue, may be much more fertile than the one behind a well-argued lawsuit before a court, and it is based on a new kind of strategic litigation that does not aim at obtaining an advantageous verdict in the matter, but intends (and manages) to increase the moral and political pressure on the defendant. With the German- Namibian settlement, unsatisfied descendants of Third Reich victims and of victims of colonialism cannot plead precedence in any international court. But they can efficiently reject the German argument about the impossibility to meet their demands because of restraints in international law, according to which neither restitution, nor collective or individual compensation is possible. By approving the settlement, Germany created a new option, which from now on can serve as a precedence: Compensation for past atrocities, whose victims are no longer alive, is not only possible, but also more likely to be achieved by future claimants than before the German-Namibian settlement – not because it has become more easily enforceable in legal terms, but because the legal mode is no longer necessary to achieve the intended result.