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Colonialism and the Criminal Law

Belated Reflections from a German Perspective

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I. Introduction: Colonialism and Coloniality

Colonialism, one might assume, is a matter of history. And indeed, with few exceptions, the former European colonies, including the German *Schutzgebiete*, have long since attained formal independence. It would be wrong, though, to believe that colonialism is merely a historical issue or a matter of legal history. Rather, it continues to have profound implications for contemporary law and society. The formal independence of former colonies does not equate the eradication of coloniality, i.e., enduring patterns of thought and action rooted in colonial structures that, in their various (re)configurations, continue to shape the legal, social, and political realities of both former colonized and colonizing societies.

For decades, Germany's colonial past was overshadowed by subsequent historical events which all had their own legal implications: World Wars I and II, the Nazi reign of terror and the Holocaust, and the systemic oppression in the GDR. Interest in this issue only began to gain momentum in the 1990s. Today, critical engagement with colonialism is increasingly *en vogue*. Curricula are being decolonized, street names are being changed, looted artefacts are being returned, and postcolonial stu-

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dies have firmly established themselves within academic discourse. Against this backdrop, the time appears ripe to critically examine the role of law – and criminal law in particular – in these processes. This implies, as we shall see, venturing into largely uncharted territory¹.

This paper aims to map out the terrain and outline elements of a research agenda (IV.)². It starts by recalling a few basic facts and characteristics of the German colonial empire (II.) before providing an overview of the current state of research related to the colonial legacy in German criminal law and comparative law scholarship (III.). The paper concludes that this underresearched field of law not only offers much to learn and study, but that a more active engagement with the colonial legacy of criminal law by German criminal law scholars is long overdue (V.).

II. A Glance at the German Colonial Empire

It would be neither appropriate nor feasible here to comprehensively present and discuss the history of the German colonial empire, though it remains an often neglected, yet relatively recent, chapter of German history. Nonetheless, a brief overview is necessary to contextualize the discussion.

From the mid-1880s onward, Germany acquired territories, referred to as *Schutzgebiete* (“protectorates”), in Africa, followed by additional territories in the

1 See below (III.) for the current state of research in German criminal law. Beyond criminal law, see, e.g., *Dann/Feichtner/von Bernstorff* (eds.), (Post)Koloniale Rechtswissenschaft, Mohr Siebeck 2023, and *Decolonize Berlin/ECCHR*, Dekoloniale Rechtswissenschaft und -praxis, Berlin 2024; see also *Jeßberger* (ed.), German Colonialism and the Law, Pretoria University Law Press 2026, forthcoming. It should be pointed out that the aforementioned conference (see note) is one of a recent series of similar events dedicated to addressing colonialism and law. Another example is the 2023 bi-annual conference of the German Society of International Law in Göttingen (see *Peters/Hobe/Kieninger* (eds.), *Koloniale Kontinuitäten im internationalen Recht*, C.F. Müller 2024).

2 Engaging with the relationship between colonialism and criminal law also called for a departure from the traditional formats typically employed at conferences of the German Society for Comparative Law (see note). First and foremost, the subject cannot be meaningfully addressed from a Northern, predominantly White perspective alone – the perspective the author of this paper himself embodies. It was therefore imperative to include voices from the Global South and from formerly colonized regions in the panel. Second, the structured questionnaire format based on predefined questions, assumptions, and legal frameworks rooted in Northern traditions proved inadequate for such a topic. The conventional model of country reports, a cornerstone of conferences of the German Society of Comparative Law, was insufficient in the context of the overall topic. Consequently, the general report, which typically synthesizes these national reports and serves as the analytical backbone of the section, risked losing both its relevance and its critical function. This is why the present paper – technically such a “general report” – takes a different approach.

Pacific region and East Asia. The German colonial empire lasted for roughly 35 years, with its formal end occurring after the Treaty of Versailles in 1919, when the *Reich* renounced all claims to its overseas territories³. While revisionist voices sought to revive the notion of reclaiming these lost colonies until the 1940s, this idea never materialized into an official objective of the German government. In this respect, Germany was both a latecomer to colonialism and among the first to relinquish its territories compared to other colonial powers⁴.

The colonies were not considered part of the domestic territory of the *Reich*; they were rather seen as *sui generis* territories⁵. The *Reich*'s Constitution and its laws, including the Criminal Code and the Code of Criminal Procedure, were not directly applicable⁶. As we will explore in more detail concerning criminal law, parts of the *Reich*'s laws were extended to the White populations in colonies through specific legislation, while the colonized peoples were subject to a special, largely discretionary administrative penal regime, which relied heavily on decrees⁷.

In terms of its ideological foundation, the German colonial project aligned with those of other colonial powers. As *Sebastian Conrad* notes, the empire was rhetorically justified as a “civilizing mission” and the promise of modernization, structured along racial lines, and motivated by economic exploitation, through land theft and the subjugation of indigenous peoples, as well as the political desire to compete with other European nations⁸. The forms of exploitation and violence varied significantly in their intensity and scope across the different colonies.

It is crucial to recognize that colonialism was not limited to physical exploitation, economic extractivism, and legal subjugation alone. It also involved the systematic production of knowledge and the construction of specific epistemologies, many of which continue to reverberate in contemporary discourses. Furthermore, the implications of colonialism were neither confined to the colonies themselves nor to the colonial period; rather, they have been multidirectional, shaping both the colonial periphery and the colonial center over time. In Germany, this influence can be observed in areas such as the economy, urban planning, medicine, and, arguably, law.

3 See Article 119 of the Peace Treaty of Versailles of 28 June 1919.

4 This has, at times, led to the false impression that German colonialism was somehow less violent or oppressive than that of other European powers.

