

## **Should claims for Colonial Reparations be recognized under International Law?**

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### **Abstract**

The article examines the social and economic consequences of colonialism and colonial state policy, underscoring the exploitation and suffering of the colonized under such policies. The writer specifically refers to India and Sri Lanka and the human and economic costs to the two countries. The writer emphasizes that these must be acknowledged, apologized and atoned for, by the former colonial governments. Counter arguments to this are examined, as to why exactly reparations are owed in the current environment. As justification, the writer seeks guidance from the examples of two nations – the *Mau Mau* and the *Herero*, who have obtained reparations as examples of marginal success. Yet, in these small ‘victories’ too, there is much to be desired. In conclusion, the writer suggests that the international community should take note of this very poignant, ignored and pivotal aspect of collective human rights and strongly recommends that action be taken immediately to provide redress for a most damaging, long-term phenomenon which is already fading from the consciousness of the colonizers. The writer proposes that the Right to Reparations be made an integral part of International Law, be made a Fundamental Human Right recognized by a duly signed International Convention which should constitute a specialized Tribunal to adjudicate such claims.

**Keywords:** Colonialism; Reparations.

### **1. Introduction**

The recent news of Germany recognizing its role in the Genocide in Namibia and its concurrence to pay reparations has opened up

a fresh debate on a topic since the withdrawal of colonialism (in its strict form) by the late 20<sup>th</sup> century.<sup>1</sup> This paper aims to seek the

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<sup>1</sup> Norimitsu Onishi & Melissa Eddy, ‘A Forgotten Genocide: What Germany did in Namibia, and what its saying now’ The New York Times, May 28<sup>th</sup>, 2021, retrieved from <https://www.nytimes.com/2021/05/28/world/europe/germa>

[ny-namibia-genocide.html](https://www.nytimes.com/2021/05/28/world/europe/germa-ny-namibia-genocide.html), accessed on 18<sup>th</sup> June 2021. Accordingly, this genocide has been named the first genocide of the 20<sup>th</sup> Century; between 1904 and 1908, tens of thousands of Namibians were killed by German forces.

justifiability of former colonies seeking compensation from their colonizers, debate on whether such claims be limited to only certain spheres, and whether reparations claims should form part of established international law. The Black Lives Matter movement, took a global dimension not only against police brutality, but the tearing down of colonial oppression, evidenced by the destruction of memorials dedicated to well-known profiteers of colonialism. It is a topic discussed widely by academics and one that is hoped will equalize the playing field as much as reverse discrimination effected within a country.

Whilst jurists have argued on the viability of reparations and their ambit, it still has not been accorded sufficient importance in the international arena. No international organization, such as the United Nations or European Union have ever officially declared their willingness to pay reparations. Thus, in a global environment increasingly cognizant of the heinous acts committed in the name of ‘civilizing’ the non-European world, this is a topic that ought to be considered very seriously, by academics, policy makers and global actors, collectively.

## 2. Applicable Theories

Unjust enrichment at the expense of others who have been unjustly impoverished is at

the crux of seeking reparations.<sup>2</sup> Brooks offers the Atonement Model, where the focus would be on morality, the nexus between the victim and perpetrator, egalitarianism and social justice.<sup>3</sup> He cites the words of the German Chancellor Adenauer who not only spoke of compensation, but restitution, both moral and material, to the victims of the Holocaust.<sup>4</sup> Thus Atonement has two facets – apology and reparations. An apology denotes the assumption of responsibility and the solidification of such apology through a redemptive act. As per Brooks, ‘*this redemptive act is... reparation*’. He states further, ‘*A reparation can be the tangible act that transforms the rhetoric of an apology into a meaningful and material reality. Accordingly, a reparation can be defined as the revelation and realization of an apology*’<sup>5</sup> To Brooks then, atonement is not a punishment but an acknowledgement of guilt; it should demonstrate a commitment to its victims.<sup>6</sup> ‘*Once the perpetrator atones, the matter of forgiveness arrives on the victim’s desk as a kind of civic subpoena*’

In Elazar Barkan’s view, redress can be either restorative and redemptive. He quotes from the famed Archbishop Desmond Tutu, who himself was an ardent advocate of restorative redress, and who deemed reparation and apology to be essential components of such redress.<sup>7</sup> What is of

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The soldiers targeted two ethnic groups – the Herero and the Nama, for their resistance against land grabs by German settlers. In May 2021, Germany formally acknowledged its actions to amount to genocide and pledged \$ 1.35 Billion towards reconstruction and development. It is interesting though, that Germany is yet to make a formal apology

<sup>2</sup> Tommy J Curry, ‘The Political Economy of Reparations: An Anti-Ethical Consideration of Atonement and Racial Reconciliation under Colonial Moralism’ [2011] *Race, Gender & Class* Vol. 18, No. 1/2 p 125

<sup>3</sup> Roy L. Brooks, ‘Toward a Perpetrator-Focused Model of Slave Redress’ (2004) Vol VI *African American Law and Policy* Report

<https://lawcat.berkeley.edu/record/1119209/files/fulltext.pdf> accessed on 23<sup>rd</sup> June 2021

<sup>4</sup> *ibid* page 66

<sup>5</sup> *ibid* page 67

<sup>6</sup> Brooks is more than aware of the present-day generations denying any culpability for their ancestor’s actions. He has this to say, ‘when whites reject reparations, arguing that they had nothing to do with slavery, they fail to understand the centrality of slavery in the socioeconomic development of this great country from which they benefit’ at page 68.

