# Reparations for colonialism: what does Belgium owe its former colonies?

## An exploration of the possible Belgian State responsibility to make reparation for its colonial past with an assessment of different reparation forms

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## INTRODUCTION

**1.** In February 2019, the UN Working Group of Experts on People of African Descent (WGPAD or "the Working Group") visited Belgium in order to assess "the human rights situation of people of African descent living in Belgium, and gather information on the forms of racism, racial discrimination, xenophobia, Afrophobia and related intolerance they face".[1] In its first findings, the Working Group encouraged Belgium to confront its colonial past and more specifically to officially apologize for the atrocities committed during the colonial period and set up a truth commission.[2] A more detailed and specific report was presented at the 42nd regular session of the Human Rights Council in Geneva in September 2019, in which the call for an apology and establishment of a truth commission was repeated.[3]

**2.** These recommendations should be situated in a wider context. Recently, there has been a growing interest in Belgium for a more conscious and reflective approach towards the colonial past, as several recent events and discussions in the public debate show. The reopening of the AfricaMuseum in Tervuren (Brussels) has relit the discussion about how Belgium is dealing with its colonial past.[4] Also, a movement has emerged that heavily questions the relevance and

[1] Report of the Working Group of Experts on People of African Descent on its mission to Belgium, Human Rights Council on its 42nd session (26 August 2019), *UN Doc.* A/HRC/42/59/Add.1 (2019), 2, par. 2.
[2] Statement to the media by the United Nations Working Group of Experts on People of African Descent, on the conclusion of its official visit to Belgium, 4 - 11 February 2019, Brussels, 11 February 2019, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24153&LangID=E.
[3] Report of the Working Group of Experts on People of African Descent on its mission to Belgium, Human Rights Council on its 42th session (26 August 2019), *UN Doc.* A/HRC/42/59/Add.1 (2019), par. 2.
[4] W. WOUSSEN, "Zolang dit museum de macht niet deelt, is het niet gedekoloniseerd", *De Standaard*, 5 December 2018, 14.

acceptance of street names referring to this colonial past.[5] Moreover, it is being discussed whether monuments that glorify King Leopold II should be taken away or rather a clear contextualisation should be added.[6] In the spring of 2020, this discussion intensified with petitions demanding to remove King Leopold II's statutes and Black Lives Matter protesters targeting these monuments.[7] Also the issue of apologies for the Belgian colonial past is gradually being addressed. Firstly, the former Belgian Prime Minister C. MICHEL has officially apologised for the way Belgium has treated "metissen" (children born out of a relation between a Belgian colonist and a local woman) during the colonial period.[8] Then, the non-profit organisation Creative Belgium launched a project in 2019 that called for the best formulated excuses to the Congolese population whereby everyone was invited to contribute by sending in their ideas.[9] More recently, the Belgian King expressed its "deepest regrets" for the Belgian colonial past in a letter to the Congolese President.[10] Furthermore, a parliamentary truth and reconciliation commission has been established to examine the Belgian colonial history and its implications.[11]

3. Both the UN report and the ongoing public discussions show the relevance of the issue of possible reparation for colonialism. Not only Belgium, but also other countries like the Netherlands, the United Kingdom and Japan are currently holding a debate on how to come to terms with their colonial past.[12] Requests to give former colonialism a more prominent conscious role and to acknowledge that it should never have happened are increasingly common.[13] Even more, the question is raised whether a State does not owe reparation for the injustice inflicted on the people in the former colonies. However, so far, no clear guidelines seem to exist and each State appears to respond to the issue in

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[5] T. DE DECKER, "Leopold II-laan in Dendermonde wordt Leopoldlaan", *VRT NWS,* 22 March 2019; J. MEESTERS, "Leopoldsburg wil af van zijn Leopold II-laan", *De Standaard*, 16 June 2020; X, "Brussel krijgt een plein vernoemd naar Patrice Lumumba", *VRT NWS,* 24 April 2018; X, "Kortrijk verandert naam Leopold II-laan", *De Standaard*, 10 June 2020.

[6] J. TRUYTS, "Nieuw infobord bij omstreden standbeeld van Leopold II in Oostende", *VRT NWS*, 11 September 2016; B. VANNIEUWENHUYZE, "Haal 'foute' standbeelden en straatnamen niet van straat", *De Morgen*, 18 August 2017.

[7] R. ARNOUDT, "Al meer dan 36.000 handtekeningen met vraag om standbeelden Leopold II weg te nemen", *VRT NWS*, 4 June 2020; L. SELS, "Zichtbaar gemaakte waarden: KU Leuven bergt beeld Leopold II op", *KULeuven blogt*, 10 June 2020, https://kuleuvenblogt.be/2020/06/10/zichtbaar-gemaakte-waarden-ku-leuven-bergt-beeld-leopold-2-op/; M. REYNEBEAU, "Sokkel onder Leopold II begint te wankelen", *De Standaard*, 10 June 2020.

[8] K. VAN DER AUWERA, "Michel verontschuldigt zich in Kamer voor behandeling metissen in koloniale periode", *Knack,* 4 April 2019.

[9] www.sorryiseenbegin.be.

[10] X, "Koning Filip betuigt 'diepste spijt' voor Belgische wandaden in Congo", *Knack*, 30 June 2020.

[11] Oprichting van de Bijzondere commissie belast met het onderzoek over Congo-Vrijstaat (1885-1908) en het Belgisch koloniaal verleden in Congo (1908-1960), Rwanda en Burundi (1919-1962), de impact hiervan en de gevolgen die hieraan dienen gegeven te worden, *Parl. St.* Kamer 2019-2020, nr. 55, 1462/001.

[12] The approach of these countries is discussed in the last chapter.

[13] R. ALDRICH, "Apologies, Restitutions, and Compensation: Making Reparations for Colonialism" in M. THOMAS and A.S. THOMPSON (ed.), The Oxford Handbook of the Ends of Empire, Oxford, Oxford University Press, 2018, (714) 714.

its own way, for example by making official apologies and establishing an inquiry commission[14] or even by paying financial compensation.[15]

4. From a moral, sociological and philosophical point of view, it can be argued that the recommendations of the UN-experts are justified and should be supported. However, the question whether there also exist legal arguments is more difficult. Therefore, it seems valuable to examine whether Belgium can be legally obliged to make reparation for its colonial past, for example as suggested in the form of issuing official apologies. In other words, it should be asked whether the recommendations of the Working Group can be backed up with legal arguments.

5. This paper examines the issue of reparations for colonialism from an international law perspective, particularly through the lens of the international law of State responsibility. Reparations are owed by a State if its responsibility for a breach of international law can be established.[16] Therefore, if the international State responsibility of Belgium for its colonial rule could be established, this may pave the way for a legal justification of reparations. Furthermore, the reparations framework of the international law of State responsibility is well-structured and extensive and can therefore function as a valuable guidebook for the discussion on reparations for colonialism.

6. It should be stressed that this research explores just one possibility for the legal justification of the recommendations. There are different options possible to approach this issue, which are outside the scope of this thesis. The State responsibility perspective examines the inter-state relations between Belgium and DRC. A different approach would be to look into possible claims of individuals against the Belgian State in the form of human rights claims, for example before the European Court of Human Rights (ECtHR), or claims from individual victims against individual perpetrators on the basis of criminal law.[17] Another approach would be the application of Belgian tort law to verify if the Belgian government would be obliged under national law to make reparations. This use of national law has been the approach of the claims by Mau Mau Kenyans who were tortured by British colonial forces, which led to the famous "Mau Mau cases" in British domestic courts.[18] Also the Dutch cases on mass-executions by Dutch officials in colonial Indonesia have used national law.[19]

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[14] This is the case for the Netherlands, see para. 144-145.
[15] This is the case for Libya, and partly for Japan, see para. 145, 175 and 177.
[16] This represents the general principle of reparation, formulated by the Permanent Court of International Justice in the Chorzow Factory case. PCIJ 13 September 1928, The Factory At Chorzow (Claim for Indemnity), Series A, No. 17.
[17] D. SHELTON, "Reparations for Indigenous Peoples: The Present Value of Past Wrongs" in F. LENZERINI (ed.), Reparations for Indigenous Peoples: International and Comparative Perspectives, Oxford, Oxford University Press, 2008, (47) 51.
[18] EWHC (QB) (UK) 5 October 2012, No: HQ09X02666 www.bailii.org/ew/cases/EWHC/QB/2012/2678.html; EWHC (QB) (UK), 2 August 2018, No. HQ13X02162 www.bailii.org/ew/cases/EWHC/QB/2018/2066.html.
[19] Rechtbank Den Haag (NL) 14 September 2011, 354119 / HA ZA 09-4171, NJF 2011/427; Rechtbank Den Haag (NL) 11 March 2015, C-09-467005 HA ZA 14-0651, NJF 2015/221;

**7.** There are several reasons why this research uses an international State responsibility perspective: the prevalent context of international law, the positive features of the State responsibility frameworks in contrast to other less suitable options and the advantages of a more general approach. First of all, it seems appropriate to apply international law since the examined recommendations are written by a working group in the context of the United Nations, an international organisation which both functions in an international law context and uses international law in the exercise of its powers. Furthermore, as will be discussed, colonialism is a phenomenon that occurred in a context of public international law, whereby international law was used to justify and regulate colonial policies.[20] Also, the choice for using the rules on State responsibility was made consciously. These rules are reasonably straightforward with regard to the conditions required and most importantly, they provide for an extensive and flexible reparations framework.[21] Furthermore, an international State responsibility approach generally appears to be more feasible than using human rights law or national law. Human rights claims before the ECtHR with regard to colonialism and the colonial rule seem to be excluded by the territorial application of the European Convention on Human Rights (ECHR) and its application *ratione temporis*.[22] For the application of national criminal law, it would be necessary to also conduct extensive and detailed historical research on specific events in the colonial period possibly violating criminal law, which would remove the focus from legal research to historical research. Lastly, it is more valuable to examine reparations for colonialism from a broader and more general perspective, allowing to compare the approach of different countries and to reach conclusions that are more widely applicable.

**8.** When considering the concrete relations between Belgium and its former colonies, it has been decided to mainly opt for a focus on the Congolese experience rather than on Rwanda and Burundi, because of the more direct control Belgium exercised in Congo, together with the strong Belgian economic presence and accompanying interests in Congo.[23]

**9.** This paper proceeds in three chapters. In the first chapter, the recommendations of the Working Group are closely examined together with

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Rechtbank Den Haag (NL) 22 November 2017, C-09-529572-HA ZA 17-333, NJF 2018/49; Rechtbank Den Haag (NL) 31 January 2018, C-09-428182-HA ZA 12-1165, NJ 2018/204.

[20] See para. 72-79.

[21] See para. 110-124.

[22] See para. 97-98.

[23] The current DRC was privately administered by King Leopold II from 1885-1908 after which it became an official Belgian colony until 1960. It was constantly governed by a "direct rule". Burundi and Rwanda were initially German colonies, but fell under Belgian control after World War I, as a part of the League of Nations Mandate territory and thereafter the UN Trust Territory of Ruanda-Urundi. These colonies were governed by an "indirect rule", with the indigenous elite administering the territories. See P. KERSTENS, "Deliver Us from Original Sin": Belgian apologies to Rwanda and the Congo" in M. GIBNEY, R. E. HOWARD-HASSMANN, J.-M. COICAUD, and N. STEINER (ed.), *The Age of Apology, Facing Up to the Past*, Philadelphia, University of Pennsylvania Press, 2009, (187) 190; J. SARKIN, "Reparations For Gross Human Rights Violations In Africa – The Great Lakes", in M. DU PLESSIS (ed.), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses*, 2007, Antwerp, Intersentia, (197) 203.

their specific context and background. The second chapter explores the potential international State responsibility of Belgium for its colonial rule in Belgium, examining some of the challenges of this approach, such as the difficulties caused by the principle of intertemporal law. This discussion leads to an analysis of the application of international law that was in force at the time of the Belgian colonial rule with a focus on the rules on forced labour. The third chapter then focuses on reparations. Both the general concept of reparations for historical injustice and the reparations framework of international State responsibility are discussed, followed by an analysis of official apologies and the establishment of a truth commission as possible forms of reparation for colonialism. In this context, the most recent developments of the Belgian approach to the colonial past are examined and assessed. This chapter does not take a strictly legal approach but attempts to provide a more complete and societally relevant view on the issue of reparations for colonialism, as the full story transcends the question whether or not there exists a legal obligation for Belgium to ensure reparations for colonialism.

# 1. THE RECOMMENDATIONS OF THE WORKING GROUP OF EXPERTS ON PEOPLE OF AFRICAN DESCENT

**10.** In the first chapter, an overview is provided of the statements and recommendations of the UN Working Group of Experts of People of African Descent relating to its visit to Belgium in February 2019, preceded by a discussion on the functioning of the Working Group.

## 1.1. WORKING GROUP OF EXPERTS ON PEOPLE OF AFRICAN DESCENT

**11.** In 2002, the Commission on Human Rights established the Working Group of Experts on People of African Descent,[24] composed of five independent experts.[25] The mandate of the Working Group was subsequently renewed by the Commission on Human Rights and the Human Rights Council in various resolutions[26] and consists *inter alia* of studying the problems of racial

[24] Resolution 2002/68 of the Commission on Human Rights on Racism, racial discrimination, xenophobia and related intolerance (18 April 2001), *UN Doc.* E/CN.4/RES/2002/88 (2001). It followed the recommendation of the Durban Action Programme to "*consider establishing a working group or other mechanism of the United Nations to study the problems of racial discrimination faced by people of African descent living in the African Diaspora and make proposals for the elimination of racial discrimination against people of African descent*". (Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban 31 August-8 September 2001, UN General Assembly, (January 2002) *U.N. Doc.* A/CONF.189/12 (2002), 29, par. 7).

[25] These experts are appointed on the basis of equitable geographic representation and at the beginning of each session, the five members elect a Chairperson-Rapporteur who is elected on a rotational basis to reflect the regional representation of the Group. Today, the experts of the WGPAD are Dominique Day (Chairperson, United States of America), Ahmed Reid (Jamaica), Michal Balcerzak (Poland), Sabelo Gumedze (South Africa) and Ricardo A. Sunga III (Philippines). See www.ohchr.org/EN/Issues/Racism/WGAfricanDescent/Pages/WGEPADIndex.aspx.

[26] Resolution 2003/30 of the Commission on Human Rights on World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive

discrimination of people of African descent by gathering relevant information and suggesting measures to eliminate this discrimination.[27]

12. A discussion has arisen on the exact meaning of "People of African Descent": does this only include people of African descent in the African Diaspora; only people descending from African slaves; or also people in Africa?[28] Although the 2003 Resolution of the Commission on Human Rights extends the mandate to include both people of African descent in all parts of the world and Africans,[29] it remains unclear what the exact mandate of the WGPAD is in this regard. Even though African States are highly present at sessions of the WGPAD, recommendations never mention Africans and only deal with the impact on people of African descent in the diaspora.[30] The favourable approach is to regard the mandate of the Working Group as wide and flexible as possible, so that it remains possible for the Working Group to also address the situation in Africa.

13. The working method of the WGPAD consists of preparing thematic reports, holding two five-day sessions per year, conducting country visits and presenting the report on the overall human rights situation in the country at issue to the Human Rights Council and the UNGA.[31] These country visits, taking place minimum twice a year, can be regarded as the most important task of the WGPAD, and are seen as "an opportunity to examine in detail the situation of people of African descent in the country, to identify any problems and to make recommendations for how these could be resolved."[32] It is remarkable that the Working Group's first visit was to Belgium, in 2005.[33]

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Implementation of and Follow-up to the Durban Declaration and Programme of Action (23 April 2003), *UN Doc.* E/CN.4/RES/2003/30 (2003); Resolution 9/14 of the Human Rights Council on the Mandate of the Working Group of Experts on People of African Descent (18 September 2008), *UN Doc.* A/HRC/RES/9/14 (2008); Resolution 18/28 of the Human Rights Council on the Mandate of the Working Group of Experts on People of African Descent (17 October 2011), *UN Doc.* A/HRC/RES/18/28 (2011); Resolution 17/25 of the Human Rights Council on the Mandate of the Working Group of Experts on People of African Descent (3 October 2014), *UN Doc.* A/HRC/RES/27/25 (2014); Resolution 36/23 of the Human Rights Council on the Mandate of the Working Group of Experts on People of African Descent (9 October 2017), *UN Doc.* A/HRC/RES/36/23 (2017).

[27] *Ibid.*

[28] C. LENNOX, "Reviewing Durban: Examining the Outputs and Review of the 2001 World Conference against Racism", *Netherlands Quarterly of Human Rights* 2009, (191) 221.

[29] Resolution 2003/30 of the Commission on Human Rights on the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive Implementation of and Follow-up to the Durban Declaration and Programme of Action (23 April 2003), *UN Doc.* E/CN.4/RES/2003/30 (2003).

[30] C. LENNOX, "Reviewing Durban: Examining the Outputs and Review of the 2001 World Conference against Racism", *Netherlands Quarterly of Human Rights* 2009, (191) 222.

[31] www.ohchr.org/EN/Issues/Racism/WGAfricanDescent/Pages/WGEPADIndex.aspx.

[32] www.ohchr.org/EN/Issues/Racism/WGAfricanDescent/Pages/CountryVisits.aspx.

[33] Report of the Working Group of Experts on People of African Descent (Visit to Belgium), Commission on Human Rights on its 62nd session (9 February 2006), *UN Doc.* E/CN.4/2006/19/Add.1 (2006).

## 1.2. COUNTRY VISIT OF THE WGPAD TO BELGIUM IN FEBRUARY 2019

**14.** From 4 to 11 February 2019, the UN Working Group of Experts on People of African Descent visited Belgium in order to *inter alia* investigate the existence and impact of racism against people of African descent. On the last day of the visit, a statement to the media was published with the first remarks and recommendations to Belgium. This was met with a lot of media attention and a public debate gradually developed, mainly discussing the statement that Belgium should apologize for the harm caused by its colonial rule. In September 2019, a full report of the visit to Belgium was presented at the 42nd Regular Session of the Human Rights Council. Belgium has also submitted a comment to the findings of the Working Group, which accompanied the Report.

### *1.2.1. First Findings*

**15.** In its first remarks, the Working Group recommended Belgium to take a more conscious approach towards its colonial past in the form of apologies for the atrocities committed during the colonial period and the establishment of a truth commission:

> *"47. The Working Group recommends reparatory justice, with a view to closing the dark chapter in history and as a means of reconciliation and healing. We urge the government to issue an apology for the atrocities committed during colonization. The right to reparations for past atrocities is not subject to any statute of limitations. The Working Group recommends the CARICOM 10-point action plan for reparatory justice as a guiding framework.*
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> *48. The Working Group supports the establishment of a truth commission, and supports the draft bill before Parliament entitled "A memorial work plan to establish facts and the implication of Belgian institutions in Congo, Rwanda and Burundi", dated 14 February 2017."*[34]

**16.** It seems that the Working Group considers that colonialism and the way a former colonial power deals with its past are root causes of current racial discrimination, and symbolic forms of reparations for colonialism could help to eliminate this discrimination. Although the Working group does not provide concrete details on how Belgium should take action, it refers to two existing frameworks as guidance. Firstly, it refers to the CARICOM 10-point action plan (established in 2014 by Caribbean nations to deal with the legacy of slavery) which implies the issuing of a "*a sincere formal apology*" to the victims of

[34] Statement to the media by the United Nations Working Group of Experts on People of African Descent on the conclusion of its official visit to Belgium from 4 to 11 February 2019, Brussels, 11 February 2019, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24153&LangID=E.

colonialism and their descendants, possibly together with other measures, such as the establishment of a development plan and debt cancellation.[35] Secondly, the WGPAD refers to a draft parliamentary resolution for the establishment of a truth commission, which contains more concrete guidelines on the possible function and mandate of the commission. These references make the recommendations of the Working Group more realistic and substantial, considerably lowering the threshold for Belgium to actually take up the advice.

*1.2.2. Official Report of the Working Group*

**17.** The Report presented to the Human Rights Council in September 2019 provides a more structured and detailed overview of the findings of the Working Group after their visit to Belgium.[36] The Report repeated that the Belgian government is recommended to issue an apology and that the establishment of a truth commission is encouraged. Although the issue of reparations for colonialism was not further mentioned, the Report stressed the importance of the recognition of harm done by the colonial past:

> *"66. The root causes of present-day human rights violations lie in a lack of recognition of the true scope of the violence and injustice of colonization. As a result, public discourse does not reflect a nuanced understanding of how institutions may drive systemic exclusion from education, employment and opportunity.*
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> *67. The Working Group is of the view that, if this dark chapter in the country's history is to be closed and reconciliation and healing are to be achieved, Belgians should finally confront and acknowledge the role of King Leopold II and of Belgium in colonization, and its long-term impact on Belgium and Africa."*[37]

**18.** Belgium was given the opportunity to officially respond to the Report of the Working Group, whereby it expressed certain criticism to the findings of the Working Group.[38] The reply touches upon the public debate about the colonial past, whereby Belgium states that it "*is coming to terms with its colonial past, which is a gradual and ongoing process*".[39] Furthermore, according to Belgium's response, "*the debate around this topic is indeed ongoing; Belgium even encourages a thorough and open public debate without any restrictions on this topic*," citing as examples the recent reopening of the renewed Africa Museum and the official apologies of the Prime Minister for the forced abduction and

[35] CARICOM Ten Point Plan for Reparatory Justice, https://caricom.org/caricom-ten-point-plan-for-reparatory-justice/.
[36] Report of the Working Group of Experts on People of African Descent on its mission to Belgium, Human Rights Council on its 42th session (26 August 2019), *UN Doc.* A/HRC/42/59/Add.1 (2019), par. 2.
[37] *Ibid.* 15.
[38] Report of the Working Group of Experts on People of African Descent on its mission to Belgium, Comments by the State, Human Rights Council on its 42th session (26 August 2019), *UN Doc.* A/HRC/42/59/Add.3 (2019).
[39] *Ibid.* par. 19.

segregation of "métissen".[40] Belgium also states that the link between the approach to the colonial past and current racism against people of African descent is an oversimplification and a generalization that lacks nuance, ignoring the "*more complex reality*".[41] This corresponds to the more general concern of Belgium that the methodology of the WGPAD seems to be flawed, because of some very strong general statements in the report without mentioning a legal basis or source, and over-hasty drawn conclusions that are lacking nuance and context.[42]

**19.** The Working Group has attempted to provide some concrete recommendations to help Belgium coming to terms with its colonial past in a rather short and modest manner, without much elaboration. This probably explains why Belgium did not consider it necessary to respond to these concrete recommendations in its comments. However, it cannot be ignored that this call for reparations for colonialism has been picked up by the media, receiving widespread response, and therefore should undoubtedly be seen to be as part of the "open public debate" that Belgium claims to encourage.

# 2. POSSIBLE STATE RESPONSIBILITY FOR THE BELGIAN COLONIAL RULE

**20.** This second chapter examines whether the recommendations of the Working Group, implying that Belgium has a certain responsibility with regard to its colonial past, can be supported by the international law of State responsibility, as it could lead to a legal justification of reparations for colonialism such as the issuing of official apologies.

## 2.1. STATE RESPONSIBILITY IN GENERAL

**21.** The general principle of State responsibility implies that "*every internationally wrongful act of a State entails the international responsibility of that State*".[43] This principle has been recognized and accepted in numerous cases of the International Court of Justice (ICJ).[44] The precise conditions for international State responsibility and its consequences are laid down in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), adopted by the International Law Commission (ILC) in 2001.

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[40] *Ibid.* par. 19-20.
[41] *Ibid.* par. 21.
[42] *Ibid.* par. 8.
[43] Art. 1 Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, *UN Doc.* A/56/10 (2001) (hereafter: ARSIWA).
[44] PCIJ 14 June 1938, Phosphates in Morocco, *Series A/B*, No. 74, 10; ICJ 9 April 1949, The Corfu Channel Case, *I.C.J. Reports* 1949, 4; ICJ 11 April 1949, Reparation for Injuries suffered in the service of the United Nations, *I.C.J. Reports* 1949, 174; ICJ 27 June 1986, Nicaragua/United States, *I.C.J. Reports* 1986, 14; ICJ 25 September 1997, Hungary/Slovakia, *I.C.J. Reports* 1997, 7.