5 Cf. *Hanschmann*, “Die Suspendierung des Konstitutionalismus im Herz der Finsternis”, *Kritische Justiz* (2012), 144–162, 148; *Wagner*, *Die deutschen Schutzgebiete*, Nomos 2002, pp. 177 et seq.

6 *Iffert*, “Das deutsche Kolonialstrafrecht”, *Kritische Justiz* (2025), 173–186, 175. Cf. *Hanschmann*, *Kritische Justiz* (fn. 5), 142, 149.

7 See below IV.1. for details and references.

8 Cf. *Conrad*, *Deutsche Kolonialgeschichte*, C.H. Beck 2019, pp. 18, 54 et seq., 69 et seq.

III. A Neglected Field – and Recent Trends

Aside from a few exceptions – such as in international law, where the TWAIL⁹ movement has inspired some debates, including in international criminal law¹⁰, and in criminology, where a discourse emerged in the 1980s, primarily driven by scholars from Latin America – issues related to colonialism and coloniality have remained largely underexplored in mainstream legal scholarship¹¹: This is particularly true for criminal law, and even more so for German criminal law. Colonialism as such, and its long-term repercussions, have, with very few exceptions, not been addressed in criminal law scholarship in Germany.

While it may not come as a surprise that standard textbooks and handbooks on German (substantive or procedural) criminal law ignore this issue, it is perhaps more surprising that even works dedicated to the history of German criminal law rarely include even a paragraph on this chapter of legal history. Notable exceptions are *Thomas Vormbaum's*, *Georg Steinberg's*, and *Milan Kuhl's* textbooks, which at least touch upon colonial law, but even they are limited in scope¹².

Beyond textbooks, the scholarly literature on this topic is equally sparse. Among the few noteworthy exceptions are *Wolfgang Naucke's* 1988 article¹³ and a more recent book chapter by *Martin Heger*¹⁴. *Naucke's* article, in particular, has served as a

9 Cf. *Anghie*, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press 2005; *Mutua*, “Savages, Victims, and Saviors”, *Harvard International Law Journal* 42 (2001), 201–245.

10 See, inter alia, the Symposium in the *Journal of International Criminal Justice* 4 (2016), 915 et seq.; and *Mehta*, *Strategic Litigation and Corporate Complicity in Crimes under International Law*, Routledge 2024; see also *Masake/Jeßberger* (eds.), *International Criminal Law and the Legacy of Colonialism: An African Perspective*, HU Edoc 2024 (https://epetitionen.bundestag.de/petitionen/_2022/_09/_20/Petition_139208.nc.html); and *Jeßberger/Steinl/Mehta*, *International Criminal Law: A Counter-Hegemonic Project?*, T.M.C. Asser/Springer 2023; *Steinl*, *Postkoloniale Kritik am Völkerstrafrecht*, in: *Jeßberger/M. Vormbaum/Burghardt* (eds.), *Strafrecht und Systemunrecht: Festschrift für Gerhard Werle*, Mohr Siebeck 2023, pp. 295–310.

11 In addition to the developments mentioned in the text, there has been a growing effort to critically explore the impact of colonialism on institutions and practices of *crime control*; see, for a very good overview, *Aliverti et al.*, “Decolonizing the criminal question”, *Punishment & Society* 23 (2021), 297 et seq., 298 with further references.

12 See *Kuhl*, *Geschichte des Strafrechts*, Nomos 2025, margin nos. 107–110; *Steinberg*, *Deutsche Strafrechtsgeschichte*, Böhlau 2023, margin no. 135; *Th. Vormbaum*, *Einführung in die moderne Strafrechtsgeschichte*, 4th ed., Springer 2019, p. 142 (the 3rd edition from 2015 did not yet include any paragraph on colonial criminal law).

13 *Naucke*, “Deutsches Kolonialstrafrecht 1886 – 1918”, *Rechtshistorisches Journal* (1988), 297–315.

14 Cf. *Heger*, *Koloniales Strafrecht*, in: *Dann/Feichtner/von Bernstorff* (eds.), *(Post)Koloniale Rechtswissenschaft*, Mohr Siebeck 2023, pp. 161–188. See also *Dubber*, *Colonial Criminal Law and Other Modernities: European Criminal Law in the Nineteenth and Twentieth Century*, in: *Pihlajamäki/Dubber/*

landmark in German criminal law scholarship, with its somewhat modest ambition to “retain” a topic otherwise neglected¹⁵. Yet despite its significance, *Naucke* likewise did not succeed in prompting a wider and more sustained scholarly exploration of the issue.

A similar picture emerges when it comes to monographs: Over the past two decades, only a handful of dissertations addressing colonial criminal law have been published¹⁶. While these works are useful for compiling historical materials, they tend to remain narrowly descriptive and are devoid of any critical or theoretical reflection, thus forming what *Sebastian Conrad* has aptly termed a “festival of legal positivistic immanence”¹⁷.

Interestingly, the neglect of colonial criminal law in contemporary German scholarship reflects a similar situation during the colonial period itself¹⁸. Even at the turn of the 19th to the 20th century, colonial criminal law was a niche topic within criminal law. The prominent legal scholars of the time – such as *von Liszt*, *Goldschmidt*, and *Binding* – did not dedicate much attention to it¹⁹. Instead, discussions of colonial criminal law were largely relegated to specialized journals and a small circle of expert authors, many of whom were former or current colonial officers. One notable exception here was legal scholar *Josef Kohler*, who extensively published on colonial law from a comparative perspective²⁰.

