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A principle(s)d approach in addressing wrongful land acquisition under German colonial rule

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Abstract: *In this chapter we seek to make connections between the expansion of colonial laws and accountability principles in public international law and current constitutional law principles. In particular, we inquire whether the lawmaking and lawgiving process during the colonial era, especially in relation to contract law and the ordering of private transactions, was in fact void on account of inherent illegality and, therefore, whether this engendered state liability. In so doing, we make connections between the past and the present and between public and private law. The chapter focuses on the propertysales contracts between German colonisers and indigenous peoples in Namibia, many of which predate the formal declaration of the German protectorate (Schutzgebiet) and the introduction of reception clauses. We argue that, even on orthodox doctrinal grounds, these transactions were void under German contract law, contrary to the lex loci principle in private international law, and ineffective*

under Nama law, which we treat as the primary legal order governing land in Bethanie. On that basis, we ask whether and how the contemporary German state can be held accountable under the law of state responsibility for colonial era dispossession. We describe this as a principled approach: an intervention that remains within the doctrinal architecture of public international law and German law, while being guided by an Afrocentric and TWAIL-informed critique of colonial legality. In doing so, our chapter seeks a synthesis between these normative orders, with a view to opening space for an equitable settlement of the unlawful expropriations carried out by the German state in what would later become Namibia.

1 Setting the scene

Imagine an intrepid Nama traveller arrives in Bremen in 1850. As his gaze takes in the land and the waters that would in the future become one of the most important ports in Europe, he declares his intention to acquire these properties. Soon, the responsible German is summoned, and an offer to buy is made. A fair deal, the Nama insists, must be governed by the laws of Namibia and be written in perfect Nama language. Of course, the responsible German person has no clue about Nama contract law and has not heard of this strange Nama language. But transact, they do, and contracts are written up, exchanged, and sealed. Later on, a few more Namas arrive, having heard of the cheap interests in land that the German natives seem to be giving away for next to nothing. Nama contracts galore, Nama travellers by the boatload, and soon enough, there are enough to convince the Tribal Council of the Nama to declare Bremen and its adjacent lands a Nama protectorate. The protectorate declaration, in addition to asserting constitutional powers over Bremen, also attempts to retrospectively cure all defects in the Nama contracts signed by the Namas who had arrived earlier, and further, they affirm the general application of Nama law over all persons and things.

Now, if this sounds ridiculous, it is probably because it is. Before the arrival of these Namibians, Bremen had its own legal system, with specific laws and procedures for contracts and dealings in interests in land. It had its own judicial system for dealing with and settling disputes. To bypass these provisions and insist that Nama law applies requires legal gymnastics that have the sole purpose of justifying the unlawful taking of land. If one transposes the actors and the places in this allegory, it describes the process of land acquisition by Germans in the territory that would later be called Deutsch-Südwestafrika or Namibia.

In this chapter, we aim to question whether German land acquisitions in Namibia during the early colonial period were lawfully executed. We argue that, as a matter of German law, these transactions were void. But we do not stop there, we go further and argue that, as a matter of Nama law, which in our view is the correct law for transactions involving Nama land and Nama subjects, the dispositions were ineffectual. We do this to show that there was no legal basis for these land transfers. This conclusion has constitutional implications for Namibia as it grapples with land reform: Not all acquisitions are equal. Some suffer such a defect that the constitutional right to fair compensation will not exist. As far as land reform is concerned, a focus on these acquisitions would be a good starting point. This chapter pursues a dual aim: first, to demonstrate using orthodox German private law, public international law and Nama law – that colonial land acquisitions in Bethanie were void; and, second, to situate that doctrinal analysis within a critical, Afrocentric and Third World Approaches to International Law (TWAIL)-informed understanding of colonial international law.

This chapter pursues a deliberately modest, yet multilayered ambition. First, it is written in conversation with German constitutional lawyers, public international lawyers and colonial legal historians who continue to invoke the supposed legality of these transactions to resist contemporary claims to land and reparations. For that audience, we proceed doctrinally, drawing on familiar categories of treaty validity, *lex loci*, contract doctrine and state responsibility, and asking what those rules would have yielded had they been applied symmetrically to European and African polities. Second, our point of departure is explicitly Afrocentric: We treat Nama law as the primary legal order governing land in Bethanie and approach German and international law as intrusive, and ultimately unsuccessful, attempts to overwrite that order. Finally, the analysis is informed by TWAIL and decolonial scholarship which has long insisted that the 'colonial encounter' cannot be squared with the core principles that European publicists professed to apply among themselves.[1] We do

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1 M Mutua 'What is TWAIL?' (2000) 94 *ASIL Proceedings* 31; A Anghie *Imperialism, sovereignty and the making of international law* (2004).

not claim to offer a full reconstruction of international law; rather, the *principled approach* developed in part four is a first step, showing that even an internally consistent application of existing doctrines destabilises the colonial legal settlement.

We commence this chapter by detailing the specific events during the early German land acquisition efforts (1). This stage setting is then followed by an examination of the implications of illegality under public international law (2), German law, and Nama law (3), before ultimately assessing what this means for public international state liability law and for the intertemporal rule (4). We conclude with some thoughts on land reform and colonial heritage (5).

2 A tale of greed

This article's basis is the events during the early days of German colonial efforts, which were already briefly introduced. While many readers might be well aware of this timeline, providing it in detail is central, as depending on the applicable law, court decisions, and contracts regarding land ownership might indeed be based on the incorrect legal basis. For the sake of clarity, this article focuses on the Bethanie area – now Southern Namibia – and the contracts and court decisions that governed its acquisition. This first part serves to identify the exact timeline of events in the respective area and the applicable law at the given time.

The immense suffering of Bethanie's peoples essentially starts with one person's name: Adolf Lüderitz. On 1 May and 25 August 1883, a German merchant, Heinrich Vogelsang, signed an agreement with Chief Joseph Frederick of Bethanie on behalf of Adolf Lüderitz, a successful German businessman. The treaty states the sale of the respective territory along the southern coast to Adolf Lüderitz.[2] This sale itself was already highly controversial: At the time, the British mile was the go-to measurement in Bethanie due to the previous British entanglement in

2 ‚Einen Landstreifen an der Küste in der Breite von 20 geographischen Meilen vom Orangefluss (unter 29° 30‘ · s. Br.).bis zum 26.° s. Br., Arigra Pequena, im Flächengehalt von ca. 800 Quadratmeilen (durch Kaufverträge vom 1. Mai und 25. August 1883 von dem Beherrscher von Bethanien, Chief Josef Frederiks erworben)‘.; L Sander *Geschichte der Deutschen Kolonial-Gesellschaft für Südwest-Afrika* Vol II (1912) 43.

the area. The German merchant, however, referred to the German mile, which is roughly four times larger than a British mile. Many sources state that he did this while knowing that his counterpart supposed they were talking about the British measurement, letting him believe he was selling a significantly smaller amount of land.[3] This aspect is but one in a line of illegalities, which will be further elaborated on in part 3.

