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Inter-state Apologies for Colonial Injustices from an International State Responsibility Perspective: A Commentary on the Belgian Controversy

Introduction

The growing awareness of the impact of colonialism on contemporary challenges linked to racism and discrimination has recently pushed former colonial powers to search for means to come to terms with their past. One of the potential avenues is the issuance of formal apologies for harm caused during colonial times. Recent examples include the formal apologies expressed by the Netherlands for its role in the history of slavery and by Germany for the atrocities inflicted on the Herero and Nama tribes in Namibia.

Similar concerns nourish Belgium's public debate and have led to several initiatives. For example, on the occasion of the 60th anniversary of the Democratic Republic of the Congo's independence in 2020, King Filip voiced his "deepest regrets" for the suffering caused by the Belgian colonial enterprise.[1] However, contrary to the initial recommendation by the UN Working Group of Experts on People of African Descent in 2019,[2] the King did not formally apologize. Another initiative was launched in the summer of 2020 when the Belgian Federal Parliament established a truth and reconciliation commission on Belgium's colonial past.[3] This commission assessed the role and structural impact of the colonial rule in the Congo Free State (1885-1908), Belgian Congo (1908-1960), and Ruanda-Urundi (1918-1962), and recently formulated recommendations on how Belgium should cope with its colonial past.[4]

However, at the end of December 2022, the endorsement by the parliamentary commission of these recommendations failed due to the lack of consensus within the commission on the issuance of formal apologies to the Congolese, Burundian, and Rwandan people "for the colonial rule and exploitation, violence and atrocities, individual and collective human rights violations during that period, and the racism and discrimination that accompanied it."[5] According to the liberal parties represented on the commission,[6] the act of expressing apologies would lead to a formal admission of Belgium's international responsibility for injustices committed during its colonial times, thereby opening the floodgates to legal claims for reparations through financial compensation.[7] The impossibility of reaching an agreement on the issuance of formal apologies finally led to the failure of the commission itself to issue recommendations to the Belgian Federal Parliament.

This short contribution examines the merits of this concern through the lens of the law of state responsibility.[8]

The Impact of Inter-state Apologies for Colonial Wrongs on International State Responsibility

Inter-state apologies for colonial injustices as a political rather than a legal act

It must be noted preliminarily that the issuance of such apologies is generally not intended by states as a legal act—especially since these are mostly accompanied by a clause emphasizing that the expression of apologies does not imply legal liability.[9] Similarly, initiatives taken by former colonial powers in the margin of the issuance of formal apologies, such as the establishment of funding programs for reconstruction and development, generally specify that legal compensation claims cannot be derived from it, nor that such financial initiatives can be interpreted as a form of compensation. These objections ensure that the emerging practice of apologizing for colonial wrongs and setting up financial programs are not assessed within the context of state responsibility but seem to be part of an intention to cope with their moral responsibility for the wounds caused by colonial rule. However, as will be demonstrated, this does not mean that formally apologizing cannot have any legal meaning.

Formal apologies as a form of satisfaction to remedy an internationally wrongful act rather than a constitutive element of international state responsibility

Formal apologies are found in the provisions of the ILC Articles on State Responsibility (ARSIWA) regarding reparation for injury and are considered one of the possible

modalities of satisfaction for moral or legal damage.[10] According to Article 37, satisfaction can be given as a subordinate means of reparation if restitution or compensation have not provided full reparation.[11] It is important to note that apologies as a form of satisfaction only come into play after the internationally wrongful act giving rise to international state responsibility has been established. Under the logic of the law of state responsibility, the finding of wrong (i.e., the existence of an internationally wrongful act) thus always precedes the question of remedy (in casu the issuance of formal apologies).

Although apologizing inherently contains an element of acknowledging certain wrongdoing, it does not itself suffice to establish state responsibility for internationally wrongful acts under public international law, thereby entitling the addressee of the formal apology to monetary compensation. Indeed, contrary to many domestic legal systems, international state responsibility is not as such based on the concept of fault. Article 2 ARSIWA, which reflects long-standing customary international law on the matter,[12] requires that two elements are fulfilled: the challenged conduct (1) must constitute a breach of a state's international obligations, and (2) must be attributable to the state. Both elements present various challenges, making establishing international state responsibility for colonial injustices a thorny enterprise.

a. Challenges regarding the establishment of a violation of an existing international obligation

The first difficulty relates to proving the existence of a violation of an international obligation. According to the principle of intertemporal law,[13] states can only be held internationally responsible for breaches of international obligations to which they were already bound at the time these breaches were committed.[14] In this context, a distinction must be made between the situation in (1) the Congo Free State (1885-1908), and later Belgian Congo (1908-1960), and in (2) Ruanda-Urundi (1918-1962).

