Law, time and (in)justice after empire: Germany's objection to colonial reparations and the chronopolitics of deflection

Introduction

Debates on reparations for colonial atrocities highlight the relationship between international law, time and (in)justice. As law remains a key vocabulary for contestations over colonial reparations, the question arises whether international law can facilitate redress for colonial violence as a particular form of historical injustice.[1] The under-explored case of Germany's refusal to negotiate reparation claims by the descendants of the survivors of its 1904-8[2] genocidal violence in today's Namibia, then colonial German South West Africa[3], casts a pessimistic light on international law's political potential for redressing historical injustice. This paper examines the Federal Republic of Germany's deployments of temporal rules limiting the scope of international law's applicability to foreclose reparation negotiations with Namibia's Ovaherero and Nama. Government officials' mobilization of these temporal rules demonstrates that the latter can serve as one of international law's "many mechanisms to prevent claims for colonial reparations".[4]

The analysis draws on a reading of parliamentary interpellations regarding the reparations question and corresponding government coalitions' responses between 1989 and 2021.[5] Based on this reading, I argue that the German 'no-reparations' stance rests on an argumentative double movement, which I capture with the concept 'chronopolitics of deflection'.[6] This argumentative strategy first turns the not-necessarily legal question of colonial reparations into one that is immovably anchored within contemporary international law. The second move invokes temporal rules governing the *limits* of international law's

[1] In a post-colonial context, this question reflects core concerns of Third World Approaches to International Law (TWAIL), which ask whether international law can serve the interests of "Third World" peoples in pursuing an anti-imperial world order given international law's its capacity for reproducing legacies of colonialism (Pahuja 2011, 261). The literature is compendious. Exemplary are Anghie 2005, Mutua 2000, 31-40, Rajagopal 2006.
[2] Whereas the colonial war on German South West Africa was declared over on 31 March 1907, the detention camps into which surviving Ovaherero and Nama were forced operated until 1908 (UN Special Rapporteurs' Letter 2023). Some survivors were not released until World War I.
[3] On German colonialism, see for example Conrad 2008, Zimmerer and Zeller 2003, Sarkin 2009, Kössler and Melber 2017.
[4] Anghie 2005, 2.
[5] Transcripts of these documents are publicly available and here cited by their numerical ID and date (eg 17/6011_30.05.2011).
[6] Chronopolitics refers to the construction of time and its investment with meaning through political practices (Mills 2020, 299).

applicability to argue that these rules preclude reparation payments from a legal perspective. Put differently, this argumentative strategy first confines the *political* question of reparations exclusively to the field of international law, only to then invalidate it by invoking temporal legal rules that preclude IL's applicability to the issue. These temporal rules are the non-retroactivity of international law, especially the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which Germany adopted in 1955, and more broadly the inter-temporal doctrine of international law.[7] Critics of the German case have mostly targeted uses of the inter-temporality principle[8], whereas this essay focuses on the comparatively under-examined role of the non-retroactivity of treaties in this contentious debate. German federal governments have ritualistically invoked the non-retroactivity of treaties to point *away* from reparation claims while pointing *towards* Germany's long-standing development assistance payments to the Namibian state to deflect from the reparations question.[9]

Further, I argue that Germany's 'chronopolitics of deflection' yields a construction of 'history as normatively temporalized time' via the non-retroactivity of international treaties. The phrase 'normatively temporalized time' captures Germany's politicization of historical time as a linear succession of self-contained epochs compartmentalized in terms of the laws applicable at each 'stage', a compartmentalization secured via invocations of the non-retroactivity of law. German governments have invoked the 1955 ratification of the Genocide Convention as the watershed moment separating a violent colonial past from a peaceful, law-abiding present. These chronopolitics consign German colonial atrocities to a distant past that is normatively severed from the present, a severance that pivots on the year of 1955 and one presented as so deep that it is unbridgeable by reparation claims. Seen in this light, Germany's invocation of its development aid payments as fulfilling its special 'moral and

[7] In brief, the non-retroactivity of treaties means that international treaties apply only to matters arising *after* their entry into force, unless consenting parties clearly intended otherwise, which does not apply to the Genocide Convention. The inter-temporality doctrine stipulates that past events must be evaluated according to contemporaneously applicable law. This essay focuses on non-retroactivity as a key element of intertemporal law.

[8] Theurer 2023a, Tzouvala 2023, UN Special Rapporteurs' Letter 2023, 5, 9. On the reproduction of colonial racism via the intertemporal principle, see the press statement by the Ovaherero Traditional Authority and Nama Traditional Leaders' Association 2023, 6-7. See also du Plessis 2007, 151-6.

[9] Morefield 2014 provides a political theory of deflection. Morefield casts deflection as a rhetorical strategy that says "don't look over there, that is not who we are; look over here, *this* is who we really are". Morefield examines deflection in the context of US-American and British anxieties over liberal democracy and their effectively imperial foreign policies.

historic responsibility' towards Namibia supplements its chronopolitical rhetoric and further deflects from the reparations question.

The discussion proceeds in five sections. The second section provides elements of the historical context before demonstrating the stakes of Germany's *legalist* deflective politics against the backdrop of arguments on Germany's *politico-moral* obligations to provide reparations to the Ovaherero and Nama. The third section begins with detailing the workings of Germany's chronopolitics of deflection based on my reading of parliamentary interpellations. I show the discursive strategies by which governments have pointed away from the reparations question by evading questions about the genocidal nature of Germany's colonial atrocities, and thus about reparations questions, while pointing towards development assistance payments to Namibia. Centerstage here takes Germany's simultaneous designation and foreclosure of the twin issue of 'genocide' and reparations as exclusively one of international law via the non-retroactivity of the Genocide Convention. I also show that Germany's more recent designation of its colonial massacres as a 'historical genocide', which is explicitly divorced from any legal usage of the term, does not undo its deflective politics, not least because this a-legal designation keeps closed the reparations question. The second part of section three proceeds by substantiating this claim surrounding the 'historical genocide' vocabulary. Given that Germany's development assistance payments to Namibia put pressure on my claim as to the persistence of the chronopolitics of deflection, I detail the normative difference between reparations and development aid. This discussion also lays out how this distinction clarifies the general and specific purposes of Germany's deflective politics. I further contextualize Germany's turn to a 'historical genocide' with a discussion of post-war Germany's hesitant engagement with retroactive international law and its reluctance to confront the Holocaust specifically *as* a genocide within the register of law. In its last part, section three brings the findings of the preceding discussion to bear on political theories of time and interprets the German reliance on the non-retroactivity of the Genocide Convention as an instantiation of the projection of history in terms of the 'normative temporalization of time', a strategy that aims at the temporal *and* normative distancing of past atrocities from the present. The fourth section addresses the relationship between international law and colonial reparations more broadly in light of the foregoing discussion. I there assess tensions and limitations woven into the inter-temporal principle and non-retroactivity in the specific context of colonial injustice, finding that no international legal principle conclusively supersedes either. This leads me to conclude that intertemporality and non-retroactivity

implicitly reiterate colonial international law and lock in place an unjust legal past. In this vein, the fifth and concluding section appraises the spatio-temporal ramifications of international law from the perspective of critical approaches to international law. The paper's closing note captures the Ovaherero and Nama's own mobilization of international law as an expression of the law's symbolic promises that yield a 'critical faith' in its political potential.[10]

Contexts

Historical context

German colonial atrocities against the Ovaherero and Nama are now recognized as the twentieth century's first genocide.[11] On 2 October 1904, Lothar von Trotha issued his infamous extermination order (*Vernichtungsbefehl*)[12] to the German colonial forces (*Schutztruppen*), instructing them to shoot all Ovaherero regardless of age or gender and otherwise drive them into the Omaheke desert, where German troops encircled water wells.[13] Thousands of Ovaherero died of dehydration, while many others were shot. On 25 April 1905, another extermination proclamation targeted the Nama. Survivors were interned in camps or forced into hard labor on farms expropriated by the Germans. Approximately 30-50% of the detained died until 1908 due to inhumane conditions.[14] A German-organized census of Ovaherero in then-German South West Africa counted 15,130 survivors, while their pre-war numbers are estimated at 80,000.[15] Although the 1960s saw research[16] on these atrocities, public awareness was low until Namibia's independence in 1990. Even since then, German public debate about its colonial past has remained muted.