<sup>7</sup> Elazar Barkan, ‘Historical Reconciliation: Redress, Rights and Politics’ [FALL/WINTER 2006] *Journal of International Affairs* Vol. 60, No. 1 pp. 1, 3. The other forms of redress were:

extreme relevance to the writer's premise is Barkan's view that redress is not isolated, but continuing. That redress aims to address '*older historical issues that inform contemporary crises and political tension... (it) explicitly engages the victimization of groups as opposed to individual victims.*'<sup>8</sup> In his view, '*reparations... are usually determined at a level that is meaningful to the victims, but insignificant to the perpetrators.*' Barkan goes on to note, '*I do not know of any case where the agreement of reparation led to any major redistribution of resources.*' It is clear then, that reparation is a pivotal concept that should be in any informed discourse regarding colonized nations; and that sadly, even in the rare instances of its recognition, no sincere, noteworthy attempt has been made towards its fulfilment.

### **3. The case for Reparations: India & Sri Lanka**

Whilst Britain is of the view that their occupation of India was beneficial, by facilitating economic, legal and administrative developments,<sup>9</sup> the truth is far from being this simple or uncontroversial. A strong and incontrovertible view persists, that Britain impoverished India. The great Nehru wrote that India was wealthy until the 18<sup>th</sup> century, and that the areas longest under British rule were now (at the time of his

writing from goal) the poorest.<sup>10</sup> The famed Romesh Dutt concluded that the British destroyed Indian commerce, later entrenched by disastrous fiscal policies and that the land tax was responsible for agrarian poverty. R. Palme Dutt stated that British rule '*thwarted and distorted*' the Indian economy and development by superimposing a foreign bourgeoisie.<sup>11</sup>

The more recent writer and speaker on this matter is Dr. Sashi Tharoor. In his celebrated speech at the Oxford Union, he laid bare the ills of British colonialism in India. Some of the most salient points he brought up will be summarized here. India's share of the world economy prior to the arrival of the British was 23% which dwindled to 4% by the time of their departure. The industrial and economic rise of Britain, the catalyst being the Industrial Revolution, was financed by India – premised on its own de-industrialization. One pivotal example being the destruction of the Indian handloom weavers, by the British destroying their looms, physically incapacitating them and imposing tariffs and duties on their cloth, effectively destroying their trade.<sup>12</sup>

The other atrocity is the Bengal Famine, one of many induced by British policies, where Dr. Tharoor estimated that between 15 – 29 million Indians perished. The Bengal Famine was precipitated by Winston Churchill's

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restitution of property, restitution of cultural property and historical commissions.

<sup>8</sup> *ibid* p 4. At page 6 Barkan makes the point that most international conventions merely emphasize on redress as an individual right opposed to the collective, which it is submitted – could be viewed as a limitation on reparations. He further states at page 9 that restitution of cultural property provides another aspect of redress, also because such property '*is characterized by its central symbolism to the identity of a group or nation.*' The former colonists would do well to take note, considering their most well-known museums boast of treasures looted from the global south.

<sup>9</sup> Living in the British Empire: India, retrieved from <https://www.nationalarchives.gov.uk/education/empire/g2/c44/background.htm>, accessed on 10<sup>th</sup> July 2021.

<sup>10</sup> Peter Robb, 'British Rule and 'Improvement'', (Nov., 1981) *The Economic History Review* New Series, Vol. 34, No. 4 507, 510

<sup>11</sup> *ibid*

<sup>12</sup> It is said that the India's cotton was exported to the mills of Lancashire, which then began exporting cloth to the world, subsequent to destroying the Indian market. As per Dr. Tharoor, India went from being a global importer of textiles, constituting 27% of the world trade, to less than 2%.

written directive that essential supplies from civilians should be diverted from Bengal to Europeans who were at the war front and to keep as reserve stockpiles. His only retort to concerns raised by officials was his query as to why Gandhi was still alive. For World War I, Indian taxpayers paid up more than 100 million pounds and 1.3 million Indian personnel served in the war. (Naturally, the casualties of both wars are immeasurable). Dr. Tharoor also strongly opined that whence Scotland failed to reach out to colonies, the Indian experiment succeeded, whereby many Scots were employed in India as soldiers, merchants, agents etc. His view is that India pulled Scotland out of poverty.

Overall, Dr. Tharoor strongly advocates reparations. He believes it is necessary, as a *tool of atonement*. It is to atone for the wrongs that have been done, not for empowerment. He acknowledges that it would be most difficult to compute the amount, to put a monetary sum to the atrocities suffered, but as an apology and an acknowledgement of wrong.<sup>13</sup>

It is submitted that Dr. Tharoor's concept of reparations echoes that of Brooks and Barkan; that the pivotal issue is atonement, acknowledgment and apology.

It has long been accepted that similar policies and atrocities were carried out by the British administration in Sri Lanka. We were only fortunate in that wresting our independence

did not cause the harrowing bloodshed it did, in India. Yet, in terms of administration, from that of 1796 to 1948, were extraordinarily similar, with the derogation of Sri Lankan language, religion, forms of administration and way of life. These were most visible, where the British did not assiduously try to conceal their intentions, in the Rebellions of 1818 and 1848.<sup>14</sup>

The 'scorched earth' policy was redefined by the British subsequent to 1818, specifically targeting the Uva Wellassa region. Historically, parts of the Badulla, Moneragala and Hambantota districts were in parallel to the rice bowl of Rajarata, signified by the fact that traditionally a *Yuva Raja* was appointed to the area. The British response to the freedom fight was the desolation of the province, where all males between the ages of 15 and 60 were either killed or exiled, eliminating all able-bodied males. Houses, paddy and fields were burnt. These fires lasted weeks, it is said. Livestock destroyed, irrigation rendered useless, anicuts damaged. The ferocity has been chronicled by Herbert White, a British Government Agent, in the 'Journal of Uva' (more telling as it is the words of a Britisher) '*If thousands died in the battle they were all fearless and clever fighters. If one considers the remaining population of 4/5 after the battle, to be children, women and the aged, the havoc caused was unlimited. In short, the people have lost their lives and all other valuable belongings.*'<sup>15</sup> Charles McFarlane, a historian

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<sup>13</sup> The text of the speech can be obtained from <https://www.news18.com/news/india/read-shashi-tharoors-full-speech-asking-uk-to-pay-india-for-200-years-of-its-colonial-rule-1024821.html> and the video from <https://www.youtube.com/watch?v=f7CW7S0zxv4&t=160s>, accessed on 10<sup>th</sup> July 2021.

