Comments to

CERD General Recommendation regarding reparations for the historical injustices from the chattel enslavement of Africans, and the ensuing harms and crimes to people of African Descent

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1. Introduction

Despite an increasing political, social, and normative pressure to acknowledge and atone,[1] the application of international law to historical injustices remains contested.[2] The growing momentum for reparations has reached "a critical juncture",[3] as seen in the African Union's adoption of a resolution on reparations.[4] At the same time, there is also a pushback by European governments and politicians,[5] who advocate reconciliation without responsibility,[6] thus focusing on 'softer' transitional justice tools and leaving out the 'harder' international legal tools of state responsibility and reparations.

2. Interstate Reparations Under International Law

Under international law, reparations are two-pronged: interstate reparations compensate for harms caused by one state to another state, while individual reparations emanate from an

1 Franziska Boehme, 'Reactive Remembrance: The Political Struggle over Apologies and Reparations between Germany and Namibia for the Herero Genocide', 19 *Journal of Human Rights* (2020) 238; Francesco Francioni, 'Reparation for Indigenous Peoples: Is International Law Ready to Ensure Redress for Historical Injustices?', in Federico Lenzerini (ed.), *Reparations for Indigenous Peoples: international and Comparative Perspectives* (Oxford: OUP 2008) 27.

2 Rachele Marconi, 'States Before Their Colonial Past: Practice in Addressing Responsibility', *Questions of International Law* (31 January 2024); Christian Tomuschat, 'The Relevance of Time in International Law', 41 *Polish Ybk of Intl L* (2021) 27.

3 Jasmine Mickens, 'Championing Reparations for Africans and People of African Descent, *Open Society Foundation* (1 November 2024).

4 Resolution in Preparation for the AU Theme for 2025 'Justice for Africans and People of African Descent through Reparations' through Consultations on Afro Descendants, Indigenous/Ethnic Ancestry, Reparations & the 6th Region, ACHPR/Res.616 (LXXXI) 2024.

5 Laura Salvadego, 'Which "Reparations" for Colonial Crimes?', *Questions of International Law* (31 January 2024); Marconi (n 2); Carsten Stahn, 'Reckoning with Colonial Injustice: International Law as Culprit and as Remedy?', 33 *Leiden Journal of International Law* (2020) 827.

6 Marconi (n 2).

individual's right to remedy for violations of human rights.[7] This comment focuses on interstate reparations. Already in 1928, the Permanent Court of International Justice (PCIJ) held that "any breach of an engagement involves an obligation to make reparation".[8] Restitutions, as one form of reparations, should "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".[9] In 2004, the International Court of Justice (ICJ) confirmed the "essential forms of reparation in customary law".[10] In 2001, the International Law Commission (ILC) adopted the (mainly customary law) Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARS). According to Art. 31(1) ARS, "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".[11] Reparations shall be made in the form of restitution, compensation, and satisfaction, jointly or separately (Arts. 34-39 ARS).

3. Addressing Historical Wrongs Through International Law

Research has shown that cases of historical wrongs are commonly resolved by means other than the law of state responsibility, implying that it is unsuitable to efficiently deal with such matters. Instead, parties settle historical injustice by way of 1) truth commissions or fact-finding inquiries; 2) unilateral recognitions of the situation, followed by apologies or other apologetic acts; 3) bilateral negotiations and settlements.[12] Furthermore, 4) international human rights law for reparations to individuals.[13] These settlements are perceived as a way to bypass reparations: 1) truth commissions or fact-finding inquiries are tools found in transitional justice settings that do not offer legally binding findings and cannot impose duties of reparation on the state. They produce a report that has a limited legal value for individuals or groups.[14] 2) Even if a conduct is not attributable to a state, a unilateral recognition might be understood as an acknowledgment

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7 UNGA Res 60/174, *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005).

8 PCIJ, *Case Concerning the Factory at Chorzów* (*Germany v Poland*), Merits, 1928 PCIJ Rep Series A, No. 17 (13 September 1928) 29.

9 Ibid 47.

10 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion (9 July 2004) 152.