It was later, on 28 October 1884, that Bethanie's peoples, represented by Chief Joseph Frederick and the German state, represented by Heinrich Vogelsang, concluded a so-called *Schutz- und Freundschaftsvertrag* (declaration of the protectorate), stating that both parties were led by the desire to declare their friendship and cooperation.[4] In this document, Joseph Frederick expresses that he urges the German *Kaiser* to form a protectorate for his people. Further, the parties agree that disputes between German and Bethanie citizens are to be resolved by a special commissioner as long as the parties do not come to a separate agreement regarding this matter. Concerning the applicable law, German law was declared applicable for most parts; again, making exceptions concerning disputes between Bethanie citizens.[5]

Therefore, the original contract between Lüderitz and Frederick of 1883 was not finalised when German law was officially in effect. Thus, Nama law would have been the relevant law regarding the sales contracts. As this posed the risk of contract invalidity, the declaration of the protectorate aimed to resolve this issue by stating in articles 4 and 5 that the contract had been validly concluded.[6] Finally, on 3 April 1885, Adolf Lüderitz sold the Bethanie territory to the newly formed German Colonial Society for Southwest Africa (*Deutsche Colonial-Gesellschaft für Südwest-Afrika*),[7] enabling the colonial exploitation to be

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3 C Nebe 'Shady deals: How German colonists bought an empire in Africa', http://www.dw.com/en/shady-deals-how-german-colonists-bought-an-empire-in-africa/a-67583060 (accessed 18 March 2025).

4 A scan of the original document is available at http://www.sammlungen.ub.uni-frankfurt.de/kolonialesbildarchiv/content/titleinfo/11427357 (accessed 18 March 2025).

5 Sander (n 2) 32f.

6 A PDF version of the 'Schutz- und Freundschaftsvertrag' can be viewed at https://www.rice.de/06_PROJEKTE/NAMIBIA_2006/DOKUMENTE/Schutzvertrag_1884.pdf (accessed 13 July 2025).

7 Contract between Adolf Lüderitz and the German Colonial Society of April 3 1885 in Sander (n 2) 43.

consolidated into one company.[8] Much later, in 1896, the imperial court of Bethanie (*Kaiserliches Gericht zu Bethanien*) declared both contracts valid. It claimed that the 1884 declaration of the protectorate validated the earlier contract with Lüderitz, being well aware that German law, as well as general law principles, would raise serious doubts about contract validity.[9]

3 Implications of illegality

After this summary of events, the next part focuses on the implications of illegality, looking at different possible perspectives by first clarifying the legal nature of the declaration of the protectorate and its validity and then the practice in international law in relation to the applicability of the law. We argue that the declaration of the protectorate was void according to international law standards and that Nama law was the relevant legal order to be applied.

For the sake of completeness, we also assess some alternative scenarios attendant to this: first, the scenario in which the declaration of the protectorate was valid, and, second, the non-applicability of German law for the contract from 1883, as well as for the court decision of 1896, showing what the legal situation would be if Nama law had been applied.

3.1 Perspectives on illegality

To determine whether these land acquisitions were void, we must first determine which law was applicable for which step of the land acquisition process. In the introductory paragraph, we identified three stages concerning this effort: the 1883 sale of land, the 1884 declaration of the protectorate, and, finally, the 1896 court decision. Here, the declaration of the protectorate is the central legal fulcrum as it does two critical functions: It states the validity of the 1883 contract and determines German colonial rule for the 1896 court decision. Therefore, we must

8 In addition to the Bethanie territory, using similar methods, Lüderitz had also acquired the Topnaar and the Hermannus territory; see Sander (n 2) 43.

9 This becomes clear as the Court itself states that because of the declaration of the protectorate and the confirmation of the first treaty with Lüderitz, the latter would not be subject to a separate examination: Kaiserliches Gericht zu Bethanien, Urt. v. 15.04.1896. See the print of the original document in Sander (n 2) 84f.

first be aware of the declaration's legal nature and then determine whether it meets the treaty validity criteria under public international law.

3.1.1 The declaration of the protectorate

In general, a protectorate is a treaty in international law containing a

> powerful State's promise to protect a weaker State from external aggression or internal disturbance, in return for which the protected entity yields certain powers to the protector ... The dependent entity is not annexed.[10]

In nineteenth century colonial efforts, however, it was common to establish so-called 'colonial protectorates', which were also created through treaties with tribal entities. In theory, the tribal entity retained internal power but, in practice, the lines of annexation were heavily blurred by the colonisers.[11] Therefore, whether the coloniser had in fact taken over the land not only depended on the respective declaration, but on the coloniser's actions.[12]

In the Bethanie area, the declaration of the protectorate aimed to ensure the German *Kaiser's* legal authority over the area in the future (article 8 of the declaration). Additionally, articles 4 and 5 state that the chief sold the land to merchant Lüderitz, and that the *Kaiser* recognises this sale and assigns the respective area under his control.[13] As mentioned

10 M Mrilsch 'Protectorates and protected states' *Max Planck Encyclopedia of Public International Law* (2011), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1082?prd=MPIL (accessed 10 July 2025).

11 R Lesaffer 'Treaties within the history of international law' in MJ Bowman & D Kritsiotis (eds) *Conceptual and contextual perspectives on the modern law of treaties* (2018) 69f.

12 See, eg, JA Kämmerer 'Das Völkerrecht des Kolonialismus: Genese, Bedeutung und Nachwirkungen' (2006) 39 *Verfassung und Recht in Übersee* 417, https://www.nomos-elibrary.de/10.5771/0506-7286-2006-4-397/das-voelkerrecht-des-kolonialismus-genese-bedeutung-und-nachwirkungen-jahrgang-39-2006-heft-4?page=0 (accessed 14 July 2025).