<sup>14</sup> Note that the writer uses the term 'Rebellion' as it is known in popular parlance and denoted by the British. However, both movements were not rebellions or

insurgencies, but an uprising of the people, against broken promises and inhumane taxation. It is interesting that when the French and the Americans revolted against similar policies, their fights have gone down in history as the French Revolution and the American War of Independence, respectively. One wonders why such nomenclature is not used for the freedom fighters of Sri Lanka!

<sup>15</sup> Hugh Karunanayake, *The Merry men of Uva*, (2018), retrieved from <https://www.historyofceylontea.com/ceylon->

writes, *'the war was now entirely ended, but dreadful and disgraceful had it been during its process. Execrable cruelties had been practiced, as well as the native troops in our service as well as the Singhalese, and we blush to admit that our British born and our Irish soldiers had in many cases, turned the contest into a war of retaliation and extermination. The chief fault lay in very high quarters. By general orders our troops were commanded to burn and destroy, and to quench the flame of insurrection in blood. The troops were employed in following the insurgents into their fastness. The dwellings of the inhabitants were burned, and their fruit-bearing trees, their coconut trees, were often cut down and their rice grounds often laid waste by breaking down the immense mounds or embankments constructed to retain water, so essential to the cultivation of this grain. The whole country was scoured in every direction by military parties, who burned and destroyed whatever provisions and other property that they could not carry away'*.<sup>16</sup> It is noteworthy that the historian is not spared a blush when speaking of the colonizer's capacity for atrocity. The 'native' and Singhalese are quite capable of atrocities, but a blush of shame arises only when the colonizer acts within the mandates of his prerogative! Nevertheless, this is a tragic chronicle of the mass scale destruction. Destruction which the Uva province is perhaps still afflicted by, to this day.

Uva Wellassa and Bintenna were again the most active in the Freedom fight of 1848, which was ostensibly over the Road

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[publications/feature-articles/the-merry-men-of-uva.html](https://www.ft.lk/article/390241/genesis-of-a-revolt), accessed 10<sup>th</sup> July 2021

<sup>16</sup>Retrieved from <https://www.ft.lk/article/390241/genesis-of-a-revolt>, accessed 10<sup>th</sup> July 2021

<sup>17</sup> The Kandyan considered it ignominious to work on the roads, or to go to prison as punishment, thereby compelling

Ordinance and the new measures of taxation. However, it was mainly due to the Lankans realizing that autonomy of governance was nothing but an illusion and that the British rule extended over all areas, over and above the contract entered into in 1815. The Road Ordinance meant that the Kandyan had to work a few days a year towards the construction of roads, and if any able-bodied man were to refuse, he had to pay 3 shillings each to the British. Families had more than one adult male and were compelled to sell lands to be able to pay the penalty. Whilst working on roads by itself may not seem harsh, there were many moral considerations, that the British were unwilling to listen to.<sup>17</sup>

The Kandyan Sinhalese man's argument went thus:

*'if I can live comfortably and respectably, in my own village and amongst my own people, by cultivating my new fields, why should I subject myself to be commanded by the white strangers?'*

What is today recognized as the autonomy, dignity and integrity of the person was not given an iota of recognition by the British, even though the citizens made peaceful representations against the laws, on the 6<sup>th</sup> of July 1848, where 3000 people assembled in Kandy and presented a memorandum to Emerson Tennent, the colonial secretary of Sri Lanka.

As Munasinghe states, the Uva Wellassa and Bintenne areas revolted in the most *'severe, sustained form'*<sup>18</sup> once again subjecting

them to pay the fine of 3 shillings each. Tax evaders were put to jail for a month with no right of appeal (British justice!) and were given rigorous imprisonment.

<sup>18</sup> Indrani Munasinghe, 'The Road Ordinance of 1848 and the Kandyan Peasantry' (1983/84) *Journal of the Royal Asiatic Society Sri Lanka Branch* New Series, Vol. 28 25, 33

themselves to the ire of the British.<sup>19</sup> Again, the opposition was met with severity using 2789 soldiers and ended in 10 months.

The benefits of the constructed roads were mainly enjoyed by the European planters, and the rationale was more to transport the produce to Colombo (market-oriented development) rather than provide facilities for remote areas.<sup>20</sup>

The writer has attempted to draw on merely two instances of British hegemony which brought untold suffering, decimation and the violation of political, economic and cultural autonomy of a people. Due to space constraints, the writer focused on British occupation, though the isle had been invaded by Portuguese and Dutch. It is submitted however, that the British stayed on the longest and the Lankan economy contributed to that of the Raj. It is hoped that this snapshot of history, though hardly doing justice to foreign yoke imposed from 1505 to 1948, would inform the reader of depredation suffered at the hands of colonists.

#### **4. Instances of reparations paid: global stage.**

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<sup>19</sup> The Ordinance and the taxes were just one of many legitimate grievances. The presence of the foreign government, its attitude towards Buddhism, the opening up of plantations and the importation of foreign workers, encroachment of their lands, violation of grazing rights and access to woodlands, were all among these grievances: *ibid*, 33

<sup>20</sup> Indrani Munasinghe, *The Road Ordinance of 1848 and the Kandyan Peasantry*, n 18.

<sup>21</sup> Thus, examples such as Germany's reparations towards the Jewish people for the Holocaust and reparations towards Poland, will be excluded; or any other similar atrocities brought about by waging war on foreign lands, such as for example, reparations paid by Japan to Korea.