German engagements with Namibia since 1990 have rested on what Germany calls a "special relationship" that entails "moral and historical", but not legal responsibilities. These 'special responsibilities' Germany expresses in development assistance payments providing the highest per-capita funds in German-African relations. These bilateral ties are presented as a

[10] Pahuja 2011.
[11] Gewald 2003, Bley 1996.
[12] Regarding the context of the extermination order, some argue that Ovaherero were preparing an uprising against German land appropriations (Cooper 2006, 113, Conrad 2008, 82), whereas others maintain that the Germans acted anticipating such an uprising (Gewald 2003, 130).
[13] Cooper 2006.
[14] Hard labor killed an estimated 90% of prisoners in the Lüderitz camp (UN Special Rapporteurs' Letter 2023, 2).
[15] Cooper 2006, 114.
[16] Drechsler 1980.

"good will" recognition of colonial legacies that avoids the distinct normative authority of (international) law. The Namibian state directs much of the funds to *areas* formerly subjected to German colonial rule and not directly to the descendants of survivors of colonial violence. These circumstances highlight problematic centerpieces of Germany's engagement with its colonial history. These are, first, the refusal to negotiate directly with Ovaherero and Nama communities and, second, the stance that reparations cannot be paid, because no genocide occurred in the international legal sense of the word due to the non-retroactivity of treaties.

Key themes tackled here also arise in the 2021 Namibian-German 'joint declaration', which resulted from six years' of strictly bi-lateral negotiations that excluded Ovaherero and Nama representatives.[17] Germany there "accepts [its] moral, historical and political obligation to tender an apology for this genocide" [in a historical sense] and, in a religious register, "asks for forgiveness for the *sins* of [its] forefathers".[18] It further announces delivery of 1,100 million Euros over 30 years, of which 1,050 million will support schemes for the relevant communities. The declaration also stresses that it "settle[s] all financial aspects of the issues relating to the past" – meaning reparations are off the table.[19] Unsurprisingly, the declaration also invokes the Genocide Convention, but not without referencing the year of its passage (1948) and – importantly - its preamble, which is the Convention's *one* part that does not confer international legal obligations.[20] It is this articulation of the reparations question via the non-retroactivity of treaties that evacuates it from the realm of international law, into which it is first placed.

Stakes

The stakes of Germany's legalist deflective politics become clearer against the backdrop of politico-moral arguments that indicate the country's reparative obligations for historical injustice. At the same time, outlining politico-moral obligations for colonial reparations highlights that drawing on international law to deflect reparation claims does not settle the debate, but merely undermines such claims using a vocabulary compromised by the history of colonial legality itself (see section four).

[17] "United Remembrance of Our Colonial Past, United in Our Will to Reconcile, United in Our Vision of the Future". Joint Declaration by the Federal Republic of Germany and the Republic of Namibia 2021 [hereafter 'joint declaration']. Theurer 2023a offers a critique of this declaration.
[18] Clauses 11 and 13, emphasis added.
[19] Clauses 20. In addition to the declaration's bilateralism, Namibian descendants of genocide survivors especially this clause.
[20] Clause 10.

The point can be illustrated by a brief consideration of arguments[21] on redressing historical wrongs.[22] Of the theories that have tackled the issue of repairing colonial wrongs across the passage of time, "interactional" and "structural" accounts are helpful in sharpening the stakes of our case. Those adopting an interactional approach to rectifying past injustice must show that the relevant parties to reparations debates, as well as the wrongs caused, persist into present times[23], such that currently living agents are entitled to and obligated to provide redress.[24] Thompson 2002 provides an intergenerational argument for claims raised by descendants of survivors of past injustice. She argues that currently living agents can claim reparations for historical wrongs because they are connected to their deceased ancestors, who suffered colonial injury directly[25], through a special transtemporal relationship. Similarly, she argues that essentially intergenerational communities, such as nation-states[26], must accept obligations to redress colonial injustice given the benefits arising from membership in such communities.[27] Arguments on institutional or corporate continuity offer another interactional perspective on the question of redressing historical injustice.[28] Tan argues that harm inflicted on a nation or a people[29] as identifiable corporate groups, such as the Ovaherero and Nama,

[21] Scholarship across political theory, philosophy and international law on this issue has expanded in tandem with the multifarious rise in colonial reparations claims. See for instance Bhabha, Matache and Elkins 2021, Butt 2009, Torpey 2003, du Plessis 2007. International lawyers have tackled issues of colonial reparations and also the case of German colonial atrocities. See Sarkin and Fowler 2008 on colonial reparations and international humanitarian law, international human rights law and the Alien Torts Claims Act; Berat 1993 for an assessment of Germany's potential commission of colonial genocide; on the legal indeterminacy of German reparation obligations, see Harring 2002; for the argument that German colonial atrocities were illegal under contemporaneous international norms, see Anderson 2005.

[22] Key subject matters in this field of inquiry more broadly are the transatlantic trade in enslaved people (Schwarz 2022), settler colonial dispossession and disenfranchisement of indigenous peoples and colonial atrocities (eg Thompson 2001). 'Reparations' must not be reduced to financial transactions. A 2023 letter by seven United Nations special rapporteurs captures "effective reparation measures" as "including an unqualified recognition of the genocide" (UN Special Rapporteurs' Letter 2023, 1). The Caricom (Caribbean Community) "Ten Point Plan for Reparatory Justice" demands measures comprising formal apologies, restitution, cultural and educational development, public health, technology transfer and debt cancellation given the legacies of enslavement and colonial genocides (Caricom 2014).

[23] Reparation claims by *descendants* of now-deceased survivors entail the question of how contemporary agents are wronged by historical injustice. Overall, Ovaherero and Nama have remained sufficiently stable social groups over time. The issue of the perpetrator's non-identity is unproblematic here as well, because the Federal Republic of Germany is the successor state of the German Reich (see Pendas 2006: 270).

[24] This discussion is not concerned with the modality and amount of reparations, nor with negotiating how to avoid creating new injustices. Tan argues that reparative obligations are obviated neither by the incalculability of reparations nor by competing principles of justice (2007, 300, 302).

[25] Thompson 2002, Thompson 2001, 123, 133.

[26] Thompson 2021, page numbers not given.

[27] Thompson 2002.

[28] Tan 2007, Kukathas 2003. These arguments counter Jeremy Waldron's 'supersession' thesis, which proposes a 'prospective theory of justice' given the complications bedeviling backward-looking reparations (Waldron 1992, for critiques see Tan 2007, 296, Thompson 2001, 121-2).

[29] 'Nation' here includes non- and/or sub-state groups.

exceeds harm done to then-alive individuals and carries through time by way of the group's collective persistence.[30] Kukathas similarly maintains that collective associations with authority structures, such as states, have enduring institutional obligations that are not limited by individuals' life spans[31], because such institutions persist over time despite changing composition of membership.[32]

Both the intergenerational and the corporate continuity accounts show that Ovaherero and Nama and Germany are sufficiently consistent collective agents over time. Therefore, one can argue that Ovaherero and Nama today have legitimate claims against Germany for its historical violence. The question then arises in what way historical injustices have persisted such that Ovaherero and Nama could still demand reparation claims. Several factors amount to what Tan captures as loss of economic and political self-determination of a corporate group.[33] In their 2023 letter to the German and Namibian governments, seven UN Special Rapporteurs highlight the intergenerational poverty resulting from Germany's colonial theft of land[34], cattle and overall means of livelihood.[35] The letter argues that this loss of assets still requires German reparative measures. It also highlights that the colonial assaults on the Ovaherero and Nama very significantly reduced their population, which continues to render them electoral minorities in Namibia.[36] These observations stress that Germany refuses to engage the Ovaherero and Nama *precisely because* there is reason to argue that their silenced claims have valuable grounds.

Still, certain nuances relevant to Germany's deflection of claims by Ovaherero and Nama and their international advocates[37] are not satisfactorily captured by interactional accounts such as

[30] Tan 2007, 292-5.
[31] Approaches to corporate responsibility raise the question of how individuals can acquire obligations through ascriptive group criteria, such as membership in a nation-state. This is an issue for liberal frameworks whose methodological individualism would demand assigning responsibilities based primarily on individual (in-)action rather than group membership.
[32] Kukathas 2003, 167, 182-3.
[33] Tan 2007, 293.
[34] The land question remains contentious due to Namibia's highly unequal land ownership (Sarkin 2009, 49-54). Of the 47% of land used for commercial agriculture, 70% are owned by descendants of white settlers (World Bank Group 2021, Nghitevelekwa 2020). Conversely, 70% of Namibia's population depends on 35% of land reserved for communal agriculture (see 19/32075, 3). This circumstance results from German colonial land-grabbing that shaped the distribution of wealth and social power, not least because German land expropriation targeted largely Ovaherero territory (Zimmerer 2003, 58). Sarkin argues that colonial land theft inscribed wealth disparities between black and white Namibians (2009, 49-50).
[35] UN Special Rapporteurs' Letter 2023, 9.
[36] UN Special Rapporteurs' Letter 2023, 10.
[37] See again UN Special Rapporteurs' Letter 2023.

