Settling Claims for Reparation

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The scale and character of past injustice can seem overwhelming. Grievous wrongdoing characterizes so much of human history, both within and between different political communities. This raises a familiar question of reparative justice: what is owed in the present as a result of the unjust actions of the past? This article asks what should be done in situations where contemporary debts stemming from past injustice are massive in scale, and seemingly call for non-ideal resolution or settlement. Drawing on recent work by Sara Amighetti and Alasia Nuti on deliberative reparative processes, the article differentiates between two different approaches to settling claims for reparation. The first pursues settlement in a legal or quasi-legal sense, seeking to close a matter through discussion, compromise, and bargaining in such a way as to maximize one's interest while drawing a line under the events in question. The second is grounded not in one's own interest but in an acknowledgement of the inevitable inadequacy of one's reparative response. Such an approach to settlement centres the agency of the individuals and groups harmed by past wrongdoing. The article examines the reparations issue with reference to a range of recent cases of alleged settlement, including claims for reparation for torture by the British army in Kenya in the 1950s, for sexual slavery by the Japanese Imperial Army in East Asia in the Second World War, and for genocide by German colonial forces between 1904 and 1908.

1. The extent of contemporary reparative obligations

Whether and to what extent any present-day persons or groups owe rectificatory obligations to others as a result of historic injustice is a much-disputed question. While some writers put forward a range of different mechanisms for linking present-day parties to past wrongdoing, others deny that the actions of previous generations can have implications for those who were not responsible for the commission of the acts in question. This article begins where many others conclude: it accepts the force of at least some arguments that ground contemporary reparative duties in the relation between past and present. In other work, I have

described three ways in which present day persons can be connected in historic injustice in a morally relevant manner, as follows:

1) Benefit: when present day parties are advantaged, and others disadvantaged, by the automatic effects of historic injustice.
2) Entitlement: when present day parties are in possession of property (however conceived) to which others have inherited entitlements.
3) Responsibility: when present day parties are members of historically continuous communities which bear ongoing responsibility for failing to fulfil rectificatory duties to others.[1]

A wide range of authors have put forward accounts that can be categorised into these brackets, in addition to other theories, such as Farid Abel-Nour's discussion of active association with the actions of one's ancestors,[2] or Janna Thompson's account of transgenerational contracts.[3] Of course, all are controversial, and arguments in favour of contemporary reparative obligations will have to contend with sceptical arguments that claim the passage of time lessens or eliminates the need to rectify past wrongdoing. It is striking that much existing work in favour of reparations has sought to pick a single form of morally relevant connection, such as claims grounded in (1) the Beneficiary Pays Principle (or BPP) or (2) focusing on the inheritance of property. Call this the Reductionist Strategy.

This takes two forms. The first starts from the morally relevant form of connection between past and present itself. It asks whether it rests on convincing normative foundations. Is it true that the connection in question gives rise to a reparative duty? So, for example, is it right to think that the involuntary receipt of a benefit stemming from an injustice can give rise to a duty to compensate those harmed by the injustice in question? Then, it asks what the practical implications of implementing the principle would be – who has in fact benefited and been harmed in the right kind of way, and what should be done about it? The second starts not with the principle but with the proposed course of action – typically either a broad programme of reparations in general (such as reparations for slavery or colonialism), or a more specific reparative policy in a more limited domain, such as migration or the allocation

[1] Daniel Butt, *Rectifying International Injustice: Principles of Compensation and Restitution Between Nations* (Oxford: Oxford University Press, 2009).
[2] Farid Abdel-Nour, 'National Responsibility', *Political Theory* 31 (2003), 693–719.
[3] Thompson, Janna, *Taking Responsibility for the Past: Reparations and Historical Injustice* (Cambridge: Polity, 2002).

of the costs of climate change. It then asks what specific principle is best suited to ground the policy in question.

There are various reasons why one might seek to base a given reparative claim on a specific, discrete principle. Some are perhaps to do with the nature of academic publishing, whereby one first dismisses other theories, before providing one's own favoured account. But the literature also contains more deliberate methodological manoeuvres, whereby authors argue that specific ways of thinking about past wrongdoing avoid particular types of objections. If one has a given policy goal in mind, then such a strategy has obvious appeal – there is a good case for being parsimonious, and only taking on the amount of argumentative baggage that is necessary to establish one's argument, or (insofar as this is different) to persuade or motivate one's audience. The Reductionist Strategy, then, has its uses. But it also has the effect of minimising the overall extent of the reparative debt, which is possessed by contemporary agents, particularly states, which are characterised by some kind of ongoing, albeit messy and perhaps interrupted, existence through time. It means that the opponents of contemporary reparative obligations are able to focus on the particular weaknesses of specific accounts: pointing to periods of time, for example, where the given principle does not seem to be in play (if there are gaps in the continuous institutional identity of states, for example, or if chains of inheritance are broken); or maintaining that particular models of reparative obligations are unable to extend to all areas of contemporary reparative politics (can, for example, the inheritance model do anything about the non-material dimensions of historic injustice? Can the BPP, which rests on the involuntary, and so non-blameworthy, receipt of benefits say anything useful about political apologies for past wrongdoing?)

