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Colonial Injustices and the Law of State Responsibility: The CARICOM Claim for Reparations*

Andreas Buser[1]

Abstract:

Caribbean States organised in CARICOM recently brought forward reparation claims against several European States to compensate slavery and (native) genocides in the Caribbean and even threatened to approach the International Court of Justice. The paper provides for an analysis of the facts behind the CARICOM claim and asks whether the law of state responsibility is able to provide for the demanded compensation. As the intertemporal principle generally prohibits retroactive application of today's international rules, the paper argues that the complete claim must be based on the law of state responsibility governing in the time of the respective conduct. An inquiry into the history of primary (prohibition of slavery and genocide) as well as secondary rules of State responsibility reveals that both sets of rules were underdeveloped or non-existent at the times of slavery and alleged (native) genocides. Therefore, the author concludes that the CARICOM claim is legally flawed but nevertheless worth the attention as it once again exposes imperial and colonial injustices of the past and their legitimization by historical international law and international/natural lawyers.

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Contents:

1. Introduction

In 1838 the British State paid £20 million to the last (official) British slave owners as a compensation for "expropriation" of those enslaved due to the abolition of slavery in the British Empire and in particular in the British Caribbean. The amount of compensation made up for around 40 per cent of the government's expenditures in that year, today it would equate to almost £200 billion.[2] At the same time the formerly enslaved got nothing, except the (formal) freedom which they should have enjoyed from the beginning. Today, those enslaved have passed away and cannot receive anything anymore. Yet, Caribbean States organised in the Caribbean Community and Common Market (CARICOM), have taken up their cause and bring forward reparation claims for slavery and (native) genocide against several European States.

Such historical claims are of course familiar to the international lawyer. Only recently two long standing claims, the Herero claim against Germany[3] and the claim by so called "comfort women" against Japan[4] led to intense negotiations among affected States and to some progress in the dissolution of those disputes. Still, there is no clear or uniform approach by States how to answer such historical claims. While some historical injustices[5] have been addressed by States with reparation schemes[6], many historical injustices and especially colonial and imperial injustices have not been adequately addressed. Especially the Trans-Atlantic Slave Trade and slavery on the American continent provoked and still provoke many claims for reparations, albeit with no or only minor success so far.[7]

What is of particular interest with regard to the CARICOM case is that it is not only about making good for the past but also about addressing today's economic inequalities. As CARICOM Heads-of-States stress that slavery and genocide have contributed significantly to today's underdevelopment of the region, their claim is explicitly linked to development issues and

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[2] *N. Draper*, The Price of Emancipation: Slave-Ownership, Compensation and British Society at the End of Slavery, 2013, 107-108.

[3] In 2015 the German government and other German officials (after years of negotiations and pressure by civil society groups) began to qualify massacres against the Herero as genocide and war crimes. Nevertheless, the German government repeatedly stressed that no legal consequences will result from this qualification, instead a political dialogue is sought with Namibia.

[4] According to media reports there has been an agreement between Japan and South Korea that includes the offering of an apology and a special fund to compensate victims still alive. Unfortunately, negotiations became stalled in early 2016.

[5] The term historical injustices will be used loosely within this text to describe acts that date back at least several centuries and are considered as morally and legally wrong today, although they often were substantively permissible at the time of their conduct.

[6] Examples include payments by Germany to Israel for the resettlement of Jewish people, by the United States of America (US) to (some) Native Americans, by the US to Japanese Americans interned during World War II, by the UK to the Mau Mau, and the controversial reparations paid or promised to be paid by Italy to Libya according to the 2008 Treaty of Friendship, Partnership and Cooperation; for an overview of reparatory programs for historical injustices, see: *E. A. Posner/A. Vermeule,* Reparations for Slavery and other Historical Injustices, Columbia Law Review 103 (2003), 696 et seq.

[7] On claims for reparations in the US, see: *R. Robinson*, The Debt: What America owes to Blacks, 2001; on claims by African States, see: *A. Gifford*, The Legal Basis of the Claim for Reparations, A Paper Presented to the First Pan-African Congress on Reparations, Abuja, Federal Republic of Nigeria, April 27-29, 1993, available at http://www.shaka.mistral.co.uk; generally on the topic: *M. Du Plessis,* Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery, Human Rights Quarterly 25 (2003); *P. M. Muhammad,* The Trans-Atlantic Slave Trade: A Forgotten Crime Against Humanity as Defined by International Law, American University International Law Review 19 (2004).

questions of global distributive justice[8]. Two rather old but still crucial questions recur here: Is there a legal obligation by former colonial states to help their former colonies to "develop" and overcome socio-economic problems (partly) related to historical injustices? And, can "the post-colonial world deploy, for its own purposes the law which had enabled its suppression in the first place?"[9]

Those questions will be addressed in the following article first by highlighting the connection the CARICOM claim draws between historical injustices and today's development problems, and second by discussing the main legal obstacles to the reparation claim, as CARICOM's strategy's success ultimately depends on the soundness of their (legal) arguments. The third and last part of this article will shortly present some moral and political notions of the claim and highlight the repercussions of historical imperial injustices legitimised by international law for today's international law discourse.

2. The Caribbean Reparation Claim in Context

a) Historical Injustices at the UN World Conference on Racism

CARICOMs recent reparation campaign started in 2013, but reparatory claims were already brought forward by Caribbean States earlier at the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (UN World Conference on Racism) which took place in August of 2001 in Durban, South Africa.[10]

Interestingly the African as well as the Asian preparatory conference for the Durban World Conference issued supportive declarations for the reparatory movement.[11] Yet, due to the strong opposition not only by the Western and European Union groups but also by the presidents of Senegal and Nigeria, the Caribbean delegates had to leave the main conference without achieving any outcomes in their favour.[12] The final declaration then stated that "slavery and the slave trade

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[8] See on global justice issues from an international law perspective: *T. M. Franck*, Fairness in International Law and Institutions, 1995; *F. J. Garcia*, Global Justice and International Economic Law: Three Takes, 2013; *E. Tourme-Jouannet*, What is a Fair International Society?: International Law Between Development and Recognition, 2013; *J. Linarelli (ed)*, Research Handbook on Global Justice and International Economic Law, 2013; *C. Carmody/F. J. Garcia/J. Linarelli*, Global Justice and International Economic Law: Opportunities and Prospects, 2014; *S. R. Ratner*, The Thin Justice of International Law: A Moral Reckoning of the Law of Nations, 2015; out of the numerous philosophical accounts see only (with a special focus on reparations for historical injustice): *D. Butt*, Rectifying International Injustice: Principles of Compensation and Restitution Between Nations, 2009.

[9] Cf. *A. Anghie*, Imperialism, Sovereignty and the Making of International Law, 2005, 8.

[10] Theme 4 of the conference's agenda included "effective remedies, recourses, redress, [compensatory] and other measures at the national, regional and international levels", see: *M. Bossuyt/S. Vandeginste,* The Issue of Reparation for Slavery and Colonialism and the Durban World Conference against Racism, Human Rights Law Journal 22 (2001).

[11] The Report of the Regional Conference for Africa (Dakar, 22-24 January 2001), UN Document A/CONF.189/PC.2/8, para. 20, stated, that „States which pursued racist policies or acts of racial discrimination such as slavery and colonialism should assume their moral, economic, political and legal responsibilities within their national jurisdiction and before other appropriate international mechanisms or jurisdictions and provide adequate reparation to those communities and individuals who, individually or collectively, were victims of such racist policies or acts, regardless of when or by whom they were committed",; the Asian Preparatory Meeting's report urged States to provide reparations for "alien domination or foreign occupation, slavery, the slave trade and ethnic cleansing [...] to those States, communities and individuals who were victims of such policies or practices, regardless of when they were committed.", Report of the Asian Preparatory Meeting (Tehran, 19-21 February 2001), UN-Document A/CONF.189/PC.2/9, para. 50.

[12] *H. Beckles*, Britain's Black Debt: Reparations for Caribbean Slavery and Native Genocide, 2013, 172.

are a crime against humanity and should always have been so" [13], implying that historic slavery and the slave trade carried out by European powers were not illegal at the time of their conduct. Although reparation activists like *Beckles*, who was also spokesman for the Grouping of Caribbean Delegations at the UN World Conference on Racism, took this as a hard setback[14], it has to be highlighted that the final declaration also includes positive outcomes for their cause. Most importantly it acknowledges that "these historical injustices [slavery, the slave trade and other racist practices] have undeniably contributed to the poverty, underdevelopment, marginalization, social exclusion, economic disparities, instability and insecurity that affect many people in different parts of the world, in particular in developing countries."[15] Thereby drawing a direct link between today's socio-economic problems in the Global South and historical injustices. Moreover, it has to be noted that several additional statements were issued by and in the name of more than 50 States which kept with the *opinio juris* that slavery, the slave trade and certain aspects of colonialism were crimes against humanity.[16]

On the whole the UN Conferences on Racism[17] brought some clarity and unity with regard to today's negative consequences of certain historical injustices, but they also revealed several long-standing conflicts among the international community and an unwillingness to agree on ways to remedy historical wrongs.[18]

b) The Current CARICOM Claim

In July 2013 the CARICOM Conference of Heads of Government mandated the establishment of the CARICOM Reparations Commission (CRC) as well as national committees on reparations.[19] The purpose of those commissions and committees is "to pursue reparations from the former European colonial powers for Native Genocide, the Trans-Atlantic Slave Trade and Slavery"[20]. Following the CARICOM mandate, the CRC was formally established in September 2013. National reparations committees have been established by twelve out of fifteen CARICOM Member States.[21] One of the tasks of the national commissions is to undertake the "preparation of the lawsuit" by gathering historical information pertaining to each claimant State and by outlining modern racial discrimination resulting from slavery in areas of health, socio-economic deprivation and social

[13] UN World Conference against Racism, Final Declaration, Durban South Africa, 8 September, 2001, UN Document A/CONF.189/12, para. 13.

[14] *H. Beckles* (note 12), 172 et seq.

[15] UN World Conference against Racism, Final Declaration, Durban South Africa, 8 September, 2001, UN Document A/CONF.189/12, para. 158.

[16] See the statement by the representative of Barbados on behalf of the Caribbean States, UN World Conference against Racism, Final Declaration, Durban South Africa, 8 September, 2001, UN Document A/CONF.189/12, chapter VII, para. 13; see also the statement made by the representative of Kenya on behalf of the Group of African States, ibid., chapter VIII, para. 2.

[17] The review conference in Geneva in 2009 brought nothing new with regard to reparations for historical injustices.