11 ILC, Responsibility of States for Internationally Wrongful Acts, Annex to UNGA Res 56/83 (12 December 2001).

12 Marconi (n 2).

13 UNGA, 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 (16 December 2005) UN Doc A/RES/60/147.

14 Jeremy Julian Sarkin, 'Amnesties and Truth Commissions', in Barbora Holá, Hollie Nyseth Nzitatira, and Maartje Weerdesteijn (eds.), *The Oxford Handbook of Atrocity Crimes* (OUP 2022) 675–702.

of the wrongfulness of an international wrongful act (Art. 11 ARS). Apologies originating from unilateral recognition are transitional justice tools and a form of apologetic remembrance.[15] Unlike truth commissions, apologies are not geared at establishing an objective truth but symbolic forms of reparation to achieve "reconciliation through words only, by public acts of contrition and repentance".[16] International law includes apologies in its framework of interstate reparations in Art. 37(2) ARS.

3) Bilateral negotiations can be problematic if the state that enters into negotiations does not (sufficiently) represent the groups affected by the historic wrong.[17] This is particularly exigent for minority and/or Indigenous groups who became marginalised and suppressed during colonial times, and where the modern-day state is established on the foundations of the former colonial state. Unless the state actively confronts and rectifies its own harmful past, there is a likelihood that the marginalisation persists.

4) Gross violations of human rights are breaches of international obligations that are owed (i) by states to individuals under their jurisdiction, enforced in domestic law, and can be adjudicated before domestic and regional human rights courts; and (ii) to the state of which the injured individual holds their nationality. Today, human rights law is the most obvious legal framework to address the relationship between the state and its population and therefore also for reparations owed to individuals.[18] Its disadvantage is an individualised treatment of the wrongdoing and a difficulty to reconcile with collective or systemic wrongdoings. Often, individuals must lodge complaints against the state that (originally) inflicted harm on them.[19]

4. Attribution and Succession

In international law, a retrospective assumption of responsibility is rare because it presupposes a connection between a past wrong and a present claim.[20] As a rule, successor states are not liable for their predecessor's international wrongdoings unless they have by conduct adopted the unlawful activity in question.[21] With the cessation of the original state, its legal

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15 Boehme (n 1) 240.

16 Kora Andrieu, '"Sorry for the Genocide": How Public Apologies Can Help Promote National Reconciliation', 38 *Millennium: Journal of International Studies* (2009) 5.

17 Carsten Stahn, 'Confronting Colonial Amnesia', 18 *Journal of International Criminal Justice* (2020) 811 and 814 also makes an argument for increased attention to representation.

18 Francioni (n 1) 31-34.

19 Tom Bentley, 'The Negotiated Apology: "Double Ventriloquism" in Addressing Historical Wrongs', 2 *Global Studies Quarterly* (2022) 3.

20 Max du Plessis, 'Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery', 25 *Human Rights Quarterly* (2003) 637 and 642.

21 Alex Green, '§ 7.1. States', in Sué Gonzáles Hauck, Raffaela Kunz and Max Milas (eds.), *Public International Law: A Multi-Perspective Approach* (Routledge 2024) 237.

responsibility ceases too. Yet, memories and lived experiences of trauma or injustice persist. However, a victim-based perspective insufficiently appreciates the agency of individuals and groups who have resisted and survived historical wrongs.[22] It risks enhancing a blaming perspective, where victims are perceived as benefiting from and holding on to their victim identity, which might lead to a backlash from the majority population, which stands in the way of a true reconciliation.[23]

5. Irreparability of Historical Wrongs

The irreparability of historical wrongs is one of the limitations of the system of interstate responsibility and reparations.[24] In *Chorzów*, the PCIJ held that compensation is a common form of reparation that is meant to wipe out the consequences of the illegal act and involves "the payment of a sum corresponding to the value which a restitution in kind would bear".[25] In cases of historical wrongs, compensations are unable 'to wipe out the consequences of the illegal act'. Even in cases where claims for compensation have been made, Western European governments prefer to establish funds, like in the Netherlands that apologised for its role in the transatlantic slave trade and established a fund of €200 million to promote awareness about the colonial power's role in slavery and €27 million to open a slavery museum.[26] From an individualistic victim-based perspective, such funds are unlikely to atone for the (intergenerational) harms experienced. From a societal perspective of the recipient state, however, many more people will benefit from the allocated funds than only the direct victims. The funds could help boost the economy of an underprivileged area and mitigate historical disadvantages. From a donor state perspective, the establishment of large funds have the same effect as developmental aid but come with the added benefit of a moral atonement for historical wrongs and ongoing inequality and discrimination. "The use of development aid to make up

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[22] Ana Vrdoljak, 'Reparations for Cultural Loss', in Federico Lenzerini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (OUP 2008) 227; Fabio Salvoli, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence', Report on apologies for gross human rights violations and serious violations of international humanitarian law (12 July 2019) UN Doc A/74/147, para. 3.

