# Buchbesprechungen

***Schwarz, Katarina*: Reparations for Slavery in International Law. Transatlantic Enslavement, the Maangamizi, and the Making of International Law.** Oxford/New York: Oxford University Press 2022. ISBN 978-0-19-763639-8 (hardback). 283 pp. £80.-

I began writing this review sitting in a small café in the Museo de Los Americas in Old San Juan on Puerto Rico. These lands have seen unbearable injustices against the original Taìno populations and enslaved people abducted from the African continent of which the museum provides rich evidence. It is from this historical setting and privileged position – the conference I am attending here although dealing with inequality is held in a local luxury beach resort hotel – that I am approaching the subject of slavery and international law: A subject I had humbly tried to address in a 2018 paper which dealt with the Caribbean Community (CARICOM) claim against the United Kingdom (UK) and other European Countries to recognise and compensate native genocide and slavery.[1] To this date the CARICOM claim remains unresolved. Negotiations to address other historical injustices, such as the genocide against Herero and Nama by German troops, seemingly developed in a more fruitful direction but lately became stalled for various reasons and have been criticised for insufficient participation of affected populations.[2] Thus, the topic of how to redress historical injustices remains timely and important.[3]

Katarina Schwarz's book on slavery reparations is probably the most comprehensive treatment of the subject in recent years.[4] I think it is fair to say that it is written primarily for academics – be it legal scholars, political scientists, philosophers, or others. However, many of its arguments could also be of interest for policymakers and diplomats confronted with claims for reparations in practice.

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1 Andreas Buser, 'Colonial Injustices and the Law of State Responsibility: The CARICOM Claim to Compensate Slavery and (Native) Genocide', ZaöRV 77 (2017). 409-446.

2 See for a critique by several UN special rapporteurs: Letter addressed to the Government of Namibia, AL NAM 1/2023, 23 February 2023, and letter addressed to the Government of Germany, AL DEU 1/2023, 23 February 2023, available at <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27875>.

3 See for recent scholarly contributions to the debate, e. g. Ramona Biholar, 'Reparations for Chattel Slavery: A Call From the "Periphery" to Decolonise International (Human Rights) Law', Nordic Journal of Human Rights 40 (2022), 64-95; Andreas von Arnauld, 'How to Illegalize Past Injustice: Reinterpreting the Rules of Intertemporality', EJIL 32 (2021), 401-432.

4 See for earlier books on the subject: Jean Allain, *Slavery In International Law: Of Human Exploitation and Trafficking* (Leiden: Martinus Nijhoff 2012); Nora Wittmann, *Slavery Reparations Time Is Now: Exposing Lies, Claiming Justice for Global Survival, an International Legal Assessment* (Vienna: Power of the Trinity Publishers 2013).

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Schwarz's book seems to pursue two main goals. First, it seeks 'to bring clarity to the international legal rules, principles, and norms that underpin the discussion' (p. 3). Second, and more in line with scholarly trends, her work seeks to deconstruct the legal discourse and open space for a reparatory justice framework that 'can shape reparations discourse and delivery' (p. 3) irrespective of whether reparations are due from a positivist point of view. While I think the book adds little to clarifying legal rules – mostly even complicating the matter for good reasons – Schwarz nicely accomplishes her second objective which also appears more central.

At the heart of her inquiry stands what she calls a 'new theory of reparatory justice' (Chapter 4). This theory promotes her central point that the law of state responsibility may inform reparation debates irrespective of the question whether slavery as such was illegal or not and that the debate should not be limited to financial compensation but should involve 'multiple modalities of redress' (Chapter 5).

But first things first. The book starts with an overview over the Triangular slave trade, what she calls the Maangamizi (Chapter 1),[5] and the role of (historic) international law and lawyers in legitimising the enslavement of Africans (Chapter 2). Although the author is aware of the broader history of slavery she focuses on the particularities of transatlantic enslavement. In doing so she highlights similarities with other forms of enslavement but ultimately argues for considering the Maangamizi as a 'sui generis case' (p. 48). Discussing the colonial origins of international law, the author problematises whether engaging with 'European international law' is at all helpful to solve this 'sui generis case'. Ultimately, however, she affirms this question. In her eyes, such engagement is necessary to destabilise arguments of 'reparation distractors' and the procedural framework of international law may be helpful as a point of reference for the consideration of historical injustices (p. 56).

In terms of doctrine, Schwarz engages with all relevant 'obstacles' to reparations claims, such as the retroactive principle, causality, and the impact of time on reparability. Her inquiry starts with a summary of the historical evolution of the prohibition of slavery both in treaty and customary law. It comes as no surprise for lawyers who dealt with the subject that she dismisses attempts 'to backdate the abolition of enslavement in treaty law to precede the transatlantic system [as] a largely fruitless endeavor' (p. 59). More

5 According to the author '[t]his term places the specific injustices within their broader context, recognizing not only that individuals were victims of enslavement but also that this treatment was intentionally perpetrated, widespread, specifically targeted toward Africans and their descendants, and interwoven with a range of related abuses'. (p. 10) The term is also used by activists to describe what they call the 'African holocaust'.