<sup>22</sup> As the British settled in Kenyan farmlands, starting their expansion into Kenya in 1887, they forcefully dispossessed

This section will aim to analyse two instances of reparations paid for colonialism (if any), as opposed to reparations paid for that of war and domestic policy (though admittedly, equally horrendous).<sup>21</sup>

#### **a) The Mau Mau & the United Kingdom.**

In April of 2011 Mau Mau victims from Kenya came to Britain requesting compensation for the suffering in British concentration camps.<sup>22</sup> The right to sue in British courts was awarded to the victims. To the Kenyan,<sup>23</sup> land was not merely for agrarian purposes; as for the native American, the land was the connection between the dead and the living, the spirituality and continuity of the community. The Mau Mau movement was formed by 1952, which waged an armed struggle for the return of their homelands. Similar to the battles fought by the Lankans, the British viewed these as insurrections by inferior peoples, unable to view life on European terms. Hundreds of thousands of Kenyans were rounded up and sent to concentration camps where they were tortured and held in isolation. Detainees were beaten to death, and on one occasion, children as young as 11 were placed in solitary confinement for singing Mau Mau songs.<sup>24</sup> Bodies of leaders

large groups of Kenyans from their ancestral lands. This rendered millions homeless and it is stated that by 1948, 1 ¼ million were restricted to 5,200 km, whilst 30,000 settlers occupied 31,000 square km - Regina Menachery, Paulose and Ronald Gordon Rogo, 'Addressing Colonial Crimes Through Reparations: The Mau Mau, Herero and Nama' (Autumn 2018) *State Crime Journal* Vol. 7 No. 2, State Crime and Colonialism 369, 371

<sup>23</sup> This mainly affected the Kikuyu ethnic group, the predominant group in Kenya.

<sup>24</sup> Regina Menachery Paulose and Ronald Gordon Rogo, *Addressing Colonial Crimes Through Reparations: The Mau Mau, Herero and Nama*, *ibid* n 22, p 372. It is further stated that 'some were castrated with methods that would be used at the time on horses, and women were inserted with hot glass bottles during

were displayed as deterrence to the living (one wonders how the medieval practices of Europe survived so late into the 20<sup>th</sup> century). The Mau Mau were never seen as a group with legitimate grievances, but as terrorists. It is estimated that a minimum of 150,000 persons were imprisoned without trial, and over a million people forcibly placed in concentration camps.<sup>25</sup>

Justice for the Mau Mau began as early as 2002, when John Nottingham, a former British colonial district officer shared his experiences of crimes committed against the Mau Mau. A suit was filed for tortious claims of assault, battery and negligence<sup>26</sup> but the British government's response was that the Kenyan government assumed responsibility for these with the advent of independence and that the claims were time barred. Fortunately, the Court held otherwise, that there was a direct nexus of accountability between the atrocities and the British government. The litigation proceeded which compelled the Foreign and Commonwealth Office to enter into an out of court settlement with the claimants. 20 million pounds were to be given to the claimants and the then Prime Minister issued an apology in Parliament.<sup>27</sup> He expressed '*sincere regret*' for the torture that took place and that there were plans to conduct a memorial for the victims, in Nairobi.<sup>28</sup> According to Prime Minister

Hague, 5,223 victims were to receive compensation. A study of the massacres and torture would reveal this number to a pitiful approximation.

What was most interesting in this contrite message was that there was no formal acceptance of liability. Firstly, the compensation was given to only the living survivors of the abuse. What then of those deceased and their families who suffered as a result?<sup>29</sup> Secondly, Hague stated that Britain still did not accept that it was legally liable for the actions of what was a '*colonial administration*' in Kenya. The thought processes behind this rationalization baffles the mind! Interestingly, Britain has also added a caveat, that this instance will not be considered a precedent, trying in effect to deter other colonies in claiming damages. Taking all these factors into consideration, one wonders whether the principles of acknowledgment, apology and atonement have been executed with sincerity or a good conscience.

This is hardly surprising in a country, where after the passage of the Slavery Abolition Act 1833, the government took out a loan of 20 million pounds to pay out the slave compensation package enunciated in the Act. The total amount was equivalent to 40% of

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their interrogation. The crimes that took place against the Mau Mau have been described as monumental, systematic and widespread.'

<sup>25</sup> It is indeed surprising that the British were ostensibly surprised with the concentration camps of Hitler's Third Reich considering that they had such precedents!

<sup>26</sup> Note the fact that a civil suit was filed and not a criminal prosecution.

<sup>27</sup> Regina Menachery Paulose and Ronald Gordon Rogo, Addressing Colonial Crimes Through Reparations: The Mau Mau, Herero and Nama, *ibid* n 22, p 376

<sup>28</sup> "I would like to make clear now, and for the first time, on behalf of Her Majesty's government, that we understand the pain and grievance felt by those who were involved in the

events of the emergency in Kenya... The British government recognises that Kenyans were subject to torture and other forms of ill-treatment at the hands of the colonial administration.

"The British government sincerely regrets that these abuses took place and that they marred Kenya's progress towards independence" – the words of Prime Minister Hague, retrieved from <https://www.bbc.com/news/uk-22790037>, accessed on 12<sup>th</sup> July 2021.

<sup>29</sup> As per the Kenyan Human Rights Commission, 90,000 Kenyans were executed, tortured or maimed. 160,000 persons were detained in horrific conditions. (*ibid*)

the government's annual income.<sup>30</sup> There should be no error of interpretation – the money was *not* utilized to compensate the victims of slavery, but the *slave owners*, for the loss of their 'trade', though ineptly named, 'slave compensation.' The British taxpayers' money was used to pay off this loan, right up until 2015. It is most telling that compensation, one could even say – reparations, were paid for those who engaged in a trade which was a crime against humanity – yet reparations seem an impossible illusion for countries and its peoples demanding equity, recompense and conscionable atonement for colonialism.