13 The original text is as follows: 'Artikel 4: Der Kapitän hat durch Kaufverträge vom 1. Mai und 25. August 1883 das zwischen dem 26. Grad südlicher Breite und dem Oranjefluss gelegene und sich 20 Meilen landeinwärts erstreckende Küstengebiet seines Landes dem deutschen Reichsangehörigen F.A.E. Lüderitz in Bremen mit allen darauf haftenden Rechten abgetreten. Artikel 5: Seine Majestät der deutsche Kaiser anerkennt diese Landesabtretung, unterstellt das betreffende Gebiet dem Schutz des Deutschen Reiches und übernimmt die Oberhoheit über dasselbe'; see https://www.rice.de/06_PROJEKTE/NAMIBIA_2006/DOKUMENTE/Schutzvertrag_1884.pdf (accessed 14 July 2925).

earlier, the tribal entities retained some authority over their own affairs. However, when it came to issues such as property, social status within (colonial) society, or relations with non-indigenous residents, the German authorities were in control.[14]

3.1.2 A contract under public international law?

Keeping this in mind, it is already controversial whether this declaration of the protectorate qualified as a proper treaty under international law standards, especially given the retroactivity of the declaration regarding the sales contract. Suppose it was not, and is indeed void. In that case, we must turn to international law theory to identify the applicable law based on international standards to determine which law applies to the 1883 sales contract. In this sub-part, we deliberately remain within the doctrinal vocabulary of nineteenth century public international law. The question is whether, taking seriously the criteria that European states applied among themselves, the 1884 declaration of the protectorate can plausibly be regarded as a valid treaty.

Treaty requirements under international law and the declaration of the protectorate of 1884

For a contract in international law to be valid, article 6ff of the Vienna Convention on the Law of Treaties (VCLT) define the requirements: the capacity of a state to conclude treaties, the power of representation, and the possibilities of treaty conclusion. As article 4 of the VCLT clarifies, however, these provisions only apply to contracts signed after the Convention's entry into force in the respective state. Therefore, we must rely on general principles of international law, considering the state practice in 1884,[15] and the question of whether these colonial state practices are even suitable for application to the colonised party. We will, therefore, briefly consider the general principles of international law before exploring the historical context.

14 R Michaels & L Salaymeh 'Colonialism and German private international law: Colonial structures in traditional PIL' *Conflict of Laws.net* (4 January 2024).
15 See, eg, I Sinclair *The Vienna Convention on the Law of Treaties* (1984) 10ff.

A treaty according to international law

For a treaty in public international law to be valid, three requirements are necessary: the statehood of both partners, the formal power of representation, and consent to be bound by the procedure of public international law.[16] These requirements emerged from common state practice and originated from the common agreement on how a treaty ought to be formed and carried out – with the consensus of common state practice being the key aspect that governs public international law.[17] At the same time, the analysis is informed by TWAIL scholarship, which has shown that these criteria were never intended to recognise African political communities as equal subjects of the *ius publicum europaeum*.

Africa's role in international law

This phenomenon of common ground, however, is called into question when it comes to colonial agreements, such as the 1884 declaration of the protectorate. The following will serve as an example of why this is the case: On 26 February 1885, the 'West-Africa- or Berlin-Conference' (in German: *Kongo-Konferenz*) was held in Berlin, Germany. Fourteen European states decided the fate of the African continent during this conference, without considering the peoples or tribes of the continent as relevant contracting parties. Quite the contrary, article 34 of the Congo Act requires the parties to inform others in the event of land acquisitions or the formation of additional protectorates on the African continent, so that other colonising parties may also claim the respective territory.[18]

This analysis leads to two important implications: first, that Africans and their communal organisations were not recognised as subjects

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16 J Crawford *Public international law* (2012) 370ff.

17 This can, eg, be seen in art 13 Congo Act. Original text: ‚Diese Bestimmungen werden von den Signaturmächten, als künftige einen Bestandteil des internationalen öffentlichen Rechts bindend, anerkannt.' WG Grewe (ed) *Fontes Historiae Iuris Gentium* Vol. 3/1 (1992) 310.

18 The original text is the following: ‚Artikel 34. Diejenige Macht, welche in Zukunft von einem Gebiete an der Küste des afrikanischen Festlandes, welches außerhalb ihrer gegenwärtigen Besitzungen liegt, Besitz ergreift, oder welche, bisher ohne dergleichen Besitzungen, solchen erwerben sollte, desgleichen auch die Macht, welche dort eine Schutzherrschaft übernimmt, wird den betreffenden Akt mit einer an die übrigen Signaturmächte der gegenwärtigen Akte gerichteten Anzeige begleiten, um dieselben in den Stand zu setzen, gegebenenfalls ihre Reklamationen geltend zu machen.' WG Grewe (n 17) 317f.

of international law. The aforementioned article 34 implies that the African population had little choice regarding land acquisition or the formation of protectorates. Otherwise, this clause would not have been adopted solely by the colonising parties. Second, the colonising parties did not even acknowledge the indigenous people's relationship to their homeland and their equal worth as human beings. For them, Africa was there for the 'taking of new possessions (… and they saw themselves being) preoccupied with the means of increasing the moral and material well-being of the indigenous populations'.[19]

This is also reflected in the fact that many colonial parties themselves did not acknowledge African communities as states. They used this very argument to deny the annexation of certain territories, claiming that it had indeed happened via a private law contract.[20] This highlights an unmissable point: Applying international law standards in this period of history, where standards were set by colonial powers, and concepts rooted in the coloniser's mindset, contradicts the core of international law. As stated above, its core element is reaching a common understanding, governed by the reciprocal knowledge and consent on how a treaty ought to be formed.

In the context of colonisation, such a consensus was impossible. There was never an equal partnership, only the imposition of ideas and rules – like the idea of public international law. From a doctrinal perspective, applying the treaty-formation criteria recognised among European states in the late nineteenth century leads to the conclusion that the 1884 declaration cannot qualify as a treaty. From a TWAIL-informed perspective, this is precisely what one would expect from a legal order structured to exclude African polities from the *ius publicum europaeum*. Therefore, it is quite hypocritical to now invoke principles of international law to justify colonising actions back then. In fact, these same principles, when enforced strictly, lead to the inevitable conclusion that many colonial agreements lack the necessary consensus. Formalising these declarations of the protectorate, thus, only served as a formal justification of legality – it had nothing to do with an equal agreement. Therefore, the declaration of the protectorate cannot be considered a treaty under public international law standards.