**22.** With regard to the legal status of the articles on State responsibility, it can be noted that most articles are regarded as reflecting customary international law by both scholars[45] and national and international tribunals[46] like the ICJ.[47] The conditions for customary international law, established state practice and *opinio iuris* (the belief that there is a legal obligation),[48] seem to be fulfilled for most articles, even though some are not yet considered so.[49] Although it is not excluded that a binding treaty on State responsibility will be adopted in the future,[50] it seems that this is very unlikely since the UNGA so far has only "*taken note*" of the draft articles and has not taken an initiative for the drafting of a convention.[51]

**23.** Two conditions are required to establish State responsibility.[52] Under article 2 ARSIWA, State responsibility requires both the attribution of the conduct to the State and the existence of a breach of international law.

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[45] Various scholars and commentators have expressed support for the acknowledgement of the ARSIWA as customary international law, see for example: D. CARON, "The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority", *AJIL* 2000, (857) 866; J. CRAWFORD, *State Responsibility; The general part,* Oxford University Press, New York, 2013, 90.

[46] The UN Secretary General has reported a widespread application of the ARSIWA in different courts and tribunals. By 2013, the ARSIWA had been cited in more than 200 decisions. See Report of the Secretary-General on responsibility of States for internationally wrongful acts: compilation of decisions of international courts, tribunals and other bodies (20 June 2017) *UN Doc.* A/71/80/Add.1 (2017).

[47] The ICJ has treated specific articles of the ARSIWA as customary law, see: ICJ 26 February 2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina/Serbia and Montenegro, *I.C.J. Reports* 2007, paras 385, 398, 401 and 407 (recognizing articles 4 and 8 ARSIWA as customary law); ICJ 3 February 2015, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Croatia/Serbia, *I.C.J. Reports* 2015, para. 127 (recognizing article 10 ARSIWA as customary law).

[48] The fifth Report of the Secretary General at the 71st session of the UNGA in 2016, summarizes the comments and information received from Governments, which shows that States perceive the ARSIWA as containing binding principles. See Report of the Secretary-General on responsibility of States for internationally wrongful acts: comments and information received from Governments (21 April 2016) *UN Doc.* A/71/79 (2016).

[49] The fact that the ICJ considers a certain article as customary international law is a strong indicator. S. TALMON, "The responsibility of outside powers for the acts of secessionist entities", *International and Comparative Law Quarterly* 2009, (493), 495.

[50] J. CRAWFORD, *State Responsibility; The general part,* Oxford University Press, New York, 2013, 92.

[51] Resolution 56/83 of the UN General Assembly on Responsibility of States for internationally wrongful acts on its 56th session (28 January 2002), *UN Doc.* A/RES/56/83 (2002), par. 3. This is in line with the recommendations of the ILC and a number of countries, who thought that the adoption of a convention on State responsibility would prove to be incredibly difficult because of the divisions among States and therefore it seemed valuable to avoid the treaty-making process. It was seen to be "more realistic, and likely to be more effective, to rely on international courts and tribunals, on State practice and doctrine to adopt and apply the rules in the ARSIWA". See: Fourth Report on State Responsibility by the Special Rapporteur James Crawford, 53rd session of the ILC (2-3 April 2001), *UN Doc.* A/CN. 4/517 (2001) para. 23.

[52] It can be noted that the international State responsibility regime only functions at the international level (see K. KAWASAKI, "The "Injured State" in the International Law of State Responsibility", *Hitotsubashi journal of law and politics 2000,* (17) 19). This implies that the injured State has to be considered a State at the moment of the claim, which is not a problem for the claim of the former colonies against Belgium.

**24.** The first condition for the establishment of State responsibility is the attribution of the conduct in question to the State. Relevant for the Belgium-Congo case is article 4 ARISWA, which considers attributable to the State "*the conduct of any State organ*". This condition would be met in the 'Congo Belge', the period under which Congo was ruled by Belgium as a colony (1908-1960).[53] In this period there is no issue of attribution, since the Belgian government and colonial administration clearly acted as State organs of Belgium when they governed the Congolese colony. However, this requires a narrow interpretation, excluding the actions of non-state actors such as the Catholic Church and Belgian companies.

**25.** This paper does not cover the period between 1885 and 1908, when Congo was ruled by King Leopold II as his private property under the name of 'Congo Free State'.[54] Congo Free State was seen as the absolute property of King Leopold II, who ruled over Congo as a different sovereign and not as the King of Belgium.[55] Consequently, it seems difficult to attribute King Leopold II's conduct in Congo to the Belgian State. Although King Leopold II was clearly a State organ as the head of the Belgian State, he was not acting in that official capacity when he was ruling over Congo.[56] It can be noted that although in 1908 a new legal framework was introduced, the everyday exercise of power remained mostly the same, for example by using forced labour.[57]

**26.** The second condition for Belgium's responsibility is the existence of wrongful conduct, which consists of the violation of a rule of international law. Article 2 ARSIWA requires the breach of an international obligation, defined in article 12 ARSIWA as an act of a State that "*is not in conformity with what is required of it by that obligation, regardless of its origin or character.*" This breach can be an action or an omission, which will amount to an internationally wrongful conduct if a State ignored a legal duty to act.[58] Besides this material element of the breach, also a temporal element is required.[59] An act of a State only constitutes a breach of an international obligation if the State is bound by

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[53] G. VANTHEMSE, *Belgium and the Congo, 1885–1980*, Oxford, Oxford University Press, 2012, 14-32.
[54] *Ibid.*
[55] J. S. REEVES, "The Origin of the Congo Free State, Considered from the Standpoint of International Law", *AJIL* 1909, (99) 116; F. STARR, "The Congo Free State and Congo Belge", *The Journal of Race Development* 1911, (383) 389.
[56] The conduct of a State organ can only be attributed to the State if that organ is acting in its official capacity. See Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its 53rd Session, *UN Doc.* A/56/10 (2001) 30-143, article 4, par. 7 (hereafter: ILC Commentaries to the ARSIWA). There might be constructions possible that attempt to attribute King Leopold II's conduct to the Belgian State. For example, one could attempt to regard Belgium's indifference towards the harsh and violent policy of King Leopold II in the Congo as an omission that entails State responsibility. However, it does not seem indispensable for this paper to dive deeper in this conundrum.
[57] See para. 81-90. See also A. LAURO and B. HENRIET, "Geschiedschrijving vermag veel, maar kan niet alles: 10 misvattingen over de Belgische kolonisatie", *Knack*, 30 June 2019.
[58] J. CRAWFORD, *State Responsibility; The general part,* Oxford University Press, New York, 2013, 218.
[59] J. CRAWFORD, *State Responsibility; The general part,* Oxford University Press, New York, 2013, 240.

that obligation at the time the act occurs.[60] This can be regarded as an expression of the general principle of intertemporal law and non-retroactivity.

**27.** With regard to colonialism, the most difficult element to establish is the temporal element of the breach of international law. It is sometimes argued that colonialism was not violating international law at the moment that it happened, and that therefore State responsibility is excluded.[61] However, this reasoning is too simplistic and overlooks the complexity of the principle of intertemporal law, which will be set out in the following section.

## 2.2. INTERTEMPORAL LAW AS ONE OF THE MAIN CHALLENGES

**28.** A short note on the background and context of the principle of intertemporal law is provided, followed by an overview of various possible exceptions or moderations. It will become clear that the hurdle of non-retroactivity is difficult to overcome.

### *2.2.1. Meaning of the principle of intertemporal law*

#### a. Origins

**29.** The principle of intertemporal law can be regarded as the result of the universalization of international law, which enlarged the need for legal certainty and foreseeability.[62] The starting point for discussing intertemporal law is generally the dictum of the arbitrator M. HUBER in the *Island of Palmas* case of 1928 which states that "*a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.*"[63] This first element points out that the acts of States need to be judged on the basis of the law applicable at the time of those acts, and thus reflects the concept of non-retroactivity of legal rules.[64] This is a non-controversial principle that has been widely accepted,[65] and can be found

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[60] Article 12 ARSIWA.

[61] These authors refer to this argument: M. DU PLESSIS, "Reparations And International Law: How Are Reparations To Be Determined (Past Wrong Or Current Effects), Against Whom, And What Form Should They Take?" in M. DU PLESSIS, *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses,* Antwerp, Intersentia, 2007, (147) 152; R. E. HOWARD-HASSMANN, "Reparations to Africa and the Group of Eminent Persons", *Cahiers d'études Africaines 2004*, (81) 90; J. SARKIN, "The Coming of Age of Claims for Reparations for Human Rights Abuses Committed in the South", *International Human Rights Journal* 2004, (67) 67; S. THAROOR, "Saying Sorry to India: Reparations or Atonement?", *Harvard International Law Journal,* Online Scholarship Symposium 2018, https://harvardilj.org/2018/07/discussion-do-colonists-owe-their-former-colonies-reparations/, 3.

[62] T. O. ELIAS, "The Doctrine of Intertemporal Law", *AJIL* 1980, (285) 285; M. KOTZUR, "Intertemporal Law", *Max Planck Encyclopedia of Public International Law*, 2008, http://opil.ouplaw.com (A.2.4).

[63] PCA 4 April 1928 Island of Palmas Case, Netherlands/USA, *ICGJ* 392 (1928), 14.

[64] A. D'AMATO, "International Law, Intertemporal Problems", in R. BERNHARDT (ed.), *Encyclopedia of Public International Law, Volume 2*, Amsterdam, North Holland, 1992, (1234) 1235.

[65] J. CRAWFORD, *State Responsibility: The general part*, New York, Oxford University Press, 2013, 241; R. HIGGINS "Some Observations on the Inter-temporal Rule in International Law" in

in various domestic legal systems in the form of a constitutional provision or as a general principle in codes, statutes and case law.[66]

**30.** HUBER continued his reasoning with a second element of intertemporal law, which states that a distinction has to be made between the creation of rights and the existence of rights.[67] When a right is created, the law in force at that time is applicable.[68] However, the continued manifestation of the right has to be judged in the light of "*conditions required by the evolution of law*".[69] Here, HUBER refers to the necessity to also pay attention to changes and evolutions in the existence of rights,[70] pointing out that rights created under international law should not be seen as completely stable or rigid but as evolving over time, which can change the scope of a right.[71] This second element has been criticized, since it seems to contradict the first limb of HUBER's dictum and risks causing instability and uncertainty, especially in the specific context of the case at issue which dealt with the establishing and maintaining of territorial title.[72] However, it has been noted that outside the context of territorial title, the concept of evolving rights can be sensibly applied,[73] and can complement the first element, by providing the necessary flexibility alongside the stability of creation of rights.[74]

### b. Legal status and codification

**31.** The principle of intertemporal law is commonly regarded as a general principle of international law, which was firstly pointed out by H. LAUTERPACHT.[75] This is also supported by a resolution adopted by the *Institut de Droit International* in 1975, acknowledging that there exists a "*general principle of law by which any fact, action or situation must be assessed in the light of the rules that are contemporaneous with it.*"[76] Furthermore, it has been

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J. MAKARCZYK (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzystof Skubiszewski,* The Hague, Kluwer Law International, 1996, (867) 867; M. KOTZUR, "The temporal dimension: Non-retroactivity and its discontents" in A. TZANAKOPOULOS, *Research Handbook on the Law of Treaties*, 2014, (153) 160.

[66] J. WOODHOUSE, "The Principle of Retroactivity in International Law", *Transactions of the Grotius Society* 1955, (69) 69.

[67] PCA 4 April 1928 Island of Palmas Case, Netherlands/USA, *ICGJ* 392 (1928), 14.

[68] *Ibid.*

[69] *Ibid.*

[70] M. KOTZUR, "Intertemporal Law", *Max Planck Encyclopedia of Public International Law*, 2008, http://opil.ouplaw.com (B.2.6).

[71] J. CRAWFORD, *State Responsibility; The general part*, New York, Oxford University Press, 2013, 241-242.

[72] P.C. JESSUP, "The Palmas Island Arbitration"; *AJIL* 1928, 735–752; W. VERSFELT, *The Miangas Arbitration*, Utrecht, Kemink en Zoon, 1933, 14-16.

[73] J. CRAWFORD, *State Responsibility; The general part*, New York, Oxford University Press, 2013, 242.

[74] M. KOTZUR, "The temporal dimension: Non-retroactivity and its discontents" in A. TZANAKOPOULOS, *Research Handbook on the Law of Treaties*, 2014, (153) 160.

[75] H. LAUTERPACHT, *The Function of Law in the International Community*, Oxford, Clarendon Press 1933, 283-285.

[76] Resolution of the Institut de Droit International on the Intertemporal Problem in Public International Law (11 August 1975), *56 AIDI* 537 (1975), par.1.

argued that it could even amount to a rule of customary international law, since there is an extensive amount of state practice and existence of *opinio iuris*.[77]

**32.** The principle has also been laid down in various international instruments. First of all, the ILC Articles on State Responsibility have dedicated a provision to this. Article 13 ARSIWA states that "*an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.*" The ILC explains in the commentaries to the ARSIWA that this must be seen as an application of "*the general principle of intertemporal law*" that was formulated by HUBER in the *Island of Palmas* case.[78] However, it seems that only the first element of HUBER'S dictum is given effect with no reference to possible evolving rights, which has been the subject of criticism.[79]

**33.** Also the Vienna Convention on the Law of Treaties (VCLT), containing rules of customary international law,[80] makes explicit reference to the principle of non-retroactivity. Article 28 states that a treaty does not apply to acts or facts that happened before the treaty entered into force.[81] However, when the articles on the Law of Treaties were drafted there was discussion with regard to the necessity of addressing the wider notion of intertemporal law, which includes HUBER's second element giving attention to the evolution of the law.[82] Neither the ILC, nor the Vienna Conference itself was able to resolve the issue, resulting in the absence of any reference in the final Convention to evolutionary interpretation of obligations or evolving rights.[83] This provides an example of the general divergence of opinion on the precise formulation and understanding of the principle intertemporal law.[84]

**34.** It can be concluded that there is consensus on the basic meaning of intertemporal law, namely that legal rules cannot be applied retroactively, but that the evolutionary element is quite controversial. However, a progressive and evolutionary interpretation of legal rights and obligations has been fully accepted in a human rights context[85] and in various national constitutional traditions,[86]

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[77] A. BUSER, "Colonial Injustices and the Law of State Responsibility: The CARICOM Claim to compensate slavery and (native) genocide", *KFG Working Paper Series* 2016, (409) 419; M. KOTZUR, "The temporal dimension: Non-retroactivity and its discontents" in A. TZANAKOPOULOS, *Research Handbook on the Law of Treaties*, 2014, (153) 162.
[78] ICL Commentary to art. 13 ARSIWA, (1).
[79] P. TAVERNIER, "Relevance of the intertemporal law" in J. CRAWFORD, A. PELLET, and S. OLLESON (eds.), *The Law of International Responsibility*, Oxford, Oxford University Press, 2010, (397) 397-400.
[80] A. AUST, "Vienna Convention on the Law of Treaties" (1969), *Max Planck Encyclopedia of Public International Law*, 2006, http://opil.ouplaw.com (F.1.16).
[81] Vienna Convention on the Law of Treaties of 23 May 1969, *United Nations Treaty Series*, vol. 1155, 331 (hereafter: VCLT).
[82] T. O. ELIAS, "The Doctrine of Intertemporal Law", *AJIL* 1980, (285) 303- 305.
[83] ICJ 10 October 2002 Cameroon/Nigeria, Equatorial Guinea intervening, Separate Opinion of Judge Al-Khasawneh, *I.C.J. Reports* 2002, (492) 502-503.
[84] T. O. ELIAS, "The Doctrine of Intertemporal Law", *AJIL* 1980, (285) 303.
[85] See para. 48, referring to the often-quoted phrase of the ECtHR that the ECHR is a living instrument and has to be interpreted in the light of present-day conditions.
[86] W. REHNQUIST, "The Notion of a Living Constitution", *Texas Law Review* 1976, (693) 693.

which provides a strong argument for the same acceptance in general international law.

*2.2.2. Possible exceptions to the principle of intertemporal law*

**35.** The basic consequence of the principle of intertemporal law is straightforward: rules cannot apply retroactively. However, it can be questioned whether there are no qualifications or exceptions possible to this principle.[87]

**a. Retrospective acceptance of responsibility**

**36.** It is generally accepted that States can consent to the application of international rules that were not yet applicable at the time of the act in question.[88] The ILC recognizes that States can agree to provide compensation for damage caused by conduct that was not seen as a violation of international law at the time of the conduct.[89]

**37.** Although generally quite rare,[90] retrospective acceptance of responsibility is definitely an option in the context of reparation for colonialism, where, for example, a bilateral treaty between a former colonized country and its colonial power can establish voluntary recognition of past crimes and provide for reparations.[91] The treaty between Italy and Libya that was concluded in 2008 can provide an example, whereby Italy bound itself to paying 5 billion dollars for next 20 years as a compensation for the colonial rule in Libya from 1911-1943.[92]

**b. Continuing effects**

**38.** The Durban World Conference stated that colonialism still has continuing effects until today since it has "*led to racial discrimination and related intolerance*" and has contributed to "*lasting social and economic inequalities in many parts of the world today*".[93] Therefore, it could be argued that since the effects of colonialism are continuing, rules of international law that are

[87] The examination of possible exceptions to the principle of intertemporal law was also the reflex of the Special rapporteur of the ILC. See Second report on State responsibility by the Special Rapporteur James Crawford, 51st session of the ILC (30 April 1999), *UN. Doc.* A/CN.4/498 (1999), par. 41.
[88] J. CRAWFORD, *State Responsibility; The general part*, New York, Oxford University Press, 2013, 245.
[89] ILC Commentary to art. 13 ARSIWA, (6).
[90] *Ibid.*
[91] E. TOURME-JOUANNET, *What is a Fair International Society? International Law Between Development and Recognition,* Oxford, Hart Publishing, 2013, 192
[92] Treaty of Friendship, Partnership, and Cooperation between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya of 30 August 2008. See also para. 146-147.
[93] This is pointed out by par. 14 of the Durban Declaration (Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban 31 August-8 September 2001, UN General Assembly, (January 2002) *U.N. Doc.* A/CONF.189/12 (2002)).

contemporaneous with these effects should be applied to the initial conduct that caused these consequences.[94]

**39.** However, it seems that the Articles on State Responsibility rule out this reasoning. Article 14 (1) ARSIWA states that a breach of an international obligation without a continuing character has to be situated at the moment of the performance of the act, "*even if its effects continue*". Although the Belgian colonial rule can be seen as a continuing act during the colonial period, it was completed by the independence of Congo in 1960, which equates it with an instantaneous act within the meaning of article 14 (1) ARSIWA.[95] An act "*does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues.*"[96]

**40.** Therefore, the continuing harmful effects of certain conduct do not establish a breach of international law if the conduct was lawful at the time it occurred, which considerably diminishes this strategy to circumvent the intertemporal principle.[97]

### c. Human rights

**41.** Human rights obligations seem to provide a possible qualification to the principle of intertemporal law. It can be argued that human rights obligations fall into a special category insofar as intertemporal law is concerned, that can allow for modifications of the application of rules and treaties to past facts, because of modern developments in international law.[98] This reasoning has been initiated and supported by R. HIGGINS, with reference to the Dissenting Opinion of Judge TANAKA in the *South West Africa* Cases in 1966.[99] In this case, the interpretation of the rules on the mandate system laid down in the Covenant of the League of Nations was at stake.[100] South Africa argued that the applicable law should be interpreted as it stood in 1920, when current Namibia came under the administration of South Africa, however Judge TANAKA argued that contemporary law should be applied.[101] He stated that South Africa was not only prohibited from behaving "*in an inhuman way*" at the time of the case, but also during 40 years before, thus from the start of the mandate system.[102] According

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[94] A. BUSER, "Colonial Injustices and the Law of State Responsibility: The CARICOM Claim to compensate slavery and (native) genocide", *KFG Working Paper Series* 2016, (409) 426.
[95] J. CRAWFORD, *State Responsibility; The general part*, New York, Oxford University Press, 2013, 265.
[96] ILC Commentary to art. 14 ARSIWA, (6).
[97] A. BUSER, "Colonial Injustices and the Law of State Responsibility: The CARICOM Claim to compensate slavery and (native) genocide", *KFG Working Paper Series* 2016, (409) 426.
[98] A. A-KHAVARI, "The Passage of Time in International Environmental Disputes", *Murdoch University Electronic Journal of Law* 2003, www.austlii.edu.au/au/journals/MurdochUeJlLaw/2003/43.html, par. 31.
[99] R. HIGGINS, "Time and the Law: International Perspectives on an Old Problem", *International & Comparative Law Quarterly* 1997, (501) 516-517.
[100] Article 22 of the Covenant of the League of Nations, 29 April 1919.
[101] ICJ 18 July 1966, South West Africa Case, Liberia/ South Africa, Dissenting Opinion of Judge Tanaka, *I.C.J. Reports* 1966, 250-324.
[102] *Ibid.* 294.

to him, there already existed an obligation of non-discrimination for South Africa before the official recognition as customary international law, which is a mere clarification of this existing obligation and as authentic interpretation has retroactive effect.[103] Judge TANAKA thus advocates for evolutive interpretation of international law obligations, with reference to the recognition and development of human rights.

**42.** This approach might seem controversial, but similar or related reasonings have been adopted in other cases. First of all, the ICJ seems to have affirmed a progressive view of international obligations in the *Namibia Advisory Opinion*,[104] whereby it explained that "*an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation*", thereby taking into account the various developments in the field at issue.[105] The Court thus advocates an interpretation of international law obligations consistent with modern developments, in order to enable the respect for recently developed human rights, like the right to self-determination.[106]

**43.** Another example is a domestic case in Australia that seems to adopt the arguments of Judge TANAKA,[107] whereby it is noted that "*whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.*"[108]

**44.** Although not accepting retroactivity of human rights law,[109] the European Court of Human Rights has adopted an interesting approach to the interpretation of the European Convention of Human Rights. The Court has

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[103] *Ibid.* 293.

[104] Second report on State responsibility by the Special Rapporteur James Crawford, 51st session of the ILC (30 April 1999), *UN. Doc.* A/CN.4/498 (1999), par. 42.

[105] ICJ 21 June 1971, Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, *I.C.J. Reports* 1971, par. 53.

[106] It can be noted that this statement has been quoted in other case law. See for example: ICJ 26 February 2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina/Serbia and Montenegro, Joint Declaration of Judges Shi and Koroma *I.C.J. Reports* 2007, 280.

[107] A. A-KHAVARI, "The Passage of Time in International Environmental Disputes", *Murdoch University Electronic Journal of Law* 2003, www.austlii.edu.au/au/journals/MurdochUeJlLaw/2003/43.html, par.31.

[108] In the Mabo case, the indigenous Meriam people claimed a right of traditional ownership with regard to the islands in the eastern Torres Strait, which was eventually recognized by the High Court. The judge stated that their title had not been eliminated by British possession and that this title still exists today if it has not been where legally extinguished. (High Court of Australia (AUS) 3 June 1992, Mabo and Others v Queensland (No 2), 175 *CLR* 1, par. 97.) See also X., "Overturning The Doctrine Of Terra Nullius: The Mabo Case", *AIATSIS Research* 2008, https://aiatsis.gov.au/publications/products/case-summary-mabo-v-queensland.

[109] In contrast to the view of Judge Tanaka, which implies that "*the specific interpretation of the rights existed from the outset*", the European Court endorses "*an approach that merely requires human rights treaties, because of their nature, to be interpreted in accordance with contemporary international law or conditions in society*". See R. HIGGINS "Some Observations on the Inter-temporal Rule in International Law" in J. MAKARCZYK (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzystof Skubiszewski,* The Hague, Kluwer Law International, 1996, (867) 869- 870.

often recognized that "*the Convention is a living instrument which must be interpreted in the light of present-day conditions*", which is the practice of the different Member States.[110] This implies that human rights violations have to be evaluated in the light of our current understanding and interpretation of human rights.[111]

**45.** In 1999, the Special Rapporteur on the Draft Articles on State Responsibility mentioned in his report that this concept of evolutionary interpretation "*does not qualify the principle of intertemporal law*", since this mode of interpretation "*has nothing to do with the principle that a state can only be held responsible for breach of an obligation which was in force for that state at the time of its conduct.*"[112] The same view has been adopted by the ILC[113] with as a result that the ARSIWA do not refer to this possible exception in the context of human rights developments. It can definitely be argued that the human rights exception to non-retroactivity should be accepted more widely, but unfortunately it cannot be ignored that there is no sufficient ground for support.