Thompson's and Tan's, because these approaches do not focalize the institutional, political and legal contexts within which Germany continues to undercut the Ovaherero and Nama's reparation claims.[38] A structural approach to questions of historical injustice thus offers a wider angle on the relevance of Germany's resort to international law to deflect from its reparative obligations.

Lu develops such a structural approach to justice and reconciliation in a post-colonial world order. On this account, colonialism cannot be reduced to wrongful interactions between former colonisers and the formerly colonised, because colonialism occurred in and through unjust international structures, including colonial legality.[39] Redressing colonial injustice therefore ought to exceed interactional, inter-state processes and requires domestic and international structural changes to the background conditions that continue to undercut self-determination of whole peoples.[40] [41] Lu's own assessment of the Ovaherero and Nama's claims shows that the strictly bilateral diplomatic process between Germany and Namibia "reflects the structural bias of a statist order" that continues to eschew the agency of the Ovaherero and Nama as the very people Germany wronged historically.[42] The erasure of the Ovaherero and Nama's position in these interstate negotiations "share[s] similarities with the historic denial of Herero entitlements to political standing and self-determination that attended German settler colonialism, which culminated in genocide."[43]

[38] See Lu 2017, 19, 45.
[39] Ibid., 53, 172, 122-6. Lu argues that 'reparations' are due only to still living victims of wrongdoing, while 'acknowledgement payments' can facilitate reconciliation for descendants of survivors of colonial injustice (2017, 250-2).
[40] Ibid., 25, 147, 159, 172, 221, 155-6.
[41] Táíwò also invites a structural understanding of the modern international order as the product of "global racial empire", in which reparations should aim at producing a just world order (2022, 122-3, 143).
[42] Lu 2017, 252, see also 260. The failed litigation effort of Ovaherero representatives at the International Court of Arbitration similarly accentuates an international order that bars non-state actors from international institutions designed for sovereign governments. Ovaherero and Nama representatives have also charged the Namibian government with enacting neo-colonial politics in its bilateral diplomacy with Germany, calling the 2021 joint declaration a "neo-colonialist agreement", asserting that "the Namibian government is busy selling them out" (Kamuiiri 2021). Namibian lawyer Patrick Kauta has filed a claim against the declaration at the Namibian High Court, partly alleging its violation of Article 63(2)(i) of the Namibian Constitution that obliges the Namibian National Assembly to guard against repeating colonial patterns (Theurer 2023b).
[43] Ibid, 252. Within Lu's framework, Ovaherero and Nama ought to be able exercise effective political agency to lessen their alienation from post-colonial institutions, while Germany should fully recognize the genocide, not least with acknowledgement payments provided to the Ovaherero and Nama (ibid., 250-1).

Although the concept of structural injustice exceeds the domain of unjust legal norms[44], Lu also highlights both colonial legality itself[45] as well as the current "lack of acknowledgement that the legality of colonialism […] was wrong"[46] as elements of structural injustice. This perspective spotlights Germany's distinctly *legalist* strategies of deflection, which includes its reliance on non-retroactivity as an element of intertemporal international law. It is no coincidence that UN representatives have criticized[47] the politicization of international legal principles in what I call Germany's chronopolitics of deflection.

A structural account therefore accentuates the relevance of the following analysis. It underscores that Germany's chronopolitics of deflection, articulated via the non-retroactivity of international law, refuses to undo the reproduction of colonial legality. The chronopolitics of deflection indirectly reinforce[48] – or at least fail to renounce – colonialism's entwinement with racist lineages of 19th century international law.[49] By invoking intertemporal legal principles, Germany avoids conceding that colonial international law was itself objectionable[50], thereby failing its structural obligation to revise formal and informal aspects of the contemporary international order that continuously recall post-colonial hierarchies.

The politico-moral arguments outlined above set the background against which Germany's legalist deflections come into starker view. However, rather than asking *what* Germany's reparative obligations are (as important as this question is), this project asks *how* Germany as a former colonial power mobilizes international law to foreclose reparation debates. More specifically, it asks what conceptions of political time underlie such legalist strategies, and what we might conclude more broadly about the political valence of international law within the specific context of colonial reparations.

From this angle, the German resort to international law to avoid questions of colonial reparations illustrates a strategy that Johnstone and Ratner term "nonjudicial legal

[44] Lu 2017, 261. Lu adopts a Youngian notion of structure that refers to informal and formal practices, institutions, rules and background conditions that render some more vulnerable to injustice than others (ibid.: 35, 243).
[45] Ibid., chapter 4.
[46] Ibid., 271.
[47] UN Special Rapporteurs' Letter 2023, Achiume 2019.
[48] I will further discuss this view in the fourth section below.
[49] Kauta's claim argues that invoking intertemporal international law reinscribes racist imperial hierarchies between civilized and non-civilized peoples (UN Special Rapporteurs' Letter 2023, 7).
[50] Lu 2017, 271.

argumentation".[51] Their examination of states' motivations for legal argumentation in political debates beyond courtrooms yields the insight that Germany deploys international law to evade criticisms of its anti-reparation stance as a mere policy choice. As Venzke shows, law's distinct claim to authority obfuscates that nonjudicial legal arguments are themselves debatable political choices.[52] These arguments underscore how Germany resorts to the seeming certainty of the non-retroactivity of international law, thereby effectively distancing its anti-reparation stance from the above-sketched politico-moral dimension of potential reparative obligations.

The 'Chronopolitics of Deflection'

International law to the 'rescue'

The signature traits of Germany's engagement with its colonial past are the strategic framing of German colonial reparations as a matter exclusively of international law and the simultaneous foreclosure of the issue by means of the non-retroactivity of law. Overall, governments have drawn on the intertemporality of law and on the non-retroactivity of treaties to deflect reparation debates. Both principles govern the temporal scope of international law and thus structure broader debates about colonial reparations. They are connected by the stance that time and law coalesce such that the past cannot be judged by current law (non-retroactivity), but must be examined according to contemporaneous law (intertemporality). This is why scholars sometimes invoke the two principles in one stroke[53], occasionally without strongly differentiating them from one another.[54] Both principles have been criticized as politicized tools to avoid reparations[55] in US-American and European anti-reparation debates[56], some of which label reparation claims as "erroneous demand[s]"[57] for retroactive legal application. Scholars have therefore grappled with both principles for a while, with some taking a cautious stance on the utility of international law to redress colonial violence.[58] German scholarship on the question has also argued that neither principle

[51] Johnstone and Ratner 2021b, 339.
[52] Venzke 2021, 26-32, Johnstone and Ratner 2021a, 9, n22, 343.
[53] Biholar 2022, 78.
[54] Eg Wilde 2023, 395-6.
[55] See Achiume 2019.
[56] Schwarz 2022, 58.
[57] Biholar 2022, 79.
[58] On intertemporality, see du Plessis 2003, Herik 2018. The fourth and fifth sections below further probe this issue.

provides a legal basis for reparations while highlighting that non-retroactivity provides a 'temporal boundary' against reparation claims addressed to Germany.[59] At the same time, critical perspectives on the German case have turned more often to the intertemporal principle.[60] As a result, this essay focuses on non-retroactivity in these debates, because it is less often criticized than the intertemporal principle, even though it is equally persistently invoked. More specifically, the paper examines deployments of the non-retroactivity of law through theories of political time to argue that an understanding of history as 'normatively temporalized time' underlies Germany's chronopolitics of deflection (see the third part of section three).