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promising to her is international customary law. Her contribution here (again) is to highlight the nuances and shifts in the (legal) justification of whether and under which conditions slavery was seen as acceptable. Analysing expressions of *opinio juris* voiced by African political entities at the time of historical injustices, Schwarz concludes that the 'fluctuating levels of participation and resistance presented by African political leaders make the claim to universal prohibition for the period of transatlantic enslavement similarly inadequate' (p. 74). Further, she dismisses Wittmann's argument that compensations are due because slavery was illegalised before the triangular slave trade,[6] based on the argument that international law can 'change for the worse' (p. 55).

So far so doctrinally convincing – but what about potential exceptions to the intertemporal law principle discussed in the literature?[7] Reading her analysis leads to ambivalent feelings. First, I was a bit disappointed that the author did neither lay a focus on the competing arguments concerning non-retroactivity and potential exceptions nor promote her own view on the subject. Instead, Schwarz limits herself to 'destabilize' the argument that slavery was perfectly legal (p. 77). The consequence she draws from this finding is not that the principle of retroactivity could be overcome.[8] More decently she promotes the view that international law at least should not be used to justify non-rectification on other grounds, be them political or moral (pp. 6 and 18). I am ambivalent about this finding because for me it is overly obvious. At the same time, I see her point in convincing policymakers and politicians who all too often refer to international law in this regard as a ready excuse not to engage meaningfully with reparation claims. So, on second sight Schwarz has a point here.

What follows are several chapters predominantly focused on the secondary rules under the law of state responsibility relevant for slavery reparations. Schwarz engages with these norms to make her central argument that irrespective of a violation of primary rules, international law may provide for a framework to guide political efforts in establishing reparations for slavery. To do so, Schwarz first addresses various legal instruments related to the passage of time such as waivers and acquiescence. Although the author does not analyse concrete cases – a caveat she repeatedly emphasises – she highlights that it is rather unlikely that potential claimants lost their rights to invoke responsibility due to the high thresholds these instruments have (pp. 84 ff.).

6 Wittmann (n. 4), 138.

7 See on this question recently: von Arnauld (n. 3).

8 For a discussion of the argument that prevailing uncertainties about the establishment of a legal prohibition could require a teleological reduction of the intertemporal principle: Buser (n. 1), 429-433.

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Second, the author engages briefly with the historical evolution of the law of state responsibility as she (implicitly) acknowledges that strictly speaking the principle of intertemporality would require these rules to be established at the time chattel slavery was practiced by European States. Thus, she engages in more depth with the historical evolution of several central requirements of the law of state responsibility such as attribution and causation.

Attribution in the case of slavery is rightly seen as rather unproblematic, given the massive involvement of European States in slavery, e. g. via licensing, permit systems, and regulatory regimes institutionalising slavery (p. 93).[9] What I would see as more problematic than the author is continuity and state succession. Whereas there is a convincing argument for continuity when it comes to European States the question who can invoke responsibility appears much more complicated. Schwarz only touches upon this issue very briefly when she argues that given the historical prevalence of state-centrism individuals may not bring cases. However, she does not address the more fundamental problem whether today's States (e. g. in the Caribbean or Africa) can invoke the responsibility of European States.[10] It might be the case, as the author highlights (p. 97), that we can separate the responsibility of a State from the question who can invoke responsibility. Yet, the crucial question that remains is who should receive remedies (be it financial compensation, an apology, or any other alternative form), and on a practical level with whom are negotiations to take place – governments of African, American, and Caribbean States, political and cultural groups or other collectives, individual descendants of the enslaved, or all of them together? And who can plausibly represent heterogeneous groups and individuals?[11] In that regard the passage of time may play a stronger role than admitted by the author, e. g. when we think about state identity or succession of African and Caribbean States with earlier political and social entities such as the Taínos or various peoples and kingdoms in Africa.

After this tour de force through the law of state responsibility and the many obstacles faced by reparation claims, one wonders why Schwarz still insists that international law is capable of providing a framework for political and moral reparation claims (Chapter 4). Her theory of reparatory justice seeks to promote 'legal reasoning […] in an extralegal context' (p. 119). This theory's main purpose is to identify several elements of reparatory justice that ought to guide state responses to historical injustices more broadly and

9 See also: Buser (n. 1), 437.

10 See on the complexities of identifying injured parties: Buser (n. 1), 338-443; von Arnauld (n. 3), 431.

11 On these difficulties also briefly: von Arnauld (n. 3), 429-430.

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slavery in particular. This chapter primarily engages with the different forms of reparatory justice and different theories about the functions of reparations. Schwarz seeks to promote a differentiated view of reparations going beyond what is often publicly conceived of as a synonym for financial compensation. Particularly so as compensating historical injustices is fraught with difficulties.