### d. Ius cogens

**46.** *Ius cogens*, or peremptory norms of international law, can be defined as norms that are accepted and recognized by the international community of States as rules from which no derogation is permitted and can be modified only by a subsequent norm of general international law having the same character.[114] The ICJ has recognized certain rules as *ius cogens*, such as the prohibition of genocide[115] and the prohibition of torture.[116] The ILC also mentions the prohibition of slavery, racial discrimination and crimes against humanity as examples, together with the right to self-determination.[117]

**47.** It could be argued that, because of the special nature and significance of *ius cogens* norms, the retroactive application of these norms could be justified. The Vienna Convention on the Law of Treaties establishes certain rules with regard to treaties that violate *ius cogens*. First of all, article 53 VCLT establishes that a

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[110] See ECtHR 25 April 1978, No. 5856/72, Tyrer/United Kingdom, 2 EHRR 1 (the first case where the ECtHR used this phrase). See also for example: ECtHR 13 June 1979, No. 6833/74, Marckx/Belgium, 2 EHHR 330; ECtHR 24 February 1983, No. 7525/76, *Dudgeon/ United Kingdom*, 2 EHHR 149.

[111] G. LETSAS, "The ECHR as a living instrument: its meaning and legitimacy" in A. FØLLESDAL, B. PETERS and G. ULFSTEIN (ed.), *Constituting Europe, The European Court of Human Rights in a National, European and Global Context*, Cambridge, Cambridge University Press, 2013, 106-141.

[112] Second report on State responsibility by the Special Rapporteur James Crawford, 51st session of the ILC (30 April 1999), UN. Doc. A/CN.4/498 (1999), par. 43.

[113] ILC Commentary to art. 13 ARSIWA, (9).

[114] Article 53 VCLT.

[115] ICJ 26 February 2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina/Serbia and Montenegro, I.C.J. Reports 2007, par. 31; ICJ 3 February 2005, Armed Activities on the territory of the Congo, Democratic Republic of the Congo/Rwanda, I.C.J. Reports 2006, par. 64.

[116] ICJ 20 July 2012, Questions relating to the Obligation to Prosecute or Extradite, Belgium/Senegal, I.C.J. Reports 2012, par. 99.

[117] ILC Commentary to article 26 ARSIWA, (5).

treaty is void if it conflicts with a peremptory norm at the time of the conclusion of the treaty. The emergence of a new peremptory norm also renders an existing treaty which is in conflict with this norm void (article 64 VCLT). However, article 71 VCLT (which explains the consequences of the invalidity of a treaty which conflicts with a peremptory norm), and the commentaries of the ILC to its Draft Articles on the Law of Treaties,[118] show that *ius cogens* norms do not have retroactive effects. Also, in the context of State responsibility, retroactivity is excluded, since the ILC explains that when a new peremptory norm emerges, there is no retrospective assumption of responsibility.[119]

**48.** D. SHELTON has rightly pointed out that only very few authors have tried to invoke the concept of *ius cogens* to give retroactive effect to certain norms. She explains that this might be because the inclusion of the concept of *ius cogens* in the VCLT represented progressive development and not codification of international law.[120] The attempts to examine this issue more in-depth are indeed quite scarce. M. KOTZUR has recognized that *ius cogens* seems to put pressure on and question the principle of intertemporal law, whereby he argues that *ius cogens* limits a contemporaneous understanding in the sense that it transcends the traditional consent principle.[121] However, he does not enter in a more extensive examination of the issue. M. WESLEY has provided a conference paper that deals with the conflict between *ius cogens* and intertemporal law, advocating that there should be a presumption of retroactivity in case of legal questions involving *ius cogens* norms, but unfortunately, he does not provide clear arguments for this.[122]

**49.** It seems difficult to provide strong legal arguments for retroactivity of *ius cogens* norms, especially with the straightforward approach of the VCLT and the ARSIWA whereby this retroactivity is excluded.[123] Principles of morality, including the fact that colonialism was a repugnant system, cannot serve by themselves as a basis for legal liability, neither the recognized special status as *ius cogens* of a rule of international law,[124] like the principle of self-determination.

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[118] ILC Commentary to article 50 VCLT, (6).
[119] ICL Commentary to article 13 ARSIWA, (5).
[120] D. SHELTON, "The World of Atonement: Reparations For Historical Injustices", *NILR* 2003 (289), 310.
[121] M. KOTZUR, "The temporal dimension: Non-retroactivity and its discontents" in A. TZANAKOPOULOS, *Research Handbook on the Law of Treaties*, 2014, (153) 179.
[122] M. WESLEY, "Jus Cogens Norms and Intertemporal Law: An Unresolved Conflict at the Heart of International Law", Inaugural University of Liverpool Postgraduate Conference in International Law and Human Rights: International Law and Human Rights in Crisis, June 2016.
[123] A. BUSER, "Colonial Injustices and the Law of State Responsibility: The CARICOM Claim to compensate slavery and (native) genocide", *KFG Working Paper Series* 2016, (409) 427.
[124] L. MOFETT and K. SCHWARZ, "Reparations for the transatlantic slave trade and historical enslavement: Linking past atrocities with contemporary victim populations", *Netherlands Quarterly of Human Rights* 2018, (247) 254.

### e. Analogy with exceptions to the principle of legality in criminal law

#### *e.1. Principle of legality*

**50.** The principle of legality in criminal law, also known as the adage *nullum crimen, nulla poene sine lege,* implies that both punishable acts and sanctions must be laid down in a written text prior to the commission of the acts involved.[125] This principle does not only prohibit retroactive laws and criminal sanctions, it also requires that the law is sufficiently precise in stipulating the different elements of the crime and the corresponding sanctions.[126] The rationale behind the principle of legality is the protection of legitimate confidence, which implies that the law should not apply to someone who is not aware of violating that law with his conduct.[127]

**51.** It has been argued that the Nuremberg and Tokyo tribunals, and some of today's international criminal tribunals dealing with the conviction of war criminals, have derogated from this principle of legality.[128] This could provide an argument *per analogiam* for a possible exception to the principle of intertemporal law.

#### *e.2. Nuremberg and Tokyo tribunals*

**52.** The Nuremberg trials have to be situated in the aftermath of World War II. In 1945, the Allies concluded the London Agreement,[129] which laid down the individual criminal responsibility for violations of rules of international law on the prohibition of war and also established he International Military Tribunal (IMT, also known as "the Nuremberg Tribunal") with a mandate to exercise jurisdiction over three crimes: war crimes, crimes against humanity and peace crimes.[130]

**53.** The IMT, and also the Tokyo Tribunal, convicted almost all defendants, with sentences ranging from the death penalty to long prison sentences.[131] The judges managed to circumvent the alleged violation of the principle of legality by

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[125] S. GARIBIAN, "Crimes against humanity and international legality in legal theory after Nuremberg", *Journal of Genocide Research* 2007, (93) 94.
[126] D. O. PENDAS, "Retroactive Law and Proactive Justice: Debating Crimes against Humanity in Germany, 1945–1950", *Central European History* 2010, (428) 432.
[127] H. KELSEN, "Will the Judgment in the Nuremberg Trial constitute a Precedent in International Law?", *International Law Quarterly* 1947, (153) 164; J. TOMUSCHAT, "The Legacy of Nuremberg", *Journal of International Criminal Justice* 2006, (830) 835.
[128] E. TOURME-JOUANNET, *What is a Fair International Society? International Law Between Development and Recognition,* Oxford, Hart Publishing, 2013, 192.
[129] Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, *United Nations Treaty Series*, vol. 82, 279.
[130] Charter of the International Military Tribunal, Annex to the London Agreement, *United Nations Treaty Series*, vol. 82, 284.
[131] Z. D. KAUFMAN, "The Nuremberg Tribunal v. the Tokyo Tribunal: Designs, Staffs, and Operations," *John Marshall Law Review* 2010, (753) 762-763.

stating that the Charter of the IMT could be seen as an expression of pre-existing norms of international law, which meant that the involved crimes were already crimes in international law before the Nazi war criminals acted.[132] According to the tribunal, the *nullum crimen* principle does not impose a limitation on sovereignty, but is a principle of justice, which apparently can be overridden by sovereign will.[133]

**54.** The most reiterated criticism on the Nuremberg trial is the alleged violation of the principle of legality, and therefore also its corollary, the principle of non-retroactivity.[134] It has been argued that the London Agreement established criminal responsibility for acts that were not punishable at the time they were performed.[135] This represents a positivist view, claiming that no prosecution was possible, since there was no positive law at the time of conduct which made the acts punishable.[136] However, various strategies have also been used to justify this alleged derogation from the principle of legality, drawing inspiration from a more naturalist perspective on law. The first strategy, which can also be found in the judgement of the tribunal, argues that no actual violation of the principle of legality existed, since the Charter of the IMT expresses pre-existing international law, based on the conscience of the international community.[137] The second strategy acknowledges the violation of the principle of legality, but it claims that there are justifiable exceptions possible to this principle.[138] In this line, H. KELSEN mentions that exceptions to the principle of retroactivity that are compatible with the objective of the principle, which is to create justice, can be allowed.[139] This reasoning is further explored in the next section, which deals with natural law arguments.

**55.** To evaluate the persuasiveness and cogency of these arguments, it is necessary to make a distinction between the different categories of crimes. Firstly, there were no strong disagreements with regard to war crimes, since there already existed international law norms prescribing criminal sanctions for these crimes, like the Hague Convention No. IV of 1939 (which is considered

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[132] K. S. GALLANT, *The Principle of Legality in International and Comparative Criminal Law, Chapter 3: Nuremberg and Tokyo*, Cambridge, Cambridge University Press, 2008, 94; S. GARIBIAN, "Crimes against humanity and international legality in legal theory after Nuremberg", *Journal of Genocide Research* 2007, (93) 96.

[133] K. S. GALLANT, *The Principle of Legality in International and Comparative Criminal Law, Chapter 3: Nuremberg and Tokyo* (Draft), Cambridge, Cambridge University Press, 2008, 113.

[134] S. GARIBIAN, "Crimes against humanity and international legality in legal theory after Nuremberg", *Journal of Genocide Research* 2007, (93) 94.

[135] H. KELSEN, "Will the Judgment in the Nuremberg Trial constitute a Precedent in International Law?", *International Law Quarterly* 1947, (153) 164.

[136] K. SELLARS, "Imperfect Justice at Nuremberg and Tokyo", *EJIL* 2011, (1085) 1094.

[137] S. GARIBIAN, "Crimes against humanity and international legality in legal theory after Nuremberg", *Journal of Genocide Research* 2007, (93) 94; K. SELLARS, "Imperfect Justice at Nuremberg and Tokyo", *EJIL* 2011, (1085) 1094.

[138] S. GARIBIAN, "Crimes against humanity and international legality in legal theory after Nuremberg", *Journal of Genocide Research* 2007, (93) 94.

[139] H. KELSEN, "Will the Judgment in the Nuremberg Trial constitute a Precedent in International Law?", *International Law Quarterly* 1947, (153) 165.

international customary law).[140] However, with regard to crimes against humanity, it was vigorously argued that the principle of legality was violated since this legal category was only for the first time formulated at the London Conference in 1945.[141] This argument was immediately rebutted. Although the term "crimes against humanity" was only introduced in 1945, this referred to a multitude of crimes that were already punishable under national law, like theft and murder.[142] Therefore, the punishable character of crimes against humanity could be drawn back to general principles of international law.[143] Lastly, it has been argued that the prosecution for peace crimes seriously compromises the principle of legality, since these crimes were not laid down in law in any form before World War II.[144] The Nuremberg Tribunal waived this argument by referring to *inter alia* the Kellogg-Briand Pact as proof for the agreed renunciation of war and stating that since the defendants were aware of their immoral conduct, their conviction was not unjust.[145] Although this reasoning, embedded in natural law, is definitely relevant, it does not seem to be convincing enough to silent the discussion on the violation of the principle of legality.[146]

**56.** Convincing arguments thus support that criminal responsibility for both war crimes and crimes against humanity did not violate the principle of legality and did not constitute a retrospective application of rules.[147] Only the criminal liability for peace crimes (recourse to aggressive war) can be seen as a highly contested matter.[148]

*e.3. Possible analogy?*

**57.** It has been suggested by Judge AL-KHASAWNEH of the ICJ in his separate opinion in the *Cameroon v. Nigeria* case that an analogy can be drawn between the exceptions made to the principle of legality in criminal law on the one hand,

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[140] C. BURSCHARD, "The Nuremberg Trial and its Impact on Germany", *JICJ* 2006, (800) 807; K. S. GALLANT, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge, Cambridge University Press, 2008, 118.
[141] D. O. PENDAS, "Retroactive Law and Proactive Justice: Debating Crimes against Humanity in Germany, 1945–1950", *Central European History* 2010, (428) 432.
[142] C. BURSCHARD, "The Nuremberg Trial and its Impact on Germany", *JICJ* 2006, (800), 807; J. TOMUSCHAT, "The Legacy of Nuremberg", *Journal of International Criminal Justice* 2006, (830) 834.
[143] J. TOMUSCHAT, "The Legacy of Nuremberg", *Journal of International Criminal Justice* 2006, (830) 834.
[144] K. S. GALLANT, *The Principle of Legality in International and Comparative Criminal Law*, *Chapter 3: Nuremberg and Tokyo*, Cambridge, Cambridge University Press, 2008, 115.
[145] *Ibid.* 124.
[146] C. BURSCHARD, "The Nuremberg Trial and its Impact on Germany", *JICJ* 2006, (800), 810; K. S. GALLANT, *The Principle of Legality in International and Comparative Criminal Law*, *Chapter 3: Nuremberg and Tokyo*, Cambridge, Cambridge University Press, 2008, 155.
[147] C. BURSCHARD, "The Nuremberg Trial and its Impact on Germany", *JICJ* 2006, (800) 808; J. TOMUSCHAT, "The Legacy of Nuremberg", *Journal of International Criminal Justice* 2006, (830) 834-835.
[148] C. BURSCHARD, "The Nuremberg Trial and its Impact on Germany", *JICJ* 2006, (800), 810; K. S. GALLANT, *The Principle of Legality in International and Comparative Criminal Law*, *Chapter 3: Nuremberg and Tokyo*, Cambridge, Cambridge University Press, 2008, 113.

and to the principle of intertemporal law in international law on the other hand.[149] He claims that if it is possible to accept criminalization in cases where the crimes are not part of positive law, which was the case in Nuremberg with regard to the grave crimes in World War II, then there is "*no reason why a behaviour that is incompatible with modern rules of international law and morally unacceptable by modern values underlying those rules should be shielded by reference to intertemporal law.*"[150]

58. Similarly, several authors have argued that since the tribunals in Nuremburg and Tokyo have made a retroactive application of international law, this should also be possible in the case of responsibility claims for slavery and slavery trade,[151] and more generally when wrongful acts committed by States amount to the most serious breaches of human rights and humanitarian law.[152]

59. It should be noted that this analogy has been criticized. The courts of Nuremberg and Tokyo dealt with individual criminal responsibility and not State responsibility, which are two distinct cases.[153] This difference mainly lies in the specific features of international criminal law, since it only focuses on the conduct of natural persons and therefore concentrates on the establishment of very personal requirements such as *mens rea* and *actus reus*, while this is absent in the law on State responsibility.[154] Moreover, as mentioned above, it seems that for two of the three categories of crimes no violation of the principle of legality existed, which considerably weakens the argument that Nuremberg and Tokyo made a significant derogation from this principle. Furthermore, the sensitive political context of the Second World War also played an important role in the establishment of the war tribunals. Therefore, although the analogy is valuable, it cannot be considered to constitute a reasoning that is powerful enough on itself to override the principle of intertemporal law.

### f. Natural law arguments

60. Another argument for a possible exception to non-retroactivity can be drawn from natural law, whereby it is argued certain rules can be applied retroactively

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[149] ICJ 10 October 2002 Cameroon/Nigeria, Equatorial Guinea intervening, *I.C.J. Reports* 2002, Separate Opinion of Judge Al-Khasawneh, (492) 503, par. 16.
[150] ICJ 10 October 2002 Cameroon/Nigeria, Equatorial Guinea intervening, *I.C.J. Reports* 2002, Separate Opinion of Judge Al-Khasawneh, (492) 503, par. 16.
[151] H. BECKLES, *Britain's Black Debt: Reparations for Caribbean Slavery and Native Genocide*, Kingston, University of West Indies Press, 2013, 170; T. CRAEMER, "International Reparations for Slavery and the Slave Trade", *Journal of Black Studies* 2018, (694) 696; A. R. HIPPOLYTE, "Unearthing The Legitimacy Of Caricom's Reparations Bid", 2014, https://ssrn.com/abstract=2416790, 21-22.
[152] F. FRANCIONI, "Reparation for Indigenous Peoples: Is International Law Ready to Ensure Redress for Historical Injustices?" in F. LENZERINI (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives,* Oxford, Oxford University Press, 2008, 43.
[153] A. BUSER, "Colonial Injustices and the Law of State Responsibility: The CARICOM Claim to compensate slavery and (native) genocide", *KFG Working Paper Series* 2016, (409) 427.
[154] B. I. BONAFE, *The Relationship Between State and Individual Responsibility for International Crimes,* Leiden-Boston, Martinus Nijhoff Publishers, 2009, 49-50.

since these rules always have existed as natural law.[155] In this regard, the special nature of human rights (their "inherent and thus pre-existing" character) can be referred to.[156]

**61.** Various natural law arguments have been put forward in the context of the Nuremberg trial, which can be used to draw an analogy with possible exceptions to the principle of intertemporal law. Two different reasonings can be discerned, although reaching the same conclusion: a derogation from the principle of legality in criminal law can be justified in the case of the Nuremberg trial. Firstly, natural law doctrine often considers the principle of legality as constituting a principle of justice.[157] Consequently, retroactive laws that serve justice might be acceptable, since they are compatible with the *ratio* of the principle of legality.[158] The second reasoning holds that the principle of legality can be restricted by other higher principles, such as justice, equity and morality.[159] For example, H. KELSEN argues that a balancing exercise should be made and that in the case of Nuremberg a retroactive law should be allowed, since the necessity to punish "*those who were morally responsible for the international crime of the second World War*" weighs more than the principle of legality.[160]

**62.** Natural law doctrine therefore supports that exceptions to the principle of legality have to be accepted when this is compatible with the higher goal of legal justice.[161] This implies that if the actor knew or ought to have known the abhorrent and immoral nature of its conduct, the principle of legality does not apply.[162] This argument has also been used by the Nuremberg Trial: because the defendants knew or ought to have known that aggressive war was morally wrong, there was no injustice in convicting them criminally for peace crimes.[163] Similarly, the dissenting opinion of Justice H. BERNARD of the Tokyo Tribunal states that

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[155] J. A. KÄMMERER, "Colonialism", *Max Planck Encyclopedia of Public International Law* 2018, http://opil.ouplaw.com. See also for example: A. DORNBACH, "Retroactivity Law Overturned in Hungary", *E. Eur. Const. Rev.* 1992, (7) 7 (proponents of a retrocactive bill used natural law as an argument).
However, it has been argued that this runs completely counter to the basis of international law: the sovereign will of states. (Kämmerer).

[156] M. KOTZUR, "The temporal dimension: Non-retroactivity and its discontents" in A. TZANAKOPOULOS, *Research Handbook on the Law of Treaties*, 2014, (153) 180.

[157] S. GARIBIAN, "Crimes against humanity and international legality in legal theory after Nuremberg", *Journal of Genocide Research* 2007, (93) 99; H. KELSEN, "Will the Judgment in the Nuremberg Trial constitute a Precedent in International Law?", *International Law Quarterly* 1947, (153) 165.

[158] D. O. PENDAS, "Retroactive Law and Proactive Justice: Debating Crimes against Humanity in Germany, 1945–1950", *Central European History* 2010, (428) 452.

[159] S. GARIBIAN, "Crimes against humanity and international legality in legal theory after Nuremberg", *Journal of Genocide Research* 2007, (93) 100.

[160] H. KELSEN, "Will the Judgment in the Nuremberg Trial constitute a Precedent in International Law?", *International Law Quarterly* 1947, (153) 165.

[161] D. O. PENDAS, "Retroactive Law and Proactive Justice: Debating Crimes against Humanity in Germany, 1945–1950", *Central European History* 2010, (428) 452.

[162] S. GARIBIAN, "Crimes against humanity and international legality in legal theory after Nuremberg", *Journal of Genocide Research* 2007, (93), 100; D. O. PENDAS, "Retroactive Law and Proactive Justice: Debating Crimes against Humanity in Germany, 1945–1950", *Central European History* 2010, (428), 452.

[163] K. S. GALLANT, *The Principle of Legality in International and Comparative Criminal Law*, *Chapter 3: Nuremberg and Tokyo* (Draft), Cambridge, Cambridge University Press, 2008, 124.

the notion of crimes against peace is an expression of natural law, in the sense that they always have been a crime "*in the eyes of reason and universal conscience*".[164]

**63.** Transposed to the issue of reparations for colonialism, natural law discourse would seem to allow reparations on the basis of a moral responsibility of the Belgian State, since this would serve the higher principle of justice. However, caution is needed when legal and moral arguments are mixed. Arguments for moral responsibility are not necessarily convincing for the establishment of legal responsibility.

### g. Analogy with exceptions in national law

**64.** It can be pointed out that the retroactive application of constitutional principles and statutes is not uncommon in national law frameworks.[165] An example can be found in the case law of the United States Supreme Court, sometimes giving retroactive application of constitutional rulings and statutes if they are deemed "*absolute prerequisites to fundamental fairness*".[166] Also in Belgian national law, retroactivity of rules can be allowed if certain conditions are fulfilled.[167] The Belgian Constitutional Court has ruled that retroactivity can be justified in the case of special circumstances, especially when it is indispensable for the achievement of an objective of general interest.[168]

**65.** Therefore, it could be argued that analogous to various national systems, the retroactivity of certain international rules should be possible if there is a substantive justification available, like the fulfilment of a fundamental objective. However, it is difficult to find enough general support for this line of thinking.

### h. Teleological reduction of the principle of intertemporal law

**66.** A. BUSER proposes an interesting argument to circumvent the obstacles of the principle of non-retroactivity in the context of reparation claims for slavery and slave trade.[169] He argues that a teleological interpretation of the principle of intertemporal law could create possible exceptions.[170] As mentioned before, the

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[164] K. S. GALLANT, *The Principle of Legality in International and Comparative Criminal Law, Chapter 3: Nuremberg and Tokyo* (Draft), Cambridge, Cambridge University Press, 2008, 147-148. It can be noted that K. GALLANT questions this reasoning on two grounds: first, the human habit of aggressive war suggests there may not be a natural law against it and second, a natural law unformulated in any positive law hardly provides notice to persons that an act is criminal.

[165] D. SHELTON, "Reparations for Indigenous Peoples: The Present Value of Past Wrongs" in F. LENZERINI (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives,* Oxford, Oxford University Press, 2008, (47) 70.

[166] United States Supreme Court (US) 22 February 1989*,* 489 US 288, Teague/Lane, 314–315; United States Supreme Court (US) 12 June 1967, 388 US 293, Stovall/Denno*,* 297.

[167] Adv. RVS 30 January 2014, nr. 54.899/1, 237.

[168] GwH (BE) 30 October 2012, nr. 137/2012, *Arr.GwH 2010*, B.9.

[169] A. BUSER, "Colonial Injustices and the Law of State Responsibility: The CARICOM Claim to compensate slavery and (native) genocide", *KFG Working Paper Series* 2016, (409) 432-433.