This strategic use of non-retroactivity arises in Germany's consistent objection to debating colonial reparations in the form of two entwined maneuvers. The first is the insistence that the concept of genocide is actionable for reparations *only* if events fall within the Genocide Convention's temporal scope – which in turn is limited by non-retroactivity. This position conflates the *political* issue of reparations with the temporal applicability of international law, which creates a qualified understanding of the *kind* of genocide that could yield reparation debates. The second manoeuvre, then, is the foreclosure of the reparations question by means of the non-retroactivity of treaties. Mobilizing this principle hence privileges the stance that the Genocide Convention cannot be applied to events that occurred before 1955, which confers a historical, yet a-legal recognition unto German colonial atrocities. Confining a reparation-relevant understanding of genocide to the realm of international law hence simultaneously forecloses the reparations issue.

The a-legal articulation of German post-colonial responsibilities began a year before Namibia's independence. A 1989 parliamentary petition filed by MPs of the then-governing coalition, titled 'The Federal Republic of Germany's Special Responsibility for Namibia and all its Citizens'[61], outlines this 'special responsibility' in terms of economic development assistance and human rights policies. Governmental references to this 'moral and historic' responsibility (or 'special historic responsibility'[62]) have continued to monopolize the

[59] Kämmerer and Föh 2004, 325-6.
[60] Theurer 2023a, Tzouvala 2023, European Center for Constitutional and Human Rights 2019.
[61] 11/3934_30.01.1989.

[62] 17/6011_30.05.2011 (interpellation) & 17/6227_15.06.2011 (response). Roos and Seidl 2015 argue that national interest animates even recent Germany concessions, such as the recognition of the atrocities as

commitment to German-Namibian reconciliation.[63] This responsibility is routinely concretized by the volume of development aid payments, which are explicitly distinguished from reparations. This argumentative pattern repeats, for instance, in 2004, on the occasion of the centennial of the German's war of extermination and in the 2021 'joint declaration', which affirms this very position.[64]

The repeated assertion that there are no obligations to pay reparations[65] given the lack of any international legal basis for such claims[66] complements the focus on development aid. At least since 2011, governmental invocations of the non-retroactivity of the Genocide Convention have consistently structured the debate about Germany's accountability for its colonial atrocities. A 2012 minor interpellation noted explicitly that the concept of genocide is a key issue in contentions about Germany's colonial war of annihilation. The interpellation stresses that this debate centered on the contested scope of the Genocide Convention.[67] The government responded reiterating the non-retroactivity of the Convention to confirm the lack of legal obligation for reparations in 2011[68], 2012[69] 2016[70], 2020[71]. When asked by opposition parties in 2011 and 2012 why the federal government had not officially recognized the genocide of the Ovaherero and Nama, the government responded highlighting the non-retroactivity of the Genocide Convention (ibid).[72] The response demonstrates that, at that time, the government reserved the term genocide *entirely* for its usage according to international (criminal) law, which rendered it inapplicable to Germany's colonial massacres.

historical genocide (discussed below). Amongst these interests is the protection of privileges held by German-Namibians and Namibians of German origin.

[64] 'Introduction' to the declaration, point 4. Clause 11 mentions Germany's '*moral* responsibility' for the colonization of Namibia (emphasis added).
[65] 17/7741_14.11.2011 (interpellation) &17/8057_1.12.2011 (response), 29.09.2021.
[66] 18/5166_12.06.2015, 17/10481_14.08.2012, 17/8057_1.12.2011, 18/9152_11.07.2016. Germany's anti-reparation stance informs advice to government representatives to avoid utterances liable to raise expectations for reparations (17/10481_14.08.2012, 3).
[67] 17/10481_14.08.2012

[68] 17/6011_30.05.2011 (interpellation), 17/6227_15.06.2011 (response), 17/7741 & 17/8057.

[69] 17/10481_14.08.2012
[70] 18/9152
[71] 17.11.2020
[72] 17/7749, 7.

Importantly, this strategy's centrality for foreclosing reparation requests is not diminished by Germany's concession that the atrocities against Ovaherero and Nama qualifies as a *historical* form of 'genocide'.[73] I submit that Germany's 2015[74] and 2021 announcements that its attacks against the Ovaherero and Nama were 'genocide' in an exclusively historical[75] sense of the term coheres with the argumentative double-movement furnishing the 'chronopolitics of deflection'. This is so, because the recognition of a 'historical genocide' comes with the refusal to also attach legal[76] relevance to this designation. Importantly, a 2015 research brief by the Federal Parliament's Research Service emphasizes that "the *description* of past events in the terminology of the Genocide Convention" does not entail the retroactive application of the Convention's legal consequences.[77] Further, "[t]he Genocide Convention does not become applicable pursuant to the deployment of the concept of genocide."[78] This document is crucial, because it demonstrates that room for the recognition of the 'historical genocide' was created by 'splitting' it off a legally relevant deployment of the term. In other words, the *description* of the relevant atrocities as 'genocide' does not cast them as a matter of international law, thereby leaving the matter divorced from potential reparations.

The turn towards a 'historical genocide' was therefore not as profound a shift for matters of reparations as one might expect. This is so, because the government divorced a historical from a legal meaning of 'genocide', thereby evacuating the concept from the realm international law, presented as the only appropriate register for reparation debates. To illustrate, a year after the 2015 announcement of the adoption of the historical term 'genocide'[79], the government answered an opposition query noting that the term genocide can be used in a purely historical and thus non-legal manner, because the Genocide Convention's

[73] "We will now officially call these events what they are *from today's perspective*: a genocide" (then-Minister of Foreign Affairs Heiko Maas, 28/05/2021, 29/09/2021, emphasis added).
[74] Martin Schäfer, spokesperson of the German Foreign Office, announced the genocide vocabulary on 10.07.2015.
19/32617, 1 – see also Maas 2021.
[75] The surveyed parliamentary documents neither define genocide 'as a historical concept', nor its relationship to genocide's legal definition in the 1948 Convention. As such, this essay follows the wording in the primary documents when using the historical/legal distinction regarding genocide.
[76] The documents surveyed refer to the '"legal" sense of the term genocide' specifically in connection to the Genocide Convention's definition of genocide.
[77] 'On the Classification of Historical Cases as Genocide' (author's translation), WD2-3000-092/15_29.05.2015, 1-10, at 6-7 (author's translation, emphasis added).
[78] Ibid (author's translation).
[79] Just four weeks before the first adoption of the concept of 'genocide', the government affirmed the absence of international legal bases for reparation claims (18/5166_12.06.2015 and 18/4903, 18/5166_12.06.2015, 17/10481_14.08.2012, 17/8057). The German recognition of the 1915 Ottoman massacres of Armenians as genocide in April 2015 further pressured Germany to recognize its own colonial atrocities as such.

preamble uses the concept in its the historical dimension. Notably, this response stressed that the preamble does not create legal obligations for states.[80] Official documents resort to the preamble to defend a non-legal evaluation ("*nicht rechtliche Einschätzung"*) of events in a "historical-political public debate" independent of the international legal status of the word.[81] Moreover, the government has refused to specify whether the 'historical genocide' prefigured the international crime of 'genocide' as codified in the Convention. A 2011minor interpellation queried whether distinctly genocidal intent, a definitional cornerstone of the 20th century international crime[82], drove the massacres. The government responded that it remains neutral on issues pertaining to historical research.[83] It repeated this overall position in 2012.[84] While a degree of ambiguity remains as to the precise meaning of a 'historical genocide'., the 2021 joint declaration deployment of 'genocide' as a historical concept accompanied statements that it would not yield reparations and that the €1.1 billion "reconstruction and development" aid were not reparations.[85] In resorting to a 'historical' understanding of genocide, Germany continues to overshadow the reparations issue with development assistance payments. As such, the historical, non-legal use of 'genocide' maintains the politics of deflection that separates reparation claims from the arena of international law, to which they are strategically confined in the first place. This deployment of 'genocide' "in a non-legal sense" to describe German colonial massacres is notably criticized in E. Tendayi Achiume's 2019 report to the General Assembly.[86] Ovaherero and Nama organizations and a 2023 UN Special Rapporteurs' letter to Germany equally contest this 'splitting' of the concept into its historical and legal valence. The latter demands an "*unqualified* recognition of the genocide" as part of "effective reparative measures".[87]

A counterpoint to the German treatment of the concept of genocide emerges in the declaration resulting from the 2001 Durban 'World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance' ('Declaration'[88]). The Declaration

[80] The Convention's preamble is repeated in clause 10 of the 2021 joint declaration.
[81] Ibid., also 18/9152, section 3.
[82] Contemporary international criminal law defines genocide as a 'special intent crime' requiring the distinct intent to eliminate (parts of) a defined group.
[83] 17/7741_14.11.2011 (interpellation) & 17/8057_1.12.2011 (response).
[84] 17/10481_14.08.2012.
[85] Maas 2021.
[86] Achiume 2018, 6, 19. Achiume served as UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance from 2017-2022.
[87] UN Special Rapporteurs' Letter 2023, 1, 5, 9.
[88] World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Declaration and Programme of Action 2002.

provides an alternative understanding of the relationship between time, law and violence. Section 13 articulates a retroactive normative temporality and states that "slavery and the slave trade are a crime against humanity *and should always have been so*".[89] This statement implies that the historical absence of a crime of slavery is in and of itself wrong.[90]

And yet, despite this important claim in the Declaration, Germany's move towards using the notion of 'genocide' is symbolically significant, because it transitioned away from a wholesale denial regarding the atrocities in German South-West Africa. Yet, overall, this move remains an adaptive, not a transformative, one.[91] As such, it did not undo the politics of deflection *tout court*.