[23] Dinah Shelton, 'Reparations for Indigenous Peoples: The Present Value of Past Wrongs', in Frederico Lenzerini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (2008) 58 and 72; Dinah Shelton, 'Reparations for Historical Injustices', in Dinah Shelton (ed.) *Remedies in International Human Rights Law* (2nd edn OUP 2006) 458.

[24] Massimo Meccarelli and Paolo Palchetti, 'The Irreparability of Colonialism', *Questions of International Law* (31 January 2024).

[25] PCIJ, *Case Concerning the Factory at Chorzów* (*Germany v Poland*), Merits, 1928 PCIJ Rep Series A, No. 17 (13 September 1928) 47.

[26] 'Dutch Government to Apologise for Role in Colonial-Era Slavery', *Reuters* (4 November 2024), https://www.reuters.com/world/europe/dutch-government-apologise-role-colonial-era-slavery-2022-11-04/

for colonial harm marginalizes wrongdoing", because it makes the former colonial power appear as generous, while the former colonised societies become objects of charity.[27] The actors responsible for the wrongdoings (or their successors) dictate the solution rather than centring the victims' dignity and worth.

6. The Unsuitability of the International Law of State Responsibility

Historically disadvantaged groups continue to experience the harm and to bear the brunt of the past, while the states that enriched themselves on the back of these groups profited and – crucially – continue to profit from the wealth and privileges acquired through exploitation.[28] The unsuitability and/or inability of the interstate system becomes visible in the initiative of CARICOM that launched a Reparations Commission to establish "the moral, ethical and legal case for the payment of reparations by the governments of all the former colonial powers and the relevant institutions of those countries".[29] The Commission is organised as a regional body, which highlights "the need for a united coalition devoted solely to reparations".[30] CARICOM, together with the African Union, also initiated the creation of a specialised tribunal for international and historical reparations claims, especially in slavery-related matters. Opponents argue that contemporary states and institutions should not be held responsible for historical wrongs.[31] The establishment of a regional commission and a tribunal, both with the sole purpose of dealing with reparations for historical wrongs, reveal the perceived inability of the system of interstate reparations.[32] Had the international legal system of state responsibility been able to deal with cases of past or continued wrongdoings, the affected communities would have seen no need to use commissions, tribunals, and protest marches to demand reparations.

7. General Principles of Law

According to Art. 38 (1)(c) of the ICJ Statute, "general principles of law as recognized by civilized nations" are part of positive law, but only subsidiary tools. General principles "may fill gaps in the international legal system by establishing procedural rules, interpretative rules

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27 Stahn (n 5) 829.

28 Stahn (n 17) 799; Francioni (n 1) 43; Salvadego (n 5).

29 https://caricomreparations.org/

30 Xhanubis, 'Reparations for Blacks in America: Four Centuries of Struggle Now on the Cusp' (1 March 2021), available at https://caricomreparations.org/reparations-for-blacks-in-america-four-centuries-of-struggle-now-on-the-cusp/.

31 Catarina Demony, 'Slavery Tribunal? Africa and Caribbean Unite on Reparations', *Reuters* (4 April 2024), available at https://www.reuters.com/world/slavery-tribunal-africa-caribbean-unite-reparations-2024-04-04/

32 Similar, Stahn (n 5) 823-827; Pablo de Greiff, 'Justice and Reparations', in Pablo de Greiff (ed.), *The Handbook of Reparations* (OUP 2006) 451-477.

or secondary rules".[33] The ILC Special Rapporteur mentions the obligation to make reparation for breaches of international law as an example of the invocation or application of general principles of law.[34] Art. 12 ARS reads: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin". The term 'regardless of its origin' signifies that "[i]nternational obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order".[35] In the ILC's understanding, general principles of law may establish obligations binding upon states. A breach of such obligation may engage the international responsibility of the state, including a duty to reparations.[36]

