

7th May 2021*

1. Please indicate which mechanisms have been established in the concerned country to hold accountable persons accused of committing or bearing responsibility for gross violations of human rights and serious violations of international humanitarian law in colonial contexts. If such mechanisms were not adopted, please explain why. Please indicate the challenges and 2 opportunities encountered in investigating, prosecuting and sanctioning such crimes.

The [*Waitangi Tribunal*](#) of New Zealand ('the Tribunal') is an impressive body that has done much to engage questions of serious violation of international law in the treatment of the Maori by the *Parekha* (British settlers who arrived in New Zealand).¹ However, while the work of the Tribunal is impressive in its addressing of the issue of dispossession of the land and in articulating both the history of such dispossession and the means of its restitution,² it falls short in holding individuals, corporations or the British Crown responsible for violations of human rights and humanitarian law committed during a period in which the Māori population fell from an estimated 250,000 people in the mid-1700s to 42,000 in 1896.³

While the legacy and consequences of the work of the Tribunal is immensely significant in terms of upholding and elevating Māori rights within New Zealand, the failure to create adequate mechanisms to punish the perpetrators of the crime is not merely a historical oversight.⁴ It has contemporary resonance in terms of the extent to which wealth is generated and handed down in a society and also in values that have been reified within the contemporary state of New Zealand which privileges specific types of commercial activities over others.

The challenge of achieving true transitional justice in New Zealand for the gross violations and crimes against humanity perpetrated against the Māori lie in the very structures of modern New Zealand and how this thriving economy connects with the wider global economic system. However, the Waitangi process in New Zealand is characterised by the participation of Maori communities and, in this sense, the positive outcomes are to be lauded and should serve as a beacon for other processes in countries where the descendants of (white) settlers of colonial rule have sought to address their own positions of privilege vis-à-vis the indigenous communities that were dispossessed and killed, first in the erection of the State at the arrival of colonisation, but equally in the continuation of the State without attempts to generate adequate reparations, restitution or compensation for affected communities.⁵ New Zealand would serve as a model for other settler colonial states where the direct beneficiaries of colonial exploitation, the descendants of the Parekha, settled and remain within the country.

To identify and address the challenges attendant to these processes we advocate for the direct involvement of members of the Māori community who participated in the establishment of the Tribunal or who have served to address the numerous claims the Tribunal adjudicated. Individuals such as chairperson, Chief Judge Wilson Isaac of the Māori Land Court may be able to offer deep insights, as

*All hyperlinks and web references accurate as of date of submission.

¹ For a general reading see Janine Hayward & Nicola R Wheen (eds.) *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi* (Bridget Williams Books, 2004).

² Mason H Durie, *Te mana Kawanatanga: The Politics of Maori Self-Determination* (Auckland: Oxford University Press, 1998).

³ Keith Sinclair, *A History of New Zealand* (Harmondsworth: Penguin Books, 1959) 190.

⁴ Also see Suzanne Romaine 'Contested Visions of History in Aotearoa New Zealand Literature: Witi Ihimaera's "The Matriarch"', 16(1) *The Contemporary Pacific* (spring 2004) 31-57.

⁵ Joshua Castellino & David Keane, *Minority Rights in the Pacific: A Comparative Legal Analysis* (2009).

would Ms Valmaine Toki who served as an Expert Member on the *United Nations Permanent Forum on Indigenous Issues*.

2. Please indicate which measures have been established in the concerned country to inquire on and establish the truth about gross violations of human rights and serious violations of international humanitarian law committed in colonial contexts. If such mechanisms were established, please indicate how was the outcome of the inquiries made public and conveyed to victims and civil society in the affected country as well as to civil society in the former colonizing power. If such mechanisms were not adopted, please explain why. Please indicate the challenges and opportunities encountered in this regard, whether victims and affected communities have been effectively consulted in the design and implementation of these measures, and whether a gender perspective was adopted.