19 Translated from the German original by Grewe (n 17) 298.
20 Lesaffer (n 11) 70.

Private international law

In this regard, it seems possible to consider the declaration of the protectorate a private law contract, as some colonial powers did (see above). However, it would be highly problematic to classify such a treaty as private law simply because the classification as a treaty under public international law fails. It would be nothing more than an attempt to circumvent the obvious legal deficiencies under public international law and to argue the validity of a treaty through the back door. And even if we see the treaty as a private law contract, by *lex loci*, Nama law would have been the relevant law, which would not have approved these transactions (see in detail below under 3.2.2).

The treaty's article 6

Besides these formal doubts in terms of validity, there is one major concern content-wise: The clause, which was supposed to cure the land sales contracts closed prior to the declaration of the protectorate. In the declaration's article 6, the German *Kaiser* confirms the validity of the 1883 land sale to Lüderitz, calling it a *Kaufvertrag* (German term for sales contract). In article 8, he makes clear that any disputes resulting from this confirmation of validity shall be resolved by the German government.[21] Two possibilities result from this wording content-wise: the confirmation of the void transaction, or the retroactive applicability of German contract law.

The confirmation of the void transaction

The wording of article 6, which states that Joseph Frederick had validly transferred the land to Lüderitz,[22] could be read as a confirmation of the sales contract as known from current section 141 BGB. Here, the parties confirm the validity of a void contract, which renders the contract

21 H Hesse *Die Schutzverträge in Südwestafrika* (1908) 8f.

22 'Der Kapitän hat durch Kaufverträge vom 1. Mai und 25. August 1883 das zwischen dem 26. Grad südlicher Breite und dem Oranjefluss gelegene und sich 20 Meilen landeinwärts erstreckende Küstengebiet seines Landes dem deutschen Reichsangehörigen F.A.E. Lüderitz n Bremen mit allen darauf haftenden Rechten abgetreten.'

valid from the time of confirmation (here: 1884).[23] Then, according to German contract law, the party needs to declare its intent to confirm the contract. In general, every action is possible to monitor this will; and the confirmation in the body of a contract is possible. However, when considering the contract confirmation, all circumstances must be taken into account; especially whether the confirming party has justified reason to act in this regard, for instance, due to lack of choice or to circumvent greater disadvantages.[24] This possibility will be further examined in part 3.2.2.

The retroactivity clause

In any case, by using the German term *Kaufvertrag*, it is clear that the *Kaiser* considers German contract law to be the guiding principle for the 1883 sale. Therefore, the contract's wording indicates that the *Kaiser* could have also deemed the 1883 contract to be evaluated by German contract law. This would mean that the applicability of German contract law had to be retroactively established, as by the principle of *lex loci*, Nama law would have been the applicable law of the place.

In many legal orders, however, the retroactivity of legal norms is restricted to very certain cases, including the German legal system, which essentially limits the retroactive applicability to cases of overriding, compelling reasons of public interest.[25] Approaches such as this can be found in many other legal orders.[26] In international law, too, the retroactive application of treaties is generally limited to a small number of exceptions. Naturally, the protection of legitimate expectations in the state-citizen relationship does not have to be taken into account in the same way here. However, an equivalent contractual relationship between

23 M Beurskens '§ 141 BGB' in Hager (ed) *BeckOGK BGB* (2025) paras 2ff.
24 Beurskens (n 23) paras 18f, 22.
25 In German law, the so-called *Rückwirkungsverbot* prohibits many cases of retroactivity. Retroactivity concerning a terminated legal case (*echte Rückwirkung*) is only possible when the legal subject had to expect retroactivity and could thus not trust in the legal *status quo* or in case of overriding, compelling reasons of public interest. See, eg B Grzeszick in Dürig/Herzog/Scholz (eds) *Grundgesetz Art 20 GG* (2024) paras 80ff.
26 An informing overview can be found here: JT Woodhouse 'The principle of retroactivity in international law' (1955) 41 *Transactions of the Grotius Society* 69, https://www.jstor.org/stable/743291 (accessed 13 July 2025).

the states, as well as consensus on the retroactive application of the treaty, is crucial.

In this case, article 6 retroactively validates the 1883 sales. Therefore, allowing retroactivity leads (and actually led, as seen in Namibia's colonial history) to massive disadvantages for the Bethanie peoples, like the loss of their homeland and unfair treatment. Consequently, the 1884 declaration of the protectorate was not a case of permissible retroactivity. Anyhow, part 3.2.1 will discuss this possibility in detail.

3.1.3 Concluding remarks

This demonstrates that, considering the fledgling stage of public international law in the nineteenth century, it is quite challenging to determine the applicable legal principles. When examining the colonial declaration of the protectorate, this becomes even more difficult: Nowadays, African states participate in public international law relations and, ideally, genuine state consensus exists – which is the core criterion of public international law. During colonial times, however, this concept was imposed by colonial powers. As a result, participation was largely illusory, consisting mainly of forced agreements and unequal contractual relationships. From a modern legal standpoint, we must therefore recognise that these transactions were not equitable, directly opposing the core principles of public international law as European countries had thought them out to be for one another.

This leads us to a somewhat paradoxical conclusion: Since an equal party consensus was unattainable, the declaration of the protectorate is null and void. We apply principles of international law here, even though we recognise that this is problematic: These principles are based on colonial concepts to which the colonised peoples did not consent. Further, during colonial times, the colonial powers did not even want African peoples to be part of public international law. Therefore, they had drawn up this idea of a somewhat colonial law with two classes: those that were full subjects of public international law and those that were only destined to be ruled over, not even real subjects at all. They put their hypocrisy into what they called *law* to justify their actions, to make them *formally* right.

Applying principles of international law, as would have been the case between the colonial powers, is part of the proposed principled approach, on which we will further elaborate in part 4: the application of those principles that would have applied if the colonial powers had not closed their eyes to the fact that equal human beings and communal structures also existed in Africa.

Therefore, under international law and according to the principle of *lex loci*, the applicable legal rules are those of the land which, in this case, are the Nama laws.

3.2 Evaluating the alternative scenarios

The above analysis shows that neither public international nor private international law can serve the land acquisitions. However, for the sake of completeness, we go further and consider other legal possibilities that have the potential to validate these transactions: In the first instance, we assess the validity of the declaration of the protectorate as a general saving measure (3.2.1) and, second, we analyse the applicability of Nama law due to the voidness of the 1884 declaration (3.2.2).