Art. 12 should be read in conjunction with Art. 33 para. 1 ARS that defines the scope of the obligation owed by a state whose responsibility is invoked. Such obligations may be owed to one or more states or to the "international community as a whole". James Crawford was clear in that 'international community as a whole' included states, non-state entities, individuals, groups, and peoples.[37] The wording is sufficiently broad to include principles that have existed prior to contemporary international law – and to general principles owed to the international community, like the principles of equity and of unjust enrichment, dignity, humanity, and solidarity.

The principle of equity, which is relevant for reparations, was recognised already by the PCIJ. In the *Meuse* case, Judge Hudson held that "a court of international law cannot ignore special circumstances which may call for the consideration of equitable principles".[38] There is limited case law, but state claims before the ICJ reveal a potential. For example, in *Certain Property*, Liechtenstein invoked the principle of unjust enrichment, which is "underpinned by the fundamental principle of good faith", and that served "to grant remedies in cases of unjustified wealth transactions under international law".[39] Despite being contested, it could be invoked for historical cases of slavery or slave trade. Indeed, advocates claim unjustified wealth

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33 Marcelo Vázquez-Bermúdez, Special Rapporteur ILC, Second Report on General Principles of Law, UN Doc A/CN.4/741 (9 April 2020) 110.

34 Ibid., footnote 176.

35 *Ybk of the ILC 2001*, Vol. II (Part Two) and Corrigendum, 76−77, para. (3) of the commentary to Art. 12. See also *Ybk of the ILC 1976*, Vol. II (Part Two) 80–87.

36 Vázquez-Bermúdez (n 33) 111.

37 James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts. A Retrospect', *AJIL* (2002) 888.

38 PCIJ, *The Diversion of Water from the Meuse* (*Netherlands v Belgium*), Judgment of 28 June 1937, Individual Opinion by Mr. Hudson, PCIJ Series A/B (1937), No. 70, p. 78.

39 *Certain Property (Liechtenstein v Germany)*, Preliminary Objections, Judgment, ICJ Rep (2005) 6, Memorial of Liechtenstein, paras. 6.1 and 6.4.

transactions from exploited or marginalised groups by imperial or colonial states, which could be based on the general principle of unjust enrichment.[40]

There is also some traction to recognise the principle of solidarity. Solidarity is understood as "an expression of unity by which peoples and individuals enjoy the benefits of a peaceful, just and equitable international order, secure their human rights and ensure sustainable development".[41] The Revised Draft Declaration on the Right to International Solidarity refers to the UN Charter, inspires the Universal Declaration of Human Rights, and connects solidarity with equality, humanity, democracy, sustainability, and responsibility in international relations. The Declaration goes as far as stating "international solidarity is a fundamental and broad principle of international law" and "a central principle in contemporary international law" (Art. 1(3)).[42] The aspects of fairness, justice, and human rights, to which the definition of the principle connects, as well as the "accountability of States concerning the implementation of their foreign policy" (Art. 1 (3)(c)) could be read as an obligation to redress historical wrongs.

8. Principle of Intertemporality

According to the customary international law doctrine of intertemporality, an act or omission should be judged against the rules of international law that applied at the time that it took place. This doctrine prevents the retrospective application of international law (Art. 13 ARS).[43] The rationale is twofold: first, the principle should provide legal certainty. Second, past events should be measured by the legal standards of the past: if the respective act was not considered illegal at the time that it was committed, then it falls outside the array of State responsibility.[44] The provision also establishes that only breaches of primary rules of international law entail state responsibility.[45]

Scholars increasingly question former colonial states' claims that they are not legally obliged to pay reparations, despite the moral wrong of their past acts.[46] Arguments made against

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[40] For further discussions, see Warren Swain and Sagi Peari (eds.), *Rethinking Unjust Enrichment: History, Sociology, Doctrine, and Theory* (OUP 2023); Shelton (2006, n 23) 444–446.

[41] UN Human Rights Council, 'Revised Draft Declaration on Human Rights and International Solidarity: Report of the Independent Expert on Human Rights and International Solidarity Obiora Chinedu Okafor' (2 May 2023) UN Doc A/HRC/53/32, Art. 1(1).