What if, instead of seeing such principles as in competition with one another, we see them as largely complementary, and as potentially having force in different circumstances, sometimes collectively, and sometimes in concert with others? This would mean that a full account of what is owed would have to include all morally relevant linkages between past and present in play. It would need to take account of the way that reparative duties of benefit and entitlement, which can be acquired, in the first instance, quite innocently, can give rise to further duties of reparation when they go unfulfilled, meaning that the agents in question are now themselves wrongdoers.

Failing to fulfil a rectificatory obligation is not a one-off action, but an ongoing process: each day that the obligation is not fulfilled is a day when something that should have

been done is not done. Thus, an acceptance of the existence of present-day state-level rectificatory obligations typically commits one to a particular view of the modern-day states which possess the obligations in question as repeat offenders: wrongdoers whose unjust actions stretch back in time, often to the commission of the original act of injustice itself.

In many cases, the narrative told will be a relatively uncomplicated one of continuous malfeasance, which originates in historic wrongdoing that straightforwardly was not rectified at the time. If we look at history during and since the colonial period, the story is one of sustained and repeated wrongdoing. Multiple grave wrongs were perpetrated, often over prolonged periods of time with no subsequent attempt to apologise or to compensate the victim. For example, Britain's initial involvement in the slave trade, which came to a formal end not with the payment of compensation to those enslaved and their families and communities, but to the slave-owners who lost out financially as a result of the emancipation of their "property".[4] Moreover, the British experience of decolonisation, whereby independence for territories such as Kenya was only granted on the condition of agreement that liability for the wrongs of the colonial period were the responsibility of the new successor governments, rather than the British state.[5] Consider the post-independence relationship of Haiti and France, whereby Haiti was compelled to pay devastating levels of compensation to France between 1825 and 1947 to compensate France for its losses following Haiti's successful slave revolt.[6] The list goes on and on.

It is helpful at this point to consider two examples of modern-day reparative claims to appreciate the potential scale of contemporary reparative liabilities. First, claims for reparation for slavery in the USA. There are various ways to quantify what would be owed if the U.S. Government were to seek to pay reparations in the present day. Some attempts take a minimalist approach, focusing just on a sub-set of claims which, one might think, could be articulated without the need for contentious counterfactual reasoning, by maintaining that specific property entitlements emanating from slavery could have been inherited by the descendants of slaves.

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[4] See Nicholas Draper. *The price of emancipation: slave-ownership, compensation and British society at the end of slavery* (Cambridge: Cambridge University Press, 2009).

[5] See Matthew Craven. *The Decolonization of International Law: State Succession and the Law of Treaties* (Oxford: Oxford University Press, 2009).

[6] The payment of the compensation could only be funded by borrowing further money from French banks at extortionate rates. As Peter Hallward argues, "Haitians have… had to pay their original oppressors three times over – through the slaves' initial labour, through compensation for the French loss of this labour, and then in interest on the payment of this compensation." (Peter Hallward "Option Zero in Haiti" *New Left Review* (2004): 23-48 at p. 26.)

For example, one recent study by Thomas Craemer estimates the present value of U.S. slave labour for the 89 years from the country's founding until the end of the Civil War. Based on wages paid to labourers in the period before the Civil War, and assuming an average of 12 hours of work a day, seven days a week, he gives an estimate in 2009 dollars ranging from $5.9 to $14.2 trillion.[7] This is a lot of money. It is not clear that it is an impossible sum for the U.S. Government to pay, especially if structured over multiple years, and given that it might be seen as a form of internal investment (for comparison, Joe Biden's recently proposed budget involves initial annual spending of $6 trillion, rising to $8.2 trillion by 2031).[8] But it must be stressed that this sum relates only to 89 years of wages. There is nothing in such a figure relating to compensation for enslavement, for physical and mental abuse, for all the myriad wrongs that accompanied slavery. Nor is there consideration of the wrong of not paying reparations up to now (as distinct from the accumulation of interest in the money that has not been paid). If we tweak the formula for calculating the contemporary debt that is owed, we quickly arrive at eye-watering sums. In his 1973 book *The Case for Black Reparations*, Boris Bittker considered how one might go about constructing a more complete bill to take account of other forms of historic racial injustice. He writes:

> For want of a better measure of these imponderables, we might speculate about the outcome of a lawsuit for damages brought by a white pupil who was erroneously assigned to a Jim Crow school for a school year before Brown v. Board of Education was decided... I venture the guess that a Southern jury would be more likely to award damages of $25,000 rather than $1,000. (Without wishing to overemphasize it, I offer as a bit of relevant evidence a $875 jury award in 1913 for a white railroad passenger for being compelled to ride for three miles in a Jim Crow car.[9]

If we calculate the reparative debt by plugging in these kinds of figures and holding that equivalent sums, over the lifetimes of those wronged, should be paid to descendants, with interest, we would plausibly be looking at a reparative bill of a quite extraordinary size.