#### **b) Herero and Nama & Germany.**

The story of the Herero and Nama peoples' pursuit of justice dates back to 1946. The Herero petitioned the ICJ in 1998, yet were rejected as they were not a State. Many lawsuits were instituted in the United States and in 2017, the Herero filed a suit against the German government in the state of New York. Damages were sought for the specific crime of genocide and reparations for the thousands of miles seized by German colonial authorities. For the longest while, the German state declared that it will fund 'targeted development projects' but not pay reparations.<sup>31</sup> This was problematic as the Herero did not comprehend why the German government was paying reparations to the

Jewish people and the Israel, for their responsibility for the holocaust, but not them. It was indeed the forgotten genocide. Harring speaks of this most eloquently:

*'What is the legal – or moral – distinction between German genocide directed at Jews and German genocide directed at Africans? Surely, in the modern world, a racial distinction cannot account for this difference in policy. Or is the distinction based on some meaningful difference between genocide in the Herero War and World War Two?'*<sup>32</sup>

It is noteworthy however, that the German government decided to make payments to the Herero and Nama peoples, in June of 2021. (Mentioned at the very inception of this paper). The government agreed to pay Namibia 1.1 billion Euros which Chancellor Markle termed '*a gesture of reconciliation.*' The government adroitly avoided calling it 'reparations.' This very well could be out of a fear of setting precedents. Germany's foreign minister accepted unequivocally that this was a genocide and will recognize the atrocities committed in Namibia, '*unsparingly and without euphemisms.*'<sup>33</sup> Yet, an apology has not yet been issued, in spite of the acknowledgment. There is a possibility of it being offered by the German Prime Minister, later on this year.

It is humbly submitted that whilst there may be shortcomings in the settlement agreed to

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<sup>30</sup> Kris Manjapra, When will Britain face up to its crimes against Humanity, 29<sup>th</sup> March 2018, retrieved from <https://www.theguardian.com/news/2018/mar/29/slavery-abolition-compensation-when-will-britain-face-up-to-its-crimes-against-humanity> Accessed on 12<sup>th</sup> July 2021.

<sup>31</sup> Regina Menachery Paulose and Ronald Gordon Rogo, Addressing Colonial Crimes Through Reparations: The Mau Mau, Herero and Nama, *ibid* n 22, 377 – 378.

<sup>32</sup> S.L. Harring, 'German Reparations to the Herero Nation: An Assertion of Herero Nationhood in the Path of Namibian Development' (2002) *West Virginia Law Review* 104: 393–417

<sup>33</sup> Phillip Oltermann, Germany agrees to pay Namibia € 1.1 billion over historical Herero-Nama Genocide, Friday, 28<sup>th</sup> May, 2021, retrieved from <https://www.theguardian.com/world/2021/may/28/germany-agrees-to-pay-namibia-1.1bn-over-historical-herero-nama-genocide>, accessed on 12<sup>th</sup> July 2021. Accordingly, more than a billion euros will go towards land reform, rural infrastructure, water supply projects etc. It is meant to benefit and involve the communities of the Herero and Nama descendants.

by Germany, it surpasses the British agreement with the Mau Mau. The German settlement will benefit the descendants of the victims, which may have been due to practical realities, since only descendants would be alive, as the genocide was between the years of 1904 – 1908. It is however, noteworthy that Namibian leaders who participated in the long negotiations have refused to accept Germany's offer.<sup>34</sup> This is because they consider the settlement reductive and insulting.<sup>35</sup>

Yet the commonality between both former colonial states remains. They are both afraid to recognize these as reparations as it would set alarming precedents for them. Many formerly colonized countries would then receive the impetus to claim. On par with the atrocity committed towards the Mau Mau is the British government's stance that it bears no responsibility to the actions of the colonial government. This begs the question – then who does? Is the British government so devoid of rational arguments as to deny responsibility for the governments of their colonies? Were colonies Sovereign or under the British crown? Judging by the Sri Lankan experience, every facet of our government and economy was controlled by the British. How can one remove oneself from a colonial administration? Does it not contradict the very term – colony?

## 5. Why are Colonial Reparations necessary?

In order to recognize that legal recompense is necessary, it must first be established that the colonial state functioned in such a manner which gives rise to a legal claim. It needs to be proved that crimes against humanity, genocide have been carried out – interestingly the very areas the International Criminal Court has been constituted to exercise jurisdiction over.

There are the detractors who may have legitimate grounds for speaking against reparations. These could include that the perpetrators of yesteryear are not alive to be held accountable for their actions – that their descendants should not pay the price of crimes perpetrated before their lifetimes and over which they had no discerning control; that the victims of the crimes are not alive to receive any recompense and the crimes which are recognized today under international law, were not in existence at the time.<sup>36</sup> Would it then be a retrospective penalty being imposed?

In response one could argue that accountability is a **continuing** act, and in crimes like colonial oppression, as much as individuals are accountable, so are overreaching state policies. Atrocities were committed not only by individual statesman but with the connivance or at least the silent acquiescence of their governments. Furthermore, whilst the present-day generations may not be aware of the extent of depredation and were not born to exercise their franchise, it is commonly understood that they reap the fruits of the accelerated

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<sup>34</sup> These are the Zeraeua Traditional Authority, the Maharero Royal House and the Kambazembi Traditional Authority.

<sup>35</sup> Kuzeeko Tjiemisa – Chiefs reject Genocide Reparations Deal, 27<sup>th</sup> May, 2021, retrieved from <https://neweralive.na/posts/chiefs-reject-genocide-reparations-deal>, accessed on 12<sup>th</sup> July 2021.

<sup>36</sup> Regina Menachery Paulose and Ronald Gordon Rogo, Addressing Colonial Crimes Through Reparations: The Mau Mau, Herero and Nama, State Crime Journal, Vol. 7, No. 2, State Crime and Colonialism (Autumn 2018), p. 369, p 379.

economic development brought on by colonialism.