[170] *Ibid.*

*ratio* of this principle is legal stability and certainty, since States should be able to rely on the existing law to guide their actions. However, "*reliance on legal stability may not be legitimate and factually weaker if a rule is openly contested, in transition or fundamentally unjust.*"[171] In this regard, it can be noted that not only the right to self-determination was in development at the end of the Belgian colonial rule,[172] colonization as such must also be seen as fundamentally unjust.[173] Therefore, since the trust in legal stability of fundamentally unjust law "*does not deserve legal protection, retroactive application of new rules does not infringe legal certainty in the case at hand.*"[174] It can thus be justified to apply modern international law to cases whereby a State would rely on the legal stability of unjust laws, since this would not be in accordance with the *ratio* of the principle of intertemporal law.

### *2.2.3. Conclusion*

**67.** The question of exceptions to the principle of intertemporal law is complex. Even though several interesting attempts have been made to modify the principle of non-retroactivity, it seems that currently the only certain and uncontested exception is the voluntary retrospective acceptance of responsibility. Since the exceptions that rely on human rights and *ius cogens* are both rejected by the ILC, this considerably reduces their strength, although their logic could definitely be followed and supported. Finally, the teleological approach introduces a valuable reasoning that might offer a possibility to reduce the impact of the principle of intertemporal law, although it should be noted that it has not (yet) found much support in case law and doctrine.

## 2.3. APPLICABLE LAW DURING COLONIALISM

**68.** If the principle of intertemporal law cannot be derogated from, it seems necessary to establish that colonialism in general, or certain specific events that happened during colonialism were contrary to international law in order to prove Belgian State responsibility. This section takes a closer look at the international law applicable during 'the colonial period', which is the period under which colonies were established and governed (for Belgium, this was from 1885-1960). Subsequently, the focus is put on the existence of forced labour in the Belgian Congo and the specific international rules on forced labour.

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[171] A. BUSER, "Colonial Injustices and the Law of State Responsibility: The CARICOM Claim to compensate slavery and (native) genocide", *KFG Working Paper Series* 2016, (409) 433.

[172] The right to self-determination can be described as "*a rule of international law by which the political future of a colonial or similar non-independent territory should be determined in accordance with the wishes of its inhabitants*". D. HARRIS and S. SIVAKUMARAN, *Cases and Materials on International law, 8th Edition*, London, Sweet & Maxwell, 2015, 100. This right was fully acknowledged in the UN Declaration of 1960. See Resolution 1514 (XV) of the UN General Assembly on the Declaration on the Granting of Independence to colonial countries and peoples (14 December 1960), *UN Doc.* A/RES/1514(XV) (1960).

[173] M. RENZO, "Why Colonialism Is Wrong", *Current Legal Problems,* 2019, 347-373: L. YPI, "What's wrong with Colonialism", *Philosophy & Public Affairs*, 2013, 158-191.

[174] A. BUSER, "Colonial Injustices and the Law of State Responsibility: The CARICOM Claim to compensate slavery and (native) genocide", *KFG Working Paper Series* 2016, (409) 433.

*2.3.1. General*

**69.** Public international law has enabled colonialism for decades, since it was used to establish colonial regimes and to justify colonial policies.[175] Colonialism thus took place under an international law framework and was legal at the time it happened.

**70.** The justification of colonialism has its origins in the doctrine of discovery, which can be defined as the principle that "*when European, Christian nations discovered lands unknown to Europeans, they automatically gained sovereign and property rights in the lands, even though indigenous people were already occupying and using the lands*".[176] Legitimate discovery requires *first* discovery, together with actual occupancy and possession.[177] It seems that by claiming that the discovered land was *terra nullius*, even though it was already inhabited, the European states appropriated themselves the right to take control.[178]

**71.** The acquisition of colonies goes far back in time: the first colonies were established by Portugal and Spain in the 15th-16th century.[179] These conquests were based on church law, since papal approvals enabled the acquisition of lands "*not hitherto discovered by others*".[180]

**72.** In the 19th century, public international law was actively used for delimiting interest zones and fixing borders of colonial territories.[181] This can partly be explained by the emergence of possible competing claims of states with regard to foreign territories, which made it necessary to find ways to avoid conflicts.[182]

**73.** An important event in this regard was the Berlin Conference (1884-1885).[183] The conference intended to manage the colonisation process in Africa and was attended by the major colonial powers.[184] Articles 34 and 35 of the General Act

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[175] B.-V. IKEJIAKU, "International Law is Western Made Global Law: The Perception of Third-World Category", *African Journal of Legal Studies* 2013, (337) 342; J. A. KÄMMERER, "Colonialism", *Max Planck Encyclopedia of Public International Law* 2018, *http://opil.ouplaw.com*; M. MUTUA, "What is TWAIL", *American Society of International Law Proceedings* 2000, (31) 33.

[176] United States Supreme Court (US) 27 February 1823, 21 U.S. 543, Johnson/McIntosh; R. J. MILLER, "The International Law of Colonialism: A Comparative Analysis", *Lewis & Clark L. Rev.* 2011, (847) 851.

[177] R. J. MILLER, "The Doctrine of Discovery: The International Law of Colonialism", *IPJLCR* 2019, (35) 39.

[178] *Ibid.* 41.

[179] L. N. MCALLISTER, *Spain and Portugal in the New World, 1492-1700,* Minneapolis, University of Minnesota Press, 1984.

[180] See: The Bull Inter Caetera (Alexander VI) (May 3, 1493). This can be found in F. G. DAVENPORT, *European Treaties Earing On The History Of The United States And Its Dependencies,* Washington, Carnegie Institution of Washington, 1917-1937, 71-78.

[181] J. A. KÄMMERER, "Colonialism", *Max Planck Encyclopedia of Public International Law* 2018, http://opil.ouplaw.com.

[182] *Ibid.*

[183] General Act of the Berlin Conference (26 February 1885), C 4361 1885.

[184] M. CRAVEN, "Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade", *London Review of International Law* 2015, (31) 32; J. SARKIN , "Reparations For Gross Human Rights Violations In Africa – The Great Lakes", in M. DU PLESSIS (ed.), *Repairing*

concluded at the Conference define the conditions under which colonial powers could "*take possession*" of land in Africa: a requirement of notification to the other Parties and the establishment of authority sufficient to protect existing rights and free trade (probably referring to effective occupation).[185] These were the only provisions relating to the acquisition of territory and therefore uncertainty about the precise legal nature of colonialism has remained. It seems that it must be regarded as something in between 'occupation' (which implies an original title) and 'protection' (which implies a derivative title).[186] This ambiguity is also shown by the fact that only sometimes consent was asked to the local rulers, in the form of treaties of protection.[187]

**74.** Congo was a special case, in the sense that since 1883, it was supervised by the Association Internationale du Congo (AIC), with King Leopold II as head, and it then acquired the status of a sovereign state ('Congo Free State').[188] After the Berlin Conference in 1884, Congo Free State came officially under the rule of King Leopold II. Congo Free State remained the personal property of King Leopold until 1908, when it was transferred to the state of Belgium and became a colony ('Congo Belge') because of the international indignation on the inhuman circumstances and exploitation.[189]

**75.** Public international law did not provide many rules on the governance of colonies and the rights of their inhabitants.[190] Colonies were regarded as the objects of international law rather than as subjects and the inhabitants of the colonies were denied any form of participation in the governance of the colony and treated as less worthy than western citizens.[191] This is clearly shown from the dual legal system that most colonial powers established, whereby European inhabitants were subject to the domestic law of the colonial power, while the native population was referred to either indigenous custom or specific rules adopted by the colonial government.[192] It is thus clear that under public international law, it was allowed to treat colonial population in a way that would not have been allowed in Europe.

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[185] M. CRAVEN, "Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade", *London Review of International Law* 2015, (31) 44; C. SCHMITT, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, New York, Telos Press, 2006, 219.

[186] M. CRAVEN, "Colonialism and Domination" in B. FASSBENDER and A PETERS (eds.), *The Oxford Handbook of the History of International Law,* Oxford, Oxford University Press, 2012, (862) 882.

[187] S. TOUVAL, "Treaties, Borders, and the Partition of Africa", *The Journal of African History*, 1966, (279) 282.

[188] F. STARR, "The Congo Free State and Congo Belge", *The Journal of race Development* 1911, 383-399.

[189] J. S. REEVES, "The Origin of the Congo Free State, Considered from the Standpoint of International Law", *AJIL* 1909, 99-118; J. SARKIN , "Reparations For Gross Human Rights Violations In Africa – The Great Lakes", in M. DU PLESSIS (ed.), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses*, 2007, Antwerp, Intersentia, (197) 202.

[190] J. A. KÄMMERER, "Colonialism", *Max Planck Encyclopedia of Public International Law* 2018, http://opil.ouplaw.com.

[191] *Ibid.*

[192] *Ibid.*

**76.** Colonialism was established, justified and maintained with the use of international law. The oppression of foreign people by Western states was considered as legitimate under international law.

*2.3.2. Forced labour*

**77.** In this section, the forced labour systems that existed in the Belgian Congo are examined and more particularly the extent to which the international applicable law at that time allowed this. First, an overview of the situation in Congo in the colonial period is given, and thereafter the precise role of the International Labour Organisation (ILO) and its Conventions is considered, together with the ECHR.

**a. Situation in the Belgian Congo**

*a.1. 1908-1930*

**78.** In 1908, Congo Free State, which had been the private property of King Leopold II since 1885, became officially a Belgian colony. The ruthless and harsh regime of King Leopold II, which had made an immense amount of victims was suppressed, but nonetheless forced labour continued to exist in the Belgian Congo.[193] The new Belgian colonial administration put its focus on the development of the colonial economy, whereby the main goal seemed to make the colony 'useful' for the Belgian State which required mobilizing workers as efficiently and cheaply as possible.[194]

**79.** A large number of workers was required in various fields for the economic development of the colony.[195] First of all, the agricultural sector, with plantations of cotton and palm oil, and the exploitation of raw materials like copper, gold and diamonds demanded a large workforce.[196] Also a lot of workers were needed for the construction of infrastructure, which was required for the optimal functioning of the mining industry and agriculture. Lastly, there was also (generally unpaid) communal labour, which included for example sanitation works and porter services.

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[193] M. EWANS, "Belgium and the colonial experience", *Journal of Contemporary European Studies* 2003, (167) 171; G. VANTHEMSE, *Belgium and the Congo, 1885-1980*, Oxford, Oxford University Press, 2012, 28.

[194] J. SEIBERT, "More Continuity Than Change? New Forms Of Unfree Labor In The Belgian Congo, 1908-1930" *Humanitarian Intervention and Changing Labor Relations* 2011, (369), 375.

[195] *Ibid.* 376-377.

[196] These plantations and mines were mostly owned by private companies through concessions with the Belgian State. This can be explained by the fact that, since the colony was supposed to be financially independent of Belgium, it relied completely on private capital, whereby the investors were given concessions for the exploitation of minerals and crops. See. J. SEIBERT, "More Continuity Than Change? New Forms Of Unfree Labor In The Belgian Congo, 1908-1930" *Humanitarian Intervention and Changing Labor Relations* 2011, (369), 375.

**80.** In this period, coercion and forced labour were frequently used.[197] Wage labour in the mines, plantations and infrastructure works were unattractive to the Congolese people for various reasons, like the poor working conditions and distance from family and community. Coercion became therefore common, since the colonial administration heavily relied on their private investors, who required an immense workforce.[198] Local administrators used deceptive and coercive means to ensure a flow of workers to the mines and plantations and employers became legally allowed to use force and penalties to coerce workers to carry out their contracts.[199]

**81.** Furthermore, after World War I, the free-market system was abolished and forced crops were introduced, whereby farmers were forced to sell their products to European dealers at fixed prices.[200] Everyone was thus required to participate in the economic development of the colony, without actually benefitting from it.

**82.** Another form of coercion in the Belgian Congo was the establishment of a 'head tax',[201] which can be seen as an indirect form of forced labour, since only through paid employment could many Africans hope to find the necessary money, as the International Labour Office has noted.[202]

*a.2. 1930-1960*

**83.** In the thirties, a very specific form of forced labour was established: obligatory labour for 'educational purposes' (officially named "*travaux d'ordre éducatif*", TOE), which consisted of a serious of compulsory tasks of varied nature, mainly in the cultivation of cash crops and local public works.[203] The legal framework of this system was laid down in the Decree of 5 December 1933, which would remain in force until the independence of Congo in 1960.[204]

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[197] S. VAN MELKEBEKE, "Coerced coffee cultivation and rural agency: The plantation-economy of the Kivu (1918–1940)" in M. VAN DER LINDEN and M. RODRIGUEZ GARCIA (eds.), *On Coerced Labour: Work and Compulsion after Chattel Slavery*, Leiden and Boston, Brill, 2016, (187) 187; J. SEIBERT, "More Continuity Than Change? New Forms Of Unfree Labor In The Belgian Congo, 1908-1930" *Humanitarian Intervention and Changing Labor Relations* 2011, (369), 384.

[198] M. EWANS, "Belgium and the colonial experience", *Journal of Contemporary European Studies* 2003, (167) 171.

[199] R. L. BUELL, *The Native Problem in Africa, volume 2*, New York, Macmillan Company, 1928, 539; J. SEIBERT, "More Continuity Than Change? New Forms Of Unfree Labor In The Belgian Congo, 1908-1930" *Humanitarian Intervention and Changing Labor Relations* 2011, (369) 382.

[200] J. SEIBERT, "More Continuity Than Change? New Forms Of Unfree Labor In The Belgian Congo, 1908-1930" *Humanitarian Intervention and Changing Labor Relations* 2011, (369) 384.

[201] *Ibid.*

[202] African Labour Survey of the International Labour Office, ILO_SR_NS48_engl, *Studies and Reports (New Series) of the International Labour Office* No.48, 1958, 295.

[203] V.F. SORIANO, "'Travail et progrès': Obligatory 'Educational' Labour in the Belgian Congo, 1933–60," *Journal of Contemporary History* 2018, (292) 293.

[204] See: A. MARON "Le décret du 5 décembre 1933. Son esprit et son application" *Centre d'Etude des Problèmes sociaux indigènes (CEPSI)* 1948, 109-129.

**84.** After the Second World War, European States and their colonies got in a wave of modernization of labour law. However, forced labour continued to exist in the Belgian Congo despite the changing mentality in other colonies (for example France's and the UK's), where coercive practices were abolished.[205] Belgium defended its compulsory labour system under the guise of the necessary education of the Congolese population,[206] which is a characteristic argument for supporting the Belgian paternalistic concept of colonialism.[207] However, economic interest was probably one of the more important considerations for maintaining forced labour, since this provided the main means of exercising economic control over the population.[208]

**85.** The system of obligatory educational labour was a clear case of forced labour, that came paired with the use of violence: "*the relations between the colonizers and the labourers entailed violent practices by the local officials such as forced detention of the individuals refusing to fulfil them or the use of a chicotte (leather whip).*"[209] Even though the system of educational labour was modified in 1955 and limited to only agricultural workloads, harsh penalties kept applicable and forced labour remained an important aspect of the Belgian colonial rule until the independence of Congo.[210]

### b. ILO and forced labour

**86.** The International Labour Organization (ILO) was established in 1919 in the context of the Treaty of Versailles after the end of World War I, and aimed first and foremost to improve working conditions.[211] It was later also given the responsibility by the League of Nations to address the issue of forced an compulsory labour, after the adoption of the Slavery Convention in 1926.[212]

**87.** However, it was clear from the beginning that the colonial powers participating in the ILO were not keen on applying the same standards and rules to their domestic territory as their colonies. Therefore, a 'colonial clause' was inserted in the ILO Constitution, which allowed colonial powers to exclude their

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[205] V.F. SORIANO, "'Travail et progrès': Obligatory 'Educational' Labour in the Belgian Congo, 1933–60," *Journal of Contemporary History* 2018, (292) 293.
[206] This shows some interesting similarities with the statements of the Chinese government justifying forced detention of the Muslim etnhic minority in 'reeductation centers', often accompanied by forced labour. See A. K. LEHR and M. BECHRAKIS, "Connecting the Dots in Xinjiang Forced Labor, Forced Assimilation, and Western Supply Chains", *CSIS (Centre for Strategic and International Studies),* www.csis.org, October 2019, 7.
[207] C. YOUNG, *Politics in the Congo: Decolonization and Independence*, Princeton, Princeton University Press, 1965, 33–72.
[208] V.F. SORIANO, "'Travail et progrès': Obligatory 'Educational' Labour in the Belgian Congo, 1933–60," *Journal of Contemporary History* 2018, (292) 307.
[209] V.F. SORIANO, "'Travail et progrès': Obligatory 'Educational' Labour in the Belgian Congo, 1933–60," *Journal of Contemporary History* 2018, (292) 294. See also: M. EWANS, "Belgium and the colonial experience", *Journal of Contemporary European Studies* 2003, (167) 171-172.
[210] V.F. SORIANO, "'Travail et progrès': Obligatory 'Educational' Labour in the Belgian Congo, 1933–60," *Journal of Contemporary History* 2018, (292) 312.
[211] Preamble of the Constitution of the International Labour Organization (ILO) (28 June 1919).
[212] D. WEISSBRODT and Anti-Slavery International, "Abolishing Slavery and its Contemporary Forms", OHCHR, HR/PUB/02/4, 12.

overseas territories from certain international labour standards.[213] Therefore, a Native Labour Code was drafted (distinct from the International Labour Code), containing a separate set of rules applicable to the colonies, containing for example the Forced Labour Convention of 1930.[214]

*b.1. Forced Labour Convention 1930*

**88.** In 1930, the ILO adopted the Forced Labour Convention, which defines forced labour as "*all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.*"[215] The Convention obliges Member States to "*suppress the use of forced or compulsory labour*" and foresees a transitional period during which forced labour for public purposes as an exceptional measure might still be allowed.[216] Even though this general prohibition of forced labour was a major breakthrough and accomplishment of the ILO, several exceptions allow States to continue using certain forced labour systems. The definition in the Convention excludes several types of work from being characterized as forced labour: military service, work as part of normal civic obligations, forced labour as a consequence of a court conviction, work in case of an emergency and minor communal services.[217] The Congolese people were expected to fulfil "*civic obligations of the citizens of a fully self-governing country*", but at the same time they were denied any civil right.[218] They were not given any rights, but only obligations.[219]

**89.** Belgium only ratified the Convention in 1944, and included several reservations.[220] The most extensive reservation was made in regards to article 19 of the Convention, that generally prohibits compulsory cultivation. Belgium "*empowers the administration to prescribe, under the head of agricultural training measures, that certain cultivation work shall be made compulsory where the indolence or improvidence of the population justifies such action*",[221] thereby allowing forced labour in agriculture.

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[213] D. R. MAUL, "The International Labour Organization and the Struggle against Forced Labour from 1919 to the Present", *Labor History* 2007, (477) 480.
[214] *Ibid.* 481.
[215] Art. 2(1) Forced Labour Convention of the ILO (28 June 1930), ILO/C/029 (1930).
[216] Forced Labour Convention of the ILO (28 June 1930), ILO/C/029 (1930).
[217] Art. 2(2) Forced Labour Convention of the ILO (28 June 1930), ILO/C/029 (1930).
[218] The Congolese people were not represented politically, they did not have the right to vote: see V.F. SORIANO, "'Travail et progrès': Obligatory 'Educational' Labour in the Belgian Congo, 1933–60," *Journal of Contemporary History* 2018, (292) 307.
[219] D. R. MAUL, *Human Rights, Development and Decolonization*, New York, Springer, 2012, 25.
[220] Wet van 20 mei 1943 houdende goedkeuring van het Verdrag betreffende de gedwongen of verplichte arbeid, aangenomen op 28 juni 1930, door de Internationale Arbeidsconferentie te Genève, *BS* 20 January 1944.
[221] Report of the Governing Body of the International Labour Office on the Working of the Convention (No.29) Concerning Forced or Compulsory Labour 1930, ILO, 32nd session Geneva, 1949, 18. Literally, the reservation was: "the competent authority may authorise recourse to compulsory cultivation as a means of agricultural instruction, if such a measure is justified by the idleness or improvidence of the population".

*b.2. Implementation and follow-up of the Forced Labour Convention 1930*

**90.** The Forced Labour Convention was followed by three other Conventions concerning forced labour, like for example the Penal Sanctions Convention which prohibited all penal sanctions for breach of contract, which has not been ratified by Belgium, and two non-binding Recommendations.[222] A further positive development was the adoption of the Declaration of Philadelphia in 1944, which laid down universal principles that were equally applicable to the colonies and came paired with "*Recommendations concerning Minimum Standards of Social Policy in Dependent territories*".[223]

**91.** In 1953, an *ad hoc* committee of the UN and the ILO drafted a report on the existence of forced labour systems that are politically and/or economically motivated.[224] The committee concluded that in several countries, like Belgium, economic forced labour systems seemed to exist. Belgium, next to Portugal, "*stood out from the other colonial powers because of the sheer amount of forced labour used in their African territories, and the brutality of the methods involved*", which were practices that did not amount to a 'normal' level of coercion.[225]

**92.** There were various allegations made against Belgium with regard to the existence of forced labour in Congo.[226] First of all, attention was drawn to compulsory cultivation in the guise of agricultural work carried out for educational purposes. The committee stated that was clear that compulsory cultivation was being imposed on large scale in the Belgian Congo for the production of food crops and products for export, which was leading to "*a system of forced labour for economic purposes*".[227] The same was concluded with regard to the various penal sanctions that are imposed on indigenous workers in case of breach of contract.[228] The committee confirmed "that certain forms of compulsory labour are still in existence" in the Belgian Congo.[229] This was again affirmed by the African labour Survey of 1958 which pointed out that

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[222] Forced Labour (Indirect Compulsion) Recommendation (28 June 1930) ILO/R/035; Forced Labour (Regulation) Recommendation, (28 June 1930) ILO/R/036; Recruiting of Indigenous Workers Convention of the ILO (20 June 1936) ILO/C/050; Contracts of Employment (Indigenous Workers) Convention (27 June 1939) ILO/C/064; Penal Sanctions (Indigenous Workers) Convention (27 June 1939) ILO/C/065.

[223] Declaration of the ILO concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia) (10 May 1944).

[224] Report of the *Ad Hoc* Committee on Forced Labour, Supplement No. 13 in the Official Records of the Sixteenth Session of the Economic and Social Council, *Studies and Reports (New Series) of the International Labour Office*, No. 36, 1953,

[225] D. R. MAUL, *Human Rights, Development and Decolonization*, New York, Springer, 2012, 207.

[226] Report of the *Ad Hoc* Committee on Forced Labour, Supplement No. 13 in the Official Records of the Sixteenth Session of the Economic and Social Council, *Studies and Reports (New Series) of the International Labour Office*, No. 36, 1953, 23.

[227] *Ibid.*, 25.

[228] *Ibid.*, 25.

[229] *Ibid.,* 27.

forced labour continued in the Congo as compulsory cultivation was still in force.[230]

**93.** Finally, the Abolition of Forced Labour Convention of 1957 prohibits specific types of forced labour "*(a) as a means of political coercion or education [...], (b) as a method of mobilising and using labour for purposes of economic development, (c) as a means of labour discipline, (d) as a punishment for having participated in strikes and (e) as a means of racial, social, national or religious discrimination.*"[231] However, this Convention does not seem of much relevance for this research, since it was only ratified by Belgium in 1961, thus after the independence of Congo.

### c. The ECHR

**94.** The European Convention of Human Rights (ECHR) of 1950 also includes a prohibition of forced labour.[232] Article 4 states that "*no one shall be required to perform forced or compulsory labour*". Similar exceptions as in the ILO Forced Labour Convention apply, military service, work as a consequence of detention or in case of emergency and normal civic obligations.

**95.** Belgium ratified the ECHR in 1955,[233] without including any reservation, which would imply that a narrower prohibition of forced labour was applicable to Belgium and Belgian Congo in comparison to the ILO Forced Labour Convention. However, the territorial application of the ECHR was limited with regard to colonies. Article 56 ECHR allows States to make a declaration that the application of the ECHR is extended to its dependent territories, but Belgium did not make this declaration with regard to Belgian Congo.[234] As a consequence, the field of application of the ECHR did not extend to Congo, notwithstanding that, at the relevant time, Belgium's domestic law treated Congo as part of its metropolitan territory.[235] It can be noted that, in more recent years, the ECtHR has allowed the extra-territorial application of the ECHR in some cases,[236] but it seems difficult to transpose this to Belgian Congo.