Our second case concerns Greece and Germany. At the peak of the Greek debt crisis in 2015, much play was made of the claim that there was something odd about thinking that Greece was in historical debt to Germany, given the nature of their relations during the Second World War. The Tsipras government spoke explicitly of bringing reparations into the

[7] T. Craemer, *Estimating Slavery Reparations: Present Value Comparisons of Historical Multigenerational Reparations Policies*, Social Science Quarterly, 96(2015), 639-655.
[8] https://www.nytimes.com/2021/05/27/business/economy/biden-plan.html
[9] Boris Bittker, *The Case for Black Reparations,* p. 62, (New York: Random House, 1973).

reckoning of the terms for the Greek financial bailout, and the following specific claims, along with others, were invoked:

> Tens, possibly hundreds, of billions of euros (dollars) in present-day money as compensation for destroyed infrastructure and goods, including archaeological treasures, looted by the Nazis from 1941 to 1944. Compensation for the estimated 300,000 people who died from famine during the winter of 1941-1942. Compensation for the slaughter of civilians as reprisals for partisan attacks. One of the most infamous massacres took place in the Greek village of Distomo on June 10, 1944, when Waffen-SS soldiers killed more than 200 women, children and elderly residents. Another in Kalavryta in December 1943 involved German troops killing more than 500 civilians, including virtually all of the town's males aged 14 or over.
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> Repayment of some 1.9 billion drachmas, around 50 million euros ($55 million) today, that the Jewish community paid as ransom to occupying authorities in 1942 in return for 10,000 Jewish men being held as slave laborers. The men were released only to be sent to concentration camps the following year. Repayment of an interest-free loan of 568 million Reichsmark (7.1 billion euros or $7.7 billion) that the Nazis forced Greece to make to Germany in 1942. Returning the train fares that the Reichsbahn received for transporting Jews to their deaths.[10]

The range of different claims here is striking. Some refer to terrible wrongs: death from famine, the slaughter of civilians, for which there can evidently be no adequate compensatory response. Others are tangible, specific, even tragically mundane: claims relating to specific sums of money misappropriated in very particular circumstances, such as train fares forcibly levied to take Jews to their deaths. The point is how very quickly the bill adds up when we are only talking about the material aspects of historic wrongdoing. Even if this was the only basis for present day reparative obligations, the liability for colonial powers such as the UK would be massive.

The scale of British colonialism was breath taking, in Africa, Asia, and beyond – the sun never set, after all, on the British Empire. But of course, one can say much more. To characterize the injustice of colonialism in material terms is to miss the point of the particular kind of grievous wrongdoing which it entailed.[11] If one expands the scope of rectificatory justice to maintain that claims to compensation can be inherited by victims, the liability of present-day states such as the UK looks to be gigantic.[12] It is commonly supposed that

[10] Frank Jordans, *Greece fights German bailout demands with Nazi-era claims*, The Times of Israel, 23/7/2015 https://www.timesofisrael.com/greece-fights-german-bailout-demands-with-nazi-era-claims/
[11] V. Bufacchi, *Colonialism, Injustice, and Arbitrariness.* Journal of Social Philosophy, 48 (2017):197-211.
[12] Butt, *Inheriting Rights to Reparation: Compensatory Justice and the Passage of Time*, Ethical Perspectives 20, 245-269, (2013).

accounts of international distributive justice can be categorised into more or less demanding camps. In the former category are the forward-looking redistributive cosmopolitans, in the latter, those who advocate backward looking principles stressing national responsibility and self-determination. The implication of this article is that it might not actually be right to think that some variant of cosmopolitan egalitarianism is the account of international distributive justice which places the most demands on currently advantaged states. A thorough-going backward-looking account which took seriously the ongoing wrongful agency of western powers could conclude that their rectificatory obligations require more in reparative transfers and structural reform than would be needed were one seeking to pursue a patterned distribution such as global equality of opportunity. The ongoing malfeasance of contemporary states may mean that their reparative duties are more demanding under a scheme of corrective justice than their duties of redistribution would be even under a highly redistributive scheme of distributive justice. The question then arises as to how reparative obligations on such a scale could possibly be met.