Shifting the focus from criminal law scholarship to comparative legal research, it becomes apparent that – unlike criminal law – the field of comparative law has

Godfrey (eds.), *Oxford Handbook of European Legal History*, Oxford University Press 2018, Ch. 45; *Iffert*, *Kritische Justiz* (fn. 7), 173, and the contributions in *Jeßberger* (ed.), *German Colonialism and the Criminal Law* (fn. 1).

¹⁵ *Naucke*, *Rechtshistorisches Journal* (fn. 13), 297.

¹⁶ See, e.g., *Schlottau*, *Deutsche Kolonialrechtspflege*, Peter Lang 2007; *Steinkröger*, *Strafrecht und Strafrechtspflege in den deutschen Kolonien von 1884 bis 1914*, Dr. Kovač 2019; *Weckner*, *Strafrecht und Strafrechtspflege für Afrikaner und ihnen gleichgestellte Farbige in Deutsch-Ostafrika*, Dr. Kovač 2010.

¹⁷ Cf. *Conrad*, “Regimes der Segregation”, *Rechtsgeschichte* (2004), 187–204, 192. In the same vein: *Iffert*, *Kritische Justiz* (fn. 6), 173; *Iffert*, *Historische Wahrheit und koloniales Wissen zum “Eingeborenenstrafrecht”*, in: L. von Bogdandy/Resch/J. Schumann (eds.), *Konflikte um Wahrheit, Nomos 2024*, pp. 207–234, 227 et seq.

¹⁸ On the role of German criminal law scholarship during the colonial period, see *Möller*, “Strafrechtliches Selbstverständnis im Kolonialrecht”, *Neue Kriminalpolitik* (2025), 80–92; *Naucke*, *Rechtshistorisches Journal* (fn. 13), 297, 311; *Walz*, *Die Entwicklung der Strafrechtspflege in Kamerun unter deutscher Herrschaft 1884–1914*, Klaus Schwarz Verlag 1981, pp. 394 et seq.

¹⁹ *Naucke*, *Rechtshistorisches Journal* (fn. 13), 297–315, 311.

²⁰ For references, see *Grossfeld/Wilde*, “Josef Kohler und das Recht der Schutzgebiete”, *Rabels Zeitschrift* (1994), 59–75, and *Iffert*, *Historische Wahrheit und koloniales Wissen zum “Eingeborenenstrafrecht”* (fn. 17), p. 213 fn. 30 and p. 215 fn. 36.

recently broadened both in terms of inclusivity and thematic scope. The entire discipline of comparative law has diversified and expanded, embracing not only Western legal traditions but also incorporating perspectives from the Global South²¹.

Current comparative legal scholarship reflects a trend that had already begun to take shape at the time of colonialism. For instance, the unofficial predecessor to the German Society for Comparative Law, the International Association for Comparative Law and Economics²², which existed from 1894 to 1933, regularly published papers related to colonial law in its yearbooks – though, it should be noted, not necessarily colonial criminal law. Colonial law, however, was a topic of interest among comparative law scholars at the time, in particular those who were involved in projects allegedly aimed at researching the legal systems of colonized peoples²³.

Apparently, colonial criminal law was not conceptualized as an element of domestic criminal law in scholarly discourse, but as a self-contained legal order (“foreign law”), examined through comparative legal perspectives²⁴. This perception reflects its technical, non-domestic status and may have contributed to the finding that it was of little concern to German criminal law scholars. At the same time, such a classification disregards the close connection and substantive interconnection of colonial criminal law with the imperial authority of the *Reich*.

To conclude this section, we can say that colonial criminal law has primarily been treated, if at all, as a domain of comparative legal scholars rather than of criminal law theorists. This relegation to the periphery of legal scholarship seems to have a lasting impact on how the subject is addressed in current academic discourse.

21 This “Southern turn” (cf. *Dann*, *The Southern Turn in Comparative Constitutional Law: An Introduction*, in: *Dann et al. (eds.), The Global South and Comparative Constitutional Law*, Oxford University Press 2020) is exemplified by recent publications, such as the *Cambridge Handbook on Comparative Law*, which, unlike earlier handbooks, includes several chapters directly addressing the relationship between colonialism and comparative law.

22 *Internationale Vereinigung für Vergleichende Rechtswissenschaft und Volkswirtschaftslehre*.

23 One example is *Boin*, *Die Erforschung der Rechtsverhältnisse in den “Schutzgebieten” des Deutschen Reiches*, LIT 1996; see for details: *R. Habermas*, “Die deutschen Großforschungsprojekte zum ‘Eingeborenenrecht’ um 1900 und ihre Folgen”, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung* (2012), 150–182; *Iffert*, *Historische Wahrheit und koloniales Wissen zum “Eingeborenenstrafrecht”* (fn. 17), pp. 207–234, 212 et seq; *Schaper*, *Koloniale Verhandlungen*, Campus 2012, p. 228 et seq.

24 See also V. below. This perspective corresponds to the “two-track conception” of modern European criminal legal history introduced by *Dubber*, *Colonial Criminal Law and Other Modernities* (fn. 14).

IV. Charting the Territory

I propose that there are at least four critical areas of inquiry at the crossroads of colonialism and criminal law which merit further study. They will be briefly outlined in the following: colonial criminal law, colonial injustice, post-colonial criminal law, and (decolonial) comparative criminal law. These areas help chart the contours of how colonialism has shaped criminal law and its legacies, and reflect current challenges and scholarly gaps in the field.

1. Colonial Criminal Law

The first and most obvious area of inquiry is colonial criminal law itself²⁵.