Canada's *National Inquiry into Missing and Murdered Indigenous Women and Girls* (the 'MMIWG Inquiry') is the most recent truth-seeking body to grapple with legacies of violence against indigenous peoples in settler colonial states.⁶ The MMIWG Inquiry found that the systemic violence against indigenous women, girls, and 2SLGBTQIA ('two-spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex and asexual') individuals amounts to an ongoing, race-based genocide against indigenous peoples, the root cause of which was colonization and settler colonial structures in Canada.⁷

The Inquiry was tasked with an expansive mandate to inquire and report on 'systemic causes of all forms of violence' including 'historical causes contributing to the ongoing violence and particular vulnerabilities of Indigenous women and girls in Canada...'.⁸ Empowered with a broad mandate, and without a temporal limitation, the Inquiry was able to reach beyond recent acts of violence to address historical wrongs. This allowed the MMIWG Inquiry to situate contemporary, physical violence levied against indigenous women and girls within the broader context of colonial harm. In turn, the MMIWG Inquiry went to great lengths to demonstrate how this genocide was fuelled by settler colonialism. In analysing the underlying systemic causes of violence, the Commissioners drew upon a series of colonial wrongs, including the paternalistic and racist *Indian Act*, forced relocations of indigenous communities, the operation of the Indian residential school system, forced sterilisations of indigenous women, the fostering and adoption of indigenous children in non-indigenous homes during the 'Sixties Scoop', and later through discriminatory child-welfare practices.

The impact of the MMIWG Inquiry greatly benefitted from a strong and diverse group of commissioners. At the outset, the pre-inquiry process identified a desire for the commissioners to be majority indigenous women, representative of Canada's First Nations, Métis and Inuit communities, and possess expertise and experience in legal principles and research methods. The four commissioners that ultimately shepherded the MMIWG Inquiry to conclusion - Marion Buller (Cree, Mistawasis First Nation), Michèle Audette (Innu), Qajaq Robinson, and Brian Eyolfson (Saulteaux, Couchiching First Nation) - largely met these criteria, all of whom are respected legal experts and/or indigenous rights advocates, while also representing different cultures and geographic areas in Canada.⁹

⁶ For an antecedent see *Bringing Them Home: The 'Stolen Children' Report* (Canberra: Australian Human Rights Commission 1997), available at <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/bringing-them-home>; see also Truth and Reconciliation Commission of Canada, 'The Legacy,' in *Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015).

⁷ National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*. (2019).

⁸ 'Terms of Reference for the National Inquiry into Missing and Murdered Indigenous Women and Girls', (Indigenous and Northern Affairs Canada, 12 December 2016), available at <http://www.mmiwg-ffada.ca/wp-content/uploads/2018/06/terms-of-reference.pdf>

⁹ Colin Luoma, 'Closing the cultural rights gap in transitional justice: Developments from Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls,' 39(1) *Netherlands Quarterly of Human Rights* (2021) 30-52.

On 3 June 2019, a two-volume report, entitled *Reclaiming Power and Place*, was presented to the Canadian federal government at a Closing Ceremony at the Canadian Museum of History in Gatineau, Quebec. The ceremony was open to the public as well as [broadcasted live](#) in six different indigenous languages: Cree, Inuktitut, Innu, Michif, Mi'kmaq, and Ojibway. The closing ceremony further incorporated various aspects of First Nations, Métis and Inuit culture, including through song, dance, ceremony and prayer. The Final report, including all supplemental reports and related outputs have been made available on a [dedicated website](#) to the MMIWG Inquiry. The website also includes the hearing transcripts of community meetings and statement gathering events, as well as a wealth of underlying data obtained through the work of the Inquiry, all freely available to survivors, families and the wider public.