[42] Ibid, preamble.

[43] Steven Wheatley, 'Revisiting the Doctrine of Intertemporal Law', 41 *Oxford Journal of Legal Studies* (2021) 484-509; du Plessis (n 20) 633-637.

[44] Goldmann (n 131) 2; Salvadego (n 5); Andreas von Arnauld, 'How to Illegalize Past Injustice: Reinterpreting the Rules of Intertemporality, 32 *EJIL* (2021) 401.

[45] ICJ, *Jurisdictional Immunities of the State* (*Germany v Italy*, Greece intervening), Judgment 3 February 2012, ICJ Rep 2012, para. 58.

[46] Matthias Goldmann, 'The Ambiguity of Colonial International Law: Three Approaches to the Namibian Genocide', *Leiden Journal of International Law* (online first, 2024) 2; Karina Theurer, 'Minimum Legal

the principle of intertemporality are: first, there have always existed rules against breaches of fundamental principles of humanity. Historical acts were illegal even according to the laws of the time. Legal history shows that colonial states had obligations towards subjugated peoples under natural and international law. This means that already during the slave trade, there were binding rules, and their breach entails a duty of reparation.[47] Second, it is difficult to conclusively establish what crimes were perpetrated, who the victims and perpetrators were, and what laws were violated, especially if the harm occurred centuries ago.[48] Third, international law should be understood by broader, pluralistic approaches rather than only through Western epistemologies.[49]

The doctrine of intertemporality perpetuates historical power: the colonial/Western states escape legal responsibility, while the victims lack possibilities for reparations. Rather than redressing historical injustice, the contemporary effects of past wrongs should be addressed and corrected. The focus thus shifts from past wrongs to current inequalities and injustices that originate in or have some causality with colonialism or slavery.[50] The victims will only be successful in their claim when they have suffered from a harmful act for such a long time that it traverses from the historic to the modern times. This seems inherently unjust because it puts the burden on several generations of victims.

In February 2023, six UN Special Rapporteurs critiqued the doctrine of intertemporality, which they consider an obstacle to reparation.[51] They followed suit with the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance who already in 2019 encouraged a "genuine 'decolonization' of the doctrines of international law that remain barriers to reparations".[52] The global order would certainly profit from a recalibration of international law and the foregrounding of (legal and moral) norms of humanity and solidarity.[53] Here too, there is an indication that general principles of law, especially that of solidarity, could be a way forward to surmount obstacles for reparations.

Standards in Reparation Processes for Colonial Crimes: The Case of Namibia and Germany', 24 *German Law Journal* (2023) 1154-1155; Andreas von Arnauld, 'How to Illegalize Past Injustice: Reinterpreting the Rules of Intertemporality, 32 *EJIL* (2021); Stahn (n 17) 823; Francioni (n 1) 29-30.

47 Stahn (n 17) 813; Shelton (2006, n 23) 456; Robert Cryer, Darryl Robinson and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4. ed. 2019) 45.

48 Salvadego (n 5); Goldmann (n 46) 27; Stahn (n 5) 828.

49 Theurer (n 51) 1155-1157; Goldmann (n 46) 14-23.

50 du Plessis (n 20) 647 and 652; Shelton (2006, n 23) 459-460.

51 Mandates of the Special Rapporteurs on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Doc. AL DEU 1/2023 (23 February 2023), available at <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27875>, p. 9.

52 Tendayi Achiume, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Racial Intolerance, UN Doc A/74/321 (21 August 2019) 10.

53 Shelton (2006, n 23) 456.

9. Opinio Juris

Since most states only assume moral or historical but not legal responsibility, they clearly demonstrate resistance against assuming legal responsibility. This behaviour is an obstacle to the creation of a new *opinio juris*, which embraces a broader understanding of responsibility for historical wrongs.[54] The resisting states are usually those who committed the wrongdoings, and their resistance will reinforce the injustice. The suppressed states whose citizens have suffered from the historical wrongs will never be able to influence the creation of a new *opinio juris* on reparations, which in turn further reinforces the injustice. These dynamics deserve further research.

[54] For a discussion on the current practice and *opinio juris* of states, see Salvadego (n 5).