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[230] African Labour Survey of the International Labour Office, ILO_SR_NS48_engl, *Studies and Reports (New Series) of the International Labour Office* No.48, 1958, 298.
[231] Art. 1 Abolition of Forced Labour Convention of the ILO (25 June 1957) ILO/C/105.
[232] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, *ETS*, no.005.
[233] Wet van 13 mei 1955 houdende goedkeuring van het Verdrag tot bescherming van de rechten van de Mens en de fundamentele vrijheden ondertekend op 4 November 1950, te Rome, en van het Additioneel Protocol bij dit Verdrag, ondertekend op 20 Maart 1952, te Parijs, *BS* 19 August 1955.
[234] B. MILTNER, "Revisiting Extraterritoriality after Al-Skeini: The ECHR and Its Lessons", *Michigan Journal of International Law* 2012, (693) 703.
[235] European Commission on Human Rights 30 May 1961, No. 1065/61, X and others/Belgium, *Y.B. Eur. Conv. on H.R.* 260.
[236] D. C. BUDZIANOWSKA, "Some Reflections On The Extraterritorial Application Of The European Convention On Human Rights", *Wroclaw Review of Law, Administration and Economics* 2012, 51-60.

## 2.4. CONCLUSION

**96.** Establishing legal State responsibility for Belgium for its colonial rule has proven very difficult, since there are no uncontested arguments in favour of this. There always seem to be certain obstacles that are difficult to overcome, like the principle of non-retroactivity. However, this should not be blindly accepted. International law is failing many African countries, as well as other third world countries. Even though decolonization has been completed, it seems that international law itself still needs to be decolonized in certain aspects.

**97.** TWAIL (Third World Approaches to International Law) provides a valuable perspective to this issue. TWAIL is an academic movement that aims to address the injustices against third world countries that are the result of the hijacking of international law by developed countries, by deconstructing the colonial legacies of international law.[237] The reasoning of TWAIL is based on the observation that international law is Western, rather than universal. The initial development of international law only involved Western States, which used international law to justify colonialism, slavery and other acts of exploitation in developing countries and continue to use it to their advantage in a context of economic neo-colonialism and contemporary global imperialism.[238] According to this approach, international law has consistently ignored the increased cultural diversity of its subjects and is therefore almost entirely based on the intellectual, historical, and cultural experiences of only one region of the world, which renders the current regime of international law illegitimate.[239] TWAIL's main goal is to resist the current unfair international legal regimes and reform international law, like the law on State responsibility, with the inclusion of States from the global south.[240] The value of TWAIL's reasoning has frequently been recognized.[241] One example is the Separate Opinion of Judge CANÇADO TRINDADE in the *Chagos Archipelago* case of the ICJ, referring to a

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[237] B.-V. IKEJIAKU, "International Law is Western Made Global Law: The Perception of Third-World Category", *African Journal of Legal Studies* 2013, (337) 338; U. NATARAJAN, J. REYNOLDS, A. BHATIA and S. XAVIER, "Introduction: TWAIL - on praxis and the intellectual", *Third World Quarterly* 2016, (1946) 1946; V. VADI, "International Law and Its Histories: Methodological Risks and Opportunities", *Harvard International Law Journal* 2017, (311) 338.

[238] J. D. HASKELL, "TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law", *Canadian Journal of Law and Jurisprudence* 2014, (383) 391; B.-V. IKEJIAKU, "International Law is Western Made Global Law: The Perception of Third-World Category", *African Journal of Legal Studies* 2013, (337) 340 and 355; S. PRAKASH SINHA, "Perspective of the Newly Independent States on the Binding Quality of International Law", *International and Comparative Law Quarterly* 1965, (121) 127.

[239] M. MUTUA, "What is TWAIL", *American Society of International Law Proceedings*, 2000, (31) 36; M. KHOSLA, "The TWAIL Discourse: The Emergence of a New Phase", *International Community Law Review* 2007, (291) 292.

[240] J. GATHII, O. OKAFOR and A. ANGHIE, "Africa and TWAIL", *African Yearbook of International Law* 2010, (9) 12; B.-V. IKEJIAKU, "International Law is Western Made Global Law: The Perception of Third-World Category", *African Journal of Legal Studies* 2013, (337) 356; M. MUTUA, "What is TWAIL", *American Society of International Law Proceedings*, 2000, (31) 38.

[241] L. ESLAVA, "TWAIL Coordinates", *GroJIL-blog*, 1 April 2019.

comprehensive volume of TWAIL authors who argue that colonialism still exists today in mutated forms.[242]

**98.** Applying a TWAIL perspective to the issue of State responsibility for colonialism, it is argued that Western States were the main actors in the development of international law and mainly used it to serve their own interests.[243] Therefore, international law today does generally not allow for legal redress for historical injustices like colonialism and slavery because these Western States were the main perpetrators of this wrongdoing.[244] Western States did not only manipulate international law to their benefit and convenience, for example by using other standards for their colonies or by making reservations to universal treaties, seriously neglecting the dignity and rights of the people in the colonies, they also keep supporting a rather rigid legal framework that completely blocks the development of any viable exception to the intertemporal principle. This strongly reflects the still very unequal balances of power between the global north and south.[245] The fact that international law does not permit reparations for colonialism is the result of the continued one-sided and subjective development of international law, manifestly excluding former colonies and other third world countries.[246] International law should therefore be reformed and more inclusively developed, allowing the recognition of the right to reparations for colonialism.

# 3. REPARATIONS FOR COLONIALISM

**99.** This last chapter starts with setting out the context of the reparation movement for historical wrongs like colonialism. Then, the reparations framework of the law of State Responsibility is examined, after which the focus is put on two types of reparations for colonialism: apologies and the establishment of a truth commission.

## 3.1. REPARATIONS FOR HISTORICAL WRONGS

**100.** In the last decades, requests for justice for certain historical wrongs have become more frequent.[247] These historical wrongs are generally considered as

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See ICJ 25 February 2019, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, *I.C.J. Reports 2019,* Separate Opinion of Judge Cançado Trindade, (156) 172 (referring to L. ESLAVA, M. FAKHRI and V. NESIAH (ed.), *Bandung, Global History, and International Law - Critical Pasts and Pending Futures*, Cambridge, Cambridge University Press, 2017).

[243] K. MAGENDANE, "Ik heb geen koloniale verontschuldigingen van België nodig", Knack, 13 February 2019.

[244] T. THIPANYANE, "Current Claims, Regional Experiences, Pressing Problems: Identification of the Salient Issues and Pressing Problems in an African Post-colonial Perspective", *Human Rights In Development Yearbook* 2001, (33) 48.

[245] I. ADAM, K. ARNOUT, B. BEVERNAGE and others, "Congolese Kunst voor de Congolezen", *De Standaard*, 18 oktober 2018.

[246] See also V. NESIAH, "German colonialism, reparations and international law", *Völkerrechtsblog*, 21 November 2019.

[247] M. CHOWDRY and C. MITCHELL , "Responding to Historic Wrongs: Practical and Theoretical Problems", *Oxford Journal of Legal Studies* 2007, (339) 340.

grave human rights violations today although they were often legal at the time of their occurrence, which is for example the case for slavery and colonialism.[248] The effects of these historical wrongs often tend to persist today in the form of discrimination and continuing inequalities, and also by causing trauma, shame and self-denigration in victimized groups.[249]

**101.** Demands for different forms of reparations for colonialism have been voiced at various levels: through official statements and private initiatives, demonstrations and petitions, lawsuits and parliamentary resolutions.[250] It has been argued that the main purpose of reparations for colonialism should be to eliminate the power structures created by colonial rule, restore a sense of equality between African and Western countries and allow the acceptance of moral responsibility for the atrocities committed, in the concrete form of acknowledgement, apologies and compensation.[251] The awareness on the issue of reparations for the human rights violations committed during colonialism has gradually been growing, propelled by several events and developments that go back as far as the nineties.[252]

**102.** One of the founding documents for requests for reparations for colonialism and slavery on a world-wide scale is the Abuja Declaration, adopted in 1993 by the Pan-African Conference on Reparations for African Enslavement, Colonisation and Neo-Colonisation.[253] The Declaration "*calls upon the international community to recognise that there is a unique and unprecedented moral debt owed to the African peoples*" and "*urges the OAU to call for full monetary payment of repayments through capital transfer and debt cancellation*", stressing the (moral) responsibility rather than the (legal) guilt of Western nations.[254] In 1999, at a follow-up conference in Ghana the Accra Declaration on Reparations and Repatriation was adopted, which states that the West should pay the astronomic amount of 777 trillion US dollars to Africa

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[248] M. R. MARRUS, "Official Apologies and the Quest for Historical Justice", *Journal of Human Rights* 2007, (75) 82.

[249] M. FREEMAN , "Back To The Future: The Historical Dimension Of Liberal Justice", in M. DU PLESSIS, *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses,* Antwerp, Intersentia, 2007, (29) 33; J. THOMPSON, "Historical Injustice and Reparation: Justifying Claims of Descendants", *Ethics* 2001, (114) 116-117; M. R. MARRUS, "Official Apologies and the Quest for Historical Justice", *Journal of Human Rights* 2007, (75) 82.

[250] R. ALDRICH, "Apologies, Restitutions, and Compensation: Making Reparations for Colonialism" in M. THOMAS and A.S. THOMPSON, (ed.), *The Oxford Handbook of the Ends of Empire*, Oxford, Oxford University Press, 2018, (714) 714.

[251] A. P. LOMBARDO and R. E. HOWARD-HASSMANN, "Africans on Reparations: An Analysis of Elite and Activist Opinion", *Canadian Journal of African Studies/La Revue canadienne des études africaines* 2005, (517) 519; S. THAROOR, "Saying Sorry to India: Reparations or Atonement?", *Harvard International Law Journal*, Online Scholarship Symposium 2018, https://harvardilj.org/2018/07/discussion-do-colonists-owe-their-former-colonies-reparations/, 2.

[252] J. SARKIN, "The Coming of Age of Claims for Reparations for Human Rights Abuses Committed in the South", *International Human Rights Journal* 2004, (67) 67- 68.

[253] R. ALDRICH, "Apologies, Restitutions, and Compensation: Making Reparations for Colonialism" in M. THOMAS and A.S. THOMPSON, (ed.), *The Oxford Handbook of the Ends of Empire*, Oxford, Oxford University Press, 2018, (714) 714-715.

[254] The Abuja Declaration of the Pan-African Conference on Reparations For African Enslavement, Colonisation And Neo-Colonisation, (27-29 April 1993) in A.A. MAZRUI, *Black Reparations in the Era of Globalization*, New York, Institute of Global Cultural Studies, 2002, 135-138.

since "*the root causes of Africa's problems today are the enslavement and colonization of African people over a 400-year period*".[255] Another significant development in the nineties, although not directly related with reparations for colonialism, was the establishment of the South African Truth and Reconciliation Commission. This contributed to the reparation movement by making it more common to publicly acknowledge and investigate racist policies such as apartheid.[256]

**103.** At the Durban World Conference against Racism (WCAR) in 2001[257] the call for reparations for historical injustices like colonialism and slavery was discussed.[258] The Conference addressed the statement of African countries indicating a need for reparations. It pointed out that former slave-trading States and colonial powers have a legal and moral responsibility for their actions and therefore should provide adequate reparation.[259] Western States claimed that both factual and legal issues stood in the way of reparation claims and they therefore opposed the demands for concrete reparations and apologies.[260] Eventually, a compromise was reached in the final text of the WCAR.[261] This

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[255] The Accra Declaration on Reparations and Repatriation of the Truth Commission Conference (12 August 1999) in A. A. MAZRUI, *Black Reparations in the Era of Globalization*, New York, Institute of Global Cultural Studies, 2002, 139-143.

[256] R. ALDRICH, "Apologies, Restitutions, and Compensation: Making Reparations for Colonialism" in M. THOMAS and A. S. THOMPSON, (ed.), *The Oxford Handbook of the Ends of Empire*, Oxford, Oxford University Press, 2018, (714) 715.

[257] The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance was held by the United Nations in Durban, South Africa from the 30th of August to the 8th of September 2001.

[258] The UNGA had explicitly referred to *historical* causes of racism when it laid down the objectives of the conference, (UNGA Resolution 52/111, 1997) which opened the door for a discussion on historical grievances, like colonialism. See C. LENNOX, "Reviewing Durban: Examining the Outputs and Review of the 2001 World Conference against Racism", *Netherlands Quarterly of Human Rights* 2009, (191) 198; J. J. LINDGREN ALVES, "The Durban Conference against Racism and Everyone's Responsibilities", *Netherlands Quarterly of Human Rights* 2003, (361) 366.

[259] The African States had developed their position on the objectives and agenda of the Conference at the Regional Preparatory Conference in Dakar in early 2001. The Dakar Program of Action recommends two specific plans of action: an International Compensation Scheme for victims of slave trade and "*other transnational racist policies and acts*", and a Development Reparation Fund "*to provide resources for the development process in countries affected by colonialism*".

[260] C. N. CAMPONOVO, "Disaster in Durban: The United Nations World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance", *George Washington International Law Review* 34(4) 2003, (659) 678.

[261] In the Durban Declaration and Program of Action, slavery and slave trade are considered as crimes against humanity from then on, although not at the time they occurred. The system of colonialism was not recognized as an international crime but was identified as a cause of racism and social and economic inequality, thereby clearly establishing the link between colonialism and current racism and discrimination. In response to the demand for apologies and reparations from African States, the governments "*acknowledge and profoundly regret the massive human suffering*" caused by slavery and colonialism. It is noted that "that some States have taken the initiative to apologize and have paid reparations where appropriate, for grave and massive violations committed" and there is a call on all those who have not yet expressed remorse or issued apologies to find an appropriate way to contribute to restoring the dignity of the victims. Finally, the existence of a "*moral obligation*" of States "*to take appropriate and effective measures to halt and reverse the lasting consequences*" of colonialism and slave trade is acknowledged. See articles 99-102 of the Durban Declaration (Report of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban 31 August-8 September 2001, UN General Assembly, (January 2002) *U.N. Doc.* A/CONF.189/12 (2002)).

Declaration attempted to provide sufficient acknowledgement of the injustice caused by slave trade and colonialism, without imposing any concrete obligations for reparation on the Western States.[262] The Durban Conference was truly revolutionary since for the first time, the issue of reparations for historical injustice was seriously discussed on a global level including African, Asian and Western countries.[263] However, it also exposed a certain divisiveness and lack of consensus on the issue in the international community, indicating an unwillingness to agree on how to remedy historical wrongs.[264]

**104.** Advocacy groups such as *Colonialism Reparation* have also accelerated the debate on reparations, by strongly calling former colonial powers to condemn colonialism, apologize and pay compensations to the colonized countries.[265] Another significant development has been the publication of research and inquiries by historians and journalists bringing the gravity of the colonial atrocities to light. The main example is A. HOCHSHILD's "King Leopold's Ghost", revealing the cruelty of Belgian colonialism.[266]

**105.** Recently, the death of the American George Floyd in May 2020 and the following Black Lives Matter protests against police brutality against African Americans have sparked a new debate on reparations for slavery and colonialism at a global level.[267] At the 43rd session of the Human Rights Council in June 2020, the United Nations High Commissioner for Human Rights stated that the countries' failure to acknowledge and facing their past legacy of slave trade and colonialism lies behind today's racial violence, systemic racism, and discriminatory policing. [268] She therefore urged countries to confront their historical past, by making "*amends for centuries of violence and discrimination, including through formal apologies, truth-telling processes, and reparations in*

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[262] C. LENNOX, "Reviewing Durban: Examining the Outputs and Review of the 2001 World Conference against Racism", *Netherlands Quarterly of Human Rights* 2009, (191) 203.

[263] S. ANDERSON and M. MATSIMELA, "The reparations movement: An assessment of recent and current activism", *Socialism and Democracy* 2003, 17:1, (255), 256; R. E. HOWARD-HASSMANN, "Reparations to Africa and the Group of Eminent Persons", *Cahiers d'études Africaines* 2004, (81) 91; J. SARKIN, "The Coming of Age of Claims for Reparations for Human Rights Abuses Committed in the South", *International Human Rights Journal* 2004, (67) 69.

[264] A. BUSER, "Colonial Injustices and the Law of State Responsibility: The CARICOM Claim to compensate slavery and (native) genocide", *KFG Working Paper Series* 2016, (409) 413.

[265] www.colonialismreparation.org/en/who-we-are.html.

[266] R. ALDRICH, "Apologies, Restitutions, and Compensation: Making Reparations for Colonialism" in M. THOMAS and A. S. THOMPSON, (ed.), *The Oxford Handbook of the Ends of Empire*, Oxford, Oxford University Press, 2018, (714) 717; A. HOCHSHILD, *King Leopold's Ghost*, Boston, Mariner Books, 1998.

[267] See for example: A. DEWAN and M. KREVER, "An American policeman killed George Floyd. Now Europe is re-examining its colonial history", *CNN* 13 June 2020; L. GAMBINO, "Calls for reparations are growing louder. How is the US responding?", 20 June 2020, *The Guardian*; N. ONISHI, "George Floyd's Killing Forces Wider Debate on France's Slave-Trading Past", *The New York Times*, June 24 2020.

[268] Statement by Michelle Bachelet, UN High Commissioner for Human Rights at the 43rd session of the Human Rights Council Urgent Debate on current racially inspired human rights violations, systemic racism, police brutality against people of African descent and violence against peaceful protests, 17 June 2020.

*various forms*".[269] This shows that, almost three decades after the first formal demands for reparations for colonialism, the debate is more alive than ever.

## 3.2. REPARATIONS FRAMEWORK IN THE LAW OF STATE RESPONSABILITY

**106.** The Draft Articles on State Responsibility require the establishment of an internationally wrongful act for reparations to be awarded.[270] As discussed in the previous chapter, it is difficult to establish this State responsibility for colonialism. However, there is definitely merit in analysing the reparations framework of the ARSIWA. The Draft Articles provide an extensive toolbox for general principles and forms of reparation.[271] Furthermore, the ARSIWA contain universally acceptable notions of reparations widely supported by the international community.[272] This implies that both from a Belgian and African perspective, the structure and forms of reparations in the ARSIWA can be awarded legitimacy. Therefore, the ARSIWA can provide a meaningful framework for the examination of Belgian reparations for colonialism to its former colonies.

### *3.2.1. The obligation to make reparation*

**107.** In 1927, the Permanent Court of International Justice formulated the general principle of reparation: "*[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.*"[273] In other words, the breach of a primary obligation of international law necessarily entails a secondary obligation to make reparation for the caused injury.[274] The Court also established the principle of full reparation, stating that "*reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*"[275] These two

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[269] *Ibid.*
[270] Article 31 ARSIWA.
[271] L. VAN DEN HERIK, "Historical Inquiry as a Form of Colonial Reparation?", *Harvard International Law Journal*, Online Scholarship Symposium 2018, https://harvardilj.org/wp-content/uploads/sites/15/Herik-Reparations.pdf, 2.
[272] This is *inter alia* evidenced by various resolutions of the UNGA recognizing the value and importance of the ARSIWA. See for example Resolution 56/83 of the UN General Assembly on the Responsibility of States for internationally wrongful acts (12 December 2001), *UN Doc.* A/RES/56/83 (2001); Resolution 59/35 of the UN General Assembly on the Responsibility of States for internationally wrongful acts (2 December 2004), *UN Doc.* A/RES/59/35 (2004); Resolution 62/61 of the UN General Assembly on the Responsibility of States for internationally wrongful acts (6 December 2007), *UN Doc.* A/RES/62/61 (2007); Resolution 65/19 of the UN General Assembly on the Responsibility of States for internationally wrongful acts (6 December 2010), *UN Doc.* A/RES/65/19 (2010); Resolution 68/104 of the UN General Assembly on the Responsibility of States for internationally wrongful acts (16 December 2013), *UN Doc.* A/RES/68/104 (2013).
[273] PCIJ 13 September 1928, The Factory At Chorzow (Claim for Indemnity), *Series A, No. 17*, 29.
[274] B. STERN, 'The Obligation to Make Reparation' in J. CRAWFORD, A. PELLET and S. OLLESON, *The Law of International State Responsibility*, Oxford, Oxford University Press, 2010, 563.
[275] PCIJ 13 September 1928, The Factory At Chorzow (Claim for Indemnity), *Series A, No. 17*, 47.

principles have become the cornerstone of the international legal framework on remedies.[276]

*3.2.2. The ARSIWA framework: general principles*

**108.** Article 31 ARSIWA establishes the principle that "*the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act*", which includes both material and moral damage.[277] Full reparation implies that the injured State should be placed in the position as if no wrongful act occurred, regardless of the costs or consequences for the responsible State, thereby aiming for remedial justice.[278]

**109.** The commentary to the ARSIWA provides some further clarifications. Material harm of damage is not required for a reparation claim, since the impact on non-material interests of a State can suffice.[279] The importance of causality is only briefly touched upon, whereby it is clarified that injuries too remote or indirectly related to the wrongful act do not qualify for possible reparation.[280] Furthermore, the principle of proportionality should be observed in every case, although its application differs depending on the form of reparation.[281]

**110.** The ARSIWA does not give specific guidance on the special case of reparations for violations of human rights. However, the UNGA adopted "*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law*" in 2005,[282] providing useful and nuanced guidance on more sensitive human rights-related reparations claims.

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[276] D. SHELTON, "Righting Wrongs: Reparations in the Articles on State Responsibility", *Am. J. Int'l L.* 2002, (833) 835.
[277] Article 31 ARSIWA.
[278] D. SHELTON, "Righting Wrongs: Reparations in the Articles on State Responsibility", *Am. J. Int'l L.* 2002, (833) 844.
[279] ILC Commentaries to the ARSIWA, 92 (7); D. SHELTON, "Remedies and Reparation" in M. LANGFORD, W. VANDENHOLE, M. SHEININ and W. VAN GENUGTEN, *Global Justice, State Duties, The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law*, Cambridge, Cambridge University Press, 2013, (367) 376.
[280] D. SHELTON, "Righting Wrongs: Reparations in the Articles on State Responsibility", *Am. J. Int'l L.* 2002, (833) 846; B. STERN, "The Obligation to Make Reparation" in J. CRAWFORD, A. PELLET and S. OLLESON, *The Law of International State Responsibility*, Oxford, Oxford University Press, 2010, (564) 569.
[281] ILC Commentaries to the ARSIWA, 94 (14); B. STERN, "The Obligation to Make Reparation" in J. CRAWFORD, A. PELLET and S. OLLESON, *The Law of International State Responsibility*, Oxford, Oxford University Press, 2010, (564) 567.
[282] Resolution 60/147 of the UN General Assembly on 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 (21 March 2006), *UN Doc.* A/RES/60/147 (2006) (hereafter: "Basic Principles").

*3.2.3. Forms of reparation*

**111.** Article 34 ARSIWA establishes the three forms of reparations: restitution, compensation and satisfaction, which can be used separately or combined.[283]

**a. Restitution**

**112.** Restitution implies the re-establishment of "*the situation which existed before the wrongful act was committed*" and constitutes the primary form of reparation.[284] This means restitution is given preference, unless this is not materially possible or puts a disproportionate burden on the responsible State.[285] Restitution seems to be less relevant to the case of reparation for colonialism, although it can be noted that the principle of restitution might be applied to requests for repatriation of cultural artefacts to former colonies.[286] However, this discussion falls outside the scope of this research.