3.2.1 Scenario one: A valid declaration of the protectorate

As determined above, the declaration of the protectorate could either mean the confirmation of the 1883 sales contract or the retroactive applicability of German contract law. Therefore, the following consequence arises: In the event of retroactive effect, we must establish whether the purchase was validly concluded in accordance with German law at the time. In the case of confirmation of the legal transaction, on the other hand, it must be determined, according to *lex loci*, whether an effective sales contract was concluded under Nama law. It must then be examined whether the requirements for confirmation of the legal transaction were met. Finally, the 1891 court decision must then be analysed on the basis of both scenarios.

Retroactivity and German contract law

Looking at scenario one, where German contract law applies, a quick review of the history of German contract law is needed to identify the relevant legal rules. Then, we will analyse the contracts from 1883 and conclude with the 1896 court decision.

A short history of German contract law

Germany's current legal system strongly relies on codified laws.[27] In 1883, however, the *Bürgerliches Gesetzbuch* (BGB)[28] was not yet in place, entering into force on 1 January 1900.

Before this, there was no *central* German law but rather a consortium of many different legal traditions and customs. However, starting in 1873, the creation of the BGB was underway, with the aim of consolidating all German legal traditions into a single, comprehensive book of law.[29]

Therefore, there is a high probability that contemporary German legal norms are very similar to those from 1883. We will, therefore, identify the relevant current German civil law provisions and check whether these implications were the same in 1883.

The 1883 sale of land

When Joseph Frederick of Bethanie and Adolf Lüderitz agreed on the 1883 sale of land, they both had different understandings of the term 'mile' in mind (see above). This case presents various options for legal evaluation, all centred on a single prevailing principle in German contract law: the declaration of intent, which signifies that a party intends to act in a legally binding manner.[30] For a contract to be valid, two of those declarations of intent must be consistent regarding the expressed subject matter.[31]

The content of a declaration of intent is identified by taking the position of a neutral bystander with average abilities.[32]

Possible applicable norms from German contract law are:

27 Eg, taking into account one of the leading principles of German basic law (*Grundgesetz*) in art 2 III German Basic Law, which expresses the obligation of a legal basis in codified law for every decision of the authorities (*Vorbehalt des Gesetzes*).

28 In short: BGB which is still valid nowadays with a few alterations and additions.

29 Deutscher Bundestag (Ausarbeitung): *Die Entstehung des BGB im Kontext katholischer Interessenpolitik* Wissenschaftliche Dienste des Deutschen Bundestags (2009) 4.

30 C Armbrüster 'Vorbemerkung § 116' in F Säcker and others (eds) *Münchner Kommentar zum BGB* (2025), para 1 f.

31 HW Eckert '§ 145 Bindung an den Antrag' in W Hau & R Poseck (eds) *BeckOK BGB* (2025) paras 1-3.

32 HP Mansel '§ 157 Auslegung von Verträgen' in O Jauernig (ed) *Bürgerliches Gesetzbuch* (2023) para 1.

(a) the hidden dissent, section 154 f. BGB
(b) the error in declaration, section 119 I Var. 2 BGB
(c) the fraudulent misrepresentation in section 123 I Var. 1 BGB

In the event of a dissent, concordant content cannot be established beyond doubt. Gaps remain open even after a supplementary interpretation of the contract. Concerning this, a so-called hidden dissent occurs when the parties are unaware of a mismatch in their agreement but assume that an agreement has been reached on all points. However, a mismatch regarding central aspects of the contract results in the contract being invalid from the very beginning.[33]

By contrast, an error in declaration occurs if the declaring person is mistaken about the content of their declaration – that is, about how their counterpart (taking the perspective of a neutral bystander) would understand the said declaration.[34]

Finally, fraudulent misrepresentation must be assumed when one party deceived the other in such a way that the declaration of intent was issued because of this error.[35]

Neither the error in the declaration nor the fraudulent misrepresentation hinders the contract's validity in the first place, but gives the declarant the right to contest it.[36]

In our 1883 case, two possibilities lie in question:

(a) whether the different understandings of the term 'mile' were a hidden dissent or an error in declaration on both parts; and
(b) whether Alfred Lüderitz, represented by Heinrich Vogelsang, was guilty of fraudulent misrepresentation, letting Joseph Frederick of Bethanie believe that the unit of measurement was indeed the English mile. Regarding this aspect, it is vital to determine whether there was a duty of clarification on the German side.

33 J Busche '§ 155 Versteckter Einigungsmangel' in FJ Säcker (ed) *Münchener Kommentar zum BGB* (2025) paras 10 ff.
34 H Dörner '§ 119 Anfechtbarkeit wegen Irrtums' in R Schulze (ed) *Bürgerliches Gesetzbuch* (2024) para 6.
35 M Rehberg '§ 123 BGB' in J Hager (ed) *BeckOGK BGB* (2025) para 54 f.
36 See § 119 I /123 I BGB.

Which mile?

In the case of a declaratory error, a contract with a particular content is objectively concluded, even though a different declaration content was intended subjectively – here, the British instead of the German mile or *vice versa*. Conversely, in the case of a hidden dissent, finding an objective contract subject is impossible, leaving the parties without a valid agreement on that matter.[37]

Regarding the 1883 contract, a neutral bystander from the Bethanie's perspective would consider the declaration to mean 'British mile', and a bystander from the German's side would understand 'German mile', leading to the following paradox result: From Lüderitz's point of view, a contract with the German measurement understanding was concluded while, from Joseph Frederick's side, the contract would be valid using the British measurement – leaving us with no match and, thus, a dissent. This result occurs as we cannot identify a uniform objective bystander's perspective due to the different legal and societal backgrounds.[38]

This results in the question of legal consequences. As of current German law, a hidden dissent means that the contract has never been validly closed if the parties had not agreed on the content, had they been in knowledge of their dissent. However, the contract was definitely never closed if the parties did not agree on the contract's main subject, as is the case in this matter concerning the amount of land to be sold.

In 1883, when the sales contracts were concluded, the BGB was not yet in place, but a committee of professors had presented a first draft of it containing an allocation of the legal norms applied at that time

37 See M Brinkmann '§ 155 BGB' in H Prütting and others (eds) *BGB-Kommentar* (2025) paras 1f.

38 However, this perspective is not at all binding but open to interpretation and different results. Eg, it would also be possible to give the neutral bystander either the perspective of the Bethanie's peoples or the one of the German colonisers. Taking on a unified point of view for both perspectives, the contract would either be valid with the German measurement (German perspective) or the British one.

throughout.[39] In this early version of the BGB, the norms regarding dissent were, in fact, very similar to the current version.[40]

However, dissent used to have a slightly different consequence. It used to not lead to the non-conclusion of the contract but to the voidness of the contract.[41]

Fraudulent misrepresentation

It is possible that the German colonisers were well aware of the custom referring to the British mile due to the presence of British colonisers in the Bethanie area prior to German occupation. If this is the case, the central question is: Did Adolf Lüderitz have the duty to clarify the measurement misunderstanding?