3. The settlement problem

Suppose we accept that there is a compelling case in justice for the payment of substantial reparations in the present day. What should happen next? How should this claim about what justice requires feed into real world public policy debates? This raises several questions on the relation between theory and practice. These questions are primarily philosophical within the nature of reparative justice itself. For example, to what extent should accounts of reparative justice seek to give all-things-considered answers to questions of what should be done, as opposed to articulating principles of justice that can be plugged into more general accounts of, for example, transitional justice and/or reconciliation?

Some are primarily practical, about how we translate arguments made in theoretical contexts into practice: how should theorists argue if they want to motivate their audience to act, or maximise their impact on the formulation of public policy? To what extent should accounts of reparative justice be grounded in controversial moral principles, such as distributive egalitarianism? There are also important questions about the extent to which historic injustice has implications for other policy areas in the present day, such as immigration policy, the allocation costs of climate change, obligations of humanitarian intervention, and so forth. But there is a further question, which political theorists often neglect, or assume an answer to: to what extent should accounts of reparative justice seek to

make policy prescriptions which are intended to be followed by political actors, as opposed to feeding into wider deliberative processes?[13]

In a recent article, "Towards a Shared Redress: Achieving Historical Justice Through Democratic Deliberation", Sara Amighetti and Alasia Nuti argue against what they call the "unilateral" approach to reparative justice, which seeks to give a determinate answer to the question of what is owed as a matter of reparative justice by focusing on the duties of wrongdoers, or others with reparative obligations. Drawing on the example of claims for reparations made by the Caricom Reparations Commission, set up by Caribbean states in 2013, they write:

> The example of CARICOM's fight suggests that it is those who have been wronged that usually advance claims of rectification. Looking at the practice can illuminate how those who suffered from historical injustice become actors in claiming redress. However, this significantly contrasts with the starting point of a great number of mainstream normative accounts that deal with the rectification of slavery and colonialism. Such accounts have a tendency to explicitly focus on the obligations that those who committed the injustice should fulfil, thus neglecting the possible claims of the victims. While this is usually done to argue that wrongdoers have responsibilities even when the victims do not put forward rectification claims, it has the effect of altogether overlooking the importance of an active engagement with the wronged in determining the form of redress.[14]

Amighetti and Nuti's approach focuses on the process of shared deliberation towards the redress of historic injustice. They highlight two problems with neglecting the active contribution that victims can make to redress: 1) *The epistemic problem:* insofar as the question of how to redress slavery and colonialism addresses an injustice, it requires an understanding of that injustice;[15] 2) *The agency problem:* a conception of redress that treats the former enslaved and colonized as passive recipients is likely to reinforce a discursive frame that re-activates the same social categories used to justify these injustices.[16]

These are powerful critiques, and it is important that those working on the political theory of reparations acknowledge their force. It is indeed undesirable if arguments for reparations stipulate what should be done to bring about reparative justice in a way that neither draws upon the knowledge nor involves the active participation of victims of

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[13] For relevant discussion, see Jeremy Waldron, *What Plato would allow,* in Shapiro and Wagner DeCew (eds.), Theory and Practice: Nomos XXXVII, (New York University Press, 1995).
[14] Sara Amighetti and Alasia Nuti ,T*owards a Shared Redress: Achieving Historical Justice Through Democratic Deliberation,* Journal of Political Philosophy 23 (2015): 385-405 at p. 387.
[15] Amighetti and Nuti, p. 387.
[16] Amighetti and Nuti, p. 388.

wrongdoing.[17] My aim in this section is to add a third problem to this account, which does not so much argue for process rather than outcomes, as argue that a focus on outcomes leads us inevitably to thinking about processes. This third problem is what I call the *settlement problem*. Redressing serious wrongdoing typically involves an inadequate compensatory response, which necessitates the involvement of the wronged.

I have argued that historic colonial wrongdoing, and subsequent failures to effect redress, have given rise to gigantic contemporary reparative obligations. How should those possessing such obligations respond to a bill of such a scale? There seem to be three options. First, one might do nothing, and use the scale of the debt as a pretext for avoiding any kind of reparative obligation whatsoever. This seems straightforwardly unacceptable from a moral point of view – an inability to pay a debt does not mean that debt disappears, it just means that it cannot be paid in full. At the very least, one ought to pay as much as one can. It is important here to distinguish the claim that some kinds of harm are non-compensable in the sense that paying any kind of compensation is inappropriate, from the claim that some kinds of harm are non-compensable in the sense that it is not possible fully to compensate a victim, either by providing substitute means to enable them to pursue their original ends, or by providing them with the means to pursue other, equally desirable ends.[18]

Non-compensability in the second sense does not mean that compensation should not be paid, it just means that it must be accepted that compensation will be inadequate to make up for the loss in question. The question of just what is owed in this kind of case is complicated and answered differently in different legal jurisdictions.[19] When confronted with very serious harms, such as the death of a spouse or a child, many jurisdictions opt for a relatively narrow form of compensation that primarily refers to the tangible financial loss caused by the death, sometimes alongside a token payment for mental distress, and sometimes without even this.