1. Regarding the administration of the Congo (1885-1960)

The administration of the Congo from 1885 to 1960, first as the Congo Free State and later as Belgian Congo, legally qualified as colonial domination. Although incompatible with today's modern international law standards, colonialism only became unlawful in the 1960s when the right to self-determination of colonial peoples consolidated under customary international law. Consequently, the issuance of formal apologies by Belgium for its historical colonization *as such* would not expose Belgium to legal liability, since, at that time, colonization was not yet considered to be in breach of Belgium's international obligations.[15]

The story might be more nuanced regarding the *atrocities* committed during Belgian colonial rule. One could think about forced labor, disproportionate use of force, mass deportations, plunder of resources, torture, and consistent racial discrimination.[16] Here, a distinction has to be made depending on when the relevant obligations outlawing these acts crystallized as prohibitions under international law. Except for slavery and forced labor, which were respectively rendered unlawful with the 1926 Slavery Convention and the 1930 ILO Forced Labour Convention (No. 29),[17] most other relevant conventions and customary rules prohibiting such conduct date from the post-World War II era, leaving seemingly little room for establishing international responsibility for colonial injustices committed before 1945.[18]

The situation might differ for colonial injustices committed after 1945, which could qualify as "crimes against humanity": a category of international crimes created within the "Nuremberg framework" that soon crystallized as customary international law.[19] It should be noted, however, that these crimes were initially only accepted when "carried on in execution of or in connection with any crime against peace or war crime,"[20] potentially posing an additional difficulty for establishing state responsibility in the context of colonial wrongdoing.

The human rights framework also brings little relief, as most relevant human rights conventions entered into force after Belgian decolonization.[21] It is also doubtful whether the 1948 Universal Declaration of Human Rights already reflected customary international law at the time of its adoption or even later, at the termination of Belgium's colonial rule in the Congo in 1960.[22] Finally, the European Convention on Human Rights, which entered into force in 1953, was not applicable to Belgium's overseas territories based on the Convention's colonial clause.

2. Regarding the administration of Ruanda-Urundi (1918-1962)

The above analysis on the existence of certain violations of Belgium's obligations under international law slightly changes with respect to Ruanda-Urundi. Contrary to the Congo, Ruanda-Urundi was established as a League of Nations mandate. According to Article 22 of the League Covenant, the well-being and development of the mandate and its people constituted "a sacred trust of civilization." The obligations of Belgium as a Mandatory Power were further elaborated in the Belgian Mandate on the East-African Territory, which in Article 3 foresees that the Mandatory "shall increase by all means in his power the material and moral well-being and shall promote the social progress of the inhabitants."[23] Article 5 adds a specific obligation to prohibit all forced labor, except for essential public works and services, on the condition of fair remuneration. Under the UN

trusteeship system, the administering power's duty to ensure the well-being of the people of the trust territories came to occupy an even more central role.[24]

Given this higher standard of protection, which limited administering powers' capacity to act at their discretion, chances to successfully invoke state responsibility for injustices committed in Ruanda-Urundi significantly increase compared to the Congolese context.

b. Challenges regarding the attribution of colonial injustices to the Belgian state, especially for those committed in the period of the Congo Free State

Difficulties may also arise regarding attributing wrongful conduct to the Belgian state. Contrary to the Belgian Congo and Ruanda-Urundi, where the issue of attribution to the Belgian state does not pose considerable problems as the Belgian Government administered those territories, the issue is more complex for atrocities committed between 1885-1908 during the period of the Congo Free State. This territory was initially considered the personal property of King Leopold II before being handed over to the Belgian state in 1908. The question, therefore, arises whether the Belgian state could be deemed to have exercised governmental control, for example, by granting financial loans or recognizing King Leopold II as the sovereign of the Congo Free State, and therefore be held responsible for acts committed by entities not residing under its effective control.[25] Another related question pertains to the issue of state succession and whether Belgium substituted for the Congo Free State in terms of state responsibility after the latter's administration was handed over to the Belgian Government.[26] The answers to these questions are not clear-cut.

Conclusion

This note has shown that some Belgian political parties' concern—that issuing a formal apology for abuses that occurred during Belgium's colonial period would constitute a legal admission of wrongdoing leading to financial compensation—lacks merit from the perspective of the law of international state responsibility. Although apologizing constitutes a supplementary means to remedy internationally wrongful acts, it does not in itself give rise to state responsibility, as the latter can only be established when a breach of an international obligation which is attributable to a state has been identified. In subsidiary order, attempts to invoke Belgium's international responsibility for its colonial wrongs present a variety of challenges, stemming, amongst others, from the principle of intertemporal law and the attribution of conduct to the state. But even if these obstacles could be surmounted to establish Belgium's international responsibility for its colonial

injustices, whether or not apologies were issued would have no bearing on the former colonies' entitlement to reparation, including in the form of financial compensation.