[18] See also: *E. Tourme-Jouannet* (note 8), 190.

[19] See: Communiqué Issued at the Conclusion of the Thirty-Fourth Regular Meeting of the Conference of Heads of Government of the Caribbean Community, 3-6 July 2013, Port of Spain, Trinidad and Tobago, available at: http://www.caricom.org.

[20] CARICOM Secretariat, News Feature 10/2014, 15 October 2014, available at: http://www.caricom.org.

[21] Ibid.

disadvantage, education, living conditions/housing, property and land ownership, employment, participation in public life and migration.[22]

The primary task of the CRC seems to be the establishment of "the moral, ethical and legal case for the payment of Reparations" and to develop a political and diplomatic strategy to achieve these goals. In 2013 the CRC summarized their reparation claim in a "ten point plan for slavery reparations".[23] In this document the CRC states that European Governments inter alia:

- Were owners and traders of enslaved Africans

- Instructed genocidal actions upon indigenous communities

- Created the legal, financial and fiscal policies necessary for the enslavement of Africans [...]

- Compensated slave owners at emancipation for the loss of legal property rights in enslaved Africans

- Imposed a further one hundred years of racial apartheid upon the emancipated

- Imposed for another one hundred years policies designed to perpetuate suffering upon the emancipated and survivors of genocide

- And have refused to acknowledge such crimes or to compensate victims and their descendants

Remedies sought by CARICOM include a full formal apology from European governments, a repatriation program for descendants of forcefully migrated enslaved people, an indigenous peoples development program, the establishment of cultural institutions in the Caribbean, such as museums and research centres to further the populations' understanding of slavery and genocide, the participation of European governments in the alleviation of Caribbean public health problems which are regarded as a legacy of slavery, a programme to address illiteracy which also is regarded as a legacy of slavery, an African Knowledge Program (school exchanges, culture tours etc.), psychological rehabilitation through "truth and educational exposure" to begin a "process of healing and repair", technology transfer and a program for international debt cancellation.[24]

As legal advisor, the CARICOM Commission has consulted the British law firm Leigh Day, which has a department for international and group claims and successfully represented several reparations claims for historical injustices before. As reported by Reuters, Martyn Day, partner at Leigh Day, announced early in 2014 that a formal complaint would be presented to European governments until the end of April 2014 and that "[t]he complaint will undoubtedly go to the governments of Britain, France, Netherlands, and very likely Sweden, Norway, and Denmark," but also that "[t]he final decision on this has not yet been made". Furthermore, Day added that if the complaint is rejected, "CARICOM nations will take their individual cases to the International Court of Justice".[25] As there are no further official statements, it remains unclear whether the formal complaint was

[22] Press statement by Fred Mitchell, Bahamas Minister of Foreign Affairs and Immigration made on March 24th, 2014, available at: http://www.thebahamasweekly.com.

[23] Available at: https://www.leighday.co.uk.

[24] See: "Ten point plan for slavery reparations", available at: https: https://www.leighday.co.uk.

[25] See: "Caribbean nations agree to seek slavery reparations from Europe", available at: http:www.reuters.com.

presented to European governments in 2014. The latest news is, that early in 2016 Barbados Prime Minister Stuart reportedly sent a formal letter of complaint, on behalf of CARICOM Member States, to the British foreign office, calling the United Kingdom (UK) to acknowledge the region's demands. In this letter Caribbean countries seem to have allowed the UK a two-year period before they will formally approach the International Court of Justice (ICJ).

With regard to other European States there are no further official statements or reports that would indicate any legal action. It also appears unclear whether the limitation of defendants by Day represents the will of CARICOM States, as their official documents include Spain and Portugal as possible addresses of their claims.[26]

Yet, what is relatively clear is that the threat to approach the ICJ is unfounded substantially, as many European States limited their acceptations of compulsory jurisdiction (Art. 36 para. 2 ICJ-Statute) to certain time periods[27], or do not accept compulsory jurisdiction at all (France). Only the Netherlands, Denmark, Sweden and Norway remain possible defendants based on compulsory jurisdiction.[28] Still, Caribbean States so far seem to focus on claims against the UK, which are not likely to be pursuable in front of the ICJ.

A further possibility would be to rely on treaty clauses that refer disputes over the interpretation and application of the relevant treaty to the ICJ, e.g. Art. IX Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), Art. 10 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Supplementary Slavery Convention), or Art. 22 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), but the Genocide Convention only entered into force in 1951, the Supplementary Slavery Convention in 1957 and ICERD in 1969 and as we will later see none of them is applicable retroactively, which also affects the named jurisdiction clauses.[29]

3. Legal Evaluation of the CARICOM Claim

CARICOM's strategy to address socio-economic problems by recourse to state responsibility for historical injustices ultimately depends on the soundness of their legal arguments. Requirements of such a claim are the violation of a primary rule, attribution, lack of circumstances precluding wrongfulness and invocation of responsibility.[30] Moreover, remedies sought by CARICOM must be addressable by legal consequences available.

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[26] See: CARICOM Reparations Commission Press Statement, Press release 285/2013, December 10, 2013, available at: http://www.caricom.org.

[27] United Kingdom of Great Britain and Northern Ireland, Declaration Recognizing the Jurisdiction of the Court as Compulsory, 31 December 2014, para. 1 (the relevant date is 1.1.1984, and the UK also excludes claims by Commonwealth States); Kingdom of Spain, Declaration Recognizing the Jurisdiction of the Court as Compulsory, 29 October 1990, para. 1 (d) (the relevant date is 15.10.1990).

[28] The Netherlands accept compulsory jurisdiction in all cases "arising" after 5.8.1921, which is broader than e.g. the UK limitation as disputes may arise today although they rely on facts dating back earlier, see: Netherlands, Declaration Recognizing the Jurisdiction of the Court as Compulsory, 1.8.1956; Denmark, Sweden and Norway make no temporal limitation in their declarations recognizing the ICJ's jurisdiction as compulsory.

[29] The ICJ recently denied jurisdiction under Art. XI of the Genocide Convention based on the non-retroactive applicability of the Genocide Convention, see: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Merits, Judgment of 3 February 2015, para. 90-117.

[30] In the analysis I will largely rely on the ILC's Draft Articles on State Responsibility (ARSIWA) which reflect customary international law in large parts.

a) Violation of (European)[31] International Law

aa) "Native Genocide" in the Caribbean?

The most comprehensive statement by the CRC on genocide is the following:

> [G]overnments of Europe committed genocide upon the native Caribbean population. Military commanders were given official instructions by their governments to eliminate these communities and to remove those who survive pogroms from the region. Genocide and land appropriation went hand in hand. A community of over 3,000,000 in 1700 has been reduced to less than 30,000 in 2000. Survivors remain traumatized, landless, and are the most marginalized social group within the region.[32]

Although this description is rather short, it contains the two important elements of genocide: the intent to destroy a national, ethnic, racial or religious group and the killing of members of this group.[33] Surprisingly, the early encounter between Spaniards and native people of the Caribbean in the late 15th and early 16th century is not included, although it reportedly led to the (near) extinction of the native Taino people.[34] This may be due to the fact that neither Haiti nor the Dominican Republic, the States that cover Hispaniola, the island which mainly was home to the Taino people, take part in the CARICOM reparations claim. Furthermore, although it appears that the "Taino tragedy" was "the result of an organized economic venture, planned and executed consciously by its continental planners, who deliberately took the human costs involved into consideration",[35] the intent to annihilate the Taino people remains debatable, as those people were needed as a work force[36] and often died of unintentionally introduced diseases (at least there are no reports of 'biological warfare').

Further reported incidents that could qualify as genocide mainly involve British conduct towards native Caribbean populations (mainly Kalinago communities).[37] *Beckles* recounts several massacres against those communities and several statements which indicate that English and later British[38]

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[31] Some may question the methodology of applying historical European international law on the conduct between European and non-European entities, the latter of which were not included in the law making process. Yet, as international law is based on consent of those to be bound by it, we have to apply the law European States consented too. Furthermore, it is highly questionable whether other "international laws" prohibited the conduct in question here, see *J. Allain*, Slavery in International Law: Of Human Exploitation and Trafficking, 2013, 17 et seqq.; on the African continent enslavement of prisoners of war but also of others appears to have been a widely shared practice and I found no indication that African political entities outlawed the practice before the 20th century.

[32] See: "Ten point plan for slavery reparations", available at: https: https://www.leighday.co.uk.

[33] See on the definition of genocide: Art. 2 Genocide Convention; Art. 2 para. 2 ICTY Statute; Art. 2 para. 2 ICTR Statute, Art. 6 ICC Statute.

[34] While the total number of Taino living on Hispaniola in 1493 seems disputed, ranging from hundreds of thousands to millions, it is quite clear that most Taino died early of diseases imported by, were murdered by or died because of the harsh working conditions imposed upon them by the Spanish, see: *C. Gibson*, Empire's Crossroads: A History of the Caribbean from Columbus to the Present Day, 2014, 35; other estimates range from 1-3.7 million, see: *N. Foote*, The Caribbean History Reader, 2013, 18.

[35] *J. Sued-Badillo*, in: S. Palmié/F. A. Scarano, The Caribbean: A History of the Region and Its Peoples, 2011, 106.

[36] See on the *encomiendo* system which provided some (superficial) protection for the native population: *I. Czeguhn*, in: U. Müssig, Ungerechtes Recht, 2013, 114.

[37] This does not mean that there has not been any conduct that may be termed genocide by other European States. The simple fact is that *Beckles* and the CRC somehow seem to focus on the UK and the sheer numbers in the decline of Native Caribbean upon contact with the Spanish is so high that I could not omit it.