Alternative forms and modalities of redress are then further expanded in chapter 5. The chapter more or less is an overview of the law of state responsibility as developed by courts, the International Law Commission (ILC), and scholars on forms of redress. The connection to the overall topic of slavery is not always as clear as it could have been. Still, each part contains at least some suggestions of what could be due for the case of slavery, such as exemplary or punitive damages instead of full 'corrective justice'. In developing 'a progressive approach to reparatory justice', Schwarz heavily draws on the jurisprudence of the Inter-American Court of Human Rights to outline which alternative modes of redress could inform reparations discourse and the law of state responsibility, such as symbolic reparations, the construction of memorials, or legislative changes (pp. 155 ff.). Schwarz does not make concrete proposals as to the measures which could or should be adopted in the context of transatlantic enslavement but argues that the full range of options should be considered and that a strong emphasise should be put on procedural justice and participation.

Still connected to the question of adequate redress is the following chapter 6 on causality and whether international law provides any guidance on connecting historical enslavement and contemporary redress. Schwarz discusses the different modalities and requirements developed by the ILC and others on causality and applies them to slavery. Notwithstanding the details of every case, Schwarz argues that factual causal connections can plausibly be established between historical enslavement and contemporary suffering (p. 172).

Under the heading of 'causation in law' she discusses legal limitations such as requirements of proximity, foreseeability, and remoteness and highlights several potential strategies of how to address these in reparation claims. The first is inheritance-based claims relying on the transmission of a claim to reparation based on harm suffered by ancestors. However, Schwarz remains sceptical towards such a strategy because jurisprudence by different human rights courts is unequivocal and it remains unresolved how far back such entitlements might be transmitted. Briefly Schwarz engages with literature on intergenerational trauma and, drawing on these findings, sees some potential of establishing a causal link between historical injustices and contemporary material suffering.

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The second goal of her discussion on 'causation' is to focus on collective entitlements or, in the author's words, '[c]laims concerning collective victimization and harm may weather the storm of history more intact than individualized claims, for the collective entity may continue in existence from the time of enslavement to the present'. Ultimately Schwarz comes to the carefully formulated conclusion that it might be that for material damage 'the legal connection […] has broken' whereas for continuing moral harms it remains 'sufficiently direct and proximate' (p. 181).

Her further arguments in this part remain somewhat opaque to me. What I get is that the lack of a clear causality chain between historical injustices and today's sufferings should not be taken as an argument against acknowledging a conduct as wrongful. This is entirely plausible. What I do not understand is why Schwarz argues that identifying a clear causal relationship 'consistent with (or at least not contradicting) legal frameworks of causation may change prevailing presumptions concerning historical enslavement and provide a lever for extralegal action' (p. 186). Given the many hurdles with establishing legal causality she discussed before I do not really see the point how law can help in solving 'extralegal' disputes here.

In her last chapter, Schwarz focuses on transitional justice to explore what the practice of redress in post-conflict transition scenarios can contribute to her theory of reparatory justice. The novelty in this chapter lies in Schwarz's proposition to apply the transitional justice framework and its requirement to break with the past to the level of international law which according to her never fully broke with its imperial and colonial past (p. 194). To signal such a break, reparatory justice is considered to be one central tool. This tool is said to have several core elements, including victim centricity, recognition, accountability, responsiveness, and political and practical compromise. Many of these elements closely resemble the elements of Schwarz's theory of reparatory justice, which is why the following inquiry at times gets a bit repetitive. Only at the very end of the chapter does the author come back to the topic of slavery. As a reader I would have expected the book to delve more deeply into the question how the transitional justice framework could be applied to slavery. The author also slightly contradicts her earlier findings that the legal framework could inform a political solution by arguing that the legal mechanisms 'fall short' of addressing widespread and massive injustice and therefore the non-legal transitional justice framework 'may enable the reckoning advocates seek' (p. 228).

Speaking of contradictions, I think the book's final conclusion could have been more nuanced or at least better explained. In concluding her work, Schwarz states that slavery (together with colonialism and imperial expansion) is 'the bedrock of the modern international legal system' (p. 229).

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Earlier Schwarz had argued that the Maangamizi was neither clearly prohibited nor allowed by historical international law. But if it was not allowed by international law, at least not in the form of chattel slavery for commercial purposes, why should slavery be considered the bedrock of international law? Relatedly, it is also slightly confusing that Schwarz warns that unaddressed violations of legal norms may lead to their degradation, which I think generally is true,[12] but in the case of slavery the author had earlier concluded that there was no clear prohibition – or is she making the argument that unaddressed historical slavery could degrade today's prohibition of slavery?

This critical appraisal is not meant to discard the books overall findings – far from. I think many of the author's conclusions are compelling. The author's call for a more fundamental reform of international law which could signal a clear break and at the same time recognition of its troublesome historical past will find great resonance with critical and Third World Approaches to international law. As Schwarz highlights, widespread and systematic injustices continue to haunt present day international relations and thus negatively impact the very functioning of international law.

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12 See generally on theories of norm erosion: Dominik Steiger, 'Ex iniuria ius oritur? – Norm Change and Norm Erosion of the Prohibition of Torture' in: Heike Krieger and Andrea Liese (eds), *Tracing Value Change in the International Legal Order: Perspectives from Legal and Political Science* (Oxford: Oxford University Press 2023), 118-135.

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