Other legal understandings of the nature of compensation in tort law are much more expansive, even if they do seek to place some limits on what a wrongdoer can owe a victim.[20] But even incorporating conservative estimates of what should be paid in such cases into an

[17] For related discussion, see Charles Mills, *Black Rights / White Wrongs: The Critique of Racial Liberalism* (Oxford: Oxford University Press, 2017): 181-200.

[18] Robert E. Goodin, "Theories of compensation" *Oxford Journal of Legal Studies* 9 (1989), 56–75.
[19] Robert Cooter and David DePianto, "Damages for incompensable harms", in Jennifer H. Arlen, *Research Handbook on the Economics of Torts* (Cheltenham: Edward Elgar, 2013), 439-459.
[20] Robert D. Cooter, 'Hand Rule Damages for Incompensable Losses', *San Diego Law Review* 40 (2003): 1097-120

account which allowed such payments to be inherited by descendants would predictably lead to massive contemporary reparative obligations in relation to colonialism.

Second, one might attempt to pay in full. There are both hard and soft limits to such a strategy. In some cases, the amount that is owed may straightforwardly be greater than the sum of resources at the disposal of the agent with the reparative duty, and indeed may be greater than they can expect to be able to access in the foreseeable future. Even if we are not dealing with sums of quite this scale, there will likely be extreme reluctance to pay gigantic amounts, given the predictable impact that doing so will have on the flourishing and life projects of those who must pay.

The third alternative is to look to make some kind of settlement. This is perhaps the solution many people are naturally inclined to support, but it is fraught with moral danger. Settlements for serious injustice will typically mean victims getting less than they should under a fully just compensation scheme. This means that unilateral redress is therefore generally not possible. If a settlement is to constitute a morally acceptable response to the demands of corrective justice, the party who is to get less than they should, will need voluntarily to agree to the terms of the settlement in question. What is needed – and the irony of this is extraordinary, given how the history of colonialism has in fact unfolded – is a form of debt forgiveness, not *of* but *by* formerly colonised peoples.

It is helpful here to a do a little more to unpack the idea of settlement. In his study of the concept, *On Settling*, Robert Goodin identifies a range of different usages of the term which he labels "modes of settling": specifically, "settling down" in a situation or place; "settling in", as in accommodating ourselves to our circumstances and our place; "settling up" with people we have displaced, unsettled, or otherwise wronged in the process; "settling for", learning to make do in our newly settled circumstances; and "settling on' a belief or value, project or commitment, way of being or way of living.[21] He suggests that these different conceptions all share something in common: specifically, that in settling we look for some kind of fixity. The search for fixity has certainly been a feature of various forms of past wrongdoing, and forms of colonial settlement, corresponding to 'settling down" and "settling in" on Goodin's schema, are good examples of forms of historic injustice that call out for contemporary redress. Most relevant to our current purposes, however, are the ideas of

[21] Robert E. Goodin, *On Settling,* p. 3. (Princeton: Princeton University Press, 2012).

"settling up" and "settling for". The first relates to the ideal of reparative justice, whereby the moral balance between perpetrator and victim is restored, with the former doing whatever is necessary to repair the moral breach. The latter, however, relates to a non-ideal outcome – where the victim cannot get their due, but must settle for something less instead, in order to achieve the kind of fixity that Goodin describes. The moral danger in settlement lies in the further injustice suffered by victims in this second scenario.

I have argued that there are good reasons to believe that the legacy of colonialism gives rise to gigantic contemporary reparative obligations. Suppose that citizens of Western states such as the UK accept this belief that they must try their best to settle this debt but argue that that they will not be able to meet their obligations in full. The desire on the part of perpetrators to come to a form of settlement in such cases is not necessarily wrong. One may believe, in good faith, that the moral value of paying the full price (or of paying as much of the full price as is literally possible) is trumped by forward-looking considerations and may understand a settlement in such a case in terms of balancing forward-looking and backward-looking interests and obligations in the name of fairness.[22]

It should be noted that this could still be potentially demanding depending on one's account of how to balance backward and forward-looking considerations. For example, if one were to argue that citizens of such states should settle at the level where any further payment would reduce themselves below a level of sufficientarian welfare. However, this is not the more familiar understanding of settlement, especially in legal contexts. In cases of what I term "bad faith settlement", the perpetrator is simply unwilling to pay out on the scale in question, and cannot be made to do so, but is prepared to settle for a smaller sum to close the issue. Such settlement is grounded not in morality but in self-interest. It is in the offender's interest to be able to draw a line under the events in question, and so they bargain and compromise to pay as little as possible while achieving their goal of a resolution to given dispute.