[38] Great Britain was only formed in 1707 with the political union of the kingdoms of England and Scotland.

authorities wanted to extinguish the Kalinagos and at several occasions killed non-combatant children, women and elderly people. The number of reported casualties in the individual cases remains rather limited, generally not exceeding 100.[39] Reproduced statements consist mainly of letters by English, later British, military officers and colonial government officials who requested permission by the English/British government to extinct the "Carib Indians" (their name for the Kalinagos). One of those letters by Sir William Stapleton, governor of the Leeward Islands, dates back to 1681 and one by governor Leyborne of Dominica to 1772. At least the request of Stapleton reportedly was confirmed by imperial officials in London.[40] *Beckles* also reports of several wars and massacres between Karifuna[41] communities and British settlers and military between 1772 and 1795.[42] According to *Beckles*, in 1795 the Karifunas in St. Vincent and St. Lucia were finally defeated. While some Karifunas fled to Dominica, a group of five thousand people is reported to have been captured by the British and shipped to the tiny island of Balliceaux in The Grenadines, where one third of them starved to death in the following four months until they finally were transported to Rattan, an inhospitable small island near Honduras.[43]

The reproduced statements and events show that English/British massacres on Kalinago and Karifuna communities might qualify as genocides. If we assume that the intention to extinct the Kalinago and Karifuna communities based on racial, ethical and religious group identity reflects general British intention than most of these massacres, if carried out with the authorisation of the British government, could be seen as fulfilling the definition of genocide described above. But generally it would be necessary to provide more evidence to prove the necessary intention and individual orders by the British government and/or officials and the linkage between such orders and the individual massacres. This is of particular importance as the ICJ strictly applies the general principle of *actori incumbit probatio* and high standards of proof when it comes to the *mens rea* of genocide.[44]

bb) The Prohibition of Genocide and the Intertemporal Principle

A particular obstacle to reparation claims for historical injustices is the intertemporal principle[45]. Defining the intertemporal principle international lawyers usually refer to the statement of Judge Huber in *The Island of Palmas* case, that "juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled".[46] The principle is codified with regard to treaty law in Art. 28 of the Vienna

[39] See: *H. Beckles* (note 12), 24-36; in some cases numbers of casualties are of course debatable, ranging from dozens to several thousands, see for example: *B. Dyde*, Out of the Crowded Vagueness: A History of the Islands of St Kitts, Nevis & Anguilla, 2005, 26 et seq.

[40] *H. Beckles* (note 12), 25.

[41] The term "Karifuna" refers to "Kalinago" communities that mixed with escaped formerly enslaved Africans.

[42] Ibid. 34 et seq.

[43] Ibid. 36.

[44] See: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment of 3 February 2015, para. 167-199; for an analysis see: *A. Gattini/G. Cortesi*, Some New Evidence on the ICJ's Treatment of Evidence: The Second Genocide Case, Leiden Journal of International Law 28 (2015).

[45] The Intertemporal Principle is by now a firmly established norm of international customary and treaty law. The principle is codified in Art. 28 Vienna Convention on the Law of Treaties (VCLT), and has been addressed in Art. 13 ARSIWA; see generally: *W.-D. Krause-Ablaß*, Intertemporales Völkerrecht: Der zeitliche Anwendungsbereich von Völkerrechtsnormen, 1970 and *T. O. Elias*, The Doctrine of Intertemporal Law, American Journal of International Law 74 (1980).

[46] See: *The Island of Palmas*, 4 April 1928, Permanent Court of Arbitration, UNRIAA, Vol. II, 845.

Convention on the Law of Treaties (VCLT), is addressed in Art. 13 ARSIWA and has been restated by the ICJ[47]. As the intertemporal principle prohibits the retroactive application of international law the question of legality has to be answered by referring to the law in force of the time of the conduct. Therefore, even if the required evidence for genocide could be produced, it remains questionable whether genocide has already been prohibited by international law at the time of its conduct in the Caribbean.

Although the factual appearance of genocide can be traced back at least to ancient times, its prohibition by international law appears to be a phenomenon of the early 20th century. The term "genocide" itself was coined by *Raphaël Lemkin* in his work *Axis Rule in Occupied Europe*[48] only in 1944. The Convention on the Prevention and Punishment of Genocide was then adopted in 1948 and entered into force in 1951. Today the prohibition of genocide is also part of international customary law.[49]

Notwithstanding its' quite recent naming and codification, some writers have argued that genocide was prohibited by customary international law earlier under different names.[50] Such a name could be "wars of extinction" or generally "crimes against humanity". Some of those writers even claim that the concept of genocide "dates back thousands of years" [51]. Consulting contemporary writers of the time in which alleged "genocides" happened in the Caribbean, we already read of certain limitations to warfare and especially to the treatment of prisoners of war.[52] *Vitoria* already seems to be of the opinion that even a just war must not be waged towards the extinction of a people.[53] *Grotius* writing in 1625, although not directly addressing the concept of genocide, limited the legality of invoking a war[54] and also warfare itself[55] to certain limitations. *Vattel* writing in 1758 excludes women, children, the aged and sick from being legitimate targets of warfare as long as they offer no resistance.[56] Yet, early international law scholars at the same time were often creative in excluding non-European entities and people from the realms of international law or at least seriously limited their rights, although often with obscure justifications.[57] Furthermore, it appears

[47] See e.g.: *Jurisdictional Immunities of the State*, ICJ. Reports 2012, 29.

[48] *R. Lemkin*, Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress, 2nd ed., 2008.

[49] See: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* Further Requests for the Indication of Provisional Measures, ICJ Reports 1993, 325; *A. Cassese*, International Criminal Law, 2008, 98.

[50] *J. Sarkin*, Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia, 1904-1908, 2009, 11, 107-109; in a similar direction: *M. J. Kelly,* Can Sovereigns Be Brought to Justice? The Crime of Genocide's Evolution and the Meaning of the Milosevic Trial, St. John's Law Review 76 (2002), 264 et seq.

[51] *J. Sarkin* (note 50), 11, 107-109.

[52] *F de Vitoria*, De indis et De jure belli relectiones (1539), para. 45-48, in: *E. Nys (ed)*, Classics of International Law, 1995, 182 et seq.

[53] Ibid. 187.

[54] *H. Grotius*, De jure belli ac pacis libri tres, bk II, ch 1, in: *F. W. Kelsey (transl)*, Classics of International Law, 1925, 169-185.

[55] Ibid., bk III, especially ch 1 and chs 11-14.

[56] *E de Vattel*, The Law of Nations or the Principles of Natural Law, bk III, ch 8, § 144, in: *C. G. Fenwick (transl.)*, Classics of International Law, 1995, 362.

[57] *Vitoria* for example argued with regard to the question if all the "guilty" could be killed in a war, that this may be necessary in the case of "Indians" because it is useless to hope for a just peace with them; see for quotes and a discussion of *Vitoria's* stance on the sovereignty and rights of "Indians": *A. Anghie* (note 9), 27.

questionable from a modern more positivist view whether the writings of the early natural/international lawyers reflected substantial international law at all.

Due to these uncertainties, one has to doubt whether genocide, in particular towards "natives", even under different names, was outlawed by international law before the 20th century. Instead most legal scholars and States of today seem to be of the opinion that genocide was only outlawed by customary law in the early 20th century, way after most "native genocides" were conducted by Europeans in the Caribbean.[58] This is demonstrable by the controversies surrounding the Armenian "Genocide" (1915-1916)[59] and the "genocide" on the Herero and Nama (1904-1908)[60].

cc) Slavery in the Caribbean and the Intertemporal Principle

Slavery in and the slave trade to the Caribbean took place between the 16th and the 19th century and was carried out by a number of European powers, mainly including the Spanish, the Portuguese, the English, the French and the Dutch. Estimates of Africans sold into the Transatlantic Slave Trade range from 9.6 to 15 million.[61] The CRC claims that "[o]ver 10 million Africans were imported into the Caribbean during the 400 years of slavery" and that only 2 million remained in the late 19th century, when slavery was finally abolished.[62]

Again the intertemporal principle might impede reparatory claims for slavery. Today the prohibition of slavery is regarded as an *ius cogens* norm which is applicable *erga omnes*.[63] However, until the late 19th century the situation was quite different. Albeit it appears as uncontested that slavery and slave trade in the Caribbean would fulfil the criteria of modern slavery prohibitions, it is rather clear that at the time of their conduct those institutions were legal.

Despite the fact that slavery of Europeans/Christians among themselves appears to have been regarded as illegal under the law of nations much earlier[64], the idea to prohibit slavery and the slave trade of Africans only came on the agenda of European States in the late 18th and early 19th

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[58] See: *R. W. Smith*, in: L. Chorbajian/G. Shirinian, Studies in Comparative Genocide, 1999, 9 et seq.; *W. Schabas*, Genocide in International Law: The Crimes of Crimes, 2000, 1 et seqq., 11; *J. A. Kämmerer/J. Föh,* Das Völkerrecht als Instrument der Wiedergutmachung? Eine kritische Betrachtung am Beispiel des Herero-Aufstandes, AVR 42 (2004), 316.

[59] Albeit the factual qualification as genocide in this case is rather clear, the legal qualification is disputed, see: *M. Roscini,* Establishing State Responsibility for Historical Injustices: The Armenian Case, International Criminal Law Review 14 (2014), 316, who concludes, that the "genocide" on the Armenians was not prohibited by international customary law but rather deems it in breach of several specific treaties the Ottoman Empire had ratified.

[60] Several German scholars concluded that the German massacres on the Herero and Nama were not prohibited by international law at the respective time, see: *J. A. Kämmerer and J. Föh* (note 58), 315-317; *S. Eicker*, Der Deutsch-Herero-Krieg und das Völkerrecht: Die völkerrechtliche Haftung der Bundesrepublik Deutschland für das Vorgehen des Deutschen Reiches gegen die Herero in Deutsch-Südwestafrika im Jahre 1904 und ihre Durchsetzung vor einem nationalen Gericht, 2009, 501, Interestingly the German government in 2015 recognised the conduct towards the Herero officially as genocide, albeit it remains unclear whether this entails a legal qualification, or is rather the acknowledgement that the conduct would factually fulfil today's definition of genocide.

[61] *H. Beckles* (note 12), 50.

[62] See "Ten point plan for slavery reparations", available at: https://www.leighday.co.uk.

[63] *Barcelona Traction, Light and Power Company, Limited,* ICJ Reports 1970, 32; *I. Brownlie*, Principles of Public International Law, 7th ed., 2008, 511.

[64] See: *F de Vitoria*, De indis et De jure belli relectiones (1539), para. 42, in: *E. Nys (ed)* (note 52), 181; H Grotius, De jure belli ac pacis libri tres (1646), bk III, ch 7, § IX, in: *F. W. Kelsey (transl)* (note 54), 696; *E de Vattel*, The Law of Nations or the Principles of Natural Law, bk III, ch VIII, § 152, in: *C. G. Fenwick (transl.)* (note 56), 286; see also: The Antelope, 23 U.S. (10 Wheat.) 5, 121 (1825).

centuries. In fact, the Western notion of who could be enslaved changed from "universality to limiting enslavement to non-Christians, then non-Europeans, then just to Africans, and finally to the international prohibition of all enslavement"[65].