It would be a mistake to treat the criminal law of the German colonies as a singular, unified body of law. Rather, colonial criminal law was a fragmented regime comprising a very limited set of laws alongside numerous decrees and by-laws²⁶. These laws were specific in terms of both territorial and personal applicability. This makes their study, in and of itself, an exercise in applied comparative law. Moreover, colonial criminal law underwent continuous development over the 35 years of the colonial empire, reflecting a dynamic and adaptive legal environment²⁷. Despite its fragmentary nature and the failure of official attempts to formulate general principles of colonial criminal law, several overarching characteristics of colonial criminal law can be identified²⁸.

The *Schutzgebietsgesetz*²⁹ (Protectorate Act) stipulated that the regulations of the *Gesetz über die Konsulargerichtsbarkeit*³⁰ (Consular Jurisdiction Act) would also apply in the colonies³¹. Consequently, various significant legal provisions of civil law, criminal law, and criminal procedure came into force in the colonies, insofar as they were relevant to consular jurisdiction. As a result, a curtailed version of the

25 For a brief but instructive general account of colonial criminal law (beyond Germany) see Hynd et al., Colonial Criminal Law, in: Caeiro/Gless/Mitsilegas (eds.), *Elgar Encyclopedia of Crime and Criminal Justice*, Edward Elgar 2024, p. 326.

26 Cf. the collection of *Zorn/Sassen*, *Deutsche Kolonialgesetzgebung*, 2nd ed., Guttentag 1913. Cf. Heger, *Koloniales Strafrecht* (fn. 14), pp. 161–188, 174; Naucke, *Rechtshistorisches Journal* (fn. 13), 302.

27 As early as in the 1890s, there was public debate about reforming colonial criminal law, particularly after reports of excessive violence by colonial authorities against colonized populations; cf. Walz, *Die Entwicklung der Strafrechtspflege in Kamerun unter deutscher Herrschaft* (fn. 19), pp. 59 et seq.

28 Cf. Iffert, *Kritische Justiz* (fn. 6), 173–186, 177.

29 *Schutzgebietsgesetz*, 18 April 1886, as amended on 10 September 1900, RGBl. No. 40.

30 *Gesetz über die Konsulargerichtsbarkeit*, 7 April 1900, RGBl. No. 15.

31 § 2 *Schutzgebietsgesetz*.

Reich penal law and procedure was applicable in the colonies – albeit only to the White population³².

By contrast, Black, Indigenous, and People of Color were excluded from this legal framework and subjected to a separate, special penal regime³³. While it would have been possible to extend the *Reich's* penal law to indigenous people – the *Schutzgebietsgesetz* provided that “Natives shall be subject to the jurisdiction provided for in § 2 [for Whites] and the law referred to in § 3 only insofar as this is determined by Imperial Decree”³⁴ – such a case never occurred, since a corresponding decree was never issued³⁵.

Thus, jurisdiction over Black, Indigenous, and People of Color, particularly in criminal matters, was vested in the colonial authorities, such as the *Bezirksamtman*n (district officer or magistrate), who wielded executive, judicial, and partially legislative powers³⁶. In some colonies, indigenous authorities were granted jurisdiction over their communities in less serious cases or non-criminal matters and could render judgments according to local law³⁷. This decision was not based on tolerance on the part of the German colonizers towards indigenous legal systems, but was an expression of their lack of power³⁸. Besides these exceptions, special German colonial rules were to be applied. Protective safeguards of penal law, such as the principles of legality and due process, were disregarded³⁹. The applicable penal law was largely judge-made – or more precisely, bureaucrat-made – containing vague offenses, often loosely based on the *Reich* Penal Code and frequently tailored to the needs of the colonial power⁴⁰. In addition to imported criminal offenses such as bigamy, there were also offenses introduced specifically for the colonies; one example is “lying in

32 Iffert, *Kritische Justiz* (fn. 6), 173–186, 176; Naucke, *Rechtshistorisches Journal* (fn. 13), 297–315, 302; Schlottau, *Deutsche Kolonialrechtspflege* (fn. 16), pp. 94 et seq.

33 Iffert, *Historische Wahrheit und koloniales Wissen zum “Eingeborenenstrafrecht”* (fn. 17), pp. 207–234, 210 et seq.

34 § 4 *Schutzgebietsgesetz* reads: “Die Eingeborenen unterliegen der im § 2 geregelten Gerichtsbarkeit und den im § 3 bezeichneten Vorschriften nur insoweit, als dies durch Kaiserliche Verordnung bestimmt wird.”

35 Naucke, *Rechtshistorisches Journal* (fn. 13), 297–315, 302; Schlottau, *Deutsche Kolonialrechtspflege* (fn. 16), p. 113.

36 Cf. Iffert, *Kritische Justiz* (fn. 6), 173–186, 179; Schlottau, *Deutsche Kolonialrechtspflege* (fn. 16), pp. 199 et seq.; Th. Vormbaum, *Einführung in die moderne Strafrechtsgeschichte* (fn. 12), p. 142.

37 For details see, e.g., Iffert, *Kritische Justiz* (fn. 6), 173–186, 177; Schlottau, *Deutsche Kolonialrechtspflege* (fn. 16), p. 203; see also Materu, *ZStW* (note), pp. 664–669.

38 Hanschmann, *Kritische Justiz* (fn. 5), 144, 153.

39 For details see Heger, *Koloniales Strafrecht* (fn. 14), pp. 161–188, 180; Iffert, *Kritische Justiz* (fn. 6), 173–186, 178 et seq.; Schlottau, *Deutsche Kolonialrechtspflege* (fn. 16), pp. 249, 316.

40 Iffert, *Kritische Justiz* (fn. 6), 173–186, 181 et seq. Cf. Heger, *Koloniales Strafrecht* (fn. 14), pp. 161–188, 180 et seq.

court”, that is making a false statement without being under oath, which was only made punishable in the *Reich* in 1943⁴¹. Special sanctions, such as flogging or chain imprisonment, were employed as punitive measures on a regular basis⁴².