This kind of approach seems clearly unacceptable in relation to the reparation of historic injustice, though, as will be seen, it is commonly found in real world cases. Importantly, it is clear that if settlement has this form, the unilateral approach is manifestly inappropriate. Bad faith settlement entails perpetrators being let off the hook. It is not up to the perpetrators themselves to do this. Furthermore, even if the bad faith settlement is the

[22] For discussion, see Catherine Lu, *Justice and Reconciliation in World Politics,* p. 229-231, (Cambridge University Press, 2017).

result of some kind of agreement with the wronged group (and leaving aside questions of what kind of level of agreement there needs to be within the group for this to be the case), the mere fact of agreement does not in any sense mean that reparative justice has been satisfied if the wronged group in question have only agreed to the settlement because the offending group is unwilling to pay any more. A settlement of this form is not only an inadequate response to injustice – it is a fresh act of injustice against the victims in itself.

If this is bad faith settlement, what is good faith settlement? This is a question that can only be answered in outline outside of the settlement process itself. Good faith settlement accepts the inadequacy of the compensatory response. It does not claim to make up for that which cannot be repaired, but acknowledges that it is partial, incomplete, and in many ways unsatisfactory. It may include, but is not limited to, material compensation or restitution, and will typically also include elements of apology, commemoration, and education – but it does not use commitments in these fields to evade more costly commitments elsewhere. It ties backward-looking accounts of reparation to forward-looking concerns of reconciliation and, potentially, the pursuit of social equality. Good faith settlement can and should be linked to questions of structural change and institutional reform. It can and should be linked to deliberative processes and truth and reconciliation movements.

Good faith settlement engages in open-ended fashion, without precommitments or limitations. It is emphatically not a negotiation. It seeks to involve all relevant agents and keeps the question of who has standing in deliberation open, paying particular concern to persons within groups who have historically been oppressed and disadvantaged. It acknowledges the need to equalise power relations and develop new forms of relationships. Rather than drawing a line and forgetting about the past, it acknowledges the significance of history by committing to a new kind of relationship. In international terms, we might envisage that good faith settlement might involve the reform of international and regional governance structures, a reworking of the Security Council of UN, debt repudiation, and very substantial commitments to development, regeneration, and climate justice.[23] Its particular terms would, of course, be determined by its participants.

Bad faith settlement, by contrast, generally doesn't do any of this. Yet this is the dominant form in many real-world cases of purported reparation. Consider three recent such

[23] For relevant discussion, see Olúfhemi O Táíwò, *Reconsidering Reparations,* (Oxford: Oxford University Press, 2022).

cases. The first relates to the British government's decision in 2013 to pay £19.9m in costs and compensation to more than 5,000 elderly Kenyans who suffered torture and abuse during the Mau Mau uprising in the 1950s.[24] Foreign Secretary William Hague told the House of Commons that the payment was being made in "full and final settlement" of a High Court action brought by five victims who suffered under the British colonial administration. Hague said:

> The British government recognises that Kenyans were subjected 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 to independence. Torture and ill- treatment are abhorrent violations of human dignity which we unreservedly condemn.

Britain also agreed to support the construction of a memorial to the victims of colonial torture and abuse in Nairobi, but "stressed that the government continued to deny liability for the actions of the colonial administration and indicated it would defend claims brought from other former British colonies. "We do not believe that this settlement establishes a precedent in relation to any other former British colonial administration."[25]

The UK initially opposed this action, accepting that the claimants were indeed subject to torture by the British colonial administration, but maintaining that there was no persisting liability owing to, first, an argument relating to the expiration of a statute of limitations, and second, the claim that responsibility for British colonial atrocities had passed to the Kenyan government at the point of decolonization. The settlement came only when it became clear that the Government might lose the case. Following the decision, Kenyan groups announced plans for further legal cases for compensation for a further 40,000 Kenyans, a move opposed by the UK Government. The first test case in this litigation was dismissed in 2018, with the judge ruling that the passage of some fifty years had compromised the defendant's ability to defend the claim. The judgment emphasised that the litigation was a court process in a civil claim, and not a public inquiry, meaning that despite the factual admissions and settlement which preceded it, "the claims must stand or fall on established principles of civil litigation."[26]

[24] For discussion, see Regina Menachery Paulose and Ronald Gordon Rogo. *Addressing Colonial Crimes Through Reparations: The Mau Mau, Herero and Nama,* State Crime Journal 7.2 (2018): 369-388.
[25] https://www.theguardian.com/world/2013/jun/06/uk-compensate-kenya-mau- mau-torture
[26] https://ukhumanrightsblog.com/2018/08/06/kenyan-mau-mau-claim-dismissed-fair-trial-not-possible-because-of-half-century-delay/