Deflection between 'aid' and (avoidance of retroactive) law

Germany's deflective politics hence persists in the claim that a 'historical' genocide does not enable reparations, because it does not reach international illegality. This claim merits further substantiation, here provided in two steps. First, my argument on the recognition of a 'historical' genocide is pressured further by Germany's provision of development aid payments to Namibia, which probes the purpose of its deflective politics. I therefore here detail the qualitative distinction between development assistance and reparations. Second, I chronicle post-war Germany's reluctant engagement with retroactive (international) law and its resistance to confront its European genocide *qua* genocide by means of law to contextualize the resort to non-retroactivity and to an a-legal concept of genocide.

As for the first point, Germany's adamant distinction between reparations and development aid exemplifies what Weber and Weber call the 'normative inversion', which captures enduring imperial features of the liberal international order. Historically, the 'normative inversion' secured the perverse hierarchy between 'civilized' perpetrators and 'savage' victims of colonial violence. It persists in the assumption of "moral authority and political competency" by formerly colonizing powers as "providers of […] rules for the rest".[92]

[89] Ibid., emphasis added.
[90] Yet, this phrase underscores that the slave trade *was* legal – thereby implicitly stressing the challenges of intertemporality (Herik 2012, 698). According to Mutua, the Declaration thereby failed to fully declare enslavement a crime against humanity (2021, 5).
[91] Roos and Seidl 2015, 200.
[92] Weber and Weber 2020, 94. Lu 2017 argues that the distinction between 'reparations' and (development) 'assistance' matters normatively, because it re-enacts the colonial demarcation of civilized and barbarian peoples (175/n72, 176).

Germany's aid payments exemplify this dynamic. Whereas 'aid' emanates from a benevolent provider's moral superiority[93], ensuring the giver's agency and influence, reparations acknowledge rectificatory obligations.[94] Focusing on development assistance therefore facilitates the former colonizer's "self-absolution"[95] and is liable to re-enact the "civilized-barbarian divide" that underwrote colonial hierarchies.[96] Such monetary transfers may concede the generic wrongness of colonial rule, while suppressing the agency of the descendants of survivors and therefore thwart engagement with the normative and material conundrums specific to such atrocities.

The distinction between reparations and aid thus probes the question of the general and specific aims of Germany's deflective politics. Generally, the fear of setting a precedent via reparations negotiations that may implicate several Western-European governments might solidify Germany's anti-reparation stance.[97] Avoiding litigation to maintain international reputation is also common among states, which is perhaps why Germany invoked the doctrine of state immunity against claims filed by Ovaherero representatives in US-American district court proceedings in 2007. It was also likely no coincidence that the 2015 adoption of the 'historical' genocide vocabulary followed an ultimatum by Ovaherero and Nama, announcing further legal action unless the genocide be publicly recognized.[98]

The more specific question persists precisely which reputation – or national identity – Germany is trying to manage by distancing its recognition of the 'historical' genocide from the realms of international law and reparations. While Germany no longer reserves the concept for the Holocaust, commemorating the Shoah as the one apocalyptically violent political breakdown in national history remains central to German collective self-understanding.[99] The commitment to the Shoah's exceptional nature arises in the inclination

[93] Historian Jürgen Zimmerer also criticises development payments as 'aid' that "morally elevates the giver", rather than satisfying a duty to rectify wrongdoing (cited in 20/2799_19.07.2022, author's translation).

[94] Bentley 2015, 5.

[95] Weber and Weber 2020, 94.
[96] Lu 2017, 176.
[97] Roos and Seidl 2015, 200.
[98] Ibid., 194-7.
[99] German president Steinmeier acknowledged the importance of commemorating Germany's colonial crimes in 2021. Yet, Steinmeier simultaneously expressed "[his] conviction: The memory of the Shoah as a civilizational collapse is and remains unique in our national conscience. It is part of our identity" (2021, author's translation).

to maintain post-Holocaust reparations as unique.[100] Incorporating colonial atrocities into German reparative politics would not only weaken Germany's minimization of its colonial past as relatively short-lived and thus somewhat insignificant in European comparison, but would also raise vociferously contested questions about longer lineages of German genocidal politics. This is not to say that Germany has not changed its stance regarding its colonial history – evidently it has renounced colonialism along with Nazism.[101] But this circumstance does not preclude critiquing the chronopolitics of deflection as an attending characteristic of this renunciation. Put differently, the point here is to probe the strategies that structure this repudiation.

This leads me to my second point. The relevance of these very strategies, namely the reliance on non-retroactivity and the sidestepping of a specifically legal grappling with 'genocide', is sharpened when placed in the comparative context of Germany's juridical engagement with Nazi crimes against humanity (CAH) and genocide in Europe after the Holocaust. Despite Germany's staunch commitment to the genocide vocabulary regarding the Holocaust, threads of continuity connect our case with the post-war German legal establishment's objection to retroactive international law and its avoidance of adjudicating genocide *qua* genocide. Devin Pendas's work contextualizes Germany's reliance on the non-retroactivity of law to manage confrontation with past mass atrocities. Pendas chronicles post-war occupied Germany's reluctance towards Control Council Law No.10 (CCL10) issued by the Allied Control Council in December 1945.[102] CCL10 endowed German courts with retroactive jurisdiction over Nazi crimes, including CAH, an international crime newly codified in the London Charter of the Nuremberg Trials. Pendas details the German prioritizing of non-retroactivity as a formalist, rule-of-law stance over the application of CAH as a new crime and vehicle of substantive justice. Some German jurists objected to CAH's retroactive application as a violation of non-retroactivity, while others defended ex post facto law based on overriding justice concerns.[103] The non-retroactivity of (international) law also supplied Nuremberg's defense lawyers and German lawyers in the 1963-65 Frankfurt Auschwitz Trial[104] with their

[100] Rechavia-Taylor and Moses 2021.
[101] See again note 103.
[102] Pendas 2010, 430-5.
[103] Ibid., 450-1, Pendas 2006, 12-14.
[104] This trial was the most extensive and most publicized adjudication of Holocaust crimes in West Germany.

argument against prosecutors' charges[105], thereby mobilizing the principle as an "exculpatory tendenc[y] of the law"[106].

Moreover, the reluctance to confront genocide *as* genocide in a legal register also marked German Nazi trials. From 1951 onwards, German courts dropped prosecutions of CAH and speedily repealed all occupation law, including CCL10. The Frankfurt Auschwitz Trial therefore adjudicated Nazi violence under 'normal' German criminal law.[107] This trial thus represented the Holocaust not as a systematically state-orchestrated mass extermination, but as a concatenation of murders or homicides motivated by individual defendants' subjective intent.[108] The trial juridically disassembled the Holocaust into a series of individualized guilt assessments, thereby avoiding a legal grappling with genocide *as such*.[109]

The ambivalent response of the post-war German legal establishment's to CCL10's retroactive application of CAH, together with the Auschwitz Trial's juridical dis-articulation of the Holocaust as multiple 'ordinary' homicides, indicate a longer German history of prioritizing formalist rule of law arguments over retroactive laws as an expression of substantive justice when addressing past mass atrocities. These findings do not obviate the important symbolics of Germany's recognition of a historical genocide in the context of development aid payments. They do however accentuate the avoidance of articulating Germany's colonial genocide via (new) international legal norms.