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[1] Speech by the King – Esplanade of the Palais du Peuple, Kinshasa (June 8, 2022), https://www.monarchie.be/en/agenda/speech-by-his-majesty-the-king-esplanade-of-the-palais-du-peuple-kinshasa.
[2] UN Doc A/HRC/42/59/Add.1, ¶ 75, (k).
[3] *Parl. St. Kamer* 2019-2020, nr. 1462/001, ¶¶ 2-3.
[4] Recommendations de la Commission spéciale « Passé colonial », https://www.lachambre.be/kvvcr/pdf_sections/pri/congo/20221122%20Aanbevelingen%20voorzitter%20def%20(004).pdf.
[5] *Id.*, Recommendation No. 69 (own translation).
[6] These liberal parties are Open VLD and Mouvement Réformateur. Other (right-wing) parties, such as N-VA and Vlaams Belang, had already resigned from the commission before the presentation of the final recommendations (Parliamentary committee on Belgium's colonial past ends in failure (Dec. 19, 2022), https://www.vrt.be/vrtnws/en/2022/12/19/parliamentary-committee-on-belgiums-colonial-past-ends-in-failur/).
[7] *Id.*
[8] The issue of state responsibility for historical wrongdoing is highly complex and may be linked to many legal issues such as e.g., the temporal application of law, the legitimate representation of former colonial people, prescription and the possibility to introduce torts at the domestic level.
[9] *See e.g.*, Recommendation No. 70, *supra* note 4.
[10] ARSIWA, art. 37(2).
[11] ILC Commentary to Article 37 ARSIWA, ¶ 1.
[12] ILC Commentaries to Articles 1 and 2 ARSIWA.
[13] The principle of intertemporal law has been heavily critiqued from a TWAIL perspective, as it has the perverse effect of consolidating power imbalances between former colonisers and their colonies (UN Doc A/74/321, ¶ 50). Although this critique has its merits, its practical impact on the principle of intertemporal law remains limited, since this principle is currently still considered an integral part of international law *de lege lata*.
[14] ARSIWA, art. 13; VCLT, art. 28. *See also* Island of Palmas (Neth. v. U.S.), UN RIAA 1928, vol. II, 829, 845.
[15] Richard Bilder, *The Role of Apology in International Law and Diplomacy*, 46 VIRG. J. INT'L L. 3, 460 (2006).
[16] *See* Commission spéciale "Passé colonial", Introduction et constats des experts, https://www.lachambre.be/kvvcr/pdf_sections/pri/congo/20221122%20Constats%20experts%20(002).pdf.

[17] Belgium ratified these conventions respectively in 1927 and 1944.
[18] For a possible state responsibility basis for atrocities committed against the Congolese population by the Congo Free State, *see* arts. 6 and 9 of the 1885 Berlin Act.
[19] *See* confirmation of the concept of 'crimes against humanity' in UNGA Res 3 (I) (Feb. 13, 1946); UNGA Res 95 (I) (Dec. 11, 1946).
[20] *See* art. 6(c) Nuremberg Charter; Principle VI(c) Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, para 97 (1950). The required link was gradually deleted later, see e.g., ILC Draft Code of Crimes Against the Peace and Security of Mankind (1996); Tadić Case, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995 ICTY-IT-94-1, A Ch (Oct. 2), ¶ 141.
[21] The ICCPR, ICESCR, and UN Torture Convention respectively entered into force on March 23, 1976; January 3, 1976; and June 26, 1987.
[22] To support this contention, reference can be made to the arduous negotiation process of the ICCPR and ICESCR (only adopted in 1966 and entered into force in 1976), which may give indications regarding the existence of the necessary opinio juris for establishing the customary status of an international norm.
[23] Mandat belge sur le territoire de l'Est africain (Londres, 20 juillet 1922), *J.O.* août 1922, 862-865 (annexe 374d) (own translation).
[24] UN Charter, art. 76.
[25] ARSIWA, art. 8.
[26] For an analysis of whether atrocities committed in the period of the Congo Free State can be attributed to Belgium from a state succession perspective, *see* Tom Ruys and Tomas Baecke, *Haunted by the past? Belgium's international responsibility for the atrocities of the Congo Free State and the question of State succession in matters of international responsibility*, 2 BELGIAN REV. INT'L L. 477, 498 *et seq.* (2022).