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Abstract: Transitional justice processes have paid scant attention to colonial injustices. Among the latter, crimes against the cultural heritage of colonized nations have gone particularly overlooked. The argument of former colonial powers is that although morally appalling, colonialism was not illegal according to the standards of the time. By challenging this argument, this article critically investigates the relation between international law and colonial injustices to suggest ways to address the crimes of the past and provide legal

guidance during transitional justice processes. It argues that to engage with colonial injustices, transitional justice should embrace a decolonized approach to Eurocentric international law and take into consideration alternative legal frameworks including both interpolity law and the legal resistance of the colonized nations.

Keywords: colonialism, international law, transitional justice, reparation, restitution, cultural heritage, rule of intertemporality.

Resumen: Los procesos de justicia transicional han prestado escasa atención a las injusticias coloniales. Entre estas últimas, los delitos contra el patrimonio cultural de las naciones colonizadas han sido especialmente ignorados. El argumento de las antiguas potencias coloniales es que, aunque moralmente repugnante, el colonialismo no era ilegal según los estándares de la época. Al cuestionar este argumento, este artículo investiga críticamente la relación entre el derecho internacional y las injusticias coloniales para sugerir formas de abordar los crímenes del pasado y proporcionar orientación jurídica durante los procesos de justicia transicional. Sostiene que, para abordar las injusticias coloniales, la justicia transicional debe adoptar un enfoque descolonizado del derecho internacional eurocéntrico y tener en cuenta marcos jurídicos alternativos, como el derecho interpolítico y la resistencia jurídica de las naciones colonizadas.

Palabras clave: colonialismo, derecho internacional, justicia transicional, reparación, restitución, patrimonio cultural, norma de intertemporalidad.

Introduction[1]

The key argument that this article makes is that transitional justice nowadays, after transitioning throughout a number of phases (Teitel 2003), should overcome its gloomy link with colonial international law to progress towards its maturity. A central concern within the field of transitional justice is the imperative to recognize and address the injustices of the past (Sirleaf 2024, 172). A transitional justice based approach should aim at surfacing the truth(s) about past wrongs, providing retributive and restorative justice, repairing the victims, fostering guarantees of non-repetition and encouraging reconciliation. When it comes to addressing the wrongdoings of the colonial past, international law, if traditionally interpreted, becomes an insurmountable obstacle to reach the main goals of transitional justice. It makes so by simply postulating that colonial wrongdoings, although unfair, were not prohibited by international law in force at the time. Breaching its link with Eurocentric and colonial bias by embracing a decolonized relationship with international law, can provide transitional justice with legal guidance and new pathways to address the legacy of historical colonial atrocities. This legacy is charged with pervasive epistemic violence and dictates economic and racial subordination showing unequivocally that colonialism is all but an issue of the past.

Theoretically, this article is based on the awareness that European states have failed to recognize the constituent role that colonialism has played in their history. It is inspired by the Third World Approach to International Law (TWAIL), postcolonial studies and recent legal scholarship challenging the postulate that colonial atrocities were legal at the time they were perpetrated. It relies on the idea of Gurminder Bhambra (2022, 12) that "the decolonization of Europe will only happen once the colonial histories of Europe are explicitly reckoned with and Europe itself is understood to have been constituted by those histories –in all their variety". Decolonizing Europe therefore, demands both epistemic justice, namely recognition of non-European knowledge claims, and material reparations.

This article challenges the common argument of former colonial powers that, although morally appalling, colonialism was not illegal according to the standards of its time. It demonstrates that, on the contrary, the legal framework surrounding colonial conquests is highly ambiguous and contradictory (Goldman 2024; Fuhrmann and Schweizer

[1] This article has been written thanks to a research fellowship of the UCL.

2025). Furthermore, it suggests that a proper understanding of the principle of intertemporality (see paragraph 2.3) can lead to embrace the idea that European states involved in the colonial project have not only a moral duty to repair the injustices of colonialism but also a legal obligation. This reparatory process should include the restitution of colonial cultural heritage acquired without the consent of the communities of origin which today vividly claim their cultural items back.

Methodologically, this article is based on an up-to-date review of the legal scholarship on colonialism and international law and postcolonial approaches to transitional justice. It adopts a doctrinal approach in the analysis of international rules concerning reparation for colonial injustices and the emerging right to restitution of colonial cultural items. It also takes into account state practice in the field of return of looted cultural colonial items.

It is divided in five sections. The first includes an introductory overview on the key issues addressed. Section two shortly discusses today's immanent dimension of colonialism in the globalized world and analyses the engagement (or better the lack thereof) of transitional justice with the atrocities of colonial time. It suggests that to be able to cope with colonial atrocities, transitional justice should breach its link with neo-colonial aspects of international law and fully embrace a decolonized approach to it. Section three highlights that the colonial encounters implied also a fight for jurisdiction where different legal systems with different rules clashed. It demonstrates that in this legally ambiguous context, several instruments emerge leading to the conclusion that colonial injustices, at least in part, should be repaired. This conclusion is based on a non-Eurocentric interpretation of international law and on alternative legal systems grouped under the umbrella of interpolity law. Section four focuses on the legal framework under international law governing the repatriation of colonial artefacts and shows how a duty of restitution of these items emerges through a decolonial approach. Section five discusses the previous findings and proposes concluding remarks concerning the possible future engagement of transitional justice with the deeds of the colonial era.