Deflective chronopolitics: History as normatively temporalized time

The previous section embedded Germany's insistence on non-retroactivity regarding the reparations issue in a longer history of German resistance to *ex post facto* law. Deepening the above discussion, this section asks what kind of relationship between time, law and (in)justice underlies this insistence on non-retroactivity as a strategy of non-judicial legal argument. I argue that Germany's reliance on non-retroactivity and intertemporality furnishes a politics of time that uses international law's authority to assert a temporal *as well as*

[105] Pendas 2006, 11, 40, 280-2, 300.
[106] Ibid., 281.
[107] Ibid., 13, 53.
[108] Ibid., 246-8, 262.
[109] Ibid., 54, 280-6, 291-8.

normative distance to its colonial past.[110] I suggest that the aforementioned temporal rules provide different avenues for practices of historicisation, which captures political efforts to divorce the present from the past in post-conflict politics.[111] Whereas intertemporality yields an understanding of *history as context*, non-retroactivity provides one of *history as normatively temporalized time*. The first confines colonial atrocities to a distant past, delineated by now odious norms and laws. The second articulates a normative rupture in time that severs the present of potential reparations from the past of horrid violence. The latter thereby produces a 'now' that breaks with a normatively 'other' past, a break posited as so fundamental that it is unbridgeable by reparation claims.[112] Via Bevernage, I submit that Germany's chronopolitics produces a political 'present' by articulating a past that is normatively and temporally distant.[113] The stylization of non-retroactivity as the bulwark against reparation claims exemplifies Bevernage's argument that any past/present demarcation is a political device that legitimizes the 'now' by rendering remote, if not obsolescent, the 'past'.[114] Our case specifically displays the deployment of international law to temporalize time in an explicitly normative register that yields the symbolic production of a bounded present via the authority of 'nonjudicial legal argument', as discussed above.[115]

Temporalization, essential to modern Western conceptions of time, refers to the ordering of time as a linear, progressivist succession of events that are either present or past.[116] The German chronopolitics of deflection deploys the principle of non-retroactivity to posit 1955 as a normative pivoting point that insulates a legal present against an atrocious colonial past. I therefore refer to Germany's articulation of political time via the non-retroactivity of the Genocide Convention as "normatively temporalized time".

The insistence on the Genocide Convention's adoption as a normative demarcation between past and present could be considered as a "kairotic" moment in German history. The intersection between chronotic and kairotic temporality transforms evenly quantifiable time

[110] I here work with Bevernage's analyses of political time in truth commissions and transitional justice. Bevernage critiques the modernist, historicizing discourses of time that govern these mechanisms to divorce the present from the past (2010, 2012, 2014, 2015, 2008).
[111] Bevernage; 2010, 125.
[112] Bevernage 2010, 125.
[113] Bevernage 2008, 14-8.
[114] Ibid., 22.
[115] Johnstone and Ratner 2021a.
[116] See Koselleck 2005.

into political time that enables value judgments in international politics.[117] Such political temporality provides qualitative distinctions between historical epochs distinguished by irreducibly political watershed moments.[118] By stipulating 1955 as one such transformative moment, the mobilization of non-retroactivity of treaties confines Germany's colonial atrocities to a normatively inaccessible past. The political temporality of German deflection is one of progress so radical to provide a normative rupture in time. Germany's reliance on the Convention's non-retroactivity for debunking reparations claims thus separates a colonial, violent past from a present depicted as juridified, peaceful and internationalist.

The reliance on non-retroactivity, therefore, provides a mechanism to inscribe historical *discontinuity* through which "events *become* past".[119] Temporal distance, crucial for normatively rendering remote Germany's colonial violence, emerges here not simply from the mere progression of time. Rather, temporal distancing, in Bevernage's words, arises from the performative delineation of the present vis-à-vis the past.[120] The chronopolitics of deflection hence do not spring from an insistence that too many neutral units of time have passed, but from the creation of a normative timeline structuring the meaning of facts via the non-retroactivity of treaties.

To illustrate, then-President Roman Herzog stated on a 1998 visit to Namibia that "too much time ha[d] passed" for an apology.[121] But the objective amount of time passed since 1908 no longer furnishes German objections to reparations. The debate now hinges on a *normative* articulation of time. When then-Minister of Foreign Affairs Heiko Maas announced Germany's 2021 recognition of the (historical) genocide, assertions that the atrocities happened "too long ago" had waned. Instead, Maas said that Germany "will now officially call these events what they are *from today's perspective*: a genocide".[122] The qualifier 'from today's perspective' gains significance if connected to the normative event of 1955. Accordingly, Maas did *not* say that "these events" were genocide in an *unqualified* sense of

[117] *Chronos* refers to evenly flowing time that measures the succession of events (Hutchings 2008, 49). *Kairos* structures chronotic time with exceptional moments that differentiate periods of differential value and political importance (ibid., 4-7, 154).
[118] Hutchings 2008, 49, 7, Mills 2020, 312.
[119] Bevernage 2012, 83, 5.
[120] Ibid., 15.
[121] Kössler 2015, 237.
[122] Emphasis added, cited in paper 29.09.2021. The 2021 joint declaration also deploys precisely this formulation (clause 10).

the term, as the 2023 Special Rapporteurs' letter explicitly demands.[123] Implicit in this statement is the stance that, from 'previous perspectives' "these events" were *not* 'genocide' – and are therefore still not genocide in the reparation-relevant sense of the term, a stance consistent with the chronopolitics of deflection.[124] Put differently, we can comprehend the atrocities' illegality *now* – but *only* now. This particular politicization of time orders time by way of the succession of different *values*[125], which makes this conflict over history not about 'what happened', or how long ago, but about the normative evaluation of 'what happened'.

In this light, attempted court proceedings against Germany by Ovaherero and Nama representatives undercut this normative ordering of time by insisting precisely on the transtemporal *illegality* of past atrocities in the here and now.[126] Seen thus, these claims contest the temporalization of time as a linear progression from one normatively self-contained epoch to another. In that sense, attempted litigations can be read as a push for rendering the past normatively coeval with the present. Put differently, such litigious pursuits aim to expose the fragile binary between past and present in legal and therefore normative terms.[127] These attempts become legible through what Hartman calls, in the context of transatlantic slavery, the "interminable grief" arising from historical atrocities that thwart a sense of "time as continuity or progression" such that "then and now co-exist".[128] In challenging non-retroactivity as the legal line dividing past and present, colonial reparation claims locate colonial genocide in a synchronic, rather than diachronic projection of time[129] that inscribes the 'presence' of the past in the present.[130]

[123] See footnotes 21 and 91.
[124] The UN Special Rapporteurs' 2023 letter highlights the phrase Mass deployed as a "qualified recognition of the genocide" (UN Special Rapporteurs' Letter 2023, 9). Recalling the above-discussed formulation in the Durban Declaration (see page 14), what Maas refrained from saying is that the atrocities in question 'should always have been' genocide – a stance markedly different from the one he articulated.
[125] Hutchings 2008, 4-7, emphasis added.
[126] Amongst the legal efforts by Ovaherero are suits filed in the International Court of Arbitration and in US-American district courts under the Alien Torts Claims Act (ATCA), the civil equivalent of a criminal universal jurisdiction statute. The failure of these efforts does not invalidate their expressivist value of resisting Germany's attempt to normatively sequester the past from the present. Expressivist perspectives consider legal action meaningful independently of their legal effects (see Sander 2019, 851).
[127] Hartman 2002, 263, 258.
[128] Ibid., 759.
[129] Bevernage 2015, 333.
[130] Bevernage 2010, 110-6.

These litigious efforts articulate the *normative* contemporaneity of what is 'genocide' "now" *and* what was equally genocide "then".[131] In Charles Mills's words, the Ovaherero and Nama's litigious attempts contest Germany's curation of normative time, in which a "time of exploitation, of racial oppression […] is displaced by discrete non-intersecting time whose non-contiguous boundaries preclude […] subversive accounting".[132] In this sense, present day legal action for colonial reparations appears as a mode of such "subversive accounting" that goes against the 'before and after' of Germany's 1955 adoption of the Genocide Convention as that which creates "discrete non-intersecting time[s]". From this perspective, Ovaherero and Nama have over many years engaged in "chronopolitical contestation".[133]

International law, time and redress for colonial injustice

Such 'chronopolitical contestations' in response to Germany's strategic mobilization of non-retroactivity show that contentions over reparations for historical injustice continue to be enacted in the register of international law. This circumstance invites broader queries marking the relationship between international law and colonial reparations. One such question is what kind of international legal challenges might apply to the intertemporal principle and non-retroactivity regarding colonial reparations. This is an expansive question that I can here tackle only within limits. It is most efficiently assessed through debates about these temporal principles governing international law themselves, because they limit the applicability of any substantive branch of international law such as international human rights law[134] or the international law of state responsibility[135]. Given the jurisprudential complexity of these debates, the following discussion is aimed not at conclusively discerning which legal argument would formally prevail. Instead, I outline the conundrums befalling intertemporal law and non-retroactivity to assess the tensions and limitations they harbor for the question of colonial reparations.