One area in which the MMIWG Inquiry sought to distinguish itself from prior truth commissions was through proceeding in a trauma-informed and decolonizing manner, including by centering Inuit, Métis and First Nations ways of being, knowing, and doing.¹⁰ Among other things, it sought to emphasise indigenous peoples' rights to self-determination and self-governance and stress that solutions to the MMIWG crisis must be led by indigenous governments, organizations, and people. It also employed an intersectional approach, investigating how multiple forms of oppression impacted indigenous women and girls based on their various identities.¹¹ While generally incorporating an indigenous approach to truth-telling, some of the proceedings still adhered to a Western, legalistic approach that relied heavily upon formal hearings with witness testimony, as opposed to indigenous laws and protocols. This arguably alienated indigenous survivors and family members and upheld a 'colonial status quo' of truth-seeking rather than one that radically transform that way transitional justice is done.¹² Despite this shortcoming, the MMIWG Inquiry's respect of indigenous protocols, symbols and ceremony and its intersectional approach to indigenous harm makes it a model for how truth commissions can be designed and implemented in colonial and settler colonial contexts.

3. Please indicate which measures have been established in the concerned country to provide reparation to victims of gross violations of human rights and serious violations of international humanitarian law committed in colonial contexts. If such processes were established, please indicate which type of reparation was provided to victims (for example: restitution, compensation, satisfaction, and /or rehabilitation). If such measures were not adopted, please explain why. Please indicate the challenges and opportunities encountered in this regard, whether victims and affected communities have been effectively consulted in the design and implementation of these measures, and whether a gender perspective was adopted.

Both examples cited above as good practice emanate in settler colonial states where the descendants of colonisers sought to engage in a process to recalibrate their relationships with the indigenous communities that were dispossessed as a consequence of colonialism. While this scenario could be of primary use in the Americas and Oceania and to some extent in southern Africa, they prove to be of limited value in countries where colonial powers have retreated fully without a descendant community that maintain the structures and hegemonies inherited from colonial rule. Our approach to this question thus focusses on instances which should not be ignored in any discussion concerning remedies to situations of colonial exploitation. This issue featured on the global human rights agenda in the lead up to the [Durban World Conference Against Racism in 2001](#), but for a range of reasons, some technical, many to do with vested interests and real difficulties, the discussion stalled.¹³ Yet the issue falls squarely

¹⁰ MMIWG Inquiry, *Doing Things Differently: 10 ways our approach is reflective of indigenous values*, available at: <https://www.mmiwg-ffada.ca/doing-things-differently/>.

¹¹ National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*. (2019), 103

¹² Jenna Walsh, 'The national inquiry into the missing and murdered indigenous women and girls of Canada: A probe in peril' 8 *Indigenous Law Bulletin* (2012) 7.

¹³ Larissa van der Herik, 'Addressing 'Colonial Crimes' through Reparations? Adjudicating Dutch Atrocities Committed in Indonesia' 10(3) *Journal of International Criminal Justice*, (July 2012) 693–705 available at

within the remit of the Special Rapporteur and we urge further attention and study to this discussion, both as a means of recalibrating relations between the so-called northern states that benefitted from colonialism and the southern states that were victims; but also in seeking to understand the extent to which the systems derived from the colonial experience continue to subjugate communities in ways that are very similar to their treatment under colonial rule.¹⁴

The scale of the issue suggests the need to engage in a context specific assessment of serious violations of human rights and (international) crimes against humanity perpetrated against particular communities during colonial rule. The difficulty with such an approach however, as attempted in the case of seeking to reopen an official (Indian) commission of inquiry into the *Jallianwala Bagh Massacre in Punjab*, India, is that it would often need to rely on biased versions of colonially narrated history.¹⁵ The passage of time also makes the collection of victim testimonies difficult, as a consequence of which the project rapidly loses steam.¹⁶

With respect to the German genocide of the Herero and Nama peoples in Namibia, Germany has not made reparations to victims despite acknowledging moral and historical responsibility.¹⁷ Nor has it consulted sufficiently with minority and indigenous victims to discuss reparations.¹⁸ Yet, German negotiations with Namibia over Herero and Nama massacres of 1905 may provide an interesting model for replication.¹⁹ The negotiations have warranted [regular reportage](#) and led to increased awareness about German history. It has also encompassed cultural artefacts and displays, profiled at [one of Germany's most respected museums](#), an important act of symbolic reparations. Its eventual success remains in abeyance with negotiations ongoing, with the community and Namibian government central to the process.²⁰

One lesson that emerges from this approach worth heeding is the role of diaspora communities in raising such questions within the confines of the (former) colonial power. The correction of history of episodic crimes from the side of the 'perpetrator' relying on victim testimony may be a significantly better way to approach the problem. When raised by existing stakeholders (citizens) within the state it could educate the wider public and create a platform for greater inclusion of populations that migrated to centres of power during colonial rule.