Thus, colonial criminal law can be understood as a dual penal system, founded on a strict racial distinction, such as between White and Black, European and indigenous, colonizer and colonized. As *Naucke* argues, the legal regime applied to colonized populations could more accurately be described as a system of penal power (“Strafmacht”), rather than penal law⁴³.

The function of colonial criminal law was not so much to provide rules for communal life but rather to uphold an exploitative and hierarchical system⁴⁴. The invocation of a civilizing mission, one that purportedly sought to educate the colonized populations, served as a pretext for harsh and discriminatory legal practices, positioning Black, Indigenous, and People of Color as “children” in need of strict control and punishment⁴⁵. At the same time, identifying pre-colonial law as foreign, violent, and primitive acted to reproduce the colonizer’s self-conception as humane, civilized, and modern⁴⁶.

2. Colonial Injustice

A second area of inquiry is the role of criminal law in responding to colonial crime or, more broadly, colonial injustice⁴⁷. This raises several important issues, including unjust convictions, mass atrocities, and colonialism itself as a form of crime.

41 See also *Th. Vormbaum*, Einführung in die moderne Strafrechtsgeschichte (fn. 12), p. 142.

42 *Schlottau*, Deutsche Kolonialrechtspflege (fn. 16), pp. 271 et seq., 422 et seq.

43 *Naucke*, Rechtshistorisches Journal (fn. 13), 297–315, 300. Cf. also *Schlottau*, Deutsche Kolonialrechtspflege (fn. 16), p. 377, and *Heger*, Koloniales Strafrecht (fn. 14), pp. 161–188, 185 et seq.

44 “Law lay at the heart of the European imperial enterprise [...], and criminal justice was at the core of law [...]”, *Hynd et al.*, Colonial Criminal Law (fn. 26), p. 325.

45 *Iffert*, Kritische Justiz (fn. 6), 174 et seq. Cf. *Naucke*, Rechtshistorisches Journal (fn. 13), 297–315, 303.

46 Indeed, colonial criminal law illustrates that the idea of a purpose-based criminal law, as developed by *Franz von Liszt* and others, remains ambivalent and by no means necessarily entails a progressive or humane conception of criminal law; cf. *Rüping*, Formen staatlicher Strafe im 18.–20. Jahrhundert, in: *Schumann* (ed.), Das strafende Gesetz im sozialen Rechtsstaat, De Gruyter 2010, pp. 35, 39. See also *von Trotha*, Liszt in Togo?, in: *von Trotha* (ed.), Politischer Wandel, Gesellschaft und Kriminalitätsdiskurse, Nomos 1996, p. 237.

47 On the ambivalent role of international (criminal) law, see *Stahn*, “Reckoning with Colonial Injustice: International Law as Culprit and as Remedy”, *Leiden Journal of International Law* 33 (2020), 823–835.

One recurring question is whether criminal law can provide a mechanism for redressing past injustices, specifically unjust convictions in colonial contexts. The rehabilitation of individuals unjustly convicted has been raised in other contexts in Germany, such as for crimes committed during the era of National Socialism or in East Germany under the GDR. In our context, the case of *Rudolf Duala Manga Bell*, a Cameroonian leader who was executed for peacefully protesting the displacement of his people⁴⁸, serves as a compelling case study. However, while political momentum for rehabilitation exists⁴⁹, it remains an open question how this can be effectively implemented.

Central, however, to the existing discourse on colonial wrongdoing is not so much the rehabilitation of those sentenced by colonial courts, but the response to mass atrocities perpetrated by the colonial power, such as the genocide of the *Ova-Herero* and *Nama* peoples in what today is Namibia⁵⁰.

However, in many cases, applying current standards of international law retroactively is considered legally problematic by the majority of legal scholars. For instance, the violent suppression of anticolonial resistance in the colonies, such as of the *Maji Maji* rebellion in Tanzania, might not have been unlawful under the standards of the colonizers at the time, but certainly would be judged as such today. This highlights the limitations of applying international law retroactively, as the principle of intertemporality generally precludes the retroactive application of contemporary standards.

In this regard, it is noteworthy – and perhaps indicative of colonial legacies – that no “Nuremberg moment” occurred in international criminal law regarding colonial crimes and injustices, a moment where doubts about retroactive punishment would have been resolved, as in the case of crimes against peace⁵¹.

Yet, while prosecution of the individuals responsible for these crimes is no longer possible, international criminal law may provide a “grammar” or vocabulary for

48 *Bommarius*, *Der gute Deutsche*, Berenberg 2015; *Tsogang Fossi*, “... gegen Eingeborene kann er auf Todesstrafe erkennen.”, *Kritische Justiz* (2025), 187–198, 192 et seq.

49 See petition No. 139208 to the German Parliament “Rehabilitation von Rudolf Duala Manga Bell und Ngoso Din”, 20 September 2022, <https://epetitionen.bundestag.de/petitionen/_2022/_09/_20/Petition_139208.nc.html>; and the public statement by (now former) state minister *Katja Keul* here <<https://www.auswaertiges-amt.de/de/newsroom/2670572-2670572>>.

50 See also *Masake*, in this issue (note), pp. 690–694. Germany officially acknowledged these atrocities in 2021, and President *Steinmeier*’s expression of “shame” about crimes committed during German colonial rule in Tanzania in 2023 reflected a broader reckoning with the country’s colonial past.

51 For Nuremberg and the discussions about retroactive punishment, in particular as concerning the crimes against peace, see *Werle/Jeßberger*, *Principles of International Criminal Law*, 4th ed., Oxford University Press 2020, margin no. 143 et seq.

addressing these atrocities (within the political discourse, rather than primarily serving the purpose of prosecution)⁵².