Under current German law, this applies when someone cannot learn an essential fact and must rely on the other party's honesty, which then intentionally misleads the trusting person.[42]

In the case of Joseph Frederick of Bethanie, it is highly probable that he had no knowledge of the differentiation between the German and the English mile and, taking into account the situation at the time, in which he had never engaged in business with a German merchant before, he had no other way of gathering this intel. Therefore, he had to trust in the Germans' honesty regarding the measurement.

However, it is unclear whether there was intent on the German side: Looking back at the events, one cannot say, without a doubt, that the Germans knew about this deviation of measurements and, thus, were aware of their duty of clarification. Anyhow, it is highly probable that

39 *"§. 154. Solange nicht die Parteien sich über alle Punkte eines Vertrags geeinigt haben, über die nach der Erklärung auch nur einer Partei eine Vereinbarung getroffen werden soll, ist im Zweifel der Vertrag nicht geschlossen. Die Verständigung über einzelne Punkte ist auch dann nicht bindend, wenn eine Aufzeichnung stattgefunden hat. Ist eine Beurkundung des beabsichtigten Vertrags verabredet worden, so ist im Zweifel der Vertrag nicht geschlossen, bis die Beurkundung erfolgt ist. §. 155. Haben sich die Parteien bei einem Vertrage, den sie als geschlossen ansehen, über einen Punkt, über den eine Vereinbarung getroffen werden sollte, in Wirklichkeit nicht geeinigt, so gilt das Vereinbarte, sofern anzunehmen ist, daß der Vertrag auch ohne eine Bestimmung über diesen Punkt geschlossen sein würde."*

40 A current text version is available under https://:www.gesetze-im-internet.de/bgb/154.html (accessed 14 July 2025).

41 F Möslein '§ 155 Versteckter Einigungsmangel' in J Hager (ed) *BeckOGK BGB* (2018) paras 5 f.

42 Rehberg (n 35) 54f.

they indeed intended to mislead the Bethanie people and trick them into an unfavourable contract. If this indeed were the case, according to section 124 I of current German contract law, Joseph Frederick would have had to declare contestation of the contract within one year after learning about the fraudulent misrepresentation.

In 1883 German contract law, the concept of contestation (*Anfechtung*) had just undergone a considerable development: As touched upon above, before the 1900s, Germany did not have a central codified contract law. Within the different German lands, there were different rules in place, such as the General Prussian State Law from 1794 (*Allgemeines Preußisches Landesrecht*). Concerning the contestation, according to General Prussian State Law, one had to contest a contract before a court in order to declare it void. Starting in the 1850s, Saxony and Bavaria developed their first written civil code: While Bavaria still relied on the necessity of a civil claim before a court in order to contest a contract, the Saxon civil code found a declaration of content to be sufficient to contest a contract.[43] Finally, in 1881 and, thus, shortly after the German *Kaiserreich* was formed in 1871, the first draft of the BGB contained in section 113 I the contestation of a contract via declaration of intent.[44]

Conclusion

Therefore, the contract would be void had Joseph Frederick contested it with a declaration of intent, which we are unable to identify in 2025. Concerning the dissent, the agreement was void.

The 1896 court decision

Now, regarding the court decision of 1896, the Court stated that because of the declaration of the protectorate, which contained the confirmation of the first treaty with Lüderitz, the latter would not be subject to a

43 M Harder 'Die historische Entwicklung der Anfechtbarkeit von Willenserklärungen' (1973) *Archiv für die civilistische Praxis* 209 213f, https://:www.jstor.org/stable/40994682 (accessed 14 July 2025).

44 Harder (n 43) 214.

separate examination.[45] Consequently, it did not examine the validity of the original sales contract, making the decision legally flawed.

3.2.2 Nama law and the confirmation of the transaction

Having shown how German and international law fail to provide a coherent legal basis for the transactions, we now return to the legal order that actually governed land in Bethanie: Nama law. If the declaration of the protectorate is seen as a confirmation of the transaction, we must first determine whether the 1883 sales contract was void according to Nama law (1). We must then determine whether a confirmation was possible in this case (2). This part foregrounds Nama law as the primary legal order governing the transactions, reflecting an Afrocentric approach that treats German and international law as secondary, not constitutive, sources of validity.

Nama law

Prior to German colonisation, the Nama and Herero peoples possessed well-established legal systems governing land tenure, transfer and communal rights.[46] In these societies, land was not held as the private property of individuals but rather as a communal resource, with chiefs or elders acting as custodians on behalf of the entire community. Customary law required broad, informed community consent for any significant transaction involving communal land. Individual agreements with outsiders, especially those conducted in foreign languages or legal forms, could not effectuate a valid transfer of title under Nama or Herero law.[47] Thus, the so-called 'land purchases' by German agents – often concluded without adequate translation, under duress, or with promises and gifts grossly disproportionate to the value of the land – were fundamentally defective. These transactions simply did not meet the requirements of the operative legal systems at the time. The contract was thus void under Nama law. Foregrounding Nama law in this way reflects our Afrocentric starting point: The validity of the sales cannot be assessed without

45 Sander (n 9).
46 MO Hinz *Customary law ascertained Vol 3* (2016) 23ff.
47 See above.

taking seriously the internal norms and institutions through which land relations were organised long before German arrival.

The confirmation of the contract

As stated above, in order to confirm a void contract, the party needs to declare its intent to confirm the contract. In general, every action is possible to monitor this will; and the confirmation via contract is possible. In this case, however, all contracting parties need to confirm the void contract. In addition to that, when considering the contract confirmation, all circumstances must be taken into account; especially, whether the confirming party has a justified reason to act in this regard, for instance, due to lack of choice or to circumvent greater disadvantages.[48]

Looking at article 4 of the declaration of the protectorate, which states that a sales contract was closed with Lüderitz in 1883 and Chief Joseph's signature, this could be seen as a confirmation of the contract void under Nama law (and, for instance, under German civil law). Further, one of Lüderitz's representatives had also signed the agreement, which can be regarded as a confirmation from Lüderitz's side.