The call for historical recalibration provides an opportunity to explore the role of Europeans in colonial ventures.²¹ An immediate reckoning of the narrative around profit-making and unjust enrichment must come first in light of its impact on the climate crisis and global inequality. Debunking the nationalist

<https://academic.oup.com/jicj/article-abstract/10/3/693/934624>. Also see Catherine Lu, 'Redressing and Addressing Colonial Justice' 11(1) *Ethics and Global Politics*, Special Issue (2018) 1-5 available at <https://www.tandfonline.com/doi/full/10.1080/16544951.2018.1507386>

¹⁴ Anibal Quijano 'Coloniality and modernity/rationality' 21(2-3) *Cultural Studies* (2007) 168-178, available at: <https://www.tandfonline.com/doi/abs/10.1080/09502380601164353> .

¹⁵ VN Datta & Nonica Datta, *The Jallianwala Bagh Massacre: A Ground-breaking History of the 1919 Massacre* (New Delhi: Penguin Random House, 2021).

¹⁶ As also shown in Mustafan Dhada, *The Portuguese Massacre of Wiriyamu in Colonial Mozambique 1964-2013* (Bloomsbury Publishing, 2014).

¹⁷ Germany, Federal Parliament, Official Record No. 17/6813, 18 August 2011.

¹⁸ Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance, A/74/231 (21 August 2019) para 12.

¹⁹ See Karie L Morgan, 'Remembering against the Nation-State: Hereros' pursuit of Restorative Justice' 21(1) *Time & Society* (2012) 21-38 available at <https://journals.sagepub.com/doi/10.1177/0961463X11431332?icid=int.sj-abstract.similar-articles.1>

²⁰ Franziska Boehme, 'Reactive Remembrance: The Political Struggle over Apologies and Reparations between Germany and Namibia for the Herero genocide' 19(2) *Journal of Human Rights* (2020) 238-255 available at <https://www.tandfonline.com/doi/abs/10.1080/14754835.2020.1727729>.

²¹ See Joshua Castellino, *Reconciling with Europe's Past* (Brussels: TEPESA Brief, March 2021) available at <https://www.tepsa.eu/tepsa-brief-2021-castellino/>

narratives emerging as political propaganda within European states is equally pressing. Setting up commissions of inquiry to solicit evidence of the impact of colonial rule would be a necessary precursor to any attempt to assess reparations or the determination of any other remedies that ought to flow. In the end, reconciling with Europe's past is less about that past and more about the future for European societies. Embracing the challenge transparently, honestly and fairly is the only formula for overcoming societal fragmentation and disruption.

4. Please indicate which measures have been established in the concerned country to memorialize the gross violations of human rights and serious violations of international humanitarian law committed in colonial contexts. If yes, please indicate whether memorialization processes were established in the affected country and /or in the former colonizing power. If such measures were not adopted, please explain why. Please indicate the challenges and opportunities encountered in this regard, whether victims and affected communities have been effectively consulted in the design and implementation of these measures, and whether a gender perspective was adopted.

Memorialization projects can be a double-edged sword for many minority and indigenous communities in colonial contexts. Such initiatives have the potential to recognize colonial wrongdoing and provide some measure of symbolic reparations to oppressed populations, often where violence against minority and indigenous communities looms large over society. In the context of British colonialism, positive examples exist in the [International Slavery Museum](#) in Liverpool and the [Mau Mau Memorial](#) in Nairobi. Even with well-meaning memory projects, such as the [proposed memorial dedicated to the Windrush Generation](#) in London, it is critical that States meaningfully consult with affected minority and indigenous communities in their design and implementation; otherwise these projects risk being perceived as a colonial imposition of their own.