Moreover, the question of whether colonialism itself should be classified as a crime under international law remains unresolved⁵³. While colonial domination was once considered a potential crime within the international legal framework and included in early drafts of the Code of Crimes Against Peace⁵⁴, it was ultimately removed from the list of offenses by the International Law Commission in 1995. It was argued that the period of colonial domination had already ended, that there were difficulties in agreeing on the elements of the crime, and that, therefore, it was unlikely that the draft proposal would gain majority support within the Commission.

Critics argue that this reflects a colonial legacy in international criminal law itself, where crimes related to sovereignty and territorial integrity are privileged, while the crimes of colonization remain largely unaddressed⁵⁵.

3. Post-Colonial Criminal Law

The third area of inquiry concerns post-colonial criminal law⁵⁶. Although colonial powers, including Germany, formally withdrew from their colonies, the legal legacies of colonialism persist. In post-colonial states, particularly those in Africa, these legacies can be seen in criminal codes, judicial practices, and institutional structures⁵⁷. Such continuities suggest a legal coloniality that continues to shape legal orders long after the formal end of colonial rule. At the same time, we can identify similar lines of continuity in the law of the former colonial powers⁵⁸.

52 In this context, *Stahn* points to the fact that “the current international architecture is marked by a paradox”, since it is built on the unequal power structures of the past, which, at the same time, it aims to discredit; see *Stahn*, “Reckoning with Colonial Injustice (fn. 47), 823, 924. See also *Stahn*, “Piercing the Colonial Veil? Colonial Crimes as Crimes against Humanity”, *Journal of International Criminal Justice* 23 (2025), forthcoming.

53 For details, see *Kaleck*, On Double Standards and Emerging European Custom on Accountability for Colonial Crimes, in: *Bergsmo/Kaleck/Hlaing* (eds.), *Colonial Wrongs and Access to International Law*, Torkel Opsahl 2020, pp. 1–40.

54 See *Ortega*, “The ILC Adopts the Draft Code of Crimes Against Peace and Security of Mankind”, *Max Planck Yearbook of United Nations Law* 1 (1997), pp. 283–326.

55 See, e.g., *Kaleck*, On Double Standards (fn. 53), pp. 1, 35 and *Ba*, “Constructing an International Legal Order Under the Shadow of Colonial Domination”, *Journal of Human Rights* 22 (2023), pp. 4–15.

56 I refer to “post-colonial” here in the temporal sense of the word; for a distinction between “post-colonialism” and “post-colonialism”, see *Mehta*, in this issue (note), p. 744.

57 For Tanzania: *Materu*, in this issue (note), pp. 669–671; for Namibia: *Masake*, *ZStW* (note), pp. 694–696.

58 See, e.g., *Steinl*, in this issue (note), pp. 737 et seq.

Two aspects in particular require further exploration: First, the processes of how and to what extent legal rules and principles from the metropolises have shaped (and continue to shape) the normative orders of the peripheries. And, second, if and to what extent the colonial mode of normative imperialism serves as a blueprint for contemporary forms of “transnationalization” of criminal law.

On the first point: Studying the post-colonial legal systems of former colonies begins with the observation that most, if not all, criminal law systems are a blend of norms and influences. For example, as is well known, German law has, to a significant degree, developed through borrowing. The same is true for post-colonial states. Their specific identities as German criminal law or Tanzanian criminal law are built upon the framework of the nation state.

However, in our context, it is useful to recall the distinction between the reception or adoption of foreign rules and principles on the one hand, and their imposition on the other. Indeed, the imposition of law through violence is one of the factors that, throughout history, has been a driver of legal change⁵⁹. The expansion of colonial empires involved the importation of Western legal models, which were the only ones familiar to the colonizers and, at the same time, were regarded as serving their interests. This imposition could be transient, as was the case with German law in Tanzania and Namibia⁶⁰, or it could have more lasting effects.

As a result, post-colonial legal systems, including those in countries such as Tanzania and Namibia, represent a fractured hybrid of indigenous legal traditions and the foreign legal frameworks imposed during colonial rule. In particular, systems shaped by British or German colonialism continue to bear the imprint of European legal models, both in substance and procedure.

While European powers forcibly imposed their legal systems on colonized territories, the reception of these laws, particularly after the formal end of colonialism, was not always passive. Over time, post-colonial states have often adapted, reinterpreted, or localized elements of colonial law to better fit their own legal and social contexts. Nevertheless, the original introduction of these legal systems was frequently marked by coercion, violence, and a lack of reciprocity.

Today, the impact of German criminal law on the legal systems of former colonies appears relatively weak, primarily because subsequent colonizers replaced German influences with their own laws⁶¹. The impact, however, seems more endur-

⁵⁹ As *Graziadaei* (in: Reimann/Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed., Oxford University Press 2019, pp. 455 et seq.) has noted, legal change is caused by a variety of factors including movement of a population and international agreements.

⁶⁰ See *Materu*, in this issue (note), pp. 669–671; for Namibia: *Masake*, in this issue (note), pp. 682 et seq.

⁶¹ *Fischer*, *Die deutschen Kolonien*, Duncker & Humblot 2001, pp. 273 et seq. See also *Materu*, in this issue (note), p. 663; *Masake*, in this issue (note), p. 682.

ing in cases where German substantive criminal law was received or adopted, driven by scholarly prestige and dominance. Ironically, at least in the German case and given its very specific historical circumstances, reception, rather than violent imposition, seems to have had longer-term effects on other legal orders.