**b. Compensation**

**113.** If restitution cannot (fully) repair the harm caused, the responsible State has to compensate the financially assessable damage.[287] The right to compensation of the injured State is as well-established rule of international law.[288] The ARSIWA commentary stresses the importance of proportionality, stating that the amount of the compensation depends on the behaviour of both States involved and "*the concern to reach an equitable and acceptable outcome*".[289] The Basic Principles also mention that the compensation has to be proportionate to the gravity of the violation of human rights and circumstances of the case.[290]

**114.** Financial compensation for colonialism is a highly debated topic. Quantifying the amount of the compensation to be paid seems an impossible

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[283] B. STERN, "The Obligation to Make Reparation" in J. CRAWFORD, A. PELLET and S. OLLESON, *The Law of International State Responsibility*, Oxford, Oxford University Press, 2010, (564) 566.
[284] Article 35 ARSIWA.
[285] Article 35 ARSIWA; J. BARKER, "The Different Forms of Reparation: Compensation" in J. CRAWFORD, A. PELLET and S. OLLESON, *The Law of International State Responsibility*, Oxford, Oxford University Press, 2010, (599) 600-601; C. GRAY, "The Different Forms of Reparation: Restitution" in J. CRAWFORD, A. PELLET and S. OLLESON, *The Law of International State Responsibility*, Oxford, Oxford University Press, 2010, (589) 590.
[286] See T. SCOVAZZI, "Repatriation and Restitution of Cultural Property: Relevant Rules of International Law" in C. SMITH (ed.), *Encyclopedia of Global Archeology*, New York, Springer, 2014, 6318-6324.
[287] Article 36 ARSIWA.
[288] ICJ Gabcikovo Nagymaros, par. 152; J. BARKER, "The Different Forms of Reparation: Compensation" in J. CRAWFORD, A. PELLET and S. OLLESON, *The Law of International State Responsibility*, Oxford, Oxford University Press, 2010, (599) 604; J. CRAWFORD, *Brownlie's Principles of Public International Law,* 8th Edition, Oxford, Oxford University Press, 2012, 571.
[289] ILC Commentaries to the ARSIWA, 100 (7).
[290] Basic Principles, 15; G. ZYBERI, "The International Court of Justice and Applied Forms of Reparation for International Human Rights and Humanitarian Law Violations", *Utrecht L Rev* 2011, (204) 209.

task and therefore monetary compensation often faces practical objections.[291] Although it has been suggested to use current African debts and the economic situation as a guidance for the quantification, this would neglect the complexity of the issue.[292] Compensation as a *symbolic* form of reparation might be a more plausible course of action. Instead of claiming the full rectification or reparation of the harm caused by colonialism and considering the issue as 'settled', symbolic compensation aims at contributing to gradual reconciliation. Since this is a symbolic form of reparation and therefore qualifies as satisfaction, it will be further discussed under the next section.

**115.** As a side note, the special and interesting case of "*ex gratia* payments" is worth mentioning. This form of compensation is made without any admission of responsibility and as a matter of discretion.[293] States sometimes persistently refuse to accept legal responsibility for a violation of international law. In this case, the concept of *ex gratia* payments still allows for the injured person or State to be indemnified and receive monetary compensation.[294]

### c. Satisfaction

**116.** If restitution or compensation are impossible or are insufficient to repair the caused harm, the responsible State is under an obligation to give satisfaction.[295] Satisfaction is thus seen as the remedy of 'last resort' with a rather exceptional character.[296] Non-material or non-financially assessable injuries often cannot be repaired by restitution or compensation and therefore allow more easily for satisfaction.[297] Satisfaction has a symbolic character and can take different forms according to the situation, such as "*an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality*".[298] By publicly acknowledging the past injustice, for example by apologizing or setting up a truth commission, the responsible State demonstrates its awareness of the inflicted harm, thereby showing respect to the victimized

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[291] H. FRAIHI, "Our Colonial Past Should Make Us More Aware of Modern Forms of Slavery", *The Low Countries*, 11 June 2019; C. GAZZINI, "Assessing Italy's Grande Gesto to Libya", *Middle East Report Online*, 16 March 2009.

[292] R. E. HOWARD-HASSMANN, "Moral Integrity and Reparations to Africa", *Human Rights in Development Online* 2001, 16.

[293] J. CRAWFORD, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge, Cambridge University press, 2002, 222.

[294] J. M. PASQUALUCCI, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge, Cambridge University press, 2003, 274.
In the context of modern slavery, the Mazengo v Mzengi case is an example whereby a State (Tanzania) accepted to compensate a victim of slavery, without admitting legal responsibility. See P. WEBB and R. GARCIANDIA, "State Responsibility For Modern Slavery: Uncovering And Bridging The Gap", *International & Comparative Law Quarterly* 2019, (539) 564-565.

[295] Article 37 ARSIWA.

[296] R. B. BILDER, "The Role of Apology in International Law and Diplomacy", *Va. J. Int'l L.* 2006, (433) 451; A. P. LOMBARDO and R. E. HOWARD-HASSMANN, "Africans on Reparations: An Analysis of Elite and Activist Opinion", *Canadian Journal of African Studies/La Revue canadienne des études africaines* 2005, (517) 519; E. WYLER and A. PAPAUX, "The Different Forms of Reparation: Satisfaction" in J. CRAWFORD, A. PELLET and S. OLLESON, *The Law of International State Responsibility*, Oxford, Oxford University Press, 2010, (623) 625.

[297] ILC Commentaries to the ARSIWA, 106 (3-4).

[298] Article 37 ARSIWA.

State and recognizing its suffering.[299] The ARSIWA also clearly indicates the boundaries satisfaction has to observe: it "*shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.*"[300] Furthermore, satisfaction cannot be intended to have a punitive character.[301]

**117.** Apologies and statements of regret are a standard and common form of satisfaction.[302] Although apologies are frequently offered spontaneously, a judicial body can order the issuing of apologies in its ruling.[303] Since the list of possible forms of satisfaction under article 37 ARSIWA is not exhaustive, other remedies can also qualify as satisfaction, such as the establishment of an inquiry or truth commission.[304] This can be particularly suitable for cases involving serious human rights violations, like colonial crimes. The characteristics, merits and limits of apologies and truth commissions with regard to colonialism will be discussed in the next section.

**118.** A declaration of wrongfulness issued by a judicial body is another possible form of satisfaction.[305] In this regard, the ICJ has issued various judgement where it considered the declaration of wrongfulness as sufficient and adequate reparation for the breach of international law.[306]

**119.** As mentioned above, symbolic monetary compensation can also constitute a form of satisfaction.[307] For example, S. THAROOR argued that Britain should pay India one pound per year, payable for 200 years to atone for 200 years of imperial rule of Britain in India, with a focus on atonement, rather than on the financial aspect of the compensation.[308] The use of symbolic monetary compensation for colonialism in combination with other forms of reparations

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[299] G. COLLSTE, "Rectification for Atrocities Under Colonialism", *International Journal of Post-Colonial Studies* 2016, (852) 860.
[300] Article 37(3) ARSIWA. See: E. WYLER and A. PAPAUX, "The Different Forms of Reparation: Satisfaction" in J. CRAWFORD, A. PELLET and S. OLLESON, *The Law of International State Responsibility*, Oxford, Oxford University Press, 2010, (623) 635.
[301] ILC Commentaries to the ARSIWA, 107 (8).
[302] *Ibid.* (7).
[303] R. B. BILDER, "The Role of Apology in International Law and Diplomacy", *Va. J. Int'l L.* 2006, (433) 451.
[304] E. WYLER and A. PAPAUX, "The Different Forms of Reparation: Satisfaction" in J. CRAWFORD, A. PELLET and S. OLLESON, *The Law of International State Responsibility*, Oxford, Oxford University Press, 2010, (623) 633.
[305] *Ibid.* 631.
[306] ICJ 9 April 1949, The Corfu Channel Case, *I.C.J. Reports* 1949; ICJ 26 February 2007, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina/Serbia and Montenegro, *I.C.J. Reports* 2007. See J. CRAWFORD, *Brownlie's Principles of Public International Law,* 8th Edition, Oxford, Oxford University Press, 2012, 575; E. WYLER and A. PAPAUX, "The Different Forms of Reparation: Satisfaction" in J. CRAWFORD, A. PELLET and S. OLLESON, *The Law of International State Responsibility*, Oxford, Oxford University Press, 2010, (623) 632; G. ZYBERI, "The International Court of Justice and Applied Forms of Reparation for International Human Rights and Humanitarian Law Violations", *Utrecht L Rev* 2011, (204) 211.
[307] ILC Commentaries to the ARSIWA, 106 (5).
[308] S. THAROOR, "Saying Sorry to India: Reparations or Atonement?", *Harvard International Law Journal*, Online Scholarship Symposium 2018, https://harvardilj.org/2018/07/discussion-do-colonists-owe-their-former-colonies-reparations/, 4.

such as official apologies can definitely be valuable. It can give a clear signal that the former colonial power takes rectification seriously and also attempts to make a concrete difference by providing some tools to aid African development and rehabilitation and help to rebuild African cultural history.[309] However, there are numerous practical issues to overcome, such as the quantification problem and the question of who exactly should receive the compensation (the government, NGOs, individuals,...). Therefore, the realization of symbolic damages is complex. Western States do not seem very enthusiastic to explore this possibility and generally seem to have difficulties with establishing sufficient political support.[310]

**120.** Various other forms of satisfaction exist, such as the creation of a fund assigned to a humanitarian goal, which is labelled as "*constructive satisfaction*".[311] Public commemoration is another valuable form of satisfaction and is especially suitable for cases involving the violation of rights of a large group or community or violations that happened a longer time ago, such as in the case of colonialism.[312] The advantage of public commemoration, for example in the form of building monuments or (re)naming streets, lies in its more permanently visible character. Therefore, it could help to ensure that also future generations will be reminded of the historical injustice in question.[313]

## 3.3. TWO CASES OF SYMBOLIC REPARATION: APOLOGIES AND THE ESTABLISHMENT OF A TRUTH COMMISSION

**121.** The UN Working Group recommended Belgium in 2019 to issue a formal apology and establish a truth commission in order to face its colonial past. Furthermore, in the tumultuous spring and summer of 2020, the idea of a Belgian truth commission took a more concrete shape and the Belgian King expressed its "*deepest regrets*" for the suffering inflicted on the current DRC under Belgian rule, thereby coming close to issuing a formal apology. Therefore, it seems valuable to examine these forms of reparations more closely and assess their suitability and limitations.

### *3.3.1. Apologies*

**122.** In the last two decades, formal apologies for historical injustices have become more common. This development has been referred to as "*a wave of*

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[309] G. COLLSTE, "Rectification for Atrocities Under Colonialism", *International Journal of Post-Colonial Studies* 2016, (852) 860; A. P. LOMBARDO and R. E. HOWARD-HASSMANN, "Africans on Reparations: An Analysis of Elite and Activist Opinion", *Canadian Journal of African Studies/La Revue canadienne des études africaines* 2005, (517) 519 and 543.

[310] R. ALDRICH, "Apologies, Restitutions, and Compensation: Making Reparations for Colonialism" in M. THOMAS and A.S. THOMPSON, (ed.), *The Oxford Handbook of the Ends of Empire*, Oxford, Oxford University Press, 2018, (714) 728-729.

[311] E. WYLER and A. PAPAUX, "The Different Forms of Reparation: Satisfaction" in J. CRAWFORD, A. PELLET and S. OLLESON, *The Law of International State Responsibility*, Oxford, Oxford University Press, 2010, (623) 633.

[312] C. DROEGE, "The Right to a Remedy and to reparation for gross human rights violations, a practitioners' guide", *International Commission of Jurists* 2006, 147.

[313] *Ibid.*

*apologies*", the "*apology phenomenon*" or "*the age of apology*".[314] Examples include the repeated apologies of Japan for its aggression during World War II,[315] the multiple apologies of Canada to its indigenous people for the forced system of residential schools[316] and the apology of the King of the Netherlands for the use of violence during the Indonesian war of independence at the end of the Dutch colonial rule.[317] Apologies can differ significantly, with a variation in sincerity, scope, context and support base, with as a consequence the effect and impact of an apology potentially differing considerably.[318] Hereafter, the role of formal apologies as a possible form of reparation for colonialism is further examined.

### a. Meaning and requirements for a genuine and successful apology

**123.** An apology is a full-fledged formal symbolic remedy under international law.[319] Generally, the three main elements of an apology are the acknowledgement of the violation, the acceptance of the responsibility for the harm caused and the promise not to repeat the behaviour in the future.[320] However, the concurrence of these three elements is not a guarantee for a meaningful apology since also sincerity is required, which can appear from the expression of remorse and regret by the responsible actor.[321] The value that this emotional element is adding to the apology should be judged from the perspective of the recipient of the apology, and the balance between empathy and respect should constantly be maintained.[322]

**124.** Various other elements can play a role in the success of an apology. The public, ceremonial and formal recording of the apologies in writing, with the explicit naming of the wrongs in question can for example help to give more

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[314] R. B. BILDER, "The Role of Apology in International Law and Diplomacy", *Va. J. Int'l L.* 2006, (433) 459 and 469; R. BROOKS, *When Sorry Isn't Enough: The Controversy Over Apologies And Reparations For Human Injustice*, New York, NYU Press, 1999; M. R. MARRUS, "Official Apologies and the Quest for Historical Justice", *Journal of Human Rights* 2007, (75) 76.

[315] J.-M. COICAUD, "Apology: A Small Yet Important Part of Justice", *Japanese Journal of Political Science* 2009, (93) 117.

[316] Canada issued an apology in 2008 and in 2017. X, "Trudeau apology to aboriginal children", *BBC*, 24 November 2017, www.bbc.com/news/av/world-us-canada-42119158/trudeau-apology-to-aboriginal-children.

[317] M. VATIKIOTIS, "Dutch king's visit to Indonesia shows why apologies matter", *Nikkei Asian Review*, 16 March 2020.

[318] R. B. BILDER, "The Role of Apology in International Law and Diplomacy", *Va. J. Int'l L.* 2006, (433) 469.

[319] *Ibid.* 469.

[320] C. JENKINS, "Taking Apology Seriously" in M. DU PLESSIS, *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses*, Antwerp, Intersentia, 2007, (53) 60.

[321] R. B. BILDER, "The Role of Apology in International Law and Diplomacy", *Va. J. Int'l L.* 2006, (433) 438; R. E. HOWARD-HASSMANN, "Official Apologies", *Transitional Justice Review* 2012, (31) 38; M. R. MARRUS, "Official Apologies and the Quest for Historical Justice", *Journal of Human Rights* 2007, (75) 79; M. MINOW, *Between Vengeance and Forgiveness*, Boston, Beacon Press, 1999, 114; L. TAFT, "Apology Subverted: The Commodification of Apology", *Yale Law Journal* 2000, (1135) 1140.

[322] R. E. HOWARD-HASSMANN, "Official Apologies", *Transitional Justice Review* 2012, (31) 38.

weight and meaning to the apology.[323] The expression of the intention to work for good relations in the future implies a commitment on the long term and therefore enhances the sustainability of the apology.[324] Similarly, leaving the door open to further reparation actions (such as monetary compensation or other symbolic remedies) signifies a long term approach to the issue.[325] Lastly, patronizing, hypocritical or insulting wording should be avoided at all time.[326]

### b. Political apologies in inter-state relations

**125.** Political State apologies have specific features. State apologies are apologies that are officially issued by a State or government towards another State or community.[327] Political apologies are apologies for acts with continuing political relevance, such as sensitive wrongs or human rights abuses when either some victims are still alive or descendants of the immediate victims are still affected by violations from a more distant past.[328] Political apologies can have multiple functions, such as the restoration or amelioration of the relations between two States, the confirmation of respect for international law or the acknowledgement of suffering communities and the contribution to their full integration in society.[329]

**126.** Political apologies in inter-state relations raise some practical challenges. Issuing an apology, a State has to be represented by a public official, who often has no personal responsibility for or involvement in the offending conduct, which makes the expression of genuine remorse and regret slightly more complicated.[330] It seems that the Head of State or government or the ambassador of the responsible State to the injured State are regarded as suitable candidates for the job.[331] Also, due regard should be paid to the recipient of the apology, since a general apology to the other State might neglect certain nuances or forget

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[323] R. B. BILDER, "The Role of Apology in International Law and Diplomacy", *Va. J. Int'l L.* 2006, (433) 438; R. E. HOWARD-HASSMANN, "Official Apologies", *Transitional Justice Review* 2012, (31) 38.
[324] H. K. JOSEPHS, "The Remedy of Apology in Comparative and International Law: Self-Healing and Reconciliation", *Emory Intl L Rev* 2004, (53) 63.
[325] H. K. JOSEPHS, "The Remedy of Apology in Comparative and International Law: Self-Healing and Reconciliation", *Emory Intl L Rev* 2004, (53) 63; M. R. MARRUS, "Official Apologies and the Quest for Historical Justice", *Journal of Human Rights* 2007, (75) 79.
[326] R. B. BILDER, "The Role of Apology in International Law and Diplomacy", *Va. J. Int'l L.* 2006, (433) 438; J.-M. COICAUD, "Apology: A Small Yet Important Part of Justice", *Japanese Journal of Political Science* 2009, (93) 114.
[327] J.-M. COICAUD, "Apology: A Small Yet Important Part of Justice", *Japanese Journal of Political Science* 2009, (93) 110.
[328] J.-M. COICAUD, "Apology: A Small Yet Important Part of Justice", *Japanese Journal of Political Science* 2009, (93) 110; R. E. HOWARD-HASSMANN, "Official Apologies", *Transitional Justice Review* 2012, (31) 34.
[329] R. E. HOWARD-HASSMANN, "Official Apologies", *Transitional Justice Review* 2012, (31) 35 and 37.
[330] R. B. BILDER, "The Role of Apology in International Law and Diplomacy", *Va. J. Int'l L.* 2006, (433) 461; J.-M. COICAUD, "Apology: A Small Yet Important Part of Justice", *Japanese Journal of Political Science* 2009, (93) 110.
[331] See for example the Dutch and Japanese cases discussed later: para. 143 and 147.

certain communities or groups of people.[332] Furthermore, political apologies are subject to both national and international agendas. Therefore, they are often the result of long negotiations while possibly being influenced by other political events.[333]

**127.** Western States like the US have been criticized for their rather selective and pragmatic approach to the use of political apologies. This could indicate that Western States aim to obtain the credit for recognizing and acknowledging the harm they caused but at the same time hope that the world remains exactly as it was before the issuing of the apology.[334]

### c. Effects of apologies

**128.** Well-considered and sincere apologies can have a strong symbolic effect.[335] Although apologies may not have immediate concrete and practical consequences ("*apologies don't provide jobs*"),[336] the straightforward acknowledgement and recognition of the wrongdoing can have a big impact on the injured community.[337] The apology does not only allow for the members of that community to feel more respected and valued on a more internal level. An apology can also be part of the fight against discrimination and for equality, which is often at least partly rooted in the committed injuries and violations.[338] Moving away from denial and silencing shows a willingness to thoroughly deal with issues such as racial discrimination by taking an approach that involves the whole context, including shameful historical events.[339] An advantage of apologies is that they can be the catalyst of a gradual and ongoing process of reflection, taking responsibility and atonement because it allows for a constant debate and the raising of awareness. Rather than definitively closing a chapter and refusing to look back, an apology makes a new approach to the colonial history of a nation possible, setting a trend of openness and critical reflection.

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[332] R. B. BILDER, "The Role of Apology in International Law and Diplomacy", *Va. J. Int'l L.* 2006, (433) 462.
[333] J.-M. COICAUD, "Apology: A Small Yet Important Part of Justice", *Japanese Journal of Political Science* 2009, (93) 110.
[334] J.-M. COICAUD, "Apology: A Small Yet Important Part of Justice", *Japanese Journal of Political Science* 2009, (93) 110; M. GIBNEY and E. ROXSTROM, "The Status of State Apologies", *Human Rights Quarterly* 2001, (911) 936.
[335] M. FREEMAN, "Back To The Future: The Historical Dimension Of Liberal Justice" in M. DU PLESSIS, *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses*, Antwerp, Intersentia, 2007, (29) 50.
[336] R. B. WEYENETH, "The power of apology and the process of historical reconciliation", *The Public Historian* 2001, (9) 32.
[337] M. R. MARRUS, "Official Apologies and the Quest for Historical Justice", *Journal of Human Rights* 2007, (75) 93;
[338] J.-M. COICAUD, "Apology: A Small Yet Important Part of Justice", *Japanese Journal of Political Science* 2009, (93) 111.
[339] M. R. MARRUS,
"Official Apologies and the Quest for Historical Justice", *Journal of Human Rights* 2007, (75) 93; R. B. WEYENETH, "The power of apology and the process of historical reconciliation", *The Public Historian* 2001, (9) 32.

**129.** Political State apologies can have multiple effects on the international level. The international relations between the involved States can considerably ameliorate and the apologies can help to boost the international reputation and image of the apologizing State, since showing respect for moral norms and daring to take responsibility are considered valuable assets capable of increasing the internal and external influence of the State.[340] Issuing apologies for historical wrongs can also benefit the international legal order. By clearly condemning past violations of human rights that are recognized today, this strengthens the importance and value of human rights and gives a strong signal these rights should be taken seriously.[341] An apology reaffirms the validity of international norms, and human rights in particular and can thus contribute to the strengthening of the integrity of international legal order.[342] Furthermore, State apologies can help the formation of customary international law, since this can be considered as State practice, thus playing a role in the development of international law.[343]

### d. Limitations of apologies

**130.** A common criticism on issuing apologies for colonialism is that it would open a Pandora's box and that it would create uncertainty on how far we should go back in history with acknowledging and taking responsibility for past wrongs.[344] However, this argument can be easily refuted. The question on which historical wrongs should be apologized for should be defined by whether the injustice still has reverberations with negative effect in the present leaving morally relevant traces, which definitively is the case for colonialism.[345]

**131.** Another criticism is that apologies offered by State representatives who were not involved in the harm caused in the past, to people who are often not direct victims but descendants, seem worthless.[346] This translates in the claim that the Belgian government and Belgians in general have no reason to apologize, since they were not directly involved with the Belgian colonial past.[347] However this overlooks the concept of transgenerational responsibility, which implies that citizens and members of the same society have "*a collective responsibility for*

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[340] R. B. BILDER, "The Role of Apology in International Law and Diplomacy", *Va. J. Int'l L.* 2006, (433) 466.
[341] M. R. MARRUS, "Official Apologies and the Quest for Historical Justice", *Journal of Human Rights* 2007, (75) 97.
[342] R. B. BILDER, "The Role of Apology in International Law and Diplomacy", *Va. J. Int'l L.* 2006, (433) 473.
[343] *Ibid.* 459.
[344] B. LUTTIKHUIS, "Juridisch afgedwongen excuses, Rawagedeh, Zuid-Celebes en de Nederlandse terughoudendheid, in Historische excuses", *Low Countries Historical review* 2014, (92) 104; M. R. MARRUS, "Official Apologies and the Quest for Historical Justice", *Journal of Human Rights* 2007, (75) 90.
[345] G. COLLSTE, "Rectification for Atrocities Under Colonialism", *International Journal of Post-Colonial Studies* 2016, (852) 861.
[346] M. R. MARRUS, "Official Apologies and the Quest for Historical Justice", *Journal of Human Rights* 2007, (75) 90.
[347] R. ALDRICH, "Apologies, Restitutions, and Compensation: Making Reparations for Colonialism" in M. THOMAS and A.S. THOMPSON, (ed.), *The Oxford Handbook of the Ends of Empire*, Oxford, Oxford University Press, 2018, (714) 728.

*making reparations for the moral failures of their institutions and the officials responsible for them*".[348] A society bears the moral responsibility to ameliorate the consequences of the harm and injustice it has caused in the past.[349]

**132.** It has also been argued that the sincerity and spontaneity of official apologies often have to be called into question, since the risk exists that the apology is used politically to avoid accountability, aimed at short-term political benefits instead of long-term reconciliation.[350] However, an official apology always has an important political aspect, which should just be included in the range of different factors to take into account when assessing the context and impact of the apology.