The second case concerns women forced into sexual enslavement during the Second World War by the Japanese Imperial Army. A deal was reached between Japan and South Korea in 2015 whereby Japan agreed to apologise, accept responsibility, and pay 1bn yen ($8.3m) to fund victims. South Korea agreed to consider the matter resolved "finally and irreversibly" if Japan fulfilled its promises, and to investigate removing a statue symbolising victims, which activists erected outside the Japanese embassy in Seoul in 2011. Both sides "agreed to refrain from criticising each other on this issue in the international community".[27] The agreement came after many years of inaction, obfuscation, and denial by the Japanese Government (and similar inaction, during some periods, by the South Korean government). A number of surviving victims (only 46, by 2015, had survived and identified themselves) objected to the terms of the deal, claiming that they had no role in the agreement.[28] South Korean Vice Foreign Minister Lim Sung-nam was confronted by one such survivor, 88-year-old Lee Yong-su, at a meeting in Seoul. "Which country do you belong to?", she shouted at him. "You could at least have let us know what kind of deal you were striking with Japan. Why are you trying to kill us twice?"[29]

The South Korean government announced that it had cancelled the agreement in 2018 and has since tried to reopen the issue with Japan. Twelve women filed suit against the South Korean government in 2016, claiming "that the government had nullified the victims' individual rights to claim damages from Japan by signing an agreement not to demand further legal responsibility without consulting with the victims themselves." The claim was unsuccessful, with the court ruling in 2018 that while the agreement "certainly lacked transparency", the government had not acted illegally.[30] However, a claim against the Japanese government was upheld by the Seoul District Court in 2021, which ordered Japan's government to pay reparations of 100 million won ($91,300) each to the families of the twelve women.[31] Japan has refused to accept the legitimacy of the ruling, with Prime Minster Yoshihide Suga claiming that, "[T]he issue of comfort women between Japan and the Republic of Korea is already settled completely and finally."[32]

[27] http://www.bbc.com/news/world-asia-35188135
[28] https://www.nytimes.com/2015/12/30/world/asia/south-korea-japan-comfort-women.html
[29] https://time.com/4164990/korean-comfort-woman-video/
[30] http://english.hani.co.kr/arti/english_edition/e_international/849403.html
[31] https://www.cbsnews.com/news/comfort-women-korea-japan-court-order-wwii-sex-slave-reparations/
[32] https://japan.kantei.go.jp/99_suga/statement/202101/_00004.html

It should be clear just how far these cases fall short of the ideal of good faith settlement. Self-interested settlement under duress, in the face of the threat of legal action or other forms of external pressure, which seeks to keep payments to a minimum while foreclosing the possibility of further actions by others is straightforwardly an inadequate response to past wrongdoing. The sums involved seem obviously inadequate from the perspective of compensatory justice. Key groups of victims have critically rejected the purported finality of the processes in question. Arguably a more interesting example is provided by the recent announcement by the German government that, following six years of negotiations, it has agreed to pay €1.1bn (via aid payments over the next 30 years) to Namibia as a response to colonial atrocities by the German army in the early twentieth century, when "tens of thousands of men, women and children were shot, tortured or driven into the Kalahari desert to starve by German troops between 1904 and 1908 after the Herero and Nama tribes rebelled against colonial rule in what was then named German South West Africa and is now Namibia."[33]

One can certainly point to features of the agreement that seem to reflect features of "good faith settlement". In accepting that the events in question should be labelled as "genocide", German foreign minister Heiko Maas stated that "Our aim was and is to find a joint path to genuine reconciliation in remembrance of the victims. That includes our naming the events of the German colonial era in today's Namibia, and particularly the atrocities between 1904 and 1908, unsparingly and without euphemisms." However, strikingly, this linguistic accommodation does not extend to the language of "reparations" itself. The agreement document avoids use of either the term "reparations" or "compensation" and a previous internal progress report on the negotiations, circulated to German parliamentarians the week before the announcement, denied that the payments should be seen in such terms, claiming "Reparations or individual compensations are not subject of the negotiations. After 100 years they would be unprecedented. The definition of injustice set up by the 1948 convention on the prevention and punishment of genocide does not apply retrospectively and cannot be the basis for financial claims."[34] The announcement of the agreement has had a mixed response in Namibia.