The general attitude that slavery and the slave trade were in accordance with the law of nations until the late 19th century was also approved by several judgements of British and US courts. In 1817 the British High Court of Admiralty recognized in *Le Louis* that although the slave trade violated English law, it did not violate international law.[66] In *The Antelope,* US Chief Justice John Marshall deemed the slave trade in violation of American law and the law of nature but "consistent with the law of nations"[67].

Only in the early 19th century, European States began to sign treaties and issue declarations regarding the abolition of first the slave trade and later slavery itself. The 1815 Declaration Relative to the Universal Abolition of the Slave-Trade[68], signed on the Congress of Vienna, was the first international instrument which dealt specifically with the slave trade.[69] The declaration recognized that the slave trade was "repugnant to the principles of humanity and universal morality" but did not require States to outlaw slave trade immediately.[70] After some other rather vague multilateral treaties, the Treaty for the Suppression of the African Slave-Trade (1841)[71] deemed the slave trade equal to piracy and enshrined duties to prohibit, prevent, and punish slave traders.[72] The General Acts of Berlin (1885) included the Declaration Concerning the Slave Trade and the Operations Which on Land or Sea Furnish Slaves to Trade which recognised that the slave trade was prohibited by "the principles of the law of nations".[73] The first comprehensive multilateral treaty directed against the African slave trade was the Brussels Act of 1890[74].[75] Further treaties concerning the slave trade were concluded in 1904, 1910, 1921 and 1933.[76] In 1926 the important Slavery Convention was signed.[77] This convention obliged States "to prevent and suppress the slave trade" but only "to bring about, progressively and as soon as possible, the complete abolition of slavery in all its

[65] *S. Drescher/P. Finkelman*, in: B. Fassbender/A. Peters/S. Peter, The Oxford Handbook of the History of International Law, 2012, 893.

[66] *Le Louis* (1817) 12 Dods 210, 165 ER 1464, 1477.

[67] *The Antelope* 23 US 66, 10 Wheat 66 (1825).

[68] Declaration of the Eight Powers relative to the Universal Abolition of Slave Trade, annexed as Act XV to the 1815 General Treaty of the Vienna Congress (signed 8 February 1815) 63 CTS 473.

[69] *J. A. Fernández*, in: B. Fassbender/A. Peters/S. Peter, The Oxford Handbook of the History of International Law, 2012, 131.

[70] The declaration instead stated that "the said Plenipotentiaries at the same time acknowledge that this general Declaration cannot prejudge the period that each particular Power may consider as most advisable for the definitive Abolition of the Slave Trade. Consequently, determining the period when this trade is to cease universally, must be a subject of negotiation between the Powers", see: Final Act of the Congress of Vienna, Act XV, Declaration of the Powers, on the Abolition of the Slave Trade, 8.2.1815.

[71] Treaty for the Suppression of the African Slave-Trade (signed 20.12.1841) 73 CTS 32.

[72] Ibid., 132.

[73] See: General Act of the Conference of Berlin Concerning the Congo, American Journal of International Law Supplement: Official Documents 7-25, (1909), Art. 9.

[74] General Act of the Brussels Conference (signed 2.7.1890) 173 CTS 293.

[75] *S. Drescher and P. Finkelman* (note 65), 910.

[76] *J. A. Fernández* (note 69), 133 et seq.

[77] Convention to Suppress the Slave Trade and Slavery (concluded 25.9.1926, entered into force 9.3.1927) 60 LNTS 253.

forms"[78]. Moreover, Art. 9 of the Slavery Convention allowed contracting parties to declare the Convention non-applicable to their colonial territories.

Although the treaties continued to be vague, scholars claim that slavery and the slave trade were subsequently outlawed by international customary law. Related to the nature of customary law, a precise year of the prohibition is difficult to ascertain. It can only be broadly assumed that both institutions were outlawed somewhere between 1885 and 1926 by customary international law.[79] For the purposes of this paper, the exact time can of course remain open, since the relevant countries had already outlawed slavery and the slave trade nationally before 1885.[80]

Yet, one question that has only been seldom addressed so far is, whether there were any legal preconditions by international law regarding the enslavement. Interestingly, contemporary legal scholars sanctioned slavery but did not regard it as unregulated, instead required certain preconditions.[81] Mostly their accounts were based on the roman *ius gentium* requirement that only prisoners of war could be enslaved, as imposing slavery on them was regarded as an act of mercy in comparison to being killed instantly.[82] *Vattel* even required the war to be just and the enslaved to be guilty of some crime punishable by death.[83] If we would follow those scholars, one strategy for Caribbean States could be to claim that the enslavement of Africans did not fulfil those preconditions, as it appears questionable whether all enslaved Africans and Native Caribbean were actually captured in wars, let alone just wars. In fact, historians suggest that most of the enslaved Africans were captured by other Africans in wars but a considerable proportion also were criminal offenders, the victims of abductions and dependants.[84] It also remains questionable whether such wars, which were often fought for the sole purpose of acquiring slaves, can be considered as "just", even according to the standards of the time. Still, such an argument is complicate to uphold, as it would require a proper understanding of the precise provisions of international law over several centuries and equally precise accounts of the concrete circumstances of the acts of enslavement. Moreover, this way of argumentation would have to deal with centuries of juridical scholarship that

[78] International Convention for the Abolition of Slavery and the Slave Trade (signed 25.9.1926, entered into force 9.3.1927) 60 LNTS 253.

[79] *G. Robertson*, Crimes Against Humanity: The Struggle for Global Justice, 4th ed., 2012, 209; *S. Drescher and P. Finkelman* (note 65), 891, argue that both institutions were outlawed in 1890.

[80] Slave Trade: Denmark (1804), Britain (1807), Holland (1814), France (1818), Spain (1820); Slavery: UK (1838), France (1848), Portugal (1858), the Netherlands (1863), Spain (1870); see: *D. S. Berry*, in: B. Fassbender/A. Peters/S. Peter, The Oxford Handbook of the History of International Law, 2012, 591 et seqq.

[81] See for example: *F. de Vitoria*, De indis et De jure belli relectiones (1539), para. 42, in: *E. Nys (ed)* (note 52), 181; *H. Grotius*, De jure belli ac pacis libri tres (1646), bk III, ch 7 and 14 in: *F. W. Kelsey (transl)* (note 54); *C. Wolf*, Jus gentium methodo scientifica pertractatum (1764), §814 and § 874 in: *J. H. Drake (transl)*, Classics of International Law, 1995, 421 et seq. and 448 et seq.; *Vitoria* and *Grotius* had of course very far understandings of who could be enslaved, with only minor restrictions.

[82] See: *H. Grotius*, De jure belli ac pacis libri tres (1646), bk III, ch 7, V, in: *F. W. Kelsey (transl)* (note 54); In a similar direction although more critical: *E. de Vattel*, The Law of Nations or the Principles of Natural Law, bk III, ch 3, § 152, in: *C. G. Fenwick (transl.)* (note 56); see generally on the history of slavery and the law of nations: *J. Allain* (note 31), 12-55.

[83] *E. de Vattel*, The Law of Nations or the Principles of Natural Law, bk III, ch 3, § 152 and § 183, in: *C. G. Fenwick (transl.)* (note 56); similar restrictions were put forward by: *C, Wolf*, Jus gentium methodo scientifica pertractatum (1764), § 814, in: *J. H. Drake (transl)* (note 81), 421 et seq.

[84] *F. W. Knight*, in: F. W. Knight/J. Sued Badillo/K. O. Laurence/J. Ibarra/B. Brereton/B. W. Higman, General History of the Caribbean, Volume III, 1997, 20 et seq.

was often creative in legitimising slavery 'beyond the line' (outside Europe) or of non-European people[85] and/or did not recognize the sovereignty of non-European political entities at all[86].

dd) Historical Injustices as Continuing Acts?

One strategy to circumvent the intertemporal principle could be to argue that the violation, which was not illegal at its beginnings, continues and consequently can be considered as a violation of international law today. The CRC for example speaks of "persistent harm and suffering experienced today" and stresses direct negative results of slavery on the health condition of descendants of those enslaved.[87]

Within the ARSIWA Art 14 covers the continuation of a wrongful act. Generally speaking, an act of a State occurs when it is performed, "even if its effects continue" (Art. 14 para. 1 ARSIWA). Therefore, continuing effects do not per se lead to the assumption that the illegal act itself continues.[88] The other way round it appears that continuing consequences of a lawful act cannot be regarded as an illegal act itself, even if the initial conduct would be illegal according to new rules in the present. With this distinction in mind, it can hardly be assumed that continuing effects of slavery and genocide are violations of international law. Even if they would be considered as illegal at the time of their conduct, this violation would have ceased with the end of hostilities (genocide)[89] and slavery and the slave trade with their abolition.

ee) Applicability and Exceptions of the Intertemporal Law Principle

(1) Applicability

One question that has to be addressed here shortly is whether the Intertemporal Law Principle can itself be applied retroactively. Although the principle was mentioned as early as 1899 by an international arbitral body[90], it remains questionable when the principle itself was established as a rule of international law. Yet, international courts have so far in several cases applied the principle to facts dating back before 1899, seemingly without regarding this practice as problematic.[91] In defence of this practice one may argue that States simply agreed upon a new principle that excluded the retroactive application of international law which is not in itself a retroactive application but rather a prohibition of such practice in the future or present. In other words, the application of the intertemporal principle does not retroactively affect the legality of acts but rather impacts upon today's legal relations.[92]

(2) Exceptions

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[85] *Vitoria* for example seemed not to apply his restrictions of slavery to pagan "Indians", see: *A. Anghie* (note 9), at 26 et seq.; see generally also: *S. Drescher and P. Finkelman* (note 65), 898.

[86] See generally: *A. Anghie* (note 9).

[87] See: "Ten point plan for slavery reparations", available at: https: https://www.leighday.co.uk.

[88] ILC, Yearbook of the International Law Commission, 2001, 60.

[89] Cf. with regard to the Armenian "genocide", *M. Roscini* (note 59), 300 et seq.

[90] *Délimitation de la Guyane anglaise (*Grande-Bretagne, Vénezuela) (Judgment of 3.10.1899), cited in: *M. Kotzur*, Intertemporal Law, in: R. Wolfrum, The Max Planck Encyclopedia of Public International Law (Oxford University Press Oxford 2008), opil.ouplaw.com/home/EPIL, margin number 5.

[91] See for example: *The Island of Palmas (United States of America* v. *The Netherlands)*, 4 April 1928, Permanent Court of Arbitration, UNRIAA, Vol. II, 845.

[92] See on this distinction: *W.-D. Krause-Ablaß* (note 45), 25-29.