**133.** A returning concern is the fear for legal claims against a State after it apologizes, because its apology might be regarded as the admission of legal responsibility.[351] For the case of Belgium, an unframed apology for colonialism might imply the consent to retroactive legal State responsibility.[352] However, Belgium could decide to clearly nuance the apology and stress the moral responsibility it assumes, avoiding a retrospective acceptance of legal responsibility.[353] Furthermore, the sums of possible compensation claims from individuals are generally relatively low, which should therefore not significantly impact the decision to make apologies.[354] For example, the fear for financial consequences did not stop the former Belgian Prime Minister G. VERHOFSTADT from issuing official apologies in 2000 for the Belgian role in the Rwandese genocide of 1994.[355]

**134.** Although the ARSIWA and its commentary only seem to regard apologies as a supplementary default remedy, this does not seriously consider "*the broader possible role or relevance of apology as an instrument of dispute management, reconciliation, or restorative justice*".[356] It should be noted that an apology by

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[348] J. THOMPSON, "Collective Responsibility for Historic Injustices", *Midwest Studies in Philosophy 2006*, (154) 166.
[349] R. E. HOWARD-HASSMANN, "Official Apologies", *Transitional Justice Review* 2012, (31) 33.
[350] B. BEVERNAGE, "Politieke verontschuldigingen in België, Enkele bedenkingen over een morele en politieke economie*", Low Countries Historical review* 2014, 80-91; J.-M. COICAUD, "Apology: A Small Yet Important Part of Justice", *Japanese Journal of Political Science* 2009, (93) 111.
[351] R. B. BILDER, "The Role of Apology in International Law and Diplomacy", *Va. J. Int'l L.* 2006, (433) 468; B. BEVERNAGE, "Politieke verontschuldigingen in België, Enkele bedenkingen over een morele en politieke economie*", Low Countries Historical review* 2014, (80) 104.
[352] See para. 39-40.
[353] R. B. BILDER, "The Role of Apology in International Law and Diplomacy", *Va. J. Int'l L.* 2006, (433) 468.
[354] S. DE FOER, "Wie betaalt voor de wreedheden uit het verleden?", *De Standaard*, 10 August 2019; R. TERMOTE, "Excuses aanbieden voor koloniale wandaden kan leiden tot schadeclaims", *De Standaard*, 14 February 2019.
[355] This is a statement of prof. A. VANDEVELDE. See S. DE FOER, "Wie betaalt voor de wreedheden uit het verleden?", De Standaard, 10 August 2019. See also: P. KERSTENS, ""Deliver Us from Original Sin": Belgian apologies to Rwanda and the Congo" in M. GIBNEY, R. E. HOWARD-HASSMANN, J.-M. COICAUD, and N. STEINER (ed.), *The Age of Apology, Facing Up to the Past*, Philadelphia, University of Pennsylvania Press, 2009, (187) 194.
[356] R. B. BILDER, "The Role of Apology in International Law and Diplomacy", *Va. J. Int'l L.* 2006, (433) 453.

Belgium can indeed play an important role in the process of coming to terms with its colonial past and acknowledging responsibility, but that it should never be seen as a sufficient 'solution' that definitively closes the chapter.[357] In this regard, the Nigerian writer B. OKRI rightly pointed out that awareness and education are indispensable, so that the truth can be passed on to the next generations.[358]

### e. The Belgian case: royal "regrets"

**135.** Before going deeper into the royal statement of regrets for the colonial past in June 2020, it is important to sketch the wider context. In the spring of 2020, the Black Lives Matter movement against racism and discrimination of black people in the United States spread to other countries. In Belgium, this translated into a movement targeting Belgium's colonial past. For example, various statues of King Leopold II were damaged, followed by a petition to remove these statues.[359] Belgium received therefore various encouragements to properly deal with and address its colonial history.

#### *e.1. "Deepest regrets" for Belgian colonial past*

**136.** On 30 June 2020, marking the 60th anniversary of the Democratic Republic of the Congo, the Belgian King expressed his "*deepest regrets*" for the Belgian colonial past. In a letter to the DRC president F. TSHISEKEDI, King Philippe wrote: "*During the time of the Congo Free State, acts of violence and brutality were committed that still weigh on our collective memory. Also in the colonial period that followed, suffering and humiliation were caused. I express my deepest regrets for the past injuries, the pain of which is regularly revived by the discrimination that is still all too present in our societies.*"[360] This constitutes the first time a Belgian reigning monarch has expressed regrets for Belgium's colonial past. The Belgian Prime Minister S. WILMÈS made it clear that the initiative came from the King himself.[361] However, the statements of the King are covered by the federal government and are in complete conformity with the position of the government.[362]

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[357] An apology can be seen as an insufficient and limited form of reparation, since, "*unless the apology is accompanied by direct and immediate actions that manifest responsibility for the violation, the official apology may seem superficial, insincere, or meaningless.*" M. DU PLESSIS, "Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery", *HRQ* 2003, (624) 655; M. MINOW, *Between Vengeance and Forgiveness*, Boston, Beacon Press, 1999, 116.

[358] K. STEYVAERT, "Moedeloosheid is een luxe", *De Standaard*, 11-12 April 2020.

[359] K. MAYDA, "Je ziet toch ook geen standbeeld van Adolf Hitler in Berlijn?", *De Standaard*, 3 June 2020; M. REYNEBEAU, "Sokkel onder Leopold II begint te wankelen", *De Standaard*, 20 June 2020.

[360] X, "Letterlijk. Brief koning aan Tshisekedi: "Ik houd eraan mijn diepste spijt te betuigen voor die wonden uit het verlenden"", *De Standaard*, 30 June 2020.

[361] X, "Koning Filip betuigt 'diepste spijt' voor Belgische wandaden in Congo", *Knack*, 30 June 2020.

[362] B. CASTEL, "Alexander De Croo: 'Onze ontwikkelingshulp in Congo is geen Wiedergutmachung'", *Knack*, 30 June 2020; "X, "Koning Filip betuigt 'diepste spijt' voor Belgische wandaden in Congo", Knack, 30 June 2020.

**137.** The statement received a lot of reactions. Generally, it has been positively received and marked as an 'historical' event.[363] However, an often returning reaction is that the expression of regrets does not suffice and only signifies a first step to reparation for the Belgian colonialism and should therefore lead to other actions by the Belgian State concerning its colonial past.[364] It has been argued that the statement opens the door to official apologies, and possibly also to financial compensation.[365] Furthermore, it could provide an appropriate occasion to properly address the colonial past in education and media and give more attention to the Congolese communities in Belgium.[366]

**138.** Before dissecting the royal statement and examining its meaning, it seems valuable to discuss domestic and foreign precedents of the expression of regrets or apologies for colonialism and specific events from the colonial period.

*e.2. Precedents*

**139.** On the Belgian domestic level, only apologies for specific events related to the colonial period have been issued. In 2002, Belgium issued apologies for the murder of the Congolese politician P. LUMUMBA just after the Congolese independence.[367] In 2019, former Prime Minister C. MICHEL formally apologized for the way Belgium has treated 'metissen' (children born out of a relation between a Belgian colonist and a local woman) during and after the colonial period.[368]

**140.** In March 2020, the Dutch King Willem-Alexander offered official apologies for the excessive violence used by the Netherlands in current Indonesia during the decolonization period, "*in the full realization that the pain and sorrow of the families affected continue to be felt today*".[369] This refers to the mass executions carried out by Dutch soldiers during the Indonesian War of

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[363] B. CASTEL, "Alexander De Croo: 'Onze ontwikkelingshulp in Congo is geen Wiedergutmachung'", *Knack*, 30 June 2020.

[364] This is the viewpoint of a.o. B. CEUPPENS, W. DE VRIENDT, M. Z. ETAMBALA, L. M. KANDOLO, K. MAGENDANE, N. NSAYI, M.-T. ROBERT and T.B.TANSIA. See B. CEUPPENS, "De brief is een begin, maar wat is de volgende stap?", De Standaard, 1 juli 2020; J.J.-C. LAURENCE, "Colonisation du Congo: des regrets, pas des excuses...", La Presse, 6 July 2020; G. PAELINCK and R. ARNOUDT, "Na de spijtbetuiging van koning Filip: wat is het verschil met excuses? En leidt dit tot herstelbetalingen?", VRT NWS, 30 June 2020; J. VERSTRAETE, D. VAN DEN BUIJS and R. ARNOUDT, "Belgen met Congolese roots: "Brief waarin koning Filip spijt over koloniaal verleden uitdrukt, mag geen eindpunt zijn"", VRT NWS, 30 June 2020; X, "Koning Filip betuigt 'diepste spijt' voor Belgische wandaden in Congo", Knack, 30 June 2020.

[365] B. CEUPPENS, "De brief is een begin, maar wat is de volgende stap?", De Standaard, 1 juli 2020; J. VERSTRAETE, D. VAN DEN BUIJS and R. ARNOUDT, "Belgen met Congolese roots: "Brief waarin koning Filip spijt over koloniaal verleden uitdrukt, mag geen eindpunt zijn"", VRT NWS, 30 June 2020.

[366] A. TORBEYNS, "Deze brief hadden we echt nodig", *De Standaard*, 30 June 2020.

[367] C. BRAECKMAN, "La Belgique s'excuse de la mort de Lumumba", *Le Soir*, 6 February 2002.

[368] K. VAN DER AUWERA, "Michel verontschuldigt zich in Kamer voor behandeling metissen in koloniale periode", *Knack,* 4 April 2019.

[369] A.-L. HOEK, "Een stap naar meer ruimhartigheid", *De Groene Amsterdammer*, 19 March 2020; M. VATIKIOTIS, "Dutch king's visit to Indonesia shows why apologies matter", *Nikkei Asian Review*, 16 March 2020; S. WIDIANTO, "Dutch king apologizes for 'excessive violence' in colonial Indonesia", *Reuters*, 10 March 2020.

independence from 1945-1949.[370] Reactions to this formal apology were quite mixed. Some political parties of the Dutch coalition government took offence because they claim they were not consulted about the official apologies and certain descendants from Indo-Dutch affected by Indonesian violence during the same period expressed that they felt humiliated and insulted by the apologies.[371] However, several historians and Dutch people from Indonesian descent welcomed the apologies and considered it as a big step towards full recognition and acknowledgement of the suffering caused by the Dutch colonial rule.[372] It should be noted that the apologies have a wider context and background. Litigation in Dutch courts has namely caused several developments in the way the Netherlands have dealt with this violent episode from their colonial past. The courts have awarded family members of the victims of the mass executions considerable monetary compensation, which provided a catalyst for some forms of reparations with regard to the Dutch colonial past, like the establishment of a civil settlement scheme and the setting up of an inquiry commission.[373]

**141.** The impact of these different actions by the Netherlands has been multifold. Firstly, the relations between Indonesia and the Netherlands seem to be improving and a constant dialogue is facilitated. Furthermore, it could be an encouragement for the Netherlands to debate on further reparations and acknowledgement with a more extended scope, possibly covering the full Dutch colonial history and not only the decolonization period.[374] Also, it seems that the awareness of Dutch people about the colonial past is being raised, aligning their views more with the historical reality, which is quite relevant in the light of recent research that has shown that most Dutch people are proud of their former empire and believe that Indonesia would be better off if it was still colonized.[375] Lastly, the Dutch acceptance of accountability could send a strong signal to other former colonial powers, like Belgium, that have violent colonial histories, to consider different forms of reparations to deal with the past.[376]

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[370] N. L. IMMLER, "Hoe koloniaal onrecht te erkennen? De Rawagede-zaak laat kansen en grenzen van rechtsherstel zien", *Low Countries Historical Review* 2018, (57) 58.

[371] J. HOEDEMAN, "Regeringspartijen geïrriteerd over onverwachte excuses koning", *Algemeen Dagblad*, 14 March 2020; S. QUEKEL, "Woede bij Indische Nederlanders: 'Onze ouders draaien zich om in hun graf door excuses Koning", *Algemeen Dagblad*, 10 March 2020; X, "Verrassing en ergernis over koninklijke excuses in Indonesië", *NOS*, 10 March 2020.

[372] A.-L. HOEK, "Een stap naar meer ruimhartigheid", *De Groene Amsterdammer*, 19 March 2020; L. NUBERG, "Excuses zijn zeker níet ongepast", *Het Parool*, 15 March 2020; X, "Verrassing en ergernis over koninklijke excuses in Indonesië", *NOS*, 10 March 2020.

[373] L. VAN DEN HERIK, "Historical Inquiry as a Form of Colonial Reparation?", *Harvard International Law Journal*, Online Scholarship Symposium 2018, https://harvardilj.org/wp-content/uploads/sites/15/Herik-Reparations.pdf, 4.

[374] A.-L. HOEK, "Een stap naar meer ruimhartigheid", *De Groene Amsterdammer*, 19 March 2020.

[375] YouGov, "Empires attitudes" 10 June - 17 December 2019, https://docs.cdn.yougov.com/g9th5mtevv/YouGov%20-%20Empires%20attitudes.pdf. See also P. BIJL, "Colonial memory and forgetting in the Netherlands and Indonesia", *Journal of Genocide Research* 2012, 441-461; P. BIJL, "Dutch Colonial Nostalgia across Decolonisation", *Journal of Dutch Literature* 2013, 128-149.

[376] M. VATIKIOTIS, "Dutch king's visit to Indonesia shows why apologies matter", *Nikkei Asian Review*, 16 March 2020.

**142.** Another precedent of apologies for colonialism is the Italy-Libya case. In 2008, Italy and Libya concluded a Treaty on "*Friendship, Partnership and Cooperation*", obliging Italy to pay 5 billion dollar worth of investments in Libyan infrastructure for the next 20 years as compensation for the excesses and crimes against Libyans during the Italian colonial rule.[377] In this context, the former Italian Prime Minister S. BERLUSCONI officially apologized and expressed his regrets for the events during the colonial period.[378]

**143.** The Italian-Libyan agreement seems to have a hidden agenda, raising some doubt on the sincerity of Italy's intentions. This is apparent from the fact that the abuses for which reparation is granted are not explicitly mentioned in the Treaty, constituting a considerable lack of history and memory.[379] The Treaty regards the colonial past as a definitively closed chapter, an issue that is settled and resolved, thereby smothering any possible discussion on the colonial past or chance for a process of recognition and commemoration.[380] Italy seems to have been driven by geopolitical considerations: Libya promised to give Italy priority with regard to the investment in Libyan gas and oil industry and support to tackle illegal immigration.[381] BERLUSCONI openly described the purpose of the treaty as "*fewer illegal migrants, more gas and more oil*".[382] Furthermore, Libya did not only gain a substantial amount of money and a moral victory over the country's former colonizers,[383] but also the reinforcement of the bilateral relations with Italy and the consequential strengthening of Libya's position at the international level.[384] By concluding the Friendship Treaty with Libya, it seems that Italy was only interested in strategic and economic gain by trying to silence any public

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[377] Treaty of Friendship, Partnership, and Cooperation between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya of 30 August 2008.

[378] A. BUFALINI, "Italian Colonialism in Somalia: issues of reparation for the crimes committed", *Sequência (Florianópolis)* 2017, (11) 30; N. RONZITTI, "The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?", *Bulletin of Italian Politics* 2009, (125) 125; S. SARRAR, "Gaddafi, Berlusconi sign accord worth billions", *Reuters*, 31 August 2008.

[379] See C. DE CESARI, "The paradoxes of colonial reparation: Foreclosing memory and the 2008 Italy–Libya Friendship Treaty", *Memory Studies* 2011, (316) 317, citing A. DEL BOCA, 'Solo soldi, la memoria non c'entra sui massacri nemmeno una parola', La Repubblica, 3 March 2009, 10,

[380] C. DE CESARI, "The paradoxes of colonial reparation: Foreclosing memory and the 2008 Italy–Libya Friendship Treaty", *Memory Studies* 2011, (316) 317; E. JONKER, "Over historische excuses, morele genoegdoening en verzoening" in Historische excuses, Low Countries Historical review, 76.

[381] Libya promised to collaborate with Italy and the EU on migration control and strengthening European external borders and allowed long- term Italian investment in oil-rich Libya. See C. DE CESARI, "The paradoxes of colonial reparation: Foreclosing memory and the 2008 Italy–Libya Friendship Treaty", *Memory Studies* 2011, (316) 316; G. OOSTINDIE, *Postcolonial Netherlands, Sixty-five years of forgetting, commemorating, silencing,* Amsterdam, Amsterdam University Press, 2011, 210.

[382] See C. DE CESARI, "The paradoxes of colonial reparation: Foreclosing memory and the 2008 Italy–Libya Friendship Treaty", *Memory Studies* 2011, (316) 316, citing G. GRAMAGLIA and L. GAROFALO, *Complici.* Rome, Editori Riuniti. 2011, 54; C. GAZZINI, "Assessing Italy's Grande Gesto to Libya", *Middle East Report Online*, 16 March 2009.

[383] C. GAZZINI, "Assessing Italy's Grande Gesto to Libya", *Middle East Report Online*, 16 March 2009.

[384] N. RONZITTI, "The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?", *Bulletin of Italian Politics* 2009, (125) 131.

debate on its colonial past, ensuring its national interests in the oil industry and obtaining guarantees for the migration issue, without being genuinely interested in issuing meaningful reparations for its colonial rule.[385] Therefore, the Italian apologies do not seem to reflect a genuine and sincere gesture.

**144.** As the last precedent of apologies for colonialism, Japan has issued multiple apologies to South Korea for the Japanese colonial rule and aggression.[386] However, the Japanese apologies have been criticized for being insincere, because of their careful and vague wording giving the impression that Japan is mainly attempting not to lose face rather than genuinely recognizing the caused harm.[387] The comprehensive apology issued by Japanese Prime Minister T. MURAYAMA in 1995 is regarded as the first explicit and clear apology for the Japanese colonial rule and aggression which "*caused tremendous damage and suffering to the people of many countries, particularly to those of Asian nations*", using terms such as 'profound remorse' and 'heartfelt apology', and has become a template for later apologies.[388] In the period of 2002-2006, Prime Minister K. JUNICHIRO apologized various times, and even included North Korea, which was regarded as quite revolutionary.[389] Another relevant apology is the statement by Prime Minister N. KAN in 2010, whereby he acknowledged that the forcibly imposed colonial rule deprived South Koreans of their "*nation and culture*" and harmed "*their ethnic pride*".[390] Although officially welcomed by the South Korean government, it seems that South Koreans were not impressed by this scripted statement adding to the list of similar apologies, and expect a genuine apology of a new dimension from Japan, supported by concrete actions.[391] Japan has been especially targeted for its practice of coercing women to work as sex slaves for the Japanese military during World War II, today known as "comfort women".[392] In 2015, as the result of a bilateral agreement concerning comfort women, Japan officially took responsibility (not explicitly moral or legal)[393] and

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[385] C. GAZZINI, "Assessing Italy's Grande Gesto to Libya", *Middle East Report Online*, 16 March 2009.

[386] J. LIND, "Apologies in International Politics", *Security Studies* 2009, (517) 528.

[387] J.-M. COICAUD, "Apology: A Small Yet Important Part of Justice", *Japanese Journal of Political Science* 2009, (93) 118.

[388] J.-M. COICAUD, "Apology: A Small Yet Important Part of Justice", *Japanese Journal of Political Science* 2009, (93) 117; J. KINGSTON, "Contextualizing the Centennial of Japanese Colonial Rule in Korea", *Asian and African Studies* 2011, (71) 74.

[389] L. BABICZ, "Japan–Korea, France–Algeria: Colonialism and Post-Colonialism", *Japanese Studies* 2013, (201) 209.

[390] J. KINGSTON, "Contextualizing the Centennial of Japanese Colonial Rule in Korea", *Asian and African Studies* 2011, (71) 73. [390] J. KINGSTON, "Contextualizing the Centennial of Japanese Colonial Rule in Korea", *Asian and African Studies* 2011, (71) 73.

[391] L. BABICZ, "Japan–Korea, France–Algeria: Colonialism and Post-Colonialism", *Japanese Studies* 2013, (201) 209.

[392] "*The effects of their sexual enslavement were so devastating that it is estimated that no more than 25 per cent of them survived the war and that most were unable to have children as a consequence of the multiple rapes and the diseases they contracted*". J.-M. COICAUD, "Apology: A Small Yet Important Part of Justice", *Japanese Journal of Political Science* 2009, (93) 118.

[393] Japan and South-Korea do not agree on the character of the assumed Japanese responsibility, so explicit references to legal or moral responsibility were avoided in the agreement. In that way, Japan can regard the agreement as establishing moral responsibility, while South Korea can see the provided funds as de facto state compensation following legal responsibility. N. KUMAGAI, "The

offered official apologies, accompanied by the payment of around 9 million US dollars to a foundation for comfort women.[394]

*e.3. Assessment and reflection*

**145.** Looking more closely at the formulation of the expression of regrets by the Belgian King, various elements significantly enhance the strength and meaning of the statement. First of all, it is remarkable that the King refers both to the brutalities of the period under the rule of King Leopold II as to the suffering caused by Belgium in 'Congo Belge'. This implies the recognition that not only the Congolese people were treated inhumanely under King Leopold II's rule, but also that the situation was not much better during the Belgian rule.[395] Furthermore, the King has explicitly recognized the relation between colonialism and current racism against and discrimination of black people in the Belgian society, which seems to reflect the conclusions of the UN experts in 2019.[396] Drawing the link between the historical suppression of the Congolese population and the current racism against Afro-Belgians is significant and meaningful.[397]Another powerful element is the encouragement of reflection and reference to the future work of the parliamentary truth commission.[398] The statement therefore does not intend to finally close a chapter, but leaves room for further discussion and consideration, which stands in sharp contrast to the Italy-Libya case. Lastly, the timing of the statement could not have been better. The anniversary of Congolese independence created a symbolic and meaningful moment to address the Belgian colonial past.[399] This considerably lifted the regrets, giving them more weight and the attention they deserved.

**146.** However, although the statement overall signifies an important and powerful step towards more recognition and reconciliation, certain elements seem to weaken its impact. Firstly, there is no explicit mentioning of the name of King Leopold II. This gives the impression that the royal house does not seem ready to express genuine regret and remorse for the atrocities committed by King Leopold II.[400] The statement also did not contain an explicit condemnation of colonialism.[401] Furthermore, the King only used the passive form when he addressed the brutality of the Belgian State. He therefore did not

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Background to the Japan-Republic of Korea Agreement: Compromises Concerning the Understanding of the Comfort Women Issue", *Asia- Pacific Review* 2016, (65) 74.

[394] N. KUMAGAI, "The Background to the Japan-Republic of Korea Agreement: Compromises Concerning the Understanding of the Comfort Women Issue", *Asia- Pacific Review* 2016, (65) 65.

[395] A. TORBEYNS, "Deze brief hadden we echt nodig", *De Standaard*, 30 June 2020.

[396] B. CEUPPENS, "De brief is een begin, maar wat is de volgende stap?", *De Standaard*, 1 juli 2020.

[397] B. CEUPPENS, "De brief is een begin, maar wat is de volgende stap?", *De Standaard*, 1 juli 2020; A. TORBEYNS, "Deze brief hadden we echt nodig", *De Standaard*, 30 June 2020; J. VERSTRAETE, D. VAN DEN BUIJS and R. ARNOUDT, "Belgen met Congolese roots: "Brief waarin koning Filip spijt over koloniaal verleden uitdrukt, mag geen eindpunt zijn"", *VRT NWS*, 30 June 2020; X, "Kalvin Soiresse: "Il est trop tôt pour des excuses officielles de la Belgique à la République Démocratique du Congo"", *rtbf*, 30 June 2020.

[398] M. REYNEBEAU, "Spijt komt altijd te laat", *De Standaard*, 1 July 2020.

[399] J.-C. LAURENCE, "Colonisation du Congo: des regrets, pas des excuses...", *La Presse*, 6 July 2020.

[400] K. MAGENDANE, "De magere brief van de koning", *De Standaard*, 4 July 2020.

[401] W. PAULI, "Mark Van den Wijngaert: 'Filip staat sterk'", *Knack*, 30 June 2020.

expressly mention the involved actors, such as the Belgian colonial administration, also leaving Belgian companies that significantly benefited from colonialism unaddressed.[402]

**147.** It is relevant that the King did only express his regrets, and did not provide official excuses for the Belgian colonial past. It has been argued the main reason is that he did not want to preempt the work of the parliamentary truth and reconciliation commission.[403] The often-cited connection between official apologies by the State and the obligation to pay financial compensation could also have played a role. The question can therefore be asked if there is a legal difference between 'regrets' and 'apologies'. It seems that there is a chance that apologies could be interpreted as the admission of fault and thus as an assumption of responsibility, while this would not be case for regrets.[404] However, the intention to assume this retrospective responsibility should be entirely clear and straightforward, so it is possible to issue apologies that do not necessarily have this effect.[405]

**148.** It can be argued that the issuing of official apologies for the Belgian colonial past by the Belgian government could be valuable for the Congolese people and other people of African descent in Belgium. The possibility of official apologies has not been excluded by the different Belgian political parties.[406] Furthermore, many Afro-Belgians advocate for the issuing of these official apologies.[407] These apologies "*would constitute a symbolic beginning of new, equal relation between Belgium and DRC.*"[408] They are the "*only basis for serious and genuine reparation, if properly addressed to the Congolese people instead of the Congolese political elite*"[409]. Furthermore, official apologies from Belgium to the Congolese people for its colonial rule would be able to strengthen the international relations between the countries. Apologies could also have a big impact at the Belgian national level, since the apologies can bring the national community in all its diversity together, by sending a clear message to Afro-Belgians that Belgium is not afraid to own up to its past mistakes, and commits to building a better future with more inclusion and equality.