Regarding the second aspect raised above: If, as in the colonial context, penal law is used as a means of domination, one might argue that, in more recent times, the violent imposition of colonial oppression has been replaced by a different form of normative imperialism. This form is subtler, yet perhaps no less effective: transnational criminal law or rather, the transnationalization of criminal law. As *Neil Boister* has demonstrated, transnational legal frameworks – such as so-called suppression treaties addressing corruption or environmental crimes – are often shaped by power asymmetries rooted in colonial histories⁶². The rhetoric of modernization that once justified colonial rule persists in contemporary legal practices, where the establishment of “modern” legal systems continues to be promoted as an ideal for post-colonial states. This enduring influence of European norms can thus be understood as a new form of imperialism – more covert, yet no less pervasive.

4. Comparative Criminal Law

The fourth and final area of inquiry is comparative criminal law. Again, two major issues can be distinguished: The first one is the role comparison played in making and shaping colonial criminal law itself; the second relates to possible implications of the colonial legacy for the methodological framework of contemporary comparative law.

German colonial law was itself shaped by comparative processes. Colonial law-making was influenced by an array of sources, including German law, other European colonial laws, and indigenous laws. As *Jakob Zollmann* notes, the creation of German colonial law was a process of imitating and adapting what other colonial powers had done⁶³. This is particularly evident in the methods used to impose criminal law in the colonies. The German legal system, in its colonial form, at least in some regards mirrored the legal practices of other colonial powers, both in terms of substance and method.

⁶² *Boister*, An Introduction to Transnational Criminal Law, 2nd ed., Oxford University Press 2018. See also *Geneuss*, in this issue (note), pp. 706–710.

⁶³ See *Zollmann*, German Colonial Law and Comparative Law: 1884–1919, in: Duve (ed.), Entanglements in Legal History, Vol. 1: Conceptual Approaches, MPI Frankfurt a. M. 2014, pp. 253–294.

But it was not only the colonial laws of other powers that were studied; pre-colonial laws and customs were also examined⁶⁴.

Today, and this is the second aspect, comparative criminal law continues to focus heavily on European and Anglo-American legal systems, despite the receding influence of German scholarship and doctrine over the past decades. This focus persists even as legal scholars increasingly recognize the need to engage with non-Western legal traditions.

Recently, *Ralf Michaels* and *Lena Salaymeh* have called for a decolonial comparative law which challenges the Eurocentric assumptions embedded in conventional comparative legal methodology⁶⁵. This approach advocates for breaking down the “center-periphery” structure that still dominates the way we compare legal systems. Decolonial comparative law aspires to a more democratic and pluralistic approach to legal scholarship, one that takes seriously the multiplicity of legal traditions outside the Western canon⁶⁶.

5. Challenges

To conclude this section, let us briefly introduce two of the many specific challenges that confront research in this area.

⁶⁴ For more details, see *Boin*, *Die Erforschung der Rechtsverhältnisse in den “Schutzgebieten” des Deutschen Reiches*, LIT 1996; *R. Habermas*, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (fn. 24), 150–182; *Iffert*, *Historische Wahrheit und koloniales Wissen zum “Eingeborenenstrafrecht”* (fn. 17), pp. 207–234.

⁶⁵ *Salaymeh/Michaels*, “Decolonial Comparative Law: A Conceptual Beginning”, *RebelsZ* 86 (2022), 166–188.

⁶⁶ One could argue against this approach that the process and methodology of comparison clearly depend on their specific function and objectives. A “one-size-fits-all” approach appears inadequate. On the one hand, law reform; on the other, the development of law within supranational or international contexts – both arguably demand distinct methodological approaches. For a nuanced discussion of this issue, see *Weigend*, *Criminal Law and Criminal Procedure*, in: *Smits et al. (eds.)*, *Elgar Encyclopedia of Comparative Law*, Edward Elgar 2023, pp. 483–495, who also raises the question of whether, in the formation of international law, we should strive for the best solution or adopt a more democratic approach.

a. Temporal Layers and Decoupling

The first challenge is related to temporal layers and the decoupling of legal systems. As has been demonstrated by *Materu* and *Masake*⁶⁷ for the cases of Tanzania and Namibia, the German colonial legacy is often obscured by subsequent colonial legal regimes. This historical layering complicates research, as the laws and practices of later colonial powers tend to overshadow earlier German influences. This makes it difficult to isolate the German colonial impact from the broader post-colonial legal frameworks that followed. It not only creates challenges for scholars trying to trace the roots of legal systems, but it can also lead to a unique and sometimes contradictory mixture of legal traditions.

Additionally, we can observe a growing divergence between the legal systems of former colonial powers and those of their former colonies. A striking example of this is the continued penalisation of activities in post-colonial states that have long been decriminalized in the former colonial powers. Take, for instance, the criminalization of homosexual acts. In many former colonies, such laws were introduced during the colonial period and continue to exist today, even though they were decriminalized in the colonizing state long ago⁶⁸. This “decoupling” creates ongoing legal and social disparities between the Global North and Global South, the (former) colonizer and colonized, complicating the search for historical and legal continuity.

b. Pre-Colonial Law and “Translating” Custom

The second challenge involves pre-colonial, particularly customary law⁶⁹, and includes two main issues.

First, when it comes to identifying pre-colonial legal systems, we often face the problem that the available sources are written from the perspective of the colonizer⁷⁰. This introduces a significant bias into our understanding, as colonial legal scholars and administrators typically saw indigenous legal systems through a lens

⁶⁷ *Masake*, in this issue (note), pp. 694 et seq.; *Materu*, in this issue (note), p. 670.

⁶⁸ Another example are bigamy laws.

⁶⁹ For legal pluralism, which is traditionally understood as the coexistence of customary, religious, and state-sponsored law, see, e.g., *Hooker*, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*, Oxford University Press 1975; and *Bennett*, *Comparative Law and African Customary Law*, in: Reimann/Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed., Oxford University Press 2019, pp. 642–672.