One exception to the inter-temporal principle could be provided for *jus cogens* norms, as those norms have a particular authority in international law and most if not all of them are also crimes against humanity. Nevertheless, the ILC made it clear in its commentary that even peremptory norms are not retroactively applicable per se.[93] The same approach was taken in Art. 71 para. 2 (b) VCLT. Therefore, it appears that the intertemporal principle does not generally exempt *ius cogens* norms.

However, some authors seem to suggest that there are exceptions from the intertemporal principle provided by customary law.[94] To support their argumentation they draw heavily on the Nuremberg and its following criminal trials and claim that those courts applied international law retroactively.[95] Albeit appealing on first sight several flaws or uncertainties regarding such an argument have to be addressed. First of all, the Nuremberg trial and other following trials were criminal trials and dealt with *nulla poena sine lege* which may be distinguished from the general principle of intertemporal law.[96] Even more importantly, decisive legal questions concerning the Nuremberg trials remain open until today: Was the tribunal really an international tribunal or rather an American military tribunal or did the Allies even establish a German court in their role as occupying powers?[97] Was the principle of *nulla poena* violated (or changed) or did the alleged crimes already exist before the court's establishment?[98] And was *nulla poena* even a rule of international law at that time?[99] The judgements themselves often remain unclear with regard to those questions.[100] Hence, the simple claim that Nuremberg and the following trials made the alleged crimes retroactively punishable is far from uncontested and as described above the ILC's ARSIWA, which can be considered as authoritative of customary law in many respects, do not provide for such an exemption.

Still, what remains legally possible is that a peremptory or even a non-peremptory norm may be explicitly made retroactively applicable by State practice, treaty provisions or other source of international law.[101] Naturally within a consent based international law system it remains to the will

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[93] ILC (note 88), 58.

[94] *H. Beckles* (note 12), 170; *A. R. Hippolyte,* Unearthing the Legitimacy of CARICOM's Reparations Bid (2014), available at: http://www.academia.edu, 21 et seqq.

[95] *H. Beckles* (note 12), 170; *A. R. Hippolyte* (note 94), 21 et seqq.

[96] This is true even as a differential treatment of both principles would appear somehow contradictory; see also: *M. Roscini* (note 59), 298 et seq., who states that "[b]oth the *Nuremberg* and *Eichmann* cases, however, are criminal trials and do not deal with state responsibility".

[97] See: *M. v. Velsen*, Der Nationalcharakter der Nürnberger Militärtribunale: Waren die Militärtribunale internationale, amerikanische oder deutsche Gerichte?, 1951; *S. Jung*, Die Rechtsprobleme der Nürnberger Prozesse dargestellt an Verfahren gegen Friedrich Flick, 1992, 109-136, with further references.

[98] It appears that most scholars and practitioners of the time considered only aggression as problematic with regard to *nulla poena*, see: ibid., 109-136.

[99] Many authors after the Nurenberg Trial denied the existence of *nulla poena* as a norm of international law see for example: *S. Glueck*, The Nuremberg Trial and Aggressive War, 1st ed., 1946, 438 et seqq.; *H. L. Stimson,* Foreign Affairs, January 1947; see generally and with further references: *S. Jung* (note 97), 147 et seqq.; The Supreme Court of Israel also denied the named question in 1962, see: *Attorney General v. Adolf Eichmann,* 36 *International Law Reports* (1968), 281.

[100] With regard to aggression the Nuremberg tribunal simply stated: "To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.", IMT, judgment of 1.10.1946, in *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22, 445.

[101] Cf. ILC (note 88), 58.

of States to apply certain laws retroactively with regard to matters between the consenting States. Art. 28 VCLT leaves this possibility explicitly open and the ILC's Commentary on Art. 13 ARSIWA regards such an explicit retroactive applicability as some form of *lex specialis* governed and allowed by Art. 55 ARSIWA.[102] As non-retroactive applicability is *lex generalis* and retroactive applicability the exception, the latter must be made explicit in any norm and has to be considered on a case by case basis and the help of generally accepted methods of interpretation.[103]

Arguments for retroactive applicability of the Genocide Convention could be based on the preamble, which states, "at all periods of history genocide has inflicted great losses on humanity" and some wordings in the UN-General Assembly (GA) Resolution indicating that genocides have happened before.[104] Anyhow, it has to be noted that the cited statements in the preamble and the GA Resolution do not necessarily imply that the acts before the existence of the convention were considered illegal. Rather, they may simply highlight the historic occurrence of such acts.[105] Accordingly, with regard to the aforementioned need of an explicit exception from the intertemporal principle the Genocide Convention cannot be considered as retroactively applicable.[106]

Basically what has been said with regard to the Genocide Convention can be reiterated with regard to the 1926 Slavery Convention, the 1956 Supplemental Slavery Convention and other relevant conventions like the ICERD. Although some writers suggest so[107], neither of those conventions can be considered as retroactively applicable. The conventions contain standard clauses on their entry into force[108] and nothing in the conventions indicates that its content shall be applied retroactively.

ff) Teleological Interpretation and *Radbruch's Formula*

We could now stop here by letting historical (European) international law be "what it is" and not what it "ought to be"[109], would there not be certain unease about the justice of this outcome. As described above[110], some international lawyers already tried to fix historical international law by creatively interpreting what was allowed and what prohibited but still by relying on positive law doctrines. I consider these approaches problematic, not only because they are legally flawed, but because they obscure the injustice of historical international law. Claiming slavery and genocide to be prohibited by international law when it was clearly not obscures the line of "what the law is" and "what it ought to be". Yet, such a result based on a formal or positivistic application of historical law might be denounced as legalistic and simply as unjust.

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[102] See: Ibid. 58; see also: *M. Roscini* (note 59), 296.

[103] In the *Ambatielos* case the ICJ required a "special clause or any special object necessitating retroactive interpretation", see: *Ambatielos case,* Preliminary objection, ICJ Reports 1952, 40; see in a similar direction: 'The Intertemporal Problem in International Law, Resolution adopted by the Institut de Droit International at its Wiesbaden Session' (1975) 56 Ann. De l'Institut de Droit Int'l 537, para. 1.

[104] *M. Roscini* (note 59), 298 et seq.

[105] Cf. Ibid.

[106] Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Merits, Judgment of 3 February 2015, para. 95-100; *J. Sarkin* (note 50), 112 et seq.; *M. Roscini* (note 59), 298 et seq.

[107] *P. M. Muhammad* (note 7), 938 et seqq.

[108] See: Art. 12 Slavery Convention, Art. 13 Supplemental Slavery Convention and Art. 19 ICERD.

[109] See on that distinction: *H. Hart,* Positivism and the Separation of Law and Morals, Harvard Law Review 71 (1958).

[110] See: III. 1. b).

But would reliance on natural law doctrines lead to a different outcome? A somewhat radical solution to the perceived injustice would be to rely on the assumption that law which is horrendously arbitrary and unjust cannot be regarded as law at all. Such a notion was introduced by *Gustav Radbruch*, German professor of criminal law and legal philosophy, with regard to atrocities committed in and by the Third Reich, in his famous essay "*Statutory Lawlessness and Supra-Statutory Law*" in 1946.[111] The formula has become widely used (although often not explicitly) by German courts[112] and has certainly been one of the most influential ideas within 20th century legal philosophy.[113] *Radbruch* basically tried to resolve the conflict between justice and legal certainty[114] by the following formula:

> The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. Measured by this standard, whole portions of National Socialist law never attained the dignity of valid law.[115]

If we would apply this formula to international law, we would come to the corollary that international norms which may be considered as unbearably unjust are not considered as international law at all. Slavery and genocide are certainly extremely degrading treatments which fundamentally deny (human) rights of those enslaved or killed. Moreover, as we have seen above, the sanctioning of slavery was not universal. It in fact, for several centuries, mainly affected Africans. This legalisation of slavery did not strive for justice and equality but in fact fundamentally negated both. Therefore, applying *Radbruch's formula* to international law would result in the sanctioning of slavery and genocide by international law being void.[116]

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[111] *G. Radbruch,* Statutory Lawlessness and Supra-Statutory Law (1946): Translated by Bonnie Litschewski Paulson and Stanley L. Paulson, Oxford Journal of Legal Studies 26 (2006); for the German original, see: *G. Radbruch,* Gesetzliches Unrecht und übergesetzliches Recht, Süddeutsche Juristen-Zeitung 1 (1946).

[112] This includes criminal law cases but also cases of civil law, examples are: *BGHSt* 2, 173; 2, 234; *BGHZ* 3, 94; *BVerfGE* 23, 98, 106 et seqq.; *BVerfGE* 54, 53, 67 et seqq.; *BVerfGE* 95, 96.

[113] The famous jurisprudential debate between Hart and Fuller for example also was inspired by Radbruch and the German courts' approach to nullify Third Reich laws, see: *H. Hart* (note 109); *L. L. Fuller,* Positivism and Fidelity to Law: A Reply to Professor Hart, Harvard Law Review 71 (1958).

[114] It has to be noted that *Radbruch* regarded legal certainty as one aspect of justice and therefore regarded the conflict to be an internal conflict within justice itself.

[115] *G. Radbruch* (note 111), 7; see on the reception of the formula in Germany: *H. Dreier*, in: F. Haft/A. Kaufmann, Strafgerechtigkeit: Festschrift für Arthur Kaufmann zum 70. Geburtstag, 1993, 57 et seq.; *R. Alexy*, Mauerschützen: Zum Verhältnis von Recht, Moral und Strafbarkeit, 1993, 3 et seq.; *H. Dreier,* Gustav Radbruch und die Mauerschützen, Juristen Zeitung 52 (1997), 423, with further references to German court decisions.

[116] The non-allowance of course must be discerned from the prohibition by international law, see: *The Case of the S.S. "Lotus",* Judgment, (1927) PCIJ Series A no 10, 18; but we might rely on further "natural law thinking" for example on "elementary considerations of humanity" as applied by the ICJ in the *Corfu Channel case*, ICJ Reports 1949, 22; a similar result could be achieved by enlarging the European internal prohibition to external realms.

Of course such a powerful tool as *Radbruch's formula*, or generally natural law, is not without dangers. As exemplified by early natural/international lawyers, misuse is a great danger. Moreover, the ceaseless changing nature of what is considered to be just might entail serious consequences for legal stability.[117] On the other hand a minimum of morality within positive international law generally improves fidelity to law and thereby the rule of law.[118] Today of course *ius cogens* and human rights law already provide such minimum standards.