1. **Colonialism and transitional justice**

1.1. *Colonialism as present*

Within one century, between 1815 and 1914, European powers through merciless colonial exploitation managed to gain direct control

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over 85% of the earth's surface. Decades after the end of the formal decolonization process, colonial and neo-colonial structures are still alive, as stressed by the UN Secretary General (2025). The existence of 17 Non-Self-Governing Territories and Israel's settler colonial project in the Occupied Palestinian Territories are an evidence that colonial relations are still in place nowadays (Al-khersan and Shahshahani 2025; Sirleaf 2024). A subject traditionally overlooked in school and academic curricula, colonialism and its legacies keep shaping racial, social and economic hierarchies (Vergès 2019). Examples of its lively presence are abundant. Fabián Salvioli, examining the legacy of violence resulting from settler states and former colonies that became later independent, argued that these contexts "have a common denominator: those rights violations have clear direct and indirect consequences today" (Salvioli 2021). Tendayi Achiume has stressed that several patterns of international migration today "are responsive to political subordination rooted in colonial and neocolonial structures" (Achiume 2019, 1510).

Former colonial powers however firmly deny any legal responsibility to repair the past. UK Prime Minister Keir Starmer in 2024 during a Commonwealth summit has declared he wants to 'look forward' rather than have 'very long endless discussions about reparations on the past'. On the contrary, the position of the African Union is that colonial practices corresponded to a large extent to crimes to be repaired (African Union 2023). Consistently with this position the African Union has chosen 'Justice for Africans and people of African descent through reparations' as theme of the year 2025. The results of a 2025 Survey involving more than 4,250 respondents show that Africans consider the restitution of colonial artefacts a key component of the reparation process for the colonial legacy (Department of Social Research INPOIDC 2025).

As postcolonial scholars have argued, the European colonial project can also be interpreted as a form of cultural control over the colonized populations that created mechanisms of knowledge-production and power relations of an oppressive nature that have gone so far unchallenged (Said 1978). The near-monopoly of Western museums' possession of the global South's cultural heritage in particular represents one of the continuities between the age of empires and our time. It is estimated that a mere few universal collections host between 90 and 95% of African cultural heritage (Sarr and Savoy 2018, 3). Museums as classic 'implicated subjects' (Rothberg 2019), have benefitted from past colonial regimes even though they were not a central actor in the colonial administrations. They historically served as a 'legitimating device for an ideology of white supremacy that

naturalized colonialism – not merely a side effect of empire but an essential technology thereof' (McAuliffe 2021, 683; Hicks 2020, 23). Although colonialism was central in making international law universal, few scholars have focused on its legal implications (van der Linden 2016, 7; Mutua 2000, 39–40; Gathii 2012, 407–428; Reynolds and Sujith 2016).

1.2. *The urge to further engage with the legacy of colonialism*

In the last decades a sophisticated framework known as transitional justice has emerged to address systematic and pervasive human rights violations linked to the injustice of the past. Trials, truth commissions, reparations, and vetting and reform processes accompanied by targeted policies of memorialization have been employed to address past atrocities. However, these instruments have not been systematically applied to colonial injustices, as clearly evidenced by the EU Framework on transitional justice, which makes no reference to colonial injustice (Stahn 2020, 798).

In the past few years, as demonstrated by the Black Lives Matter movement and protests like the 'urban fallism', the urge to engage with the multi-layered legacies of colonialism has gained momentum. In 2019, the European Parliament passed a resolution to strengthen rights of people of African descent in Europe, in which highlighted that some EU Member States have "taken steps toward meaningful and effective redress for past injustices and crimes against humanity" and invited "EU institutions and the remainder of the Member States to follow this example"[2]. Furthermore, the European Parliament (2021, 6) has encouraged the development of EU guidelines on restitution of colonial artefacts. In the last decade there have been also efforts to address colonial violence through investigations and litigation in domestic courts of European countries (Stahn 2023).

Since historical injustices linked to the colonial era have not been systematically addressed by Western states and the EU, it is legitimate to further investigate how transitional justice can be engaged in this respect. This article positions itself within the emerging literature investigating the relationship between transitional justice, international law and colonialism. It recognizes both recent efforts by civil society, diasporas and (more modestly) states to cope with the legacy of

[2] European Parliament Resolution 2018/2899 (RSP) of 26 March 2019.

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colonialism and the obstacles these efforts have faced. The next paragraph succinctly examines the fraught relationship between transitional justice and colonial atrocities, identifying the key challenges it presents.

1.3. *Transitional justice and colonial atrocities*

Despite its expanding trajectory, transitional justice has not largely engaged with colonial injustices. Colonial atrocities are deemed to be chronologically too far, which makes the reconstruction of their setting and the identification of victims and perpetrator too challenging. Recent initiatives have however signalled a new trend with transitional justice institutions accepting an engagement with the legacy of colonialism. The Truth and Dignity Commission in Tunisia, for instance, has analysed the institutional legacies of French colonial rule (Nyhus 2025, 1). In 2018, the mandate of the Burundian National Truth and Reconciliation Commission was expanded to include colonial wrongs committed since 1885 (Nyhus 2025, 2). The Belgian parliament in 2020 established a commission to shed light on the implications of its colonial rule in Congo, Burundi and Rwanda (Rosoux 2022). Other examples include the 2008 Truth and Reconciliation Commission on Indian Residential Schools in Canada, the historical and truth commissions set up to investigate injustices suffered by the Sámi, the Kven, the Tornedalians and Lantalaiset people in Sweden and Finland (Destrooper and Palli-Aspero 2022) and the 2020 Yoo-Rook Justice Commission in Victoria, Australia.