However, the circumstances of the alleged confirmation suggest that Chief Joseph had little choice but to sign this agreement. The well-known actions of the German colonisers make it highly probable that he and his people would have faced drastic violence and force, had they not complied in this way. Consequently, the contract could not be confirmed according to German law.

Having looked at the German law perspective, it is, again, logically flawed to apply the German law principle of contract confirmation to an agreement governed by Nama law at a time when German civil law had not yet officially been declared applicable. Under Nama law, the confirmation of this transfer of land would, as stated above, also have failed. Any attempt to override local legal norms by unilaterally imposing German or European legal concepts was legally baseless. The contracts and deeds executed in these circumstances were void *ab initio*; no valid transfer of title could occur absent compliance with indigenous legal requirements. This only further monitors the absurdity of the situation.

48 Beurskens (n 23) 18f, 22.

The 1891 court decision

In this regard, the court decision, again, was legally flawed. The confirmation of the sales contract failed under German civil law as well as under Nama law.

Conclusion of scenario one

In scenario one, where the declaration of the protectorate is regarded as valid, still a legally unflawed land acquisition was impossible, thus making the 1891 court decision legally flawed.

3.2.3 Scenario two: Does Nama law save these transactions?

It is not surprising that under Nama law, none of the transaction steps were legally unflawed, again, making the 1891 court decision unlawful.

3.3 Concluding remarks

This analysis illustrates the legal gymnastics that the German colonisers went through to give their colonising efforts a sprinkle of legality. However, when assessed closely, we quickly spot the charade and identify major legal defects: the wrongful application of colonial international law standards; the dismissal of Nama law; and the ignorance of legal defects under German law. At the time of the initial land acquisitions in the late nineteenth century, German constitutional law did not extend to territories outside the German Empire unless those territories were formally annexed or declared protectorates. German nationals abroad, including those in Namibia, were subject to the local law of the land, not German law. The subsequent establishment of a German protectorate and the retroactive application of German law could not validate transactions that were void under the law in force at the time of their conclusion. German legal doctrine itself recognised that contracts contrary to the law of the place where the land is situated are null and void. A void act cannot be revived by subsequent changes in law, and attempts to do so violate both German and international legal norms regarding due process, property rights, and the requirement of genuine consent.

The principle of *lex loci*, or the law of the land, further underscores the invalidity of these acquisitions. At the time the German agents purported to acquire land, the applicable law was that of the Nama and Herero, not that of Germany or any foreign power. Any attempt to override local legal norms by unilaterally imposing German or European legal concepts was legally baseless. The contracts and deeds executed in these circumstances were void *ab initio*; no valid transfer of title could occur absent compliance with indigenous legal requirements. In this respect, the German colonial project was not merely a political imposition but a legal nullity in terms of property rights.

4 State liability

This conclusion leads us to the question of whether the German state can still be held accountable for these actions today. In this part, we will therefore delve into the implications of international state liability related to colonial rule. Here, one central aspect is that of temporal applicability: Do we refer to international law applicable in the colonies at the given time, or do we alter it in order to cancel out colonial injustices – which contradicts the intertemporal law principle?[49] Doing the latter, achieving state liability might become easier. However, this comes with uncertainty for current state actors and bears a high potential for disputes and disagreement. To try and untangle this matter, the analysis will provide an overview of past and present principles (4.1) and conclude how they might have a chance of success with a principled approach to colonial justice (4.2).

4.1 Past and present principles of international law

As touched upon above, European actors had not recognised the African territories as states and had thus excluded them from the *ius publicum europaeum*.[50] Therefore, by custom at the time, the protectorates or colonies would not have been able to claim state liability for the unlawful

49 JA Kämmerer 'Das Völkerrecht des Kolonialismus: Genese, Bedeutung und Nachwirkungen' *Verfassung und Recht in Übersee* 39 (2006) 417, https://:www.nomos-eli-brary.de/10.5771/0506-7286-2006-4-397/das-voelkerrecht-des-kolonialismus-genese-bedeutung-und-nachwir-kungen-jahrgang-39-2006-heft-4?page=0 (accessed 14 July 2025).

50 As above.

taking of land.[51] Among the colonial powers, however, state liability law was developing together with international obligations such as the respect of foreign territory.[52]

4.1.1 Breach of international obligations

Regarding this, the contemporary state liability law has emerged over time through common practice and consensus. The requirements are the following:

(1) an international legal obligation in force between two states;
(2) a omission imputable to the state; and
(3) a causal link between the violation and the harm that occurred.[53]

Here, it is of vital importance that the harmful action occurred during a time when the legal obligation in question had already been established as international practice between the states in question,[54] thus prohibiting the intertemporal application of state liability law. As mentioned above, the colonial public international law did not prohibit dubious land acquisitions. Quite the contrary, the colonial powers welcomed and valued those, as seen in the Congo Act, where the contracting parties encourage each other to take even more land and make it their possession.[55] Therefore, by forming a common ground on their racist beliefs towards the colonised parts of the world, the claim was that no international legal obligation existed that prohibited unlawful land acquisitions in Africa and, consequently, no state liability: a rather self-serving conclusion.

4.1.2 Diplomatic protection

The law of diplomatic protection is one of the first forms of state liability law. It emerged during colonial times and was mainly used to protect

51 R Kolb *The international law of state responsibility* (2017) 9f.
52 J Crawford 'State responsibility' *Max Planck Encyclopedias of International Law* (2006) para 1f.
53 See, eg Crawford (n 52) paras 6ff.
54 As stated by art 13f of the 2001 ILC Articles on Responsibility of States for Internationally Wrongful Acts, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (accessed 15 July 2025).
55 Eg art 34; see WG Grewe (ed) *Fontes Historiae Iuris Gentium* Walter de Gruyter Berlin New York vol. 3/1 (1992) 317f.

the colonising country's citizens in foreign territory.[56] By international custom, the following requirements need to be fulfilled to grant diplomatic protection:

(1) an injury has occurred involving a citizen of one state;
(2) another state has caused that injury; and
(3) the injury was considered a wrongful act at the time it occurred.[57]

Again, disregarding the question of statehood and citizenship under colonial rule under requirement (1), there again was no wrongful act by international custom due to the colonial public international law that the colonising parties put in place – as the taking of land was very much welcomed among European states.[58] Thus, doctrinally, the intertemporal rule and the architecture of state responsibility block claims arising from colonial dispossession. Normatively, this reveals what TWAIL scholars have long argued: that the law of state responsibility was designed to protect colonial states from precisely such claims. Our *principled approach* is a minimal internal correction that exposes this asymmetry without abandoning the doctrinal framework altogether.