In any event, positivist lawyers and European States might reject the internationalisation of *Radbruch's formula* and denounce it as 'natural law thinking'[119]. To some extent rightly so, as such a (radical) approach could be accused of circumventing the requirements of *ius cogens* law making[120] and has hardly any foundation in positive international law. Studies of Transitional Justice show that the German example of nullifying past unjust law, though not singular in history, is an exception among national approaches to deal with historical injustices[121] and had a particular historical background. Therefore, *Radbruch's formula* cannot be considered as a general principle of law recognized by "civilized nations" (Art. 38 para. 1 c) ICJ Statute). In addition, simply nullifying past international law and introducing new prohibitions involves again the danger of obscuring this law's injustice[122]. If flagrantly unjust law is simply void, then no change is necessary and any moral criticism is somehow obsolete.

A less radical proposition would be a teleological reduction of the intertemporal principle.[123] Such an approach must not rely on natural law but simply on the interpretation of existing (positive) international law. Although the intertemporal principle is accepted by customary law it has no precise shape and is open for interpretation.[124] A teleological interpretation of the intertemporal principle could lead us to some exceptions of this principle, just as national jurisdictions know such exceptions[125]. The telos of the intertemporal principle is legal stability and certainty. States should be able to rely on the law governing in their respective time in order to orient their actions and omissions along what is legal and what prohibited.[126] However, it is arguable that States before

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[117] Cf. *W. M. Reisman,* The Quest for World Order and Human Dignity in the Twenty-first Century, Recueil des cours, Collected Courses, Tome/Volume 351 (2012), 84 et seqq.

[118] Cf. *L. L. Fuller* (note 113), 657.

[119] It has to be noted here that early naturalist international lawyers as seen above also sanctioned slavery.

[120] I have to thank Prof. Dr. Heike Krieger and Julian Kulaga for highlighting this problem.

[121] Similar approaches like that in Germany were taken in some post-soviet countries, but many States took different approaches toward historical injustices in times of transition, see generally: *R. G. Teitel*, Transitional Justice, 2001.

[122] Cf. *H. Hart* (note 109), 620.

[123] It is obvious that customary law also needs clarification by way of interpretation. The ICJ dealt with the interpretation of customary law in *North Sea Continental Shelf*, ICJ Reports 1969, 31; see generally: *M. Herdegen*, Interpretation in International Law, in: R. Wolfrum, The Max Planck Encyclopedia of Public International Law (Oxford University Press Oxford 2013), opil.ouplaw.com/home/EPIL, margin number 61.

[124] Cf. *Land and Maritime Boundary between Cameroon and Nigeria*, Judgment, ICJ Reports 2002, 303, (Separate Opinion of Judge Al-Khasawneh), 502 et seq.

[125] Several jurisdictions know exceptions to the general prohibition of applying law retroactively. Generally there is a presumption against retroactivity, but this presumption might be defeated in exceptional cases were no trust in legal security was given or in cases were other reasons (for example public good) prevail over the interest in legal security; see with regard to common law jurisdictions: *B. Juratowitch*, Retroactivity and the Common Law, 2008 60 et seqq., 137; *C. J. G. Sampford*, Retrospectivity and the Rule of Law, 2006, 229 et seqq.; see for a comparison between German and US law: *G. Kisker*, Die Rückwirkung von Gesetzen: Eine Untersuchung zum anglo-amerikanischen und deutschen Recht, 1963.

[126] Cf. *M. Kotzur* (note 86), margin number 14.

around 1899 could not rely as much in legal stability as States do nowadays with a firmly established intertemporal principle.[127] Moreover, reliance on legal stability may not be legitimate and factually weaker if a rule is openly contested, in transition or fundamentally unjust.[128] Some acts or omissions are so horrendously unjust that no reasonable State, and notably not those States that saw themselves as particularly "civilized", may rely on their legality. Slavery, the slave trade and genocidal actions towards natives were furthermore criticised by contemporaries, courts and at times even by States as morally unjust.[129] As the trust in legal stability of horrendously unjust laws, which were furthermore openly contested and beginning in the 19th century in transition, does not deserve legal protection, retroactive application of new rules does not infringe legal certainty in the case at hand. Such an approach would also avoid obscuring the justice of international law, but clearly applies today's law retrospectively.

What has to be noted is that such an approach circumvents the above found principle that international law must be made retroactively applicable explicitly. In any event explicit consent by the "perpetrator" States would be the best solution, and given the lack of compulsory jurisdiction of the ICJ (at least with regard to the UK) is factually the only solution.

But might such a rule even if based on consent not lead to legal chaos instead of legal certainty? I would deny that, as the intertemporal principle remains the general rule with only minor exceptions (for example for *ius cogens* norms). Albeit some might fear the opening of the Pandora's Box and oppose creating precedents, which might lead to numerous claims from all over the (post-colonial) world, we will later see that the secondary rules and especially the question of invocation of responsibility further delimit such claims.[130]

b) The Secondary Rules

Even if States would agree or a court would find, that prohibitions of genocide, slavery and the slave trade should be applied retroactively this does not automatically lead to the legal consequence of reparations. Rather, we further have to apply the secondary rules of State responsibility, including attribution, circumstances precluding wrongfulness, invocation of responsibility and legal consequences.

aa) Secondary Rules and the Intertemporal Principle

Before elaborating upon secondary rules, two preliminary questions have to be addressed. Is the intertemporal principle applicable also to secondary rules? And if yes were the secondary rules of State responsibility already sufficiently established between the end of the 15th and the end of the 18th century?

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[127] See above: C. I. 5. a)

[128] Cf. *D. Shelton*, in: F. Lenzerini, Reparations for Indigenous Peoples: International and Comparative Perspectives, 2008, 69.

[129] See above C. 3 for examples of court decisions and international contracts; Among the contemporaries *De las Casas* is well-known for his critical stance on the Spanish conduct towards Native Caribbean. In his writings he described the killing of "twelve million" native people (men, women and children) between 1502-1542 as "tyrannically and unjustly", see: *B. d. l. Casas/F. W. Knight (ed)*, An Account, Much Abbreviated, of the Destruction of The Indies, With Related Texts, 2003, 7.

[130] Several studies on historical injustices fear that without the intertemporal principle legal claims might go back too far, leading to ceaseless claims, see for example: *J. A. Kämmerer and J. Föh* (note 58), 327.

Although often overlooked, beside the primary rules breached also the secondary rules had to be accepted at the time of the conduct. The wording of Art. 13 ARSIWA seems to address only the primary rules affected.[131] Yet, if we recall the statement by Judge Huber that "juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled"[132] the answer becomes clearer. It appears only logical that the *telos* (legal certainty) of the intertemporal principle also requires attribution, circumstances precluding wrongfulness and the legal consequences of an illegal act to be appreciated in the light of the law contemporary with the facts. Otherwise States would face unforeseeable consequences or would be liable for acts not attributable or justified at the time of their conduct.[133] Thus, any claim for historical injustices has to rely on the secondary rules of State responsibility in force at the time of the violation of the primary rule. To provide a history of the secondary rules of state responsibility is of course a difficult and lengthy task, which I will not bore the reader with here.[134] I shall only address the most problematic obstacles shortly.

The first problem is that early state practise is rare so we would have to rely on the writings by the early international lawyers.[135] Those lawyers had already identified basic concepts of State responsibility and introduced compensation as a form of reparation[136] but it might be questionable whether their doctrines were already part of customary international law of their time.

What also has to be kept in mind is that early concepts of state responsibility in the 17th century were in fact systems of individual responsibility of the sovereign (e.g. king or queen) him- or herself.[137] With regard to early historical injustices it is therefore doubtful whether individual responsibility of kings and princes can be equated with State responsibility. As international lawyers used the notions of State and sovereign often synonymous and in those times States were equated with the sovereign[138] such an assumption is debatable but contentious.

Furthermore, those early concepts of state responsibility often required fault by the sovereign and generally operated with rather narrow conceptions of attribution, which also excluded *ultra vires* acts of State officials.[139] This makes it even more difficult to attribute several massacres, which might be considered as genocides, to the respective State, as sufficient evidence of formal acknowledgement or order by the respective government might be difficult to produce. However, with regard to slavery and the slave trade this exclusion does not appear (too) problematic as both

[131] Art. 13 ARSIWA states: "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."

[132] See: *The Island of Palmas (United States of America* v. *The Netherlands)* 4 April 1928, Permanent Court of Arbitration, UNRIAA, Vol. II, p. 845.

[133] With the same result albeit without much discussion: *M. Roscini* (note 59), 308 et seqq.

[134] See on the History of State Responsibility: *I. Brownlie*, State Responsibility, 1983, 1-10; *J. A. Hessbruegge,* The Historical Development of the Doctrines of Attribution and Due Diligence in International Law, New York Journal of International Law and Politics 36 (2004); *C. F. Amerasinghe*, Diplomatic Protection, 2008, 8-21; *B. Sabahi*, Compensation and Restitution in Investor-State Arbitration, 2011, 7-42.

[135] A notable exception are payments of war reparations of France to Germany after the Franco-Prussian War of 1872. Yet, the example occured after alleged "genocides" and slavery were abandoned in the Caribbean.

[136] See: *H. Grotius*, De jure belli ac pacis libri tres (1646*),* bk 2, ch XVII, § I, XIII, XX, XXII, in: *F. W. Kelsey (transl)* (note 54), 430-437.

[137] *J. A. Hessbruegge* (note 134), 281.

[138] Ibid. 286.

[139] See for example: *H. Grotius*, De jure belli ac pacis libri tres (1646), bk II, ch XVII, § XX, in: *F. W. Kelsey (transl)* (note 54), 436 et seq.; similar views like that of Grotius were later held by *Zouche* and *Pufendorf*, although the later already spoke of States not kings, see: *J. A. Hessbruegge* (note 134), 284 et seq.

acts were constantly confirmed by the respective governments through legislation and other formal acts.[140]. Albeit the slave trade was often carried out by private companies, European States were highly involved and profited from this trade as private entities were granted charters by their respective governments to trade in enslaved people.[141]

With regard to later historical injustices attribution might be easier. The 18th century saw the gradual replacement of the king or queen by the State and the expansion of State responsibility.[142] Especially *Wolf* and his student *Vattel* further developed the concept of State responsibility and even introduced concepts of diplomatic protection.[143] *Wolf* for example stated that an act is attributable to the ruler of a State and "consequently [...] to the nation itself" if the ruler ratifies or approves the act of an individual.[144] *Wolf* is also described as being "the first writer to accept that a state could be responsible for the acts of individuals it employs as its agents without there being the need of fault on behalf of the ruler himself"[145]. Interestingly *Vattel* argued with regard to the Uzbek nation that a nation is generally responsible for the crimes of its citizens, "when, by its manners, and by the maxims of its government, it accustoms and authorises its citizens indiscriminately to plunder and maltreat foreigners, to make inroads into the neighbouring countries & c."[146] The described conduct seems easily applicable to European Nations granting permissions and generally encouraging private companies, citizens and military commanders to plunder foreign countries (e.g. the Caribbean) and to enslave their population.