To start, some arguments use the intertemporal principle to submit that Germany's atrocities were already illegal at the time.[136] This position confronts others arguing that these atrocities

[131] As such, these litigation attempts contest the implicit moral relativism of temporal distancing (see Bevernage 2012, ix, 5, 55).
[132] Mills 2020, 312.
[133] Ibid.
[134] Biholar 2022.
[135] Buser 2017, Arnauld 2021.
[136] Anderson 2005, Shelton 2004, Sarkin 2009.

fell beyond international law altogether. The latter camp argues that German colonial territories were subject to domestic, not international law[137] and that Ovaherero and Nama lacked subjectivity under contemporaneous international law as non-state 'uncivilised' peoples.[138] Arguments defending the international illegality of these atrocities submit that the Ovaherero were sovereign subjects under international law until later stages of Germany's war of extermination.[139] Hence, although Ovaherero and Nama were no signatories to contemporaneous international treaties[140], such as the first Hague Convention (1899), the principles codified in these treaties ought to have applied to them qua their status as 'nations'[141]. However, the fundamental Eurocentrism of 19th century international legal positivism[142] makes it unlikely that Europeans recognized Ovaherero and Nama as subjects of international legal standing.

And yet, German claims that the atrocities were legal[143] also go too far. They certainly violated Article VI of the General Act of the Berlin Conference on West Africa (1885), which required all signatories, including Germany, "to watch over the preservation of the native tribes".[144] But since the General Act primarily created mutual obligations between European colonizers, the question is how descendants of colonial genocide survivors could today render actionable a historical violation of Article VI. It is debated whether Ovaherero and Nama derived subjective claim rights from Article VI at the time *and* whether their descendants hold such claim rights today – and if so, how they could go about enforcing them. Anderson (2005) argues that indigenous peoples were third-party beneficiaries of the General Act, meaning they derived entitlements despite not being signatories to it. Several complications attend this claim. Anderson herself highlights mid-20th century re-statements of the third-party beneficiary doctrine that limit its reach to states under international law while

[137] Germany has argued that their treatment of Ovaherero and Nama fell under German municipal law (McCallion and Lockman 2019, 40). Such an intertemporal argument implicitly legitimizes the atrocities (ibid.). On the domestic legal status of German colonial territories, see Conrad 2008, 37.
[138] As I detailed elsewhere, 19th century European international jurisprudence contracted international law's ambit to (mostly) the European 'family of nations' (self-citation redacted).
[139] Shelton 2004, 122-3.
[140] Cooper 2006, 118.
[141] Anderson 2005, 1181-3. The Eurocentrism of 19th century international jurisprudence on state recognition (self-citation redacted) complicates Anderson's claim, because even if the Ovaherero were empirically a polity recognizable as sovereign, European states would hardly have extended sovereign recognition to them.
[142] Anghie 2005, chapter 2, esp. 52-65.
[143] See Harring 2002, 406.
[144] General Act of the Berlin Conference on West Africa 1885. However, an Article VI violation would require the concession that Germany had indeed assumed sovereignty over the Ovaherero in 1904, because the Article requires exercise of European sovereign rights as a precondition.

stipulating that the signatories must clearly intend for third parties to derive rights from a treaty. It is unlikely that European colonizers both recognized Ovaherero and Nama as international legal subjects *and* intended to confer rights onto them via the General Act.

Even when assuming that such rights were indeed conferred at the time, descendants of now-deceased survivors would encounter multiple barriers when trying to enforce them. The two claims filed by Ovaherero representatives under the Alien Torts Claims Act (ACTA) in US-American district courts illustrates such barriers. The ACTA provides a civil law (tort law) avenue for non-US citizens to sue for international law infringements of certain kinds, thereby opening a litigious avenue that is foreclosed at international courts and tribunals by the Ovaherero and Nama's non-state status.[145] The first claim failed because, the court held that the plaintiffs had no actionable claim.[146] The second claim failed, because the appellate court did not consider the plaintiff's claims to warrant an exception to the Foreign Sovereign Immunities Act, meaning Germany could not be sued due to sovereign immunity[147]. The latter instance demonstrates that the state-centric nature of international law contains resources through which states can avoid litigation for historical wrongs. As a result, international law not only provides an at best highly contested basis for reparations demands, it also harbours "many mechanisms *to prevent* claims for colonial reparations", as noted above.[148]

Three critiques of non-retroactivity offer another approach to evaluate the relationship between international law and colonial redress. The first is specific to the case at hand here, which is that the Genocide Convention renders genocide an international crime engendering individual criminal responsibility. The main defense of non-retroactivity would therefore be *nullum crimen, nulla poena sine lege*, which aims at protecting individuals against arbitrary punishment.[149] Yet, such protection is not even applicable in our case, because all relevant

[145] The degree to which the ATCA covers conduct that occurred entirely beyond US-American territory, such as German colonial expropriation, is debated. In Kiobel v. Royal Dutch Petroleum Co. (2013), the US Supreme Court ruled that nothing precludes interpreting the ATCA with a presumption *against* its extraterritorial application.
[146] Hereros v. Deutsche Afrika-Linien GMBLT & Co. 2007.
[147] Rukoro v. Federal Republic of Germany 2020.
[148] Anghie 2005, 2, emphasis added.
[149] Article 15 of the International Covenant on Civil and Political Rights contains an exception to non-retroactivity. Paragraph 2 allows punishment for grave breaches of general international legal principles independently of municipal law at the time of the offense. Paragraph 1 stipulates that individuals can be punished for crimes inscribed in international law *or* national law, thereby allowing for convictions for

individuals are deceased. At stake is thus not individual criminal responsibility, but instead a form of collective and political responsibility, for which non-retroactivity is considered comparatively weaker.[150] Second, some critics argue that non-retroactivity should not cover historical violations of modern-day peremptory norms (*jus cogens*) .[151] The Inter-American Court of Human Rights stipulated an exception to non-retroactivity in 1993, noting that no treaty codifying slavery – nowadays a *jus cogens* violation – should be invoked in international human rights litigation.[152] Moreover, some municipal legal codes have rendered international crimes, such as crimes against humanity and war crimes, retroactive.[153] Relatedly, the European Court of Human Rights began only in 2008 to enforce non-retroactivity in appeals contesting earlier municipal retroactive convictions for crimes against humanity and war crimes.[154] These examples demonstrate that international tribunals other than the paradigmatic Nuremberg Trials have endorsed the retroactivity of certain key norms. And yet, the International Law Commission has objected to the generalized retroactivity of *jus cogens* norms.[155] A third argument holds that non-retroactivity is significantly weakened, if not overridden, when past laws were manifestly unjust[156] and/or subject to contemporaneous moral outrage.[157] Such arguments suggest that contemporaneous public denunciations of certain repugnant acts demote the authority of intertemporality, including non-retroactivity.[158]

These critiques of non-retroactivity demonstrate that the principle is not sacrosanct. And yet, it remains sufficiently solid a pillar of (international) legality such that it has not predominantly been dislodged in the particular context of reparation claims. This

international crimes not inscribed in national law (Joseph and Castan 2013, 15.16). Paragraph 1 also grants imposition of lighter penalties legislated after a criminal act.

[150] Arnauld 2021, 418.

[151] Buser 2017, 427.

[152] Theurer 2023b, 1160.

[153] See Mariniello 2013, 223-4 on the Latvian and Estonian criminal codes and the Albanian and Polish constitutions.

[154] Mariniello 2013.

[155] Ibid.

[156] Buser 2017, 430, Arnauld 2021, 415. Germany itself deployed natural law after reunification to retroactively hold responsible border guards for killing refugees crossing the Cold War intra-German border based on German legal theorist Radbruch's argument that fundamentally unjust law is no law at all (Castan and Joseph, 15.16). Buser however warns that natural law thinking is no guarantee against normative arbitrariness (ibid., 431-2).