At the same time, memory projects have been historically weaponized to enshrine distorted histories that marginalize minority groups and glorify the perpetrators of colonialism. The spontaneous removal of statues in former colonial powers during the throes of the #BlackLivesMatter social movement was a stark reminder of how widespread the phenomena is of memorializing colonial adventurers in European capitals and squares. While the removal or destruction of certain statues such as that [King Leopold in Belgium](#) have been widely heralded, the action is portrayed by some as a [form of vandalism](#) despite its symbolism and significance to many.

These debates and contestations are being played out in the United Kingdom, which has a disproportionate number of public memorials and spaces dedicated to individuals linked to either colonialism or the transatlantic slave trade. The removal of colonial monuments, such as the dumping of the statue of Edward [Colston into the Bristol Harbour](#) or the removal of a [statue of slaver Robert Mulligan outside the Museum of London Docklands](#) can mark a significant transitional moment in both the former colony and colonial powers. They can prove cathartic, signal a break from past wrongdoing and a distancing from the violent ideologies that are characteristic of the colonial project.²² Yet, they can also spur resentment and help foster further distrust and violence towards communities marginalized through colonialism. This has been observed in Britain, where the removal of colonial monuments prompted a backlash from society. The UK government swiftly acted by introducing a [proposed law](#) that would protect colonial monuments from being removed, making it so that offensive monuments could only be removed in the most exceptional circumstances.

An alternative approach, and one promoted by [David Olosuga in his series in Africa](#), has been to visit communities impacted by British colonization as a British man himself and to find ways to erect or memorialize episodes within Britain's African colonial adventures and capture these in documentaries.

²² Joanna Burch-Brown, 'Should Slavery's Statues Be Preserved? On Transitional Justice and Contested Heritage' *Journal of Applied Philosophy* (2020) available at <https://onlinelibrary.wiley.com/doi/full/10.1111/japp.12485>

While the documentaries are viewable free to air in the United Kingdom, the real merit will come in their inclusion within the British history curriculum.

5. Please indicate which measures have been established in the concerned country to guarantee non-recurrence of the gross violations of human rights and serious violations of international humanitarian law committed in colonial contexts. If such mechanisms were not adopted, please explain why. Please indicate the challenges and opportunities encountered in this regard, whether victims and affected communities have been effectively consulted in the design and implementation of these measures, and whether a gender perspective was adopted.

Unfortunately, in many instances around the world, the decolonization experience has merely been a [privatization of colonial enterprise](#) from the former colonial power to the hands of a dominant set of men from the majority community.²³ In many post-colonial states, with India a particular case in point, this came with a genuine attempt to ensure that the crimes perpetrated through colonial rule would not be repeated with a constitution that emphasized equal rights and respect for all communities.²⁴ Key to the constitution was recognition of the sovereignty of the people of their own resources. Constitutions in many instances, especially in African states, also served to make internal sense and generate a hybrid national narrative that would unite disparate and sometimes antagonistic communities thrown together within the physical boundaries of a post-colonial state whose original dimensions were agreed between colonial powers to demarcate their respective hegemonies.²⁵

Yet as the case of India shows very clearly, despite seventy years of progress in one direction – towards creating a state based on the rule of law and avowed equality between all communities within the territory, the significant changes required to break the colonial shackles were not overcome, and as a consequence the post-colonial state of India made few inroads into denting the systems and structure that colonial rule imposed on India – i.e. an extraction-based model of development perpetrated through use of technology that made labour redundant, in the belief of a trickle-down economics that never materialized. In the twenty-first century as wealth became concentrated in a few hands and jobs disappeared, the distant entrepreneurs who profited became further removed from the people. Instead they succeeded in establishing a critique (“appeasement politics”) of previous poor governance,²⁶ and generated an artificial majority (Hindutva) by targeting and scapegoating minorities with a view to gaining votes that would eventually establish themselves as a neo-colonial power.²⁷