19th century international lawyers also engaged with limiting the fault requirement and *Hall* enlarged responsibility for acts of administrative officials and naval and military commanders.[147] This could allow us to attribute massacres by those officials, which were not always ordered by government officials and at times were carried out *ultra-vires*, to their respective States.

So which conclusions can we draw from this short historical analysis for the CARICOM claim? First of all, any reparatory claim for historical injustices has to perform the difficult task of identifying the secondary rules in force at the time in question. Secondly, some serious limitations of State responsibility in former times have to be kept in mind, especially the non-attribution of ultra-vires acts and the requirement of fault. However, those limitations mostly affect the attribution of genocide, while slavery and the slave trade are more easily attributable.

bb) Invocation of Responsibility

Even if we would agree that the prohibition of slavery, the slave trade and genocide could be applied retroactively and attribution to European States is possible (in large parts), serious further

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[140] Laws established by the individual colonies regulated slavery in the British Colonies. Other States, for example France with its "Code Noir" (1685) centrally set up laws governing slavery in the colonies, see: *C. Birr*, in: U. Müssig, Ungerechtes Recht, 2013, 117.

[141] See on the involvement of the Spanish crown in the early slave trade: *D. S. Berry* (note 80), 587.

[142] *J. A. Hessbruegge* (note 134), 287 et seq.

[143] See: *C. F. Amerasinghe* (note 134), 8.

[144] *C. Wolf*, Jus gentium methodo scientifica pertractatum (1764), § 314, in: *J. H. Drake (transl)* (note 81), 160.

[145] *J. A. Hessbruegge* (note 134), 289 with reference to *C. Wolf*, Jus gentium methodo scientifica pertractatum (1764), § 314, in: *J. H. Drake (transl)* (note 81), 160.

[146] *E. de Vattel*, The Law of Nations or the Principles of Natural Law, bk. II, ch. VI, § 78, in: *C. G. Fenwick (transl.)* (note 56), 137.

[147] *W. E. Hall*, A Treatise on International Law, 2nd ed., 1884, 193, § 65; for an analysis see: *J. A. Hessbruegge* (note 134), 293.

questions appear with regard to invocation of responsibility.[148] As invocation of responsibility usually requires that the obligation violated is owed to the entity that invokes responsibility of the violator, difficile questions with regard to legal subjectivity of former political entities and/or individuals are involved.

(1) Responsible Party

To pin responsibility on today's States involves "complex questions of State succession, continuity and identity".[149] It has been argued elsewhere that European States of the times of slavery were "mere shadows of today's states".[150] With regard to conduct that happened before the Westphalian peace (1648) it may even be arguable that historical political entities before that time could not be regarded as States in the modern sense at all. Yet, as the modern States emerged gradually between the 12th and 16th century[151] an in-depth and case by case examination would be needed. Alternatively, it may be arguable that modern States succeeded those former entities with regard to obligations regarding State responsibility.[152] In any event one would have to track the identity or succession of those States during the centuries.

Any such undertaking is faced with the problem that the rules on State succession to international responsibility are undertheorized and to a large extent indeterminate.[153] This of course is irrelevant in cases of State identity, as in such cases a State retains all previous rights and obligations.[154] State identity is neither affected by internal changes like revolutions, nor by military occupation where the occupied State does not cease to exist.[155] Moreover losses of territory generally do not change the identity of States. Therefore, modern European States (like the UK and France) did not lose their identity with the loss of their former Empires.[156]

Additionally, state practice supports some basic rules on the succession to obligations to repair. The principle of succession to international responsibility is for example applicable in cases of unification and integration of States.[157] Finally, there is an "overwhelming tendency" that denies succession of newly independent States to reparatory obligations of the former colonial power before the date of independence and instead supports the responsibility of the continuing State for its *own* internationally wrongful acts.[158]

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[148] Unfortunately most legal scholars' accounts of reparations for historical injustices so far seem to have avoided or neglected those questions, see: *M. Du Plessis* (note 7); *J. Sarkin* (note 50); *M. Roscini* (note 59); *A. R. Hippolyte* (note 94).

[149] *M. Du Plessis* (note 7), 632; see generally on state succession to international responsibility: *P. Dumberry*, State Succession to International Responsibility, 2007.

[150] *M. Du Plessis* (note 7), 632.

[151] *A. Cassese*, in: B. Fassbender/A. Peters/S. Peter, The Oxford Handbook of the History of International Law, 2012, 49.

[152] In some cases, European States relied on territorial title going back as far as the Middle Ages, suggesting that they succeeded political entities which acquired that title or that they are identical with those political entities, see: *The Minquiers and Ecrehos Case*, ICJ Reports 1953, 53-56.

[153] See for an excellent exemption of accounts of those rules: *P. Dumberry* (note 149).

[154] *A. Zimmermann,* Continuity of States, in: R. Wolfrum, The Max Planck Encyclopedia of Public International Law (Oxford University Press Oxford 2006), opil.ouplaw.com/home/EPIL, margin number 1.

[155] Ibid. margin number 9-10.

[156] Ibid. margin number 13.

[157] *P. Dumberry* (note 149), 421.

[158] Ibid., 168-184, 205-206, with further references and examples of State practice.

(2) Injured Parties

The obligations of an internationally responsible State can be owed "to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach."[159] The ILC further distinguishes invocation of responsibility of a State by an injured State (Art. 42 ARSIWA) and by States others than an injured State (Art. 48 ARSIWA). Art. 42 ARSIWA states that:

> A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:
>
> (a) that State individually; or
>
> (b) a group of States including that State, or the international community as a whole, and the breach of the obligation:
>
> (i) specially affects that State; or
>
> (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

An injury in that context does not mean any form of damage but rather that the obligation breached was owed to (a) the individual State or the cases of (b).[160] Therefore, to invoke the responsibility of another State having suffered damages from an illegal act is not enough. Rather Caribbean States would have to point out that the prohibition of slavery, the slave trade and genocide was owed to their individual States. Although we rely on a retroactive application of those prohibitions still only those who were protected by the prohibition in question and were hurt by the violation of the obligation are able to invoke responsibility today.

If we consider States as protected by the rules in question we face several obstacles. With regard to the date of the violations of international law it is highly questionable if political entities (Tribes, chiefdoms, kingdoms etc.) in Africa or the Caribbean could be regarded as sovereign States and consequently as subjects of international law at all.[161] Indeed, although often by use of creative, ambiguous and inconsistent arguments, European scholars and States excluded those entities purposefully from the realms of international law.[162] But even if we assume that States in Africa were subjects of international law at the time (which is not that farfetched because certain kingdoms certainly fulfilled the modern criteria of statehood and were even implicitly accepted at times as sovereigns by contemporary courts[163] and scholars[164]), modern African States can hardly be

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[159] Art. 33 para. 1 ARSIWA.

[160] ILC (note 88), 118.

[161] *Vitoria* for example did not seem to regard "Indians" to be fully sovereign, see: *A. Anghie* (note 9), 13-31; neither did international courts and arbitrators in the past accept the Statehood of Native political entities see: *The Island of Palmas,* 4.4.1928, Permanent Court of Arbitration, UNRIAA, Vol. II, 858; the ICJ recently denied indigenous rulers in sub-Saharan Africa the status of States, see: *Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Reports 2002, 404-407; for sound criticism see: Separate opinion of Judge Ranjeva, 469-471; Dissenting opinion of Judge Koroma, 474-487 and the Separate opinion of Judge Al-Khasawneh, 492-505.

[162] See generally on the different strategies to exclude native entities from sovereignty by international lawyers and States: *Anghie* (note 9); and the introductions by *M. Craven*, in: B. Fassbender/A. Peters/S. Peter, The Oxford Handbook of the History of International Law, 2012, and *L. Obregón*, in: B. Fassbender/A. Peters/S. Peter, The Oxford Handbook of the History of International Law, 2012.

[163] In the *Antelope* case, Chief Justice Marshall implicitly accepted non-European States as subjects of international law, as he suggests that African Nations created some sort of territorial customary law sanctioning enslavement of prisoners of war, see*: The Antelope*, 23 U.S. (10 Wheat.) 5, 121 (1825); later in the

regarded as either identical with those entities or as their successors. In any event, Caribbean States are not identical with or succeeding African States. At the same time it is hardly imaginable, that modern Caribbean States are identical with or the successors of (hypothetical) Kalinago or Taino States, as they cover different territories and peoples, have fundamentally changed their internal order and have different historical ties and importantly do not seem to have proclaimed the will to continue or succeed to the legal personality of Indigenous People's States.[165] Thus, even, if we would use *Radbruch's formula* and declare the exclusion of non-European States void, the fact that European States destroyed, replaced and ultimately entirely changed non-European political entities excludes the possibility of invoking responsibility for past violations of international law by modern Caribbean States and others.

Alternatively, we might argue that the prohibition of slavery was owed to the international community as a whole and today's Caribbean States are specially affected in the sense of Art. 31 (b) (i) ARSIWA. This of course would mean to apply the concept of obligations *erga omnes* retrospectively. Moreover, although the expression "including that State" is not added to "the international community as a whole" (see Art. 31 (b) (i) ARSIWA) it appears that exactly this case is meant. Responsibility can only be invoked by States part of that international community at the time of the violation. The same considerations then exclude the possibility to invoke State responsibility as "a State other than an injured State" (Art. 48 ARSIWA) and it has to be noted that the formula that a State may claim "performance of the obligation of reparation [...] in the interest of [...] the beneficiaries of the obligation breached"[166] does not reflect customary law even today.[167]

A third strategy could be to focus on the individual victims and their descendants as injured parties. Under the law of diplomatic protection any injury to a foreign citizen can be regarded as an injury to the State itself, as "[b]y taking up the case of one of its subjects [...] a State is in reality asserting its own rights".[168] However, such a strategy has to face several objections and an uncertain factual basis. First of all, victims of slavery and genocide would have to be considered as foreign nationals, not as "property" or nationals of European States. For example, if we consider enslaved Africans as "subjects of other kings" (as the Spaniards did[169]) who suffered harm in the then territory of European States, their case would become one of diplomatic protection. Yet, generally a State is only "entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation

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18th century of course scholars argued increasingly to exclude non-European states from the realm of international law as they were regarded as "uncivilised", see: *A. Anghie* (note 9), 54.