An acknowledgment of such was made as recently as June 2020 by the Bank of England, Lloyd's of London, the Royal Bank of Scotland and the Brewer, Greene King.<sup>37</sup> These are veritable state and brand name British companies of the United Kingdom, drawing in heavy profits annually. It is clear that these successful enterprises profited heavily off the slave trade and colonial policies and these profits remain, duplicate and are enhanced to this day. Yet, as heinous as slavery is, one must also consider the impact of colonial policies on colonies and their lasting economic deprivation. Academics have long argued that there is a strong nexus between Europe's development and their colonial possessions. The eloquent arguments of Mukherjee merit careful consideration. He states that '*at the heart of colonialism lay surplus appropriation from the colony to the metropolis or the colonisers*'<sup>38</sup> In the 1500's, Asia (excluding Japan) produced more than three times the global GDP than did western Europe, which declined steadily once colonialism was entrenched, by the 1600s. By 1913, Asia's share of the global GDP was only a 2/3<sup>rd</sup> of western Europe.<sup>39</sup> India and China which accounted for 24.9% and 24.4% of the global GDP in the 1500s, were reduced to 4.2% and 4.5% respectively, by 1950. Both were

subject to colonization in the intervening period, thus making the nexus crystal clear.

Bagachi states that the flow of finances from the colonies, '*supported the largest flow of migrants (from Europe) in recent human history as recorded between the 1870s and 1920s... (it) not only led to the peopling of the United States and its rise as the most economically advanced country in the world but also helped improve the living conditions of the Europeans left behind.*'<sup>40</sup> Britain also ensured that India's position as the chief global exporter of textiles was displaced. Britain's manipulation of policy in India ensured that Indian produce was forcibly kept out of British and global markets, and latterly, from the Indian market itself. This resulted in India tragically falling to a mere 1.4% of the world manufacturing output by 1913 (in comparison to 19.7% in 1800). Conversely, Britain ensured its export of cotton to India increased dramatically to 2,000 million yards by 1887 (compare to 0.8 million yards in 1815). This led to the deindustrialization of India further, and her economic degradation.<sup>41</sup> World War I and the Great Depression of the 1930s displaced Britain's economy from being the '*creditor of the world*' to a country in financial difficulties, in debt to the United States. Mukherjee states that in 1918 India made a 'gift' of £45 million to the British war effort and during the World War II, the expenditure

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<sup>37</sup> Jeremy Kahn, George Floyd Protests force Britain to reckon with its role in slavery, leading some companies to pay reparations, Fortune, June 18<sup>th</sup>, 2020, retrieved from <https://fortune.com/2020/06/18/george-floyd-protests-uk-slavery-reparations/>, accessed on 14<sup>th</sup> July 2021. Accordingly, the Bank had 27 members, including 11 former Bank governors, who owned slaves or directly profited from the trade. Furthermore, The Bank of England issued a statement on the 19<sup>th</sup> of June 2020 that though it in itself was never directly involved in the slave trade, but was aware of some 'inexcusable' connections of former governors and directors therein. The Bank promised to withdraw any images of such persons from its display on any part of the

Bank. (Retrieved from <https://www.bankofengland.co.uk/news/2020/june/statement-in-relation-to-the-banks-historical-links-to-the-slave-trade>, accessed on 20<sup>th</sup> July 2021).

<sup>38</sup> Aditya Mukerjee, Empire: How Colonial India Made Modern Britain, *Economic and Political Weekly* Vol. 45, No. 50 (DECEMBER 11-17, 2010) 73, 74

<sup>39</sup> Ibid n. 38, p 75

<sup>40</sup> Amiya Kumar Bagachi, *Perilous passage: Mankind and the Global Ascendancy of Capital*, Oxford University Press [2006] 232, 243

<sup>41</sup> Ibid n 38, p 78

ranged from Rs. 50 Crore (1939 – 40) to Rs. 458 Crore in 1944. The total expenditure of the Indian Central government accounted for by defence services rose to 75% by the end of World War II.<sup>42</sup> The British placed a ‘*vicelike stranglehold*’ on Indian finance, fiscal and monetary policy that even when the Reserve Bank of India was established, it was precluded from being autonomous and ‘*misused*’ by Indians who were compared to a ‘*spoilt, willful, naughty child*.’<sup>43</sup> The most blatant and audacious infringement of the Indian economy was in the 1940s when Britain forcibly took out loans from India amounting to Rs. 17,000 million (approximately 17 times the annual revenue of the Government of India and 1/5<sup>th</sup> of Britain’s GDP in 1947).<sup>44</sup> This is exactly at a time when millions of Indians were dying of a famine induced by Britain’s war policies, spearheaded by Winston Churchill. In conclusion, the renowned economist Utsa Patnaik estimates that in approximately 200 years, the British Raj appropriated at least \$44. 6 trillion. In context, the 2018 estimate of Britain’s GDP is \$3 Trillion.<sup>45</sup>

When considering the human cost, the debilitation of Indian village industry meant thousands of Indians had no means of sustenance. This was utilized further to the advantage of the colonial government. Thousands were shipped to the Caribbean, Mauritius, Fiji, Malaya, South Africa, Burma and Sri Lanka. Indians were now akin to

‘indentured’ labourers.<sup>46</sup> Thus, it is not only currency that was ‘exchanged’ and manipulated, but human lives, which cannot be measured by a price.

The above paragraphs seek to offer a counterargument to the position that colonial reparations are not in order; to the position that the current British (and other) developments of the Western imperialism do not owe anything to the countries they colonized; to the argument that colonization brought great benefits rather than degradation. The numbers speak for themselves. It is humbly submitted that even the so-called benefits accrued to the colonies, such as roads, railroads, schools and administration – were tools to mechanize and manipulate more profitable sources for the empire and create a native population malleable to such. Unfortunately, no extensive studies have been conducted locally to see the exact costs colonial policy has had on Sri Lanka, and this is a lacuna in local scholarship.