[33] https://www.theguardian.com/world/2021/may/28/germany-agrees-to-pay-namibia-11bn-over-historical-herero-nama-genocide
[34] https://www.theguardian.com/world/2021/may/21/germany-rules-out-financial-reparations-for-namibia-genocide

While a spokesman for the Namibian president, Hage Geingob, described the acknowledgment of genocide "as the first step" in the right direction, and claimed that "It is the basis for the second step, which is an apology, to be followed by reparations", Vice-President Nangolo Mbuma noted that the harm caused was in a sense non-compensable, and that the amount proposed was insufficient to amount to an adequate settlement, saying, "No amount of money in any currency can truly compensate the life of a human being. We need to recognise that the amount of 1.1 billion euros agreed upon between the two governments is not enough and does not adequately address the initial quantum of reparations initially submitted to the German Government."[35]

The agreement has been explicitly rejected by groups representing the descendants of the victims, drawn from the minority Herero and Nama peoples, as opposed to the Ovambo majority group that dominates the Namibian government.[36] In the Namibian parliament, opposition politicians condemned the agreement, and argued that key affected groups had not been properly involved in deliberations. Edson Isaacks, from the opposition Landless People's Movement Namibia (LPM), spoke of a "substandard agreement", stating "They have excluded communities, groups of Namibians … that is apartheid that government has practised." Another LPM parliamentarian, Utaara Mootu told Prime Minister Saara Kuugongelwa-Amadhila,"You have betrayed us", arguing, "You have not allowed for equal participation based on human rights policies. You have not given us the chance to narrate the economic trauma" caused by the genocide.[37]

The German announcement is certainly striking in that it represents reparations on a different order of magnitude than has hitherto been made in relation to European colonialism (leaving aside, of course, the compensation payment made to slave *owners* by the Slave Compensation Act of 1837). But it should be clear that, if only on account of the reaction of relevant parties with standing, that it cannot be seen as an example of "good faith settlement". This observation does, however, underline how demanding the account of good faith settlement is. I have argued that the scale of colonial wrongdoing means that not only the *participation* (which was in fact seemingly lacking in the Namibian case) but the *agreement*

[35] https://www.reuters.com/world/africa/germany-colonial-era-genocide-reparations-offer-not-enough-namibia-vice-2021-06-04/

[36] Franziska Boehme, *Germany acknowledged colonial atrocities in Namibia as genocide. Victims' groups want more*" Washington Post (9/6/2021) https://www.washingtonpost.com/politics/2021/06/09/germany-acknowledged-colonial-atrocities-namibia-genocide-victims-groups-want-more/

[37] https://www.aljazeera.com/news/2021/6/8/betrayal-namibian-opposition-lawmakers-slam-germany-genocide-deal

of victims is necessary to the achievement of a just resolution: otherwise, an unfulfilled reparative obligation persists. Perhaps this conclusion should be understood relative to some type of provisos: we need a full account of what it means to be a party with standing, there may not need to be a requirement for strict unanimity so long as all relevant groups are in uncoerced, overall agreement, and we might specify that not only perpetrators but also victims need to be operating, in some fashion, in good faith. Nonetheless, it follows on my account that the good faith agreement of all parties with standing is necessary if settlement is to be reached. It is not enough for the party with reparative duties to put forward a proposal that they, or some other third party, deem to be fair or reasonable. It is up to those who have been wrongfully harmed, and who will end up with less than they should, to determine what they are prepared to accept.

It is sometimes thought that there is something practical about the pursuit of reparative justice, as opposed, for example, to its distributive counterpart – duties are direct, fulfilling them does not involve the participation of third parties, and the basic principles of corrective justice are perhaps less controversial than those of distributive justice.[38] Indeed, I have previously argued that it makes strategic sense for those in favour of significant international redistribution to couch their arguments in corrective rather than distributive terms (though I now worry that such a strategy runs the risk of instrumentalising corrective justice in a morally objectionable fashion).[39] I fear we have ended up somewhere less practical. The vision of good faith settlement which this article has advocated is one whereby parties with extensive reparative duties that they cannot fulfil are dependent on the good will of those to whom the debt is owed.

Good faith settlement requires a commitment to a process without knowledge of an outcome. I know of no significant real world settlement process that obviously realises such an ideal, though I accept that it is not my place to arbitrate on such matters, but that of the victims in question. It is obviously hard to see agents such as the governments of Western states being willing to sign up to such a process, and perhaps also hard to imagine how it could result in the kind of broad-based agreement which I have argued is necessary if good faith settlement is to be realised. This is tragic. There is therefore a further, inherently

[38] See Charles Mills, "Race and Global Justice" in B. Buckinx, J. Trejo-Mathys, and T. Waligore (eds.) *Domination and Global Political Justice: Conceptual, Historical and Institutional Perspectives,* 181-205, (New York: Routledge, 2015).
[39] Butt, *Rectifying International Injustice.*

political question – if "settling up" is not available, how should a reparative politics of "settling for" be organised? What kind of genuine reconciliation, of restoration of the moral equilibrium, is possible or even desirable when some of the parties to the process are not willing to act as moral agents? How should the victims of injustice – wronged once by the initial injustice, wronged again by its ongoing non-rectification, and now wronged yet again by being presented with a morally inadequate offer of bad faith settlement, respond? Such questions are beyond the scope of this article. But it is clear that the outcome of such a process, even if it has the practical effect of making things better than they are now, will not be just.

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