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[402] M. REYNEBEAU, "Spijt komt altijd te laat", *De Standaard*, 1 July 2020.
[403] X, "Kalvin Soiresse: "Il est trop tôt pour des excuses officielles de la Belgique à la République Démocratique du Congo"", *rtbf*, 30 June 2020.
[404] This is the point of view of J. WOUTERS, professor of international law at KULeuven. See M. VERBERGT and W. LECLUYSE, "Waarom koning Filip wel 'spijt' betuigt, maar geen excuses geeft", *De Standaard*, 30 June 2020.
[405] See paragraph 35.
[406] D. COPPI, "Congo: les partis ouvrent la porte à des excuses", *Le Soir*, 1 July 2020.
[407] See for example: B. CEUPPENS, 'De brief is een begin, maar wat is de volgende stap?', *De Standaard*, 1 juli 2020; A. TORBEYNS, "Deze brief hadden we echt nodig", *De Standaard*, 30 June 2020; J. VERSTRAETE, D. VAN DEN BUIJS and R. ARNOUDT, "Belgen met Congolese roots: "Brief waarin koning Filip spijt over koloniaal verleden uitdrukt, mag geen eindpunt zijn"", *VRT NWS*, 30 June 2020.
[408] J. VERSTRAETE, D. VAN DEN BUIJS and R. ARNOUDT, "Belgen met Congolese roots: "Brief waarin koning Filip spijt over koloniaal verleden uitdrukt, mag geen eindpunt zijn"", *VRT NWS*, 30 June 2020.
[409] K. MAGENDANE, "De magere brief van de koning", *De Standaard*, 4 July 2020.

### *3.3.2. Truth Commissions*

**149.** Truth and reconciliation commissions have been increasingly established during the last decades. Originally most truth commissions were introduced in political transition circumstances: from war to peace, from dictatorship to democracy, from racist policies to more equality. Famous examples include the truth commission in South Africa after apartheid and the various truth commissions in Latin America in the 1980s and 1990s.[410] However, it has been recognized that truth commissions can also be valuable to tackle issues in a stable and democratic context.[411]

#### a. Characteristics

**150.** A truth commission can be described as a temporary institution with the task of collecting information about the facts of a prior conflict and human rights violations. It often provides a forum for victims or descendants to tell their stories and challenges, in order to give an accurate and detailed picture of the conflict in a comprehensive report, which also contains certain recommendations and guidelines on how to deal with the information and responsibilities in a way to allow reconciliation.[412] Truth commissions are valuable instruments for dispute resolution, with the aim of constructing the truth on past events and reconciling parties in a conflict, because the investigation can complement legal procedures and even contain an own, unique compensatory value.[413]

**151.** The transitional justice expert P. HAYNES has extensively developed the notion of truth commissions, which consists of several inherent characteristics: truth commissions are established with the official support of a State, they focus on past human rights abuses, investigate patterns of violations and crimes (and not individual events), only exist temporarily with the task of submitting an

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[410] P. B. HAYNER, "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study", *HRQ* 1994, (597) 608.

[411] Two examples are the American and Canadian truth commissions. The American Greensboro Truth and Reconciliation Commission was established in 2004 to examine multiple murders by the KuKluxclan in 1979. The Canadian Truth and Reconciliation Commission was established in 2010 to deal with the racist policies of residential schools towards indigenous people. See S. PARMENTIER and M. ACIRU, "The Whole Truth and Nothing but the Truth? On the Role of Truth Commissions in Facing the Past" in P. MALCONTENT (ed.), *Facing the Past. Amending Historical Injustices Through Instruments of Transitional Justice*, Cambridge, Cambridge University Press, 2016, (225) 226 and 234; P. PILLAI, "Truth Commissions and Colonial Atrocities: Moving the Needle Further Towards State Responsibility?", *Opinio Iuris*, 27 April 2019.

[412] T. M. ANTKOWIAK, "Truth as Right and Remedy in International Human Rights Experience", *Mich. J. Int'l L.* 2002, (977) 996; L. J. LAPLANTE, "On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Develop", *Yale Hum. Rts. & Dev. L.J.* 2007, (141) 146; A.G. O'SHEA, "Truth and Reconciliation Commission", *Max Planck Encyclopedia of Public International Law* 2008, http://opil.ouplaw.com; S. PARMENTIER and M. ACIRU, "The Whole Truth and Nothing but the Truth? On the Role of Truth Commissions in Facing the Past" in P. MALCONTENT (ed.), *Facing the Past. Amending Historical Injustices Through Instruments of Transitional Justice*, Cambridge, Cambridge University Press, 2016, (225) 226.

[413] A.G. O'SHEA, "Truth and Reconciliation Commission", *Max Planck Encyclopedia of Public International Law* 2008, http://opil.ouplaw.com; L. VAN DEN HERIK, "Historical Inquiry as a Form of Colonial Reparation?", *Harvard International Law Journal*, Online Scholarship Symposium 2018*, https://harvardilj.org/wpcontent/uploads/sites/15/;* Herik-Reparations.pdf, .5.

official report of its findings and are interested in collecting information from the affected populations.[414]

**152.** The composition of a truth commission is generally very diverse, with people from a wide range of professional backgrounds, such as human rights lawyers, doctors, mental health professionals and academics, which ensures a combined expertise.[415] The appointment of the members often resembles the procedure of the commission's establishment, for example through a governmental decree or parliamentary decision.[416]

**153.** A truth commission can serve various purposes. One reason to set up a truth commission is to enable objective fact finding in order to establish an accurate record of a country's past, which prevents the events from being lost or re-written.[417] Although truth commissions are only able to bring a fraction of the events to light, they manage to limit the amount of lies or misunderstandings that circulate in a society.[418] Furthermore, it can be argued that a truth commission has an even more important purpose than finding the truth: acknowledging the truth. A State admits the harm it has caused and recognizes it was wrong.[419] A truth commission can show a State how to move forward, starting from the past, by recognizing that horrible violations were committed, and at the same time embracing positive initiatives or realisations that came after that period, which can be used as a further catalyst.[420]

### b. Limitations and disadvantages

**154.** Truth commissions generally face some limitations. The main issue seems to be that truth commissions are only able to make non-binding recommendations and that governments often tend to fail to implement these recommendations.[421] The realisation of the recommendations is thus completely left to the discretion of the government and other political institutions and

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[414] P. B. HAYNER, "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study", *HRQ* 1994, (597) 604. See also: E. BRAHM, "What is a Truth Commission and Why Does it Matter?", *Peace and Conflict Review*, 2009 (1) 4; S. PARMENTIER and M. ACIRU, "The Whole Truth and Nothing but the Truth? On the Role of Truth Commissions in Facing the Past" in P. MALCONTENT (ed.), *Facing the Past. Amending Historical Injustices Through Instruments of Transitional Justice*, Cambridge, Cambridge University Press, 2016, (225) 228.

[415] C. JENKINS, "Taking Apology Seriously" in M. DU PLESSIS, *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses*, Antwerp, Intersentia, 2007, (53) 78.

[416] S. PARMENTIER and M. ACIRU, "The Whole Truth and Nothing but the Truth? On the Role of Truth Commissions in Facing the Past" in P. MALCONTENT (ed.), *Facing the Past. Amending Historical Injustices Through Instruments of Transitional Justice*, Cambridge, Cambridge University Press, 2016, (225) 235.

[417] P. B. HAYNER, "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study", *HRQ* 1994, (597) 607.

[418] L. HUYSE, *Alles gaat voorbij, behalve het verleden*, Leuven, Van Halewyck, 2006, 157.

[419] P. B. HAYNER, "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study", *HRQ* 1994, (597) 607.

[420] K. STEYVAERT, "Moedeloosheid is een luxe", *De Standaard*, 11-12 April 2020.

[421] C. JENKINS, "Taking Apology Seriously" in M. DU PLESSIS, *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses*, Antwerp, Intersentia, 2007, (53) 79; A.G. O'SHEA, "Truth and Reconciliation Commission", *Max Planck Encyclopedia of Public International Law* 2008, *http://opil.ouplaw.com*, C.5.

depends on their willingness to take appropriate action, which will often be encouraged by civil society organisations and other coalitions.[422] The final report of the commission is not the end of the process, but is just the beginning of another chapter. This can sometimes be overlooked since the realisation of the recommendations is generally less sensational or enchanting than the establishment of the commission.[423]

**155.** Furthermore, it can be noted that truth commissions can cause a confrontation with the complexity of the reality.[424] Truth-telling can therefore seem paradoxical in the sense that it aims at bringing clarity and eliminating confusion or misunderstanding, at the same time it will also bring out ambiguities with regard to the past, since the more detailed truth is often multi-layered and far more complex than first thought.[425]

### c. The right to truth as a human right

**156.** The right to truth about gross human rights violations and serious violations of human rights law is an independent right, recognized in various national and international legal instruments and jurisprudence.[426] The right to truth is inherently related to a State's obligation to respect and guarantee human rights, to conduct effective investigations with regard to gross human rights violations and to guarantee effective remedies and reparation.[427]

**157.** Truth commissions generally have the task of promoting justice, uncovering the truth, proposing reparations and recommending reforms of abusive institutions.[428] The establishment of these commissions has significantly contributed to the development of the right to truth. Truth-finding enables the

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[422] A.G. O'SHEA, "Truth and Reconciliation Commission", *Max Planck Encyclopedia of Public International Law* 2008, *http://opil.ouplaw.com*, C.5: S. PARMENTIER and M. ACIRU, "The Whole Truth and Nothing but the Truth? On the Role of Truth Commissions in Facing the Past" in P. MALCONTENT (ed.), *Facing the Past. Amending Historical Injustices Through Instruments of Transitional Justice*, Cambridge, Cambridge University Press, 2016, (225) 244.

[423] S. PARMENTIER and M. ACIRU, "The Whole Truth and Nothing but the Truth? On the Role of Truth Commissions in Facing the Past" in P. MALCONTENT (ed.), *Facing the Past. Amending Historical Injustices Through Instruments of Transitional Justice*, Cambridge, Cambridge University Press, 2016, (225) 244.

[424] M. PARLEVLIET, "Considering Truth. Dealing with a Legacy of Gross Human Rights Violations", *Netherlands Quarterly of Human Rights* 1998, (141) 158.

[425] *Ibid.*

[426] See for example: Principles 2 and 4 of the Updated Set of principles for the protection and promotion of human rights through action to combat impunity of the Commission on Human Rights on its sixty-first session (8 February 2005), *UN Doc.* E/CN.4/2005/102/Add.1 (2005); Resolution 60/147 of the UN General Assembly on 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 (21 March 2006), *UN Doc.* A/RES/60/147 (2006) (principles 11,12(b) and 24). For more examples, see Promotion and Protection of Human Rights, Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights (8 February 2006), *UN Doc.* E/CN.4/2006/91 (2006), 4-8.

[427] Promotion and Protection of Human Rights, Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights (8 February 2006), *UN Doc.* E/CN.4/2006/91 (2006), 14-15.

[428] *Ibid.*

consolidation of peace after a period of human rights violations and facilitates the process of reconciliation, for which some form of institutional investigation and acknowledgement of the past are essential elements.[429]

158. The right to truth implies the right to know the truth with regard to gross human rights violations and serious crimes under international law, for both family members or other close relatives and for society as a whole.[430] The right to truth is therefore both an individual and a collective right, since also groups and communities can be considered holders of the right, especially with regard to particularly serious and systemic human rights violations that occurred over a longer period of time and considerably affected that group.[431] More concretely, this entails the right to knowing "*the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them*".[432]

### d. The Belgian Truth and Reconciliation Commission

159. Setting up a truth commission to assess and map the colonial atrocities of a State, with the goal of establishing the truth and provide recommendations for further action has not been very common. The Mauritian Truth Commission established in 2009 provides an example, although its impact has been rather minimal.[433] A more recent precedent is the decision of the Netherlands to

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[429] Promotion and Protection of Human Rights, Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights (8 February 2006), *UN Doc.* E/CN.4/2006/91 (2006), 6; A. MCDONALD, "A Right to Truth, Justice and a Remedy for African Victims of Serious Violations of International Humanitarian Law", *Democracy & Development* 1999, (139) 147.

[430] Promotion and Protection of Human Rights, Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights (8 February 2006), *UN Doc.* E/CN.4/2006/91 (2006), 14-15; Principles 2 and 4 of the Updated Set of principles for the protection and promotion of human rights through action to combat impunity of the Commission on Human Rights on its sixty-first session (8 February 2005), *UN Doc.* E/CN.4/2005/102/Add.1 (2005); C. DROEGE, "The Right to a Remedy and to reparation for gross human rights violations, a practitioners' guide", *International Commission of Jurists* 2006, 81.

[431] Promotion and Protection of Human Rights, Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights (8 February 2006), *UN Doc.* E/CN.4/2006/91 (2006), 11; C. DROEGE, "The Right to a Remedy and to reparation for gross human rights violations, a practitioners' guide", *International Commission of Jurists* 2006, 90.

[432] Promotion and Protection of Human Rights, Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights (8 February 2006), *UN Doc.* E/CN.4/2006/91 (2006), 4. See also: S. PARMENTIER and M. ACIRU, "The Whole Truth and Nothing but the Truth? On the Role of Truth Commissions in Facing the Past" in P. MALCONTENT (ed.), *Facing the Past. Amending Historical Injustices Through Instruments of Transitional Justice*, Cambridge, Cambridge University Press, 2016, (225) 239.

[433] In 2008, the Truth and Justice Commission of Mauritius was established, with the mandate to, *inter alia*, "...make an assessment of the consequences of slavery and indentured labour during the colonial period up to the present". It is remarkable that the truth commission has as one of its main functions to address colonialism and its impact, instead of just treating it as a mere circumstance. However, the truth commission faced various difficulties in the setting up and functioning, and unfortunately, its recommendations were not taken seriously on the national political level.. See P. PILLAI, "Truth Commissions and Colonial Atrocities: Moving the Needle Further Towards State Responsibility?", *Opinio Iuris*, 27 April 2019.

establish an inquiry commission in order to investigate the Dutch colonial past, with a focus on the turbulent period of the decolonisation of Indonesia and how the Netherlands have handled this disturbing legacy so far.[434]

**160.** In Belgium, a draft resolution proposing to conduct research in order to establish the facts and recognize the involvement of various Belgian institutions with regard to the colonization of current DRC, Rwanda and Burundi was presented in the federal parliament in 2017.[435] This proposal did not have effect, since it expired after the federal elections in May 2019.[436] However, the context of the protests against racism and targeting of statutes of King Leopold II in the spring of 2020 put the issue of how Belgium has to deal with its colonial past high on the political agenda.[437] This eventually led to the establishment of a parliamentary truth and reconciliation commission in July 2020.

*d.1. Establishment of a Special Commission*

**161.** On 17 July 2020, the Belgian Chamber of Representatives approved the official establishment of the Special Commission with the task of "*conducting research on Congo Free State (1885-1908) and the Belgian colonial past in Congo (1908-1960), Rwanda and Burundi (1919-1962), its impact and its required consequences.*"[438] The establishment of this commission has its roots in a draft resolution presented in the federal parliament in the beginning of June 2020,[439] which mostly copies the proposals from the draft resolution of 2017.[440]

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[434] L. VAN DEN HERIK, "Historical Inquiry as a Form of Colonial Reparation?", *Harvard International Law Journal*, Online Scholarship Symposium 2018, https://harvardilj.org/wp-content/uploads/sites/15/Herik-Reparations.pdf, 4.

[435] Voorstel van resolutie over het uitvoeren van een onderzoek om de feiten vast te stellen en de betrokkenheid te erkennen van de diverse Belgische instellingen in de kolonisatie van Congo, Rwanda en Burundi, *Parl.St.* Kamer 2016-2017, nr. 2307/001.

[436] If the Belgian federal parliament is dissolved after the elections, this causes all proposals not yet approved by one of the two chambers of the parliament to be cancelled, which means that they have to be re-submitted in the newly elected parliament if any effect is envisaged. Zie D. JACOBS, *Nieuwkomers in de Politiek, Het parlementair debat omtrent kiesrecht voor vreemdelingen in Nederland en België (1970-1997),* Gent, Academia Press, 1998, 213.

[437] J. Cauwenberghs, "Kamervoorzitter Patrick Dewael wil waarheidscommissie rond koloniaal verleden", De Standaard, 12 June 2020.

[438] Oprichting van de Bijzondere commissie belast met het onderzoek over Congo-Vrijstaat (1885-1908) en het Belgisch koloniaal verleden in Congo (1908-1960), Rwanda en Burundi (1919-1962), de impact hiervan en de gevolgen die hieraan dienen gegeven te worden, *Parl. St.* Kamer 2019-2020, nr. 1462/001 (hereafter: "the Establishment Act").

[439] This draft resolution proposes to appoint an international and multi-disciplinary research team with the task of examining the structural role of the State, Belgian authorities and institutions during the Belgian colonial period and developing guidance on the basis of this historical research for the recognition of Belgian responsibility by the government. Furthermore, the draft resolution states that the team should formulate guidelines on the stimulation and facilitation of academic research on colonialism and the Belgian colonial period and on the different ways that the conclusions of the conducted research can receive an appropriate place in Belgian society. See Voorstel van resolutie over het uitvoeren van een onderzoek om de feiten vast te stellen en de betrokkenheid te erkennen van de diverse Belgische instellingen in de kolonisatie van Congo, Rwanda en Burundi, *Parl. St.* Kamer 2019-2020, nr. 1334/001.

[440] Voorstel van resolutie over het uitvoeren van een onderzoek om de feiten vast te stellen en de betrokkenheid te erkennen van de diverse Belgische instellingen in de kolonisatie van Congo, Rwanda en Burundi, *Parl.St.* Kamer 2016-2017, nr. 2307/001.

**162.** The Establishment Act of the Special Commission specifies the composition of the Commission and its mandate. The Commission is composed of 17 permanent members, which are appointed by the Chamber respecting the rules on proportionate representation of the political fractions.[441] Furthermore, the Commission will be assisted by a multidisciplinary team of 10 Belgian, Congolese, Rwandese and Burundian experts.[442]

**163.** The mandate of the Commission, described as a "*herculean task*",[443] relates both to historical research and the current situation in Belgian society.[444] The 'historical' task consists of examining the role of the Belgian State, Belgian authorities and non-state actors in Congo Free State and Belgian Congo, Rwanda and Burundi and the economic impact of the colonisation on Belgium and the former colonies. The 'societal' task includes the formulation of recommendations on how Belgium should deal with its colonial past and proposals for reconciliation. The Commission should also provide recommendations for the stimulation and facilitation of academic research on (post)-colonialism and the Belgian colonial period. The Commission will formulate its conclusions and recommendations on the basis of reports of the expert team. For this purpose, the expert team has received two main tasks.[445] Firstly, the team should report on the "*historical events of the Belgian colonial past*", and more specifically on the current state of affairs of the existing research, to which degree a scientific consensus on the Belgian colonial past exists and how accessible the relevant historical archives are. In this context, it should also report on how the scientific historical insights on Belgian colonial history are present in education and the wider society. Secondly, the team of experts should assess whether symbolic actions, such as the removal of colonial statutes, could facilitate reconciliation and which concrete actions could help to address the racism and discrimination in Belgian society. Furthermore, the team should provide guidance on how the victims can be involved in the research, together with the legal and financial consequences. Although the initial aim for the expert team was to finish its first report in October 2020,[446] this has been delayed to (at least) the spring of 2021. Thereafter, thematic hearings will be conducted by the Commission, followed by the report with recommendations.

*d.2. Assessment*

**164.** Both in the lead-up to the official establishment of the Special Commission by the parliament and in the period hereafter, various criticisms were voiced. These criticisms reflect relevant concerns relating to the value and meaningfulness of this commission.

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[441] See par. 5-6 of the Establishment Act.
[442] See par. 7 of the Establishment Act.
[443] M. VERBERGT, "Congocommissie wacht herculestaak", *De Standaard*, 10 July 2020.
[444] See par. 3 of the Establishment Act.
[445] See par. 4 of the Establishment Act.
[446] See par. 7 of the Establishment Act.

**165.** First of all, the involvement of the Congolese, Rwandese and Burundian diaspora has been a contended issue. The Belgian *AfricaMuseum* had been consulted to provide advice on the operation and composition of the Special Commission, and this document was heavily criticized by activists and associations from the diaspora.[447] Their main concern was the significant lack of participation of the diaspora in the work of the Special Commission. The final text of the Establishment Act has therefore attempted to satisfy the requests of the diaspora, by providing that the experts should involve "*the various relevant actors in society, such as the diaspora*" when discussing the issue of reconciliation.[448] However, it has been convincingly argued that this does not suffice. The focus of the Commission lies on academic knowledge, which neglects the experience of the Congolese, Rwandese and Burundian communities in Belgium and the population of these former colonies.[449] The value of including diaspora in the operation and composition of the Special Commission should not be underestimated. Representatives of diaspora-organisations could create a large support base in their community and ensure that the Commission operates in an inclusive and balanced manner.[450]

**166.** Secondly, the composition of the expert group has come under serious attack.[451] Firstly, the expert group has been criticized for not containing enough members of the diaspora.[452] Different representatives of the diaspora have been requested to participate in the work of the commission, but there is only one representative who is an official 'expert' of the expert team.[453] This has been considered as a decision with colonial characteristics, since it implies that Afro-Belgians are only 'second-class participants'.[454] Furthermore, the lack of a Congolese, Rwandese or Burundian member who can touch base with the local population in the former Belgian colonies has raised some serious questions.[455]

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[447] S. GRYMONPREZ, "Diaspora zet Congocommissie meteen onder hoogspanning", *De Standaard*, 13 July 2020.
[448] See par. 10 of the Establishment Act.
[449] O. U. RUTAZIBWA, ""Congo" Commissie – why I will not participate in the expert group", 21 July 2020, https://oliviarutazibwa.wordpress.com/2020/07/21/congo-commissie-why-i-will-not-participate-in-the-expert-group/.
[450] L. M. KANDOLO, "Laat Congocommissie niet op een fiasco uitdraaien", *De Standaard*, 16 July 2020.
[451] The final composition of the expert group was announced on 6 August 2020. See X, "Dit zijn de experts van de bijzondere Kamercommissie koloniaal verleden", *De Standaard*, 6 August 2020.
[452] L. M. KANDOLO, "Laat Congocommissie niet op een fiasco uitdraaien", *De Standaard*, 16 July 2020; A. MUAMBI, "De geest van Congo verdient een rustplaats", De Standaard, 18 July 2020; O. U. RUTAZIBWA, ""Congo" Commissie – why I will not participate in the expert group", 21 July 2020, https://oliviarutazibwa.wordpress.com/2020/07/21/congo-commissie-why-i-will-not-participate-in-the-expert-group/; K. VIDAL, "Nog voor officiële uitnodiging kampt Congocommissie al met afzegging", *De Standaard*, 15 July 2020; K. VIDAL, "Hoeveel vrijheid krijgen experts van politici?", *De Standaard*, 18 juli 2020.
[453] A. TORBEYNS, "Diaspora toch aanwezig in definitieve expertengroep", *De Standaard*, 7 August 2020.
[454] A. TORBEYNS, "Diaspora toch aanwezig in definitieve expertengroep", *De Standaard*, 7 August 2020; K. VIDAL, "Hoeveel vrijheid krijgen experts van politici?", *