## 6. The way forward

Ideally, what would be appropriate recompense for the social and economic crimes committed by a colonial government to a colony? How can such recompense reflect the aspirations of modern-day citizens

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<sup>42</sup> Ibid n 38 p 79

<sup>43</sup> Ibid n 38 p 79. The likening of India to a wilful child took place at a Cabinet meeting held on 4<sup>th</sup> November 1932, with Neville Chamberlain (Chancellor of the Exchequer) and Samuel Hoare (Secretary of State) in attendance. The statement is attributed to Neville Chamberlain. One can see from the paternalistic language used by the British, the condescension displayed towards the Indians, who after all, had all the right to dispose of their own monies. However, autonomy, sovereignty, independence, inherent right to

dignity were not concepts believed by the Imperialistic states.

<sup>44</sup> Ibid n 38 p 80

<sup>45</sup> Ajai Sreevatsan, British Raj siphoned out \$ 45 Trillion from India: Utsa Patnaik 21<sup>st</sup> November 2018 <https://www.livemint.com/Companies/HNZA71LVNINVXQ1eaIKu6M/British-Raj-siphoned-out-45-trillion-from-India-Utsa-Patna.html>, accessed 1<sup>st</sup> August 2021.

<sup>46</sup> It is estimated that nearly 65% of the population of Mauritius was Indian, and so was the case in British Guyana (42%) and Fiji (43%) – ibid n 38 p 78

of a former colony? What could alleviate the wounds of the past?

Judge Cancado of the International Court of Justice made a convincing and empathetic observation in his dissenting judgment in the case of *Croatia v Serbia*:

*'There is no restitution integrum at all for the fatal direct victims, the memory of whom is to be honoured. As for the surviving victims, reparations, in their distinct forms, can only alleviate their suffering, which defies the passing of time. Yet, such reparations are most needed, so as to render living – or surviving atrocities – bearable. This should constantly be kept in mind.'*<sup>47</sup>

This is exactly the stance the writer agrees with. The effects of colonialism continue, either blatantly or subtly, in all colonized nations. This is why reparations, material and monetary, are vital.

Yet, how can colonial reparations be computed? The very lack of international cognizance of this matter, deems it virtually impossible to present a computation. This is coupled with of course, each colonized nation's rather diverse experiences, though rooted in the same narrative of exploitation for the development of the 'mother country.'

A few notable international instruments can be examined. Firstly, the International Law Commission's Responsibility of States for Internationally Wrongful Acts 2001, which mandates in Article 1 that '*(E)very internationally wrongful act of a State entails the International Responsibility of that State.*' As per Article 31, '*the responsible*

*State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*' In the subsequent Article, an injury is deemed to include damages which may be material or moral. It is submitted that wrongs committed under colonial policies ought to be deemed internationally wrongful acts, yet to what extent has this been recognized under international law? The writer is met with a dearth of authorities that one could claim under. Interestingly, aligned with the kinds of reparations discussed above, Article 34 envisages that reparations take the form of '*restitution, compensation and satisfaction...*' It is submitted then, that the concept of reparations has received wide recognition, but under these Articles, are such limited to more recent forms of international human rights violations?

Secondly, there is the General Assembly Resolution 60/147 of 16<sup>th</sup> December 2005 – the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. In its preamble it states that it will adopt a '*victim-oriented perspective*' which is concomitant with colonial crimes. Article II speaks of through investigations of violations and the provision of victims effective and equal access to justice. Interestingly, under Article IV, Statutes of Limitations will not apply to violations of international human rights law – which could provide a sound base for claims for colonial reparations. As per Article V, harm suffered includes '*physical or mental injury, emotional suffering, economic loss or substantial impairment of their*

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<sup>47</sup> *Croatia v Serbia* [2015] International Court of Justice, paragraph 475.

*fundamental rights...* These categorizations would include the continuing harms suffered by colonies. As per Article IX, reparations can take varied forms. Similar to earlier discussions, these include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Whilst each of these have been progressively interpreted, compensation can be given to ‘*lost opportunities*’ and ‘*moral damage*’; ubiquitous phrases capable of far-reaching interpretation in relation to colonialism and effects lasting centuries. Under ‘satisfaction’, section 22 speaks of a public apology – the least form of contrition that has not been offered by any of the major colonists like Britain, to any of their colonies.

In spite of the two rather far-reaching instruments mentioned above, which unabashedly speak of reparations, they are yet to be utilized to justify reparations for colonial ills. It is the author’s humble view that a historical epoch as damaging as colonialism should not have to rely on broadly termed international instruments, but deserves a collective, deliberative international convention of its own.

Furthermore, The Genocide Convention, is silent on reparations. As seen above, decisions of the International Court of Justice proffer empathetic insights to the matter, but these decisions are not directly on the subject of colonial reparations.<sup>48</sup> Article 77 of the Rome Statute which established the International Criminal Court speaks of Reparations, stating that, ‘*the Court shall*

*establish principles relating to reparations to, or in respect of, victims, including restitution, compensation or rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to... victims and will state the principles on which it is acting.*’ As laudable as this is, it is submitted then that a case would necessarily have to be instituted in the ICC for the Court’s judicial pronouncements, for the Court may only make an order against a convicted person. This may be a circuitous and uncertain route for compensation due for centuries of violations. It is also pertinent to note that only three cases so far, have been relevant to the matter of compensation, that of *Katanga*, *Al Mahdi* and *Lubanga*.<sup>49</sup> It is submitted that neither concerned colonial atrocities, but contemporaneous civil strife and warfare. To that extent, these are not precedents for colonial state crimes, although the Court’s dicta on the nature and significance of reparations is valuable for international legal jurisprudence.

Whilst the justiciability of compensation remains virtually out of reach, Paulose and Rogo<sup>50</sup> offer a formula for determining the amounts due to a country:

- a. To be applied on a *case-by-case* basis;
- b. A determination of *what State crimes* took place;

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<sup>48</sup> Even the above case was on whether the two nations had committed genocide against each other – and that too pursuant to strife between them and not due to colonial policies.