1.3.1. An uneasy relationship: transitional justice, colonialism and cultural heritage

Restitution of colonial cultural heritage has gained increasing importance as a significant transitional justice step and an important moment towards the decolonization of museums. This is due to several factors. Scholars since more than one decade have argued that transitional justice should embrace a broader spectrum of harm to include also cultural heritage (McAuliffe 2021, 687, de Greiff 2014, 12). Civil society and diasporas in cooperation with Global South's and Western curators have organized initiatives highlighting the racist approach underpinning several museum collections and the importance of cultural heritage for the source communities. This has

strengthened the acknowledgement of cultural heritage as a key element of the identity of former colonies and the progressive (although still marginal) inclusion of cultural rights under the umbrella of transitional justice. Debates from the past thirty years within transitional justice resonate with striking similarity in contemporary discussions on restitution of cultural heritage (McAuliffe 2021, 687). This is because reparative, truth, memoralization and justice related aspects of the restitution discourse fit well in the transitional justice paradigm (Sarr and Savoy 2018). Restitution of colonial cultural heritage therefore can accomplish key goals of transitional justice like reparation, truth-telling, victims acknowledgement and equitable redistribution of wealth (McAuliffe 2021, 687). Boheme has stressed the high justice potential of acts of restitution because "museums are in a unique position of being custodians of the material manifestations of appropriation that opens up practical avenues to 'make it good'" (Besterman 2014, 24, quoted in Boehme 2022, 5). She reads unsuccessful attempts at restitution by France and Germany through a transitional justice paradigm concluding that these states failed to convincingly engage with the legacy of the colonial past. Moreover, the discourse on restitution is 'distinctly transitional' where it is framed as a form of reparation after pervasive violence (McAuliffe 2021, 680). This new engagement with colonial past has not gone unnoticed. Aidan Nyus has stressed that the structural dimension of the injustices of the colonial systems, results very complex to grasp.

Colonial violence being 'structural' means it is carved into the fundamental architecture of colonial societies and institutions, leading to harm and inequality without a single, identified perpetrator (Nyhus 2025, 2; Lu 2011). This pervasive violence was embedded in systems, laws, and cultural norms that benefit the colonizers and dispossess the colonized, causing lasting disparities in access to resources and power. This has triggered the dilemma, discussed by postcolonial critique, whether transitional justice can be associated with efforts to cope with colonial legacies and whether itself can be decolonized.

The first common denominator of postcolonial critiques to transitional justice, not surprisingly, is tied with the Western origins and Eurocentric nature of the discipline. It is in fact widely accepted that the knowledge on which transitional justice is based as well as the one it produces, is linked mainly with European and North American academia and practice (van der Merwe and Lykes 2020 415-419). Consequently, such critique goes on, a genuinely postcolonial transitional justice would be a challenge to the legitimacy of Western actors active in the field (Sesay 2022). Abdullah An-ai'm has

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impersonated a radical criticism of transitional justice neo-colonial nature by stressing that it aims at 'universalizing relativistic liberal values' (An-Na'im, 2013, 198). The consequence is, An-Na'im argues, that the Western idea of justice to be applied during transition remains so unquestionable, that 'even the possibility of an indigenous alternative conception of justice is not taken seriously at a theoretical or empirical level' (An-Na'im 2013, 197).

The neo-colonial remnants in the transitional justice approach are well evidenced by its legalism (McEvoy 2008). Transitional justice is strongly intertwined with international (rule of) law, which it constantly tries to export and promote in a manner considered both ahistorical and context-insensitive (Moyo 2019, 71; Anghie and Chimni 2003). Due to its roots in liberal democracies, transitional justice has also prevalently focused on violations of the right to physical integrity and of civil and political rights, neglecting economic, social and cultural rights. Therefore, the transitional justice link with neo-colonial aspects of international law makes it unfit to address the colonial legacies. The racial bias of global international law institutions is exemplified by the operating of the International Criminal Court (ICC). In fact, the selectivity of the prosecution programme of the ICC has attracted well-known criticisms centred on the shielding of citizens of White nations and accuses of continuing the civilizing mission of international law (Sirleaf 2024, 170-171). Coherently with these criticisms, TWAIL scholarship has stressed that the prevalent regimes of global trade, investments and intellectual property embedded in international law favour industrialized countries to the detriment of those of the Global South (Gathii 2021, 412).

Another important point made by postcolonial critique to transitional justice regards the nature and intrinsic weakness of the postcolonial state, to which poor attention has been paid. Due to its culturalist and textualist drift, transitional justice has become an object of knowledge and a battlefield where it is decided whose knowledge matters, the one it has produced so far, dominated by Western scholars and practitioners, or the one of its supposed beneficiaries (Grewal 2023, 322; Nyuhs 2025, 12; Mignolo and Walsh 2018). This has implicated scant attention to the features of the postcolonial state and its inherited weakness sharpened by the neoliberal twist imposed by the international financial institutions in the aftermath of independence.

It goes beyond the scope of this article to elaborate upon a recipe for a decolonized version of transitional justice ready to face the full gamut of the colonial legacies. More humbly, here it is suggested that

if the discipline wants to try to seriously engage with colonial injustices and colonial heritage restitution, it should breach its unhealthy relation with the limits that a conservative reading of international law imposes. To do so, it should fully engage with decolonial approaches to international law and draw some lessons learnt from the scholarship promoting it. The next paragraphs present an analysis of the possibilities that a decolonized reading of international law offers to cope with colonial crimes and injustices.

2. **The injustices of colonialism: overcoming the constraints of European colonial international law**

2.1. *International law and colonial violence*

Although colonialism was central in making international law universal, few scholars have focused on its legal implications (van der Linden 2016, 7). A remarkable exception to the lack of interest for the legal issues relating to colonialism is represented by the scholarship linked to the Third World Approach to International Law (Anghie and wa Mutua 2000, 31–40; Gathi 2012, 407–428).

Anghie (2012) offers a far-reaching analysis of the legal features of colonialism and its impact on international law. The traditional interpretation of international law of the time of colonization is strongly positivistic. This interpretation ignores the tensions and ambiguities characterizing colonial international law. The latter, despite its deep European, class and gender roots, was unilaterally labelled as universal at the time of colonial empires. This universal status however could be obtained only through political, epistemic, material and legal violence. Universality was not substantiated by consent and reciprocity, key principles of international law, but through the unilateral application of racist theories grounded on the idea that only 'civilized nations' –white people– would be subject of and contribute to the development on international law. Put it simple, the paradoxical and untenable result of this logic was that (European) international law would apply universally but selectively, depriving colonized nations also of the minimal protection they would be entitled to.