[164] The early natural lawyers (e.g. *Vattel*) appear to have been more willing to classify native peoples as subjects of international law (or at least as political entities with some rights), while later positivists clearly excluded such entities from statehood based on notions of 'otherness', *S. J. Anaya*, Indigenous Peoples in International Law, 2nd ed., 2004, 22 et seq., 26 et seqq.

[165] See on the criteria for state continuity: *A. Zimmermann* (note 154), margin number 15 et seq.

[166] Art. 48 para. 2 b ARSIWA.

[167] ILC (note 88), 127.

[168] *The Mavrommatis Palestine Concessions,* Judgment of 30 August 1924, P.C.I.J., *Series A*, no. 2, 12.

[169] *D. S. Berry* (note 80), 586.

of the claim."[170] Therefore, it is not enough that those enslaved were foreign, but they must have been nationals of Caribbean States, which was not the case initially.

There is some support for exceptions of the nationality rule in the case of State succession, disappearance of the State of original nationality and newly independent States.[171] However, such exemptions still require that the person has become a national of the new or succeeding State and the exemption is limited to claims against third States (not the former State of nationality).[172] Thus, exercising diplomatic protection for native people or enslaved Africans who became nationals of European States is excluded. Furthermore, all formerly enslaved people have died, what would require us to allow diplomatic protection for deceased nationals.[173] But even in this case the problem remains that most of the deceased people never became nationals of today's Caribbean States. Exceptions might only be Haiti and Cuba which became independent nations in 1804 and 1898. Those nations surely included formerly enslaved nationals for whom diplomatic protection might be exercised (if we would accept that diplomatic protection for deceased nationals is possible and those enslaved were no citizens of the former colonial state), yet most direct victims of slavery and genocide never became nationals of Caribbean States. Thus, the strategy of exercising diplomatic protection directly for victims of slavery is fraught with difficulties.

The constellation would of course change if we could regard descendants of those enslaved and killed as injured victims. However, it appears that those persons 'only', if at all, suffer (indirect) damages but cannot be regarded as directly injured in the sense that their rights have been violated. Even human rights courts like the European Court for Human Rights (ECtHR) only accept claims by descendants/relatives of victims of human rights violations on a limited scale. The ECtHR for example has created the construct of the 'indirect victim' requiring a close relationship to the direct victim (close family members) and at times also that the 'indirect victim' is closely affected by claimed human rights violations.[174] A similar approach is taken by UNGA resolutions on the rights of victims, which define victim as a person that "suffered physical or mental harm or economic loss as well as impairment of fundamental rights" and accept that there can be indirect victims such as immediate family members or dependants of the direct victim.[175]

The majority of today's descendants of direct victims of course would most probably lack those requirements. It is unlikely that today's descendants even knew their enslaved ancestors living in the late 19th century or earlier, excluding a close relationship between those people. And great-great-grandparents can hardly be regarded as immediate or close family members. In conclusion, as any clear rule allowing the invocation of responsibility by States for injuries to ancestors of their

[170] Art. 5 para. 1, ILC Draft Articles on Diplomatic Protection, ILC, Yearbook of the International Law Commission, 2006; on the rule of continuous nationality in diplomatic protection see also: *P. Dumberry* (note 149), 337 et seqq. and *C. F. Amerasinghe* (note 134), 96 et seqq.

[171] For an in-depth analysis with numerous examples of state practice, see: *P. Dumberry* (note 149), 344-411.

[172] Ibid., 405 et seqq.; see also Art. 5 ILC Draft Articles on Diplomatic Protection.

[173] Such a rule is questionable and state practise is very limited, see for a further analysis: Ibid., 355.

[174] *K. Rogge*, in: K. Pabel/S. Schmahl, Internationaler Kommentar zur Europäischen Menschenrechtskonvention, 2015, para. 287; *C. Grabenwarter/K. Pabel*, Europäische Menschenrechtskonvention, 5th ed., 2012, § 13, para. 20.

[175] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, para. 1-2, adopted by UNGA Resolution 40/34 (29.11.1985); 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, para. 8-9, adopted by UNGA Resolution 60/147 (16.12.2005).

population is missing, Caribbean States seem not to be entitled to invoke the responsibility of European States.

c) Statutes of Limitation

A further time limit for historical claims might be set by international statutes of limitation. While there is no limitation period in the law of State responsibility, rights to reparation can be lost through waiver or acquiescence.[176] Acquiescence includes unreasonable delay.[177] Yet, the ICJ has stated in its *Certain Phosphate Lands in Nauru* judgment, that "international law does not lay down any specific time-limit in that regard" and that "[i]t is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible".[178] With regard to the case at hand it has to be highlighted, that prior to World War II only Haiti, the Dominican Republic and Cuba had become independent States[179], while most other Caribbean territories only declared independence in the 1960s and 1970s.[180] It further has to be acknowledged that due to political ties and pressures following independence, those States were de facto not in a position to make such claims and that the preparation of historical facts, now carried out by the CRC, can take years or even centuries. Consequently, claims by those States should not be considered inadmissible but generally acquiescence provides some limitations to historical claims.

d) (Hypothetical) Legal Consequences

Forms of reparation for the injury caused by internationally wrongful acts today include restitution, compensation and satisfaction.[181] Requested remedies by Caribbean States do not easily qualify as such, except the apology which qualifies as a form of satisfaction[182]. Albeit some requested remedies include aspects of restitution, they might be more easily achieved by Caribbean States themselves with money obtained through compensation. With regard to compensation, the demands are a reflection of the damages Caribbean States perceive to have encountered but also a statement of what CARICOM States would do with money obtained. Directly tackling the legacies of historical injustices and trying to improve the lives of the descendants of victims of those crimes must be greeted from a development or socio-economic rights perspective.

What remains questionable is of course causality. It appears rather farfetched that all of the socio-economic problems mentioned by CARICOM can be directly linked to historical injustices and it is most likely an impossible task to keep apart the different causes for those problems. Today's Caribbean elites cannot and should not be freed from their own responsibility for socio-economic problems in their States. Moreover, compensation for historical crimes dating back up to 500 years

[176] Art. 45 ARSIWA.

[177] ILC (note 88), 122.

[178] *Certain Phosphate Lands in Nauru*, Preliminary Objections, ICJ Reports 1992, 253–254.

[179] All three of those States have not joined the reparatory claim yet.

[180] See on the decolonization process in the Caribbean: *N. Foote* (note 34), 285 et seqq.

[181] Art. 34 -39 ARSIWA.

[182] See Art. 37 para. 2 ARSIWA.

can hardly be based on definite numbers of victims or other ways of clearly assessing the damage caused.[183]

Yet, the focus on development issues may turn out as politically wise. Tackling today's socio-economic problems might appear more convincingly to European States and to some extend rebuts arguments that money obtained will only enrich elites[184]. The various legal obstacles in mind, Caribbean States can only hope for a settlement with European States involving increased development cooperation.

4. Conclusion

The legal foundations of the CARICOM claim are flawed. As the intertemporal principle not only affects the primary but also the secondary rules, claims must be based entirely on international law governing in the past. International advocates and judges would have to dive deep into the history of international law to adjudicate a claim that compromises alleged violations of international law for a period stretching over four centuries. Even if we would accept, based on a teleological interpretation of the intertemporal principle or explicit consent by States involved, that the prohibition of slavery, the slave trade and genocide should be applied retroactively, further legal limitations remain. The scrutiny has led us to the conclusion that the law of State responsibility does not provide rights to reparations for today's States if they are neither identical nor succeeding past subjects of international law. Neither can Caribbean States invoke the law of diplomatic protection as direct victims have died before they became nationals of modern Caribbean States.

Albeit the CARICOM claim may not succeed, it successfully exposes once again grave injustices of the past. International law not only sanctioned (or at least not prohibited) slavery and genocide outside Europe but also continually disregarded other political entities than European States as sovereign and consequently denied non-European people of any sovereign protection. Those exclusions now continue to haunt the justice of international law, as serious obstacles to reparations rely on exactly those exclusions or are at least follow-up problems of the legitimisation of the usage of force and power by European States through international law. The massive exertion of force by European States in the past onto political communities of what is called today "the Global South" simply destroyed, replaced and ultimately entirely changed those entities in a way that no legal claim is available for today's States.

Whether this result is fair or just from a moral point of view is open to contestation but involves difficult questions of intergenerational justice[185]. From a global distributive justice perspective, the issue of repairing the past becomes a matter of addressing today's distributive inequalities. Notions of benefit from historical injustices (even if the benefit is involuntary) may oblige present day parties morally to compensate victims or their descendants if they are still disadvantaged.[186] These questions remain for philosophers to be discussed and may influence States to accept such

[183] Cf. *C. Tomuschat*, in: A. Randelzhofer/C. Tomuschat, State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights, 1999, 23; *M. Du Plessis* (note 7), 648 et seq.

[184] The negative example in that regard are reparations paid or promised to be paid by Italy to Libya under al-Gadaffi according to the 2008 Treaty of Friendship, Partnership and Cooperation between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya.

[185] See on this problem e.g.: *R. G. Teitel* (note 121), 138 et seqq.

[186] *D. Butt* (note 8), chapter 4.

claims voluntarily. International law clearly allows retroactive application of today's international law if State's would consent to do so. In the meanwhile, a valuable step into the direction of an international healing process might be the acknowledgement of past injustices (as exemplified by Germany with regard to the Herero) and open discussions between States and civil stakeholders.

What remains for international lawyers to do is to develop a critical consciousness of the past atrocities and the 'dynamic of difference'[187] legitimized by and enshrined in international law. International discourse and the law itself are still rich of injustices towards the Global South and its people[188], obliging international lawyers to keep on the "decolonization"[189] of international law.

[187] *A. Anghie* (note 9), 4.

[188] Ibid., 245-310; see generally perspectives of scholars affiliated with Third World Approaches to International Law (TWAIL), for introductions see: *B. S. Chimni,* Third World Approaches to International Law: A Manifesto, International Community Law Review 8 (2006) and *J. T. Gathii,* TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography, Trade, Law and Development 3 (2011).

[189] The term is borrowed from: *S. Pahuja*, Decolonising International Law: Development, Economic Growth and the Politics of Universality, 2013.

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The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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