<sup>49</sup> *The Prosecutor v. Germain Katanga FORMERLY The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 / *The Prosecutor v. Ahmad Al Faqi*

*Al Mahdi* ICC-01/12-01/15 / *The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06

<sup>50</sup> Regina Menachery Paulose and Ronald Gordon Rogo, 382 Addressing Colonial Crimes Through Reparations, *ibid* n 36

- c. Whether such crimes have a *continued* impact on remaining victims and survivors;
- d. If so, what *kinds of reparations* would be appropriate to bring a *holistic* redress to the crimes that took place;
- e. Whatever is so determined, must be given directly to the victims and those reparations should provide a *direct and ultimate benefit* to the survivors.

In spite of all this, have we even yet received an apology from colonial states? Have we of the global South even received our lost treasures which are proudly displayed by the former colonial states, as a tacit boast of their empire, secure in the knowledge that it is their right to own and display and not return and repent?

Kehinde Andrews<sup>51</sup> is of the opinion that slavery and colonialism are the bulwarks of western prosperity. He believes in a collective solution, because the reparation money could not be given simply to the people of former colonies or their governments, who may not spend it on public welfare. He proposes the establishment of an international council imbued with varied stakeholders to determine the distribution of the monies. He also believes it is not about saying the former colonies desire money for past wrongs, but asking the colonial nations to acknowledge their guilt, apologize and offer reparations for in terms of education programmes, debt relief, infrastructure etc. To the counter allegation – that America and Europe provide official development

assistance (ODA) to developing nations and that is (tacit!) reparations enough, Andrews replies pithily, '*ODA is not the answer. As Malcolm X said, "if you stick a knife in my back nine inches and pull it out six inches, that's not progress". The point is to heal the wound*'<sup>52</sup>

## 7. Conclusion

It is humbly submitted that international law and jurisprudence is yet to take serious note of colonial reparations. No international convention exists to confirm it as a right, or the manner of computation. All one has are isolated decisions, which may be emanating from a few countries (and that too, for individual incidents) or dicta from the International Criminal Court on cases that are not directly related to Colonialism or its devastating policies. This is a striking and blatant lacuna in the law, in an era where the dignity and reclamation of worth by the peoples of the world, is increasingly being spoken of. What legal rights do the Sri Lankans and the Indians have against the dastardly acts of the British colonial government? What rights do the indigenous children of the Americas have against their colonial oppressors, who sent them to their deaths to residential schools, built to 'assimilate' them into western culture and to stamp out any of their own language, culture and rich heritage?<sup>53</sup> No international convention exists to date, for the victims of these heinous crimes. It is time the international community recognized that colonial policy amounted to a crime against

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<sup>51</sup> Associate Professor in Sociology in at Birmingham City University.

<sup>52</sup> Kehinde Andrews, Katja Dombrowski, Hans Dembowski, We are looking at really big numbers (31/10/2017) retrieved from [https://www.dandc.eu/en/article/british-scholar-says-](https://www.dandc.eu/en/article/british-scholar-says-western-prosperity-was-built-slavery-so-reparations-should-be-paid)

[western-prosperity-was-built-slavery-so-reparations-should-be-paid](https://www.dandc.eu/en/article/british-scholar-says-western-prosperity-was-built-slavery-so-reparations-should-be-paid), accessed on 14<sup>th</sup> July 2021.

<sup>53</sup> Ian Austen, 'With discovery of Unmarked Graves, Canada's Indigenous seek Reckoning' *The New York Times* (June 26<sup>th</sup>, 2021).

humanity; it is time it took cognizance of the fact that reparations are due, even though centuries too delayed. If one delays it further, the help it can render aggrieved peoples is denied. Justice delayed is justice denied, indeed. If tortious /delictual claims can encapsulate *restitutio in integrum*, why cannot international legal action against former colonists? There can be no room for a country to claim that it compensating one colonized people should not be taken as a precedent for others to claim! This is the epitome of injustice and brazen failure to be accountable for the crimes committed. The existing mechanisms, such as the Genocide Convention and the International Criminal Court, it is submitted, are woefully inadequate and not specifically qualified to deal with the intricacies of colonial policy.

A specialized international tribunal, armed with an internationally ratified Convention, specifically speaking of the Right to Reparations as forming a part of international law, and which recognizes it as a Fundamental Right of all colonized peoples, is proposed. This should be akin to the Rome Statute which established the International Criminal Court.<sup>54</sup>

In such an event, both sides can argue their cases out in the international tribunal; it will require a most specialized group of judges and lawyers, for the balancing of interests, the layering of benefits coupled with atrocities, to ascertain the true monetary

value to be meted out to countries. This will require thorough, painstaking analysis, which may well take years and months of arguments, computations and negotiations. Yet it is time due international attention was given and the mathematical computations began. Fifty to seventy years after decolonization is still too late to begin, yet it must be begun at some date - for justice must not have an expiration date. After all, we are (or so it is told by the 'liberal west') on the cusp of a year of accountability and penitence; should it not be taken a step further and be justiciable, for the betterment of all humanity living in previously colonized countries?

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<sup>54</sup> The writer is fully aware of the virtual impossibility of establishing such a mandate, given the attitudes of the global north. One example comes to mind: on the 31<sup>st</sup> of December 2021, the United Nations adopted a Resolution at the General Assembly entitled 'A global call for concrete action for the elimination of **racism, racial discrimination, xenophobia and related intolerance** and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action.' There were 106 votes in favour, 14 votes against and 44 abstentions. It

is interesting to note some of the countries who voted against this Resolution – namely, Australia, Canada, Germany, Israel, Netherlands, United Kingdom and the United States. Spain and Portugal abstained. Is it just a mere coincidence that these are all countries who have pursued devastating colonial policies at one time or another in their chequered histories? The writer opines, not. Retrieved from <https://digitallibrary.un.org/record/3896183?ln=en>, accessed on 21<sup>st</sup> August 2021.

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