Colonial international law was part of a fight for jurisdiction during colonial aggressions. In fact, at that time no universally accepted meta-rule that entitled European powers 'to set the terms of International law' existed (Goldmann 2024). Colonial powers simply claimed that European international law governed relations between themselves and

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colonised peoples. And they did so intentionally ignoring the legal rules and the international legal order that colonized people had already established. Repeating this logic today, as European governments do, means not only reiterating the injustices of the past, but imposing a narrow view of international law which deprives the discipline of its emancipatory potentiality (Fuhrmann and Schweizer 2025, 16). The argument that international law of the time of empires should be chosen as an exclusive benchmark to discuss, analyse and assess the atrocities of that time seems therefore a selective choice dictated by a clear political will to circumvent obligations to repair the past.

To address the colonial and racist legacy it is therefore necessary to escape the trap posited by what Milos Vec has poignantly labelled as the 'Eurocentric canonization of subjects and sources of international law' (Vec 2017) as well as limitative readings of the intertemporality rule that reduce it simply to a form of authority of the past over the present (Fuhrmann and Schweizer 2025, 7). This implies that the Global North must be open to include a plurality of views that decentres and displaces the myth of Westphalia as a birthplace of international law. The idea that colonial injustices have to be assessed based on the yardstick of legal precepts of the time is often coupled with a reading of coeval international law which excludes any protection of autochthonous populations. This approach ignores that the process of colonization by European states of large parts of Africa, Asia and Oceania did not occur in a legal vacuum. It was often regulated through mutual agreements (of protectorate or cession) creating a complex, ambiguous and often contradictory legal setting on the ground. This complex legal setting has been overlooked by international legal scholarship. The current academic debate remains dominated by European scholars, despite the fight for reparation for colonial injustices being led by non-Western academics and practitioners from the Global South (Savoy 2022, 1-7). This makes necessary a paradigm shift in the reparation debate to include in its remit perspectives and sources from the Global South.

International law has played an ambiguous role with regard to colonialism. It is at the same time a culprit, as it developed and acquired its universal character by justifying the colonial adventure; and a remedy, because through subfields such as international human rights and international criminal law it is asked today to redress the past. Colonialism has also escaped the grip of international law and efforts to include it in the catalogue of international crimes have failed, as judge Pal, the only representative of developing world at the Tokyo Post-WWII Tribunal stressed in his dissenting opinion (Pal 1948).

Historians have shown structural commonalities between colonial injustices and contemporary patterns of atrocities culminating in the subjugation and humiliation of peoples (Zimmerer 2004, 49–76). Raphael Lemkin (1944, 79), the father of the term genocide, and Hannah Arendt (1951, 267-268) have stressed that it was colonial violence that paved the way for totalitarian regimes and the Holocaust in the 20th century. However, while the perpetrators of the Shoah were prosecuted despite the absence of a clear legal framework condemning their crimes, the colonial violence has gone unpunished.

More recent efforts by states of the Global South to criminalize colonialism as a violation of the right to self-determination, similarly failed. At the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban in 2001 reparations for grave human rights violation linked to slavery and colonialism were discussed under the auspices of the UN. Despite the requests of former colonies for reparations, the closing Declaration of the conference recognized the suffering caused by colonialism, but it neither acknowledged responsibility of former colonial States nor provided for remedies. In the next paragraph are presented legal arguments as to why and how colonial injustices could and should be redressed overcoming the limits dictated by colonial international law.

2.2. *How to address colonial violence through (or without) international law*

Against a conservative interpretations of the legal framework regulating colonial relations recent legal scholarship has produced several counter-arguments. The latter have proved that: 1) part of the colonial past wrongs constituted unlawful acts already at the time when they were committed; 2) the legal framework applicable to colonial time was ambiguous, and so far pluralistic approaches to its reconstruction taking into account the legal stance of the colonized have been scant and marginalized; 3) exceptions to a rigid and illogical application of the principle of non-retroactivity were made in the past to address atrocities comparable to colonial crimes (Fuhrmann and Schweizer 2025, 7; Stahn 2020, 803).

Arguing that some of the colonial atrocities were already illegal when they were perpetrated, Nora Wittmann and Mamadou Hébié have analysed reparations claims for the *Maafa-Maangamizi*, the 'African holocaust,' including the atrocities connected with chattel slavery and colonialism (Fuhrmann and Schweizer 2025, 7). They have

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demonstrated that transatlantic slavery was illegal since its beginning based on European, African and International law of the time (Wittmann 2016, Hébié 2022). This conclusion was based on the fact that 'virtually all legal systems restricted the legality of enslavement to cases of captivity in just wars' and that persons in captivity maintained basic protection rights and the right to life (Wittmann 2016, quoted in Fuhrmann and Schweizer 2025, 7). In the same vein, Andreas von Arnauld has demonstrated that international law of the colonial time was not as positivistic as it is today because it included moral principles incompatible with the colonial exploitation. Relying on a 'jurisgenesis' based on the concept of *colère publique* elaborated by the French sociologist Émile Durkheim, von Arnauld (2021, 405) demonstrates that the inhuman colonial violence was considered illegal already when it was perpetrated. Van der Linden (2016) provides a legal analysis of treaty practice between Africans and Europeans. The study concludes that the acquisition of African territory was illegal pursuant to the legal framework in force at the time.

Affirming that colonial international law is the legal benchmark to assess the legality of colonial injustices is highly controversial and rather problematic for several reasons. The first set of reasons is linked to the challenges relating to ascertaining what were the rules governing the relations between the colonized and the colonizer. It remains widely debated when European international law has become universal and consequently applicable to non-European polities. The reconstruction of the legal framework applicable to the colonial context is hence extremely difficult and legal sources from colonized settings need to be duly reconstructed and assessed. The colonized subjects were at the same time subjected to but excluded from the elaboration of international law of the colonial era, which was not by chance known also as *Jus Publicum Europaeum.* The non-inclusive and explicitly racist nature of international law of the colonial time openly contradicts the principle of consent, which is a pillar of international law.