4.2 *Status quo* and a principled approach

The proposal we advance here is intentionally restrained. We do not attempt to redesign the law of state responsibility or to draft a comprehensive blueprint for decolonising international law. Rather, we ask what follows if one applies to colonial expropriations the existing architecture, particularly the intertemporal rule and the secondary rules of state responsibility, taking seriously the symmetry between relations among European states and relations between European and African polities. In this sense, the *principled approach* operates inside the doctrinal frame, but it is normatively driven by the Afrocentric and TWAIL insight that colonial legality was never meant to count African communities as bearers of rights.

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56 J Dugard 'Diplomatic protection' *Max Planck Encyclopedias of International Law* (2021) paras 2f.

57 See International Law Commission *Draft Articles on Diplomatic Protection* (2006) art 1, https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf (accessed 16 July 2025).

58 Again, this is illustrated in art 34 of the 1884 Congo Act.

We realise that past and present mechanisms to ensure state liability fail. This is, again, because public international law was and remains strongly influenced by the colonial past. Therefore, the former colonisers have made sure that they will not be held accountable via international law, as seen, for example, in articles 12 to 14 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, which state that an action has to be wrongful by international obligation at the time of its commitment. We refer to this as the prohibition on intertemporal application.[59] One may argue that this ensures legal predictability and security for states and that it is the only way in which states will agree to those international standards. The argument is that we have to leave colonialism and its crimes in the past and move forward to build equal and lasting state relationships.

However, in doing so, we miss a central point: that public international law grew due to colonial efforts and that the colonisers created their law to fit their unlawful actions. In short: They made it to render their actions lawful on paper and to protect themselves from any kind of liability. Of course, they were aware that what they were doing was inhumane and would not have been tolerated if it occurred among European states, thus being a breach of a *European* international obligation. Therefore, we are faced with the following situation: State liability does not seem possible given this legal architecture, but at the same time, an equal state relationship between the former colonisers and the former colonised will not be possible as long as these atrocities are not acknowledged and properly addressed.

In what follows, we therefore first introduce different propositions on how international law should be modified (4.2.1) before elaborating on a principled approach in an attempt to reassess colonial injustice based on the existing mechanisms of state liability (4.2.2).

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59 A critical perspective, an explanation of the issue as well as a proposition from German Administrative Law is provided by NL Daiqui 'From past injustices to today's unlawful consequences/Eurocentric legal systems with a global social claim to validity?' *Verfassungsblog* 6 December 2022, https://verfassungsblog.de/from-past-injustices-to-todays-unlawful-consequences-eurocentric-legal-systems-with-a-global-social-claim-to-validity/ (accessed 16 July 2025).

4.2.1 Modification propositions

How state liability should be modified is not a novel question. The intertemporal principle is especially central in this debate. Here, however, land acquisitions are not the primary focus. Many scholars focus on the more prominent atrocities, such as genocide or slave trade.[60] In relation to this, it is discussed whether continuing negative effects can circumvent the intertemporal principle or questioned whether the intertemporal principle itself can even be applied to early colonial cases, as it is a part of international law.[61] Others refer to the Holocaust and name certain provisions of *jus cogens* as an exception to the intertemporal principle. Similarly, one can refer to Radbruch's formula and determine that the colonial international law could not have been regarded as law at all, as it was so obviously wrong and a mere cover to formally claim lawfulness.[62]

4.2.2 A principled approach

The latter is not necessarily transferable to unlawful land acquisitions, as they are, in proportion to genocide, relatively *less bad*, if one had to categorise the colonial wrongdoings. What we can take away, however, is that the colonial law of the time was aimed precisely at avoiding any liability. This denied the colonised population their equality and humanity. In order to compensate for this colonial injustice, the following proposal is made to insert a correction that would enable state responsibility.

Reminding ourselves of the requirements of state liability, the requirements are:

(1) an international legal obligation in force between two states at the time the violation occurred;
(2) a omission imputable to one state; and

60 Eg, with the CARICOM claim, see 'Reparations for Haiti continue to be central to CARICOM's reparations claim – CARICOM Secretary-General', https://caricom.org/reparations-for-haiti-continue-to-be-central-to-caricoms-reparations-claim-caricom-secretary-general/ (accessed 17 July 2025).
61 A Buser 'Colonial injustices and the law of state responsibility: The CARICOM claim to compensate slavery and (native) genocide' (2017) 77 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 426 426f.
62 This, eg, is argued by AR Hippolyte 'Unearthing the legitimacy of CARICOMS reparation bid' (2014) 22f, https://www.academia.edu (accessed 17 July 2025); also quoted by Buser (n 61) 426f.

(3) a causal link between the violation and the harm that occurred.[63]

As identified above, criterion (1) is our main problem: Due to the colonial international law, Africa was not seen as a continent with sovereign communal entities and equal rights and obligations. Therefore, this can be corrected by inserting the following requirements under criterion one:

(a) the violation occurred under colonial rule;
(b) the violation would have been a breach of international law obligations at the time, had one of the colonial powers been the affected party; and
(c) the colonial public international law is used to justify that an international obligation was not breached.

In this regard, this complies with the prohibition on retroactive application, as an international obligation actually existed, just not in relation to the colonised people. Thus, we create the situation that would have existed if the African states had been recognised as equal from the outset. This not only contributes to the recognition of past injustices, but is also a vital step towards decolonising international law.

5 Conclusion

Public international law has the potential to address the wrongful actions of colonising states. With appropriate modification, the principles that form the basis of state liability could correct these historical wrongs. However, for this to happen, a key obligation needs to be recognised by the responsible states; this the duty of cooperation. For without such consensus, there is little chance of addressing past injustice unless the responsible state is willing to acknowledge it. As the current hard politics of decolonisation have shown, this is not an easy goal. However, it must remain our ambition to address errors in the international system and suggest ways to eliminate them. In this case, it is not even necessarily international law that is at the centre of the findings. No, it also involves the law of contemporary Namibia and the issue of fair land distribution and land reform. Read against its colonial grain, public international law contains tools that, if applied symmetrically to African and European polities, would classify German colonial land acquisitions as unlawful

63 Crawford (n 52) paras 6ff.

expropriations engaging state responsibility. In this regard, the debate on colonial succession and decolonisation must be continued.

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