The key lesson germane to this mandate and inquiry is that paper-based guarantees to prevent the repetition of colonial history are unlikely to succeed unless significant structural changes are made to society, which are then safeguarded through robust institutions. In the case of India each of the institutions relevant to this discussion are legacies from colonial rule: the model of economic development followed a path set by colonial rule, reified by western dominance of the global system.²⁸ Among the first structural changes required would be transformations of inherited legal systems based

²³ ‘Colonial Crime, Environmental Destruction and Indigenous Peoples: A Roadmap to Accountability and Protection’ in *Colonial Wrongs, Double Standards and Access to Law* [M. Bergesmo & WE. Kaleck eds.] (Centre for International Law Research and Policy, 2020) 577-601.

²⁴ Madhav Khosla, *India’s Founding Moment: The Constitution of a Most Surprising Democracy* (Massachusetts: Harvard University Press, 2020).

²⁵ Peter Fitzpatrick, ‘The New Constitutionalism: The global, the postcolonial and the Constitution of Nations’ 10(2) *Law, Democracy and Development* (2006) available to download via *African Journals Online* at <https://www.ajol.info/index.php/idd/article/view/138332>

²⁶ Catarina Kinnvall, ‘Populism, Ontological Insecurity and Hindutva: Modi and the Masculinization of Indian Politics’ 32(3) *Cambridge Review of International Affairs* (2019) 283-302 available at <https://www.tandfonline.com/doi/full/10.1080/09557571.2019.1588851>

²⁷ Joshua Castellino, ‘The Rise of the Majorities and the Existential Threat to India and China’ 8(3) *Chinese Journal of Comparative Law*, (December 2020) 538–557, <https://doi.org/10.1093/cjcl/cxaa018>

²⁸ For a general impact of British colonization on India see Shashi Tharoor, *Inglorious Empire: What the British Did to India* (New Delhi: Adelph Book Company, 2016).

on individual rights that dispossessed communally owned ancestral indigenous land titles, which would in turn generate heightened respect for the environment.²⁹ ‘Productive’ land use that is privileged under inherited legal regimes (which have sustained exploitation as part of the extractive development model) – a [legacy from colonial](#) rule – continues to fuel contemporary climate change.

India is often considered a model for the emergence of a post-colonial state. Yet its inability to generate deep structural changes towards mass participation and inclusion, when combined with the privatization of financial interests with direct links into the governance machinery has totally disrupted its trajectory of inclusion. The capture of media by the emerging state, in conjunction with intimidation of political opponents and generation of fake news enabled reach into a relatively under-educated population, which has enabled neo-colonial control of the State.

From the perspective of specific communities – two specifically protected in the Indian constitution, *adivasis* and *dalits* – India’s independence in 1947 had little impact on their existence, and current Indian rule treats them in a manner similar to British rule. For Muslim populations in India, who were specifically targeted in the design of an artificial majoritarianism linking disparate ethno-linguistic communities together, the current rule may be significantly worse than in colonial times when they were not specifically targeted on the basis of their religion.

Rather than viewing the scope of this mandate as based on reassessing the past to determine remedies for violations of human rights and humanitarian law, we argue that the legacy of colonialism lies equally in current systems of law, finance and governance that perpetrate contemporary violations of human rights (and at times humanitarian law). Achieving guarantees against non-repetition would require concerted challenge to the values that underpin such systems as colonial in a bid to unravel them, in tandem with a quest for transnational accountability for crimes perpetrated during colonial rule. While much remains to be accomplished in this regard, the structural and systems changes necessary to redress colonial crimes dovetail with the growing demand for environmental justice today.

²⁹ See Lara Dominguez & Colin Luoma ‘Decolonising Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment’ 9(3) *Land* (2020) 65 available at <https://doi.org/10.3390/land9030065>.