During colonial time, international law endowed with universal applicability and validity was not in force and international relations between European states and foreign polities were governed by different parallel orders. There was hence a polycentric international legal order based on what is defined also as 'interpolity law'. Saliha Belmessous (2011) questions the uncritical applicability of international law of the colonial time, to colonized populations. Belmessous employs 'interpolity law', a set of legal practices with broad recognition across a diverse range of polities in the early modern and modern world, as the order applicable to the relation colonizer-colonized. This approach

deprives former colonizers of the possibility to justify colonial practices of dispossession based on the uncritical application of (European) international law.

In this articulated setting, decolonial scholarship argues in favour of a 'postcolonial interpretation of the doctrine of intertemporal law' which includes research on when the polycentric international legal order was replaced by (European) international law (Theurer 2023, 1147). Therefore, the legal reasoning culminating in the argument that European colonial practices were legal pursuant to the standard of the time is characterized by an evident flaw. On the one hand former colonial powers argue that international law had reached its universal status during the 19th century, which made it universally applicable. On the other, they deprive former colonies of the connected protection, like the shelter provided by humanitarian law.

The position of the German Government on the genocide committed in Namibia at the beginning of the 20th Century illustrates this paradox in a paradigmatic fashion. A document published by the academic service of the German Bundestag highlights that The Hague Convention of 1899 represented a codification of rules of humanitarian law that had already crystallized into customary international law and were hence universal at that time (Wissenschaftlicher Dienst des Bundestages, 2016). The document also makes clear that the so-called Martens clause in paragraph 7 of the preamble of the 1899 Hague Convention implied that the precepts of humanity and civilization prohibited genocide. Being customary international law universal in its application, one would expect that this assumption would logically lead to the illegality of the German extermination practices in South-West Africa. The document of the academic service of the Bundestag on the contrary states that:

This legal view was limited to members of the community of international law, which at the time consisted largely of European states. Indigenous peoples were, according to the prevailing view, "uncivilized" and thus excluded from the aforementioned principles principles.

This position has been criticized because it is based exclusively on a limited number of Western sources and is imbued with racist stereotypes (Theurer 2023, 1158). Several contemporary western legal scholars had different and more nuanced positions. Making legal subjectivity under international law dependent on different levels of civilization was not a universally accepted criteria at the end of the 19th century. This is evidenced by the fact that the Belgian Institute of International Law dropped an attempt to formulate a legal definition of

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'civilized people'. Moreover, some Western scholars of the time considered indigenous peoples, irrespective of their full-fledged legal subjectivity under international law, entitled to protection of their basic rights (Blunschli 2002, 299).

The disparate opinions make research on the law applicable during the colonial time which includes the stance of the colonized peoples more necessary than ever. The results of the research can guide transitional justice efforts towards reparative approaches for colonial injustices. Next paragraph argues that the precise contours of the rule of intertemporality are contested. This argument provides a useful analysis of context-sensitive ways to interpret the principle of intertemporality and room for addressing the wrongdoings of colonialism.

2.3. *The rule of intertemporality between stability and change*

The intertemporality rule consists of two elements included in the decision of Judge Max Huber acting as arbitrator in the Las Palmas case (Huber 1928, 829, 845). The first part of the rule states that:

> a juridical fact [is] appreciated in the light of the law contemporary with it, and not the law at the time when a dispute in regard to it arises.

In a nutshell the rule, by requiring a given fact to be adjudicated in the light of the norms in force at the time of its commission, prevents the retroactive application of international law. The second element of the rule of intertemporality can support a more flexible and context-sensitive understanding. It reads as follows:

> [t]he same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.

Here the need for legal certainty entrenched in the first limb yields ground to a more dynamic interpretation of past rules and titles. If the rule formulated by Huber is seen as a barrier to reparation for colonial injustices this depends on the excessive emphasis put on its first limb at the expenses of the second (Theurer 2023, 1154).

The interpretation of the rule has varied over time. In 1951, Georg Schwarzenberger grasped the emancipatory strength of the doctrine

which in his opinion aimed at the "determination of international law prevailing at successive periods and applicable to a particular case" (Schwarzenberger 1951). Two of the most prominent international lawyers of Huber's time, Phillip Jessup (1928) and Hersch Lauterpacht (1933), in the aftermath of the Las Palmas arbitration, confirmed that the ground-breaking potential of the rule of intertemporality was immediately clear after its formulation.

The ICJ attitude towards the intertemporality rule has fluctuated between prudence and leaps confirming the remarkable dynamic potential embedded in it. While in some cases it has interpreted the rule as an expression of the past over the present, in other cases it has adopted bolder approaches. In the *Namibia* case for instance, the ICJ interpreted colonial law based on successive legal developments occurred after the colonial era. It interpreted the notion of 'sacred trust of civilization' in the light of the later law of decolonization and of the principle of self-determination, which had not yet fully developed during colonial time (Fuhrmann and Schweizer 2025, 11). A similar reasoning has followed the ICJ in the 2019 advisory opinion on the decolonization of the Chagos Archipelago. By rejecting the UK claim that the law applicable to the separation of the Chagos Archipelago from Mauritius should have been the law coeval to the partition, ICJ argued that it can base its decisions also on legal tools "which postdate the period in question, when those instruments confirm or interpret pre-existing rules or principles"[3]. In doing so, the ICJ, to fathom the meaning of the principle of self-determination in the years 1965-1968 relied on the 1970 Declaration on Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations. According to recent scholarship backed by opinions of the ICJ highlighted above, in disputes linked to colonial issues the second element of the rule allows a more flexible interpretation of the law, which takes into account the further development of legal principles and norms (Theurer 2023, 1146–1168). This can be of particular significance in disputes regarding injustice when the latter have led to a continuing harm.

The continuing nature of colonial harm has been confirmed in the Chagos Archipelago case. Intervening in the dispute the representative of Cyprus have stressed that "Decolonisation is a process, not a single act; and until the process is entirely completed it generates continuing

[3] See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion*. 2019. I.C.J. 95, 143.

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obligations for both the administering State and the international community of States as a whole, intertwined as it is with the principle of self-determination" [4]. Based on the concept of continuing harm, current obligations of former colonial powers stemming from the principle of self-determination can be interpreted in the light of the two elements of the intertemporality rule. The first limb will drive the search for the law in force at the time of the colonial wrong, the second can highlight possible successive legal element to be taken into account to interpret it.

The challenges faced to identify the law applicable in the colonial context may sometimes lead to a situation of uncertainty where the only possible outcome is a judgement of 'non liquet' (Theurer 2023, 1161). To avoid the repetition of historical injustices, it is possible to rely on the formula originally elaborated by the German philosopher Gustav Radbruch in 1946 to cope with the discriminatory rationale underpinning the legislation of Nazi era. Radbruch treats legal precepts that are completely disconnected from the idea of justice present in Nazi legislation as non-law. The formula reads as follow:

> 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 (Radbruch 1946, 7).

The Radbruch's formula has been also successfully utilized after the fall of the Berlin wall to judge the crimes of the German Democratic Republic to sidestep the limits imposed by statutes of limitation (Vassalli 2001). Through the Radbruch's formula, German judges in order to cope with evident injustices that were made legal by the Nazi regime have employed the same rationale adopted during the Nuremberg trial where ex post-facto justice was enacted (Mutua 2021, 24). In this regard Makau Matua has stated that

> Nuremberg is a great example of a constitutional moment in which society realizes that certain abuses, though not criminalized, are so inimical to morality and decency that leaving them unpunished sets an untenable precedent. In such a situation, dispensing with the

[4] Written Statement of Cyprus, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, 2019, I.C.J. Pleadings 8 (May 11, 2018)

general prohibition against retroactive laws is the more plausible option.

To address a complex issue like that of reparation for colonial injustices exclusively through adversarial court litigations would probably not be the most suitable solution. Transitional justice in the last four decades has provided a number of instruments that can be employed to come to terms with this murky page of global human history. Legal scholarship has stressed the promising role of truth commissions and direct negotiations on an equal footing, as an instrument for reparation of colonial injustices under the condition that participatory rights of direct victims and their descendants existing under international law are fully respected (Theurer 2023, 1164). To approach colonial injustice however, transitional justice has to embed and encourage a decolonized approach to international law.

The next section analyses in particular the repatriation of colonial cultural artefacts as a form of reparation for colonial injustices. This has become a particularly heated issues in view of the recent reiteration of the requests by representatives of the Global South of restitution of cultural items looted by Europeans and currently displayed in western museums. A duty of restitution of these items is emerging under international law irrespective of the legality of the colonial acquisition.

3. **The restitution of colonial cultural heritage. The terms of the current debate**

The debate surrounding the restitution of colonial cultural heritage has a long history. In 1971, the Ghanaian author Nii Wate Owoo produced the film 'You Hide Me', featuring African artefacts hidden in the magazine of the British Museum and asking for their restitution to newly independent states in Africa. Requests for restitution of cultural heritage in the 1970s paved the way for the UN General Assembly's Resolution 3187 on the Restitution of Works of Art to Countries Victims of Expropriation[5]. The Resolution, which is a crucial but non-binding instrument, deplored the removal, virtually without payment, of *objects d'art* from one country to another, as a result of colonial occupation and encouraged restitution as a form of international cooperation and just reparation. However, campaigns for reparation

[5] Restitutions of works of art to countries victims of expropriation UN Doc A/RES/3187(XXVIII), 18 December 1973.

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and restitution have not led to significant results. In particular, voices from former colonies have been silenced and ignored.

New hope has emerged following the speech of French President Macron in Ouagadougou where in 2017 he recognised that colonialism was a crime against humanity to be addressed. Consequently, Macron commissioned art historian Bénédicte Savoy and economist Felwine Sarr to write a report entitled 'The Restitution of African Cultural Heritage: Towards a New Relational Ethics'. Deeply influenced by critical cultural studies, the Sarr-Savoy report firmly roots the issue of art restitution within the debate on colonial injustices, arguing that the appropriation of African cultural heritage constitutes "transgressive acts, which no juridical, administrative, cultural or economic apparatus would be capable of legitimising" (Sarr and Savoy 2018, 8). The report investigates and makes very explicit the tied link between colonial wars and the looting of art:

> Within the context of the 19th century, one can indeed see that the violent acquisition and economic capitalization (through the art market) as well as symbolic capitalization (through the museum) of African and Asian objects of cultural heritage goes hand in hand with the wars of that same era (Sarr and Savoy 2018, 11).

The report concludes that 'any objects taken by force or presumed to be acquired through inequitable conditions' between the late 1800s and 1960 should be returned if their countries of origin ask for them (Sarr and Savoy 2018, 61). The scope of the report's conclusion, however, is mitigated by the fact that it covers only Sub-Saharan Africa and no other territories colonized by France.

The Sarr-Savoy report sparked a world-wide debate. The Netherlands, Austria, Germany, Belgium and the national Council of Museums of England have adopted specific but inconsistent guidelines on restitution of colonial art[6]. Belgium is so far the only country which has adopted a specific law on return of colonial artefacts, while in France a draft bill is under parliamentary scrutiny[7].

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[6] National Museum of World Cultures. 2019. *Return of Cultural Objects: Principles and Process,* 2019; German Museums Association. 2021. Guidelines for German Museums: Care of Collections from Colonial Contexts; Restitution Belgium, Ethical Principles for the Management and Restitution of Colonial Collections in Belgium, June 2021; Arts Council England, Restitution and Repatriation: A Practical Guide for Museums in England, 2022

[7] Loi du 3 juillet 2022 reconnaissant le caractère aliénable des biens liés au passé colonial de l'État belge et déterminant un cadre juridique pour leur restitution et leur

The Belgian bill and the French draft are different as to the time frame considered (1885 to independence of its three colonies for Belgium, 1815 to 1972 for France) and the geographical scope (the Belgian law applies only to goods from Democratic Republic of Congo, Rwanda and Burundi, the French draft bill makes no difference about provenance of the items). Both are not applicable to archives and the French draft excludes also items found during archaeological digs and property of military nature. The final decision regarding the restitution remains in the hands of the former colonial powers in both cases. Neither the Belgian law nor the French draft consider the return of colonial artefacts as a form of reparation connected with breaches of international law. The French law goes further in the process of denial of responsibilities for the past as it does not mention colonialism at all, referring in quite neutral terms simply to 'illicit acquisitions' between 1815 and 1972.

In October 2021, the Jesus College of the University of Cambridge was the first to return one of the famous Benin Bronzes looted by the British troops in 1897 to Nigeria's National Commission for Museums and Monuments. The Horniman Museum in London repatriated six Bronzes and Germany 21 Bronzes in November and December of the same year respectively. Stahn has depicted the return of the Bronzes of Benin as a potential 'game changer' (Stahn 2022, 77). Although other returns have followed -The Netherlands in 2025 has repatriated 113 Benin Bronzes- the new landscape on returning colonial cultural heritage is however far from unproblematic.

It remains unclear what is the legal justification for the few episodes of repatriation. European states adopt loose wording and systematically refuse to use the term reparation, which would imply a breach of international law. Furthermore, most European universal museums refuse or delay the return of colonial artefacts and remain rooted in a Eurocentric and neocolonial approach. In fact, through the Declaration on the Value and Importance of Universal Museums[8], main European museums in 2002 expressly opposed the restitution of colonial takings. European states and museums are acting on a case-

retour, Le Moniteur Belge, 28 September 2022, no. 2022042012; Projet de loi relatif à la restitution de biens culturels provenant d'États qui, du fait d'une appropriation illicite, en ont été privés (MICB2517755L).

[8] See Declaration on the Value and Importance of Universal Museums. 2002. Accessed November 12, 2024: https://ia804501.us.archive.org/11/items/cmapr4492/20030000%20Information%20Declaration%20on%20the%20Importance%20and%20Value%20of%20Universal%20Museums.pdf.

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by-case approach on the premise that a clear legal and policy framework for return of colonial art is missing. This is for instance the position of the Dutch Advisory Committee on the National Policy Framework for Colonial Collections, expressed in a 2021 report entitled 'Colonial Collections and a Recognition of Injustice'.

Existing binding instruments do not apply retroactively. As a result, a de facto binary legal framework has emerged. Colonial cultural heritage is to be returned only on moral and comity grounds or based on negotiations. On the contrary, in the intra-European context restitution on legal grounds was already the standard in the aftermath of WWII (Scovazzi 2012, 11). For Nazi-confiscated art, the lack of a specific legal framework has been addressed through the 1998 Washington Principles which have led to the restitution of artefacts. Recent scholarship and the European Parliament have stressed that it is a collective European responsibility to set up a clear policy on return and clarify -or if necessary set up- legal standards of supranational level (McAuliffe 2021, 680).

UN Special Rapporteur in the field of Cultural Rights Alexandra Xanthaki (2021, 21-29) has highlighted that State obligations regarding restitution exist, but are not fully clear. It is therefore necessary filling this gap by clarifying what these state obligations are, the legal status of colonial artefacts in Western museums and the framework governing their return. The body of specialised research to build upon is limited, largely dominated by Western authors and overlooks the legal stance of African authors. At the same time, some legal scholars are more critically engaging with the legal issues surrounding the restitution of colonial art. Campfens (2019, 75-110) argues that a duty to return colonial artefacts is emerging under international law due to a process of "humanization of cultural heritage law". Carsten Stahn (2023) provides a rich account of the taking of African cultural heritage and its episodic returns relying on 'micro-histories, biographies, or 'necrographies' of objects'. Hausler and Selter (2025) look at what happens to objects after they were returned.

From the analysis of the relevant literature three main conclusions can be drawn: 1) the legal framework governing colonial artefacts in European museums and the requests for their return is characterized by gaps and uncertainties which have not been explored systematically; 2) the legal perspectives of the colonized polities and communities of origin have been mostly ignored; 3) a unified policy/legal framework is needed in Europe to avoid the current trend of governments and museums acting on an ad hoc basis. It is therefore imperative to verify

if international law, historically used as an oppressive instrument to justify the European colonial project, can today also be a form of redress endowed with reparative effects.

3.1. *New developments on cultural restitution under international law*

In 1978 Director General of UNESCO Amadou-Mahtar M'Bow (1978) famously pled for the return of cultural heritage illegally removed to the legitimate owners. The plea seemed to preconize a paradigm shift in the relations between the West and the Global South which, however, did not materialise. This contradicts an old and enduring trend in international law which usually has considered attacks against cultural heritage uncivilized. Hindu, Muslim, precolonial African, and Japanese norms protecting items of deep cultural meaning explain the special status that cultural heritage has enjoyed in a virtually universal manner (Campfens 2019, 86).