⁷⁰ For the German context, see *Iffert*, *Historische Wahrheit und koloniales Wissen zum “Eingeborenenstrafrecht”* (fn. 17), pp. 207, 211; *Schaper*, “Deutsche Kolonialgeschichte postkolonial schreiben”, *Aus Politik und Zeitgeschichte* 40–42 (2019), 11–16, 15.

of superiority, and often misrepresented or ignored the complexities of these systems⁷¹. This leads to issues of access and reliability of sources and makes it harder to reconstruct pre-colonial legal traditions with accuracy⁷².

The second issue relates to the “translation” of custom. Customary law often relies on unwritten, oral traditions that were radically disrupted or altered by colonial rule. Even if we manage to identify elements of customary law, interpreting them based on Western legal frameworks can distort their meaning and function. As a consequence, the challenge of translating indigenous legal concepts into the language of colonial or contemporary law raises profound questions about the authenticity and fidelity of such interpretations⁷³. Furthermore, the question arises to what extent customary or traditional norms can be assessed against allegedly “universal” or “modern” legal standards, often originating from the Global North⁷⁴.

These challenges demonstrate the complexities of studying the legacy of colonialism in criminal law. They underscore the need for careful, nuanced research that is sensitive to the historical, cultural, and legal contexts in which colonialism took place and acknowledges how its influence persists today.

V. Conclusion

We can conclude with the following three observations: Colonialism does not explain everything; criminal law scholarship needs to engage more deeply with colonialism; and research must be interdisciplinary and collaborative.

The first point is simple – perhaps obvious – but still worth stating. Of course, one cannot claim that colonialism explains everything, that the (post)colonial lens offers a “theory of everything”: a singular, all-encompassing framework that fully accounts for and connects all aspects of societal life. This would be a misunderstanding. However, it is true that coloniality is a relevant factor that must be taken into account in a globalized world characterized by deeply entangled legal systems.

71 R. Habermas, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (fn. 24), 150–182, 156 et seq.

72 Iffert, *Historische Wahrheit und koloniales Wissen zum “Eingeborenenstrafrecht”* (fn. 17), pp. 207, 226 et seq., 231 et seq.; Schaper, *Aus Politik und Zeitgeschichte* (fn. 71), 11–16, 15.

73 See Shomade, *Colonial Legacies and the Rule of Law in Africa: Ghana, Kenya, Nigeria, South Africa, and Zimbabwe*, Routledge 2021; Onazi (ed.), *African Legal Theory and Contemporary Problems: Critical Essays*, Springer 2014.

74 Interestingly, many constitutions of former colonies, such as Namibia’s, explicitly provide for such a test; see, e.g., Article 66(1) of the Namibian Constitution of 21 March 1990: “Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.”

The second observation concerns criminal law scholarship – particularly German criminal law scholarship. There is a clear need for more substantive engagement with colonialism and the enduring structures of coloniality⁷⁵. While it is true that colonial criminal law has mostly been classified as a matter of comparative law, one could contest this, or at least agree that there remains much to be explored and learned from a criminal law perspective as well. A starting point for this necessary and long-overdue engagement with the colonial constellation may be found in the fields of inquiry sketched in this paper – colonial criminal law, criminal law responses to colonial injustice, post-colonial criminal law, and (the decolonization of) comparative criminal law – which represent critical avenues for further research. Taken together, they may form the foundation of a broader research agenda.

This would be a research agenda which speaks to various existing discourses: the historical foundation of German criminal law (as a matter of criminal law history), the nature and function of criminal law and punishment (as a matter of criminal law theory), and the dealing with mass atrocities, transitional justice, and the globalization of law (as a matter of international criminal law). For instance, given the context of colonialism, there are compelling reasons to revisit the prevailing narrative of the liberal-progressive heyday of German criminal law around the turn of the 19th to the 20th century⁷⁶; for too long, this narrative has ignored its darker counterpart: the colonial penal regime⁷⁷. There are also good reasons to reflect on the methodological foundations of comparative law itself. While cultural relativism can be just as problematic as ethno- or Eurocentrism, a comparative approach that remains aware of the colonial legacy – tailored to the specific aim of comparison – may provide a more appropriate and nuanced framework.

A third and final observation relates to research design. Addressing colonial legacies requires interdisciplinary input – as many disciplines have progressed further than law – as well as new, inclusive modes of collaboration that incorporate perspectives from the Global South; organising this South-North conversation and shaping the process leading up to it will be one of the most important tasks that lie ahead of us⁷⁸.

⁷⁵ See also *Mehta*, in this issue (note), p. 760.

⁷⁶ See, e.g., the relevant chapters in *Eb. Schmidt's* treatise (Einführung in die Geschichte der deutschen Strafrechtspflege, Vandenhoeck & Ruprecht 1947), which are entitled “Die rechtstaatlich-liberale Epoche” and “Die rechtstaatlich-soziale-Epoche”. For a critical account, see *Dubber*, Colonial Criminal Law and Other Modernities (fn. 14), pp. 1053, 1070 et seq.

⁷⁷ Cf. *Schlottau*, Deutsche Kolonialrechtspflege (fn. 16), p. 352.

⁷⁸ For humble efforts to implement such formats, see, e.g., the newly established Center for Advanced Studies “Reflexive Globalisation and the Law: Colonial Legacies and Their Implications in the 21st Century” (<<https://www.rewi.hu-berlin.de/de/lf/ljs/jbg/index.html>>) as well as the “CrimCol project” (<<https://fli.berlin/crimcol/>>), both at Humboldt-Universität zu Berlin.