[157] Social Democrats in the German Reichstag vehemently protested von Trotha's extermination order, citing newspapers reporting similar objections (Arnauld 2021, 411).

[158] Shklar defended CAH's retroactive adjudication at Nuremberg, because nobody but the Nazis "doubt[ed] the wrongness of crimes against humanity" during their commission. She argued accordingly that CAH's novelty in 1945 should not thwart their post-war prosecution (1964, 163).

circumstance raises the question of why the principle should prevail, thereby probing its legitimacy. Of course, the purpose of intertemporal law, and therewith non-retroactivity, is legal stability and predictability, values which hardly allow for a blanket demotion of the principle. However, in the specific context of colonial reparations, the question arises *to whom* such stability is of value. Endorsing non-retroactivity as a vehicle for legal certainty leaves undisturbed an international law that supplied former colonial powers with argumentative bulwarks against reparation claims, thereby protracting the colonial quality of an international law that was created by colonial powers.[159] Secured by non-retroactivity, intertemporality then freezes past injustice in its place, only to implicitly reiterate it every time the intertemporal principle is invoked.

From this angle, a difficult choice arises between "immunis[ing] historical injustice"[160] via non-retroactivity and an "ex post facto imposition"[161] of law. Judith Shklar's appraisal of the retroactive adjudication of crimes against humanity (CAH) at the Nuremberg Trials, probably the paradigmatic case for political instantiations of non-retroactivity, illuminates the political value of such 'ex post impositions' of law. Shklar thought that the retroactive crime of CAH justified the Nuremberg Trials as their moral centre due to its political importance.[162] She therefore prioritized the legitimacy of the Trials over their compromised legality insofar as they served liberal ends by disseminating legalistic values going forward.[163] For her, the crucial point was that law provides "a form of political action".[164] Her question thus was not "is law political", but rather "what sort of politics can law maintain and reflect?".[165] Decisive for her were the social and political value of legalistic practices, which for her lay in revealing the expanse of this violence to the Germans.[166] Shklar's defense of the retroactivity of CAH therefore arose from her hope that adjudicating this newly codified crime would re-educate Germany's legal elite for a decent and politically liberal future.[167] Even though

[159] Herik 2012, 635 n51; exemplary Biholar 2022.
[160] Biholar 2022, 89.
[161] Galater, cited in Arnauld 2021, n25.
[162]Shklar 1964, 145-7, 153-8, 163-5, 170, 191-3.
[163] Ibid., 160, 209-10, 220.
[164] Ibid., 143, 156.
[165] Ibid., 144. This perspective supplied her critique of legalism. Legalism considers law a "discrete entity" that is either "there" or "not there" (ibid., 143) according to distinct criteria (ibid., 33-5). Shklar critiques legalism as a foreshortened, formalist understanding of law that precludes its irreducibly political quality and social value (ibid., 33). Her view of the relationship between legalism and political liberalism frames her evaluation of Nuremberg's retroactive charge of crimes against humanity. This is why Shklar does not discard legalism altogether, but debunks its intrinsic value (ibid., 165).
[166] Ibid., 112, 145-8, 162-7, 210, 220.
[167] Ibid., 145, 165-8, 170.

Shklar's hopes for the educative function of retroactivity may not have materialized in West Germany until after the 1960s[168], her argument highlights the political value of prioritizing the political legitimacy of retroactivity over strict legality. While non-retroactivity can serve to silence reparation debates, political discourse could equally well articulate commitments to reparative politics through accepting retroactive law as a vehicle for realizing substantive justice concerns.[169] This very nexus between retroactivity and justice indeed surfaced in post-war German defences of CCL10, which held that retroactive law alone could visit proper justice on Nazi atrocities.[170] If Germany were to put forth arguments for retroactivity as a "form of political action", it could make use of the distinct normative authority of contemporary legal categories to express the substantive injustice of colonial atrocities in a transtemporal manner.

Yet, Germany's clinging to the non-retroactivity of law as a strategy to avoid reparation debates raises the question as to the persistence of international law's colonial features. Given that no international legal principle has to date conclusively superseded intertemporality and non-retroactivity, the question of colonial reparations recalls Anghie's statement that "the colonial history of international law is concealed even when it is reproduced".[171] Adapting this statement, we might say that – although *current* international law provides norms that would strictly outlaw Germany's colonial atrocities *today* – intertemporality reproduces colonial international law each time the principle is invoked, while non-retroactivity conceals the colonial nature of past international law by creating an exclusively forward-looking normative cut-off point for reparation debates.

Conclusion

The discussion in the previous section shows that principles of intertemporal law are not as clear cut as Germany depicts them. But, at the same time, no legal argument has to date practically secured reparations for descendants of survivors of colonial atrocities.[172] This fact

[168] Pendas's excavation of Germany's post-war wrangling with retroactive international law (1945-65) disappoints Shklar's self-consciously sceptical anticipation of the positive effects of CAH's retroactive application on German bureaucratic and legal elites (eg 2006, 7). On the West-German rejection of Nuremberg given its retroactive application of law, see Burchard 2006.
[169] For the political indeterminacy of international law, see Rajagopal 2006 on hegemonic and counter-hegemonic international law.
[170] Pendas 2010, 454.
[171] cited in Lu 2017, 92.
[172] British compensation payments to Kenyan nationals were given to still-living survivors of unjust treatment during the 1950s.

underscores the pessimistic stance taken here regarding international law's potential for redressing colonial injustice. Based on Anghie's remark on international law's capacity to 'conceal' its colonial valence, I conclude with a note on the spatiotemporal ramifications of international law, drawing on critical approaches to international criminal law. Kamari Clarke's work on African responses to the ICC indicates how international criminal law's (ICL) constrained temporality, secured by the non-retroactivity of the 2002 Rome Statute, brings to light certain kinds of injustices, often located in the post-colonial world, while leaving untouched other kinds. Some African ICC critics, as Clarke shows, construct a history of international law that sees it not as the product of Geneva, Nuremberg and Rome, but rather as the accomplice of Europe's colonial violence, which continues to leave unscrutinised colonialism's complex afterlife and maintains the exploitation of African peoples.[173] Such resistance against the ICC's 'legal now' highlights the latter's spatialised repercussions, because the non-retroactivity of 21st-century international crimes creates a geography of global injustice (eg Syria, "Africa") in which Europe's colonial violence and its structural legacies remain beyond the eye of the law. ICL has therefore been called a "powerful exculpatory device"[174] that creates hierarchies in a global attention economy in which the hyper-visibility of ICL's four core crimes demotes other forms of violence.[175] Clarke's critique in turn accentuates how international law's spatio-temporality reveals certain forms of violence and precludes others.

This tension surfaces when juxtaposing the Ovaherero and Nama's failed international litigation attempts against Germany with European universal jurisdiction trials against Syrians for international crimes committed in the Syrian war. German criminal courts have been especially active in reaching verdicts in such trials.[176] Here, *current* Middle Eastern atrocities are adjudicated as international crimes, while the non-retroactivity of treaties still forestalls debates about the criminality of Germany's own *past* atrocities. International (criminal) law thereby foundationally selects "who ends up in the courtroom", rather than merely "what happens in the courtroom".[177] German global justice commitments, then, arise

[173] Leaders of African states have resisted the ICC's "hegemonic production of legal temporality" by re-assembling historical events into narratives that cast the ICC as continuing the international law that legitimised Africa's colonization (Clarke 2016, 89-96, Clarke 2019, 17, 27-31).
[174] Mégret 2014, 32.
[175] Schwöbel-Patel 2021.
[176] This observation does not entail the normative claim that Germany should abstain from such prosecutions. Han 2022 offers a skilful justification of these trials.
[177] Mégret 2014, 25.

in trials of *contemporary foreign* crimes in a present from which Germany's own violent colonial past is excised. This constellation highlights the role of international law in reproducing an international (symbolic) order that remains centered on the Euro-American world as the locus of legal agency and justice.

It is therefore unsurprising that critics of international law consider political strategies are preferable to legal ones for negotiating colonial reparations.[178] We should however not entirely discard as misguided the Ovaherero and Nama's resort to the vocabulary of international law to articulate their claims. Their reliance on international law returns us to its dual quality that resides in the tension between positivist strictures and symbolic promises of justice, a tension that continues to fuel a critical faith in international law's political power.[179]

[178] Du Plessis 2003, 657-8; Herik 2012, 657.
[179] Pahuja 2011, 1, 33.

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