Similar considerations can be tracked in the writings of fathers of international law like Grotius Campfens. During Congress of Vienna European powers agreed to return cultural objects looted by Napoleon (Campfens 2019, 87). The protection covering cultural items was later codified in the first convention on humanitarian law, the 1899 Hague Regulations Concerning the Laws and Customs of War on Land. The attacks against cultural heritage during WWII acted as a trigger for ad hoc treaties on the protection of cultural objects. The application of these treaties to colonial contexts however is considered impossible due to the principle of non-retroactivity.

The expansion of human rights norms offers a plausible way to address the problem. The right to take part in cultural life consecrated under article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) offers arguments to demonstrate the birth of a right to restitution of colonial artefacts. Pursuant to General Comment 21 of the UN Committee on Economic, Social and Cultural Rights, the right to take part in cultural life encompasses the right to 'access to cultural goods'[9]. This interpretation, in line with several contemporary museums' guidelines and soft law documents, offers an

[9] UN Committee on Economic, Social and Cultural Rights, General Comment no. 21, Doc. E/C.12/GC/21, 2–20 November 2009; ICESCR, Art. 15, para. 1(a)). Consequently, states are due to adopt 'specific measures aimed at achieving respect for the right of everyone… to have access to their own cultural... heritage and to that of others' (ICESCR, paras. 49(d), 50)

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instrument for former colonized people to claim back their cultural heritage.

Similar conclusions were drawn by former independent expert in the field of cultural rights, Farida Shaheed. She declared that:

> [t]he right of access to and enjoyment of cultural heritage forms part of international human rights law, finding its legal basis, in particular, in the right to take part in cultural life, the right of members of minorities to enjoy their own culture, and the right of indigenous peoples to self-determination and to maintain, control, protect and develop cultural heritage[10].

Even more explicit with regard to a right to restitution is the UN Declaration on the Rights of Indigenous People (UNDRIP), which includes specific norms relating to cultural objects (Gómez Isa 2020). Article 11.2 UNDRIP includes a right of 'redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs' (Fischer-Lescano 2020). Article 12.2 UNDRIP affirms that: "States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned". Although the UNDRIP at its birth was not a binding instrument, it has acquired a particularly high status because its provision regarding indigenous people cultural heritage are an expression of the right of access to culture stemming from article 15 ICESCR.

Campfens argues that 'According to General Comment on Article 15 of the ICESCR, para. 1(a), the right of "access to culture" includes the rights as listed in the UNDRIP' (Campfens 2019, 100). Part of legal scholarship is of the opinion that UNDRIP has crystallized into customary international law, but state practice is still inconsistent with its requirements. Therefore, more in-depth research is needed to verify if it has given birth to new rules requiring the restitution of cultural heritage taken from indigenous peoples during colonial periods.

A reference must be made also to the potential role that the principle of self-determination of people might play in future disputes

[10] Human Rights Council, "Report of the Independent Expert in the Field of Cultural Rights (Farida Shaheed), Doc. A/HRC/14/36, 22 March 2010.

regarding restitution of colonial cultural items. Although at the moment extraordinary, the case of the restitution of the Venus of Cyrene to Libya by Italy provides an interesting research path. The statue was returned because the Italian Supreme Administrative Court (Consiglio di Stato) argued that the right of self-determination of former colonies postulates the return of cultural items (Chechi 2008, 159–81). This interpretation, if supported by state practice, could have a ground-breaking impact on the dispute regarding the restitution of cultural items between former colonial powers and ex colonies.

Conclusion

This article has argued that to engage with colonial atrocities transitional justice has to breach its tie with colonial remnants of international law and embrace a fully decolonized understanding of it. So far international law has contributed to seal colonial injustices pretending that nowadays they cannot be repaired. This was due to unilateral, selective and bad faith interpretations of the legal framework surrounding colonial encounters between 'civilized' racist conquerors and 'uncivilized' local populations. The suppression of claims for reparation to address colonial injustices is however not dictated by international law, but rather by a neocolonial interpretation and misapplication of the latter.

The increasing attempts to come to terms with historical injustices in the last twenty years through legal action and transitional justice initiatives, demonstrate an emerging intolerance towards the duplication of colonial racist rationales emerging by the uncritical application of colonial international law. It has demonstrated that a decolonial interpretation of the rule of intertemporality, coupled with the awareness that international law of the colonial era was polycentric and not Eurocentric, can lead to fairer results paving the way to reparation for colonial injustices. With regard to colonial cultural heritage in particular, it has sketched a human rights-based legal framework which can make restitution possible irrespective of the legality or illegality of the acquisition of cultural objects. In doing so, this article has highlighted areas where further legal research should concentrate to guide transitional justice programmes conceived to address the legacy of colonial injustices.

The agenda for future scholarly engagement is thick, inversely proportional to the engagement of transitional justice and international law with colonial atrocities. Scholarly work should first and foremost

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concentrate on indigenous perspectives on the legal framework applicable to colonial atrocities and on dispute settlement tools rooted in the culture of the victimized communities. It is crucial verifying when European international law has become truly universal, which implies that it was based on the respect of the key principles of reciprocity and consent. Equally important is to verify the content of interpolity law in contexts where European international law was not applicable for the reasons outlined above.

Scholars engaged in assessing the suitability of reparation for colonial violence using international law as a yardstick, might want to engage in a comprehensive analysis of the rule of intertemporality in both its components, to clarify cases where old laws can be illuminated in the light of changing values of the international community. The clarification of the legal framework surrounding claims for reparation of colonial injustices and restitution of colonial cultural objects does not mean per se that reparations, when due, should be channelled mainly through legal procedures.

In the end, we all know that colonial practices were unacceptable and illegal as much as the genocidal acts that have marked the history of Europe in the twentieth century. If the former have gone unpunished while the latter have been addressed, it is a matter of politics and not of law. Advocates of transitional justice might use the arsenal that this paradigm has developed enriched with non-Eurocentric perspectives and decolonial filters to cope with the issues that decolonization, which is an ongoing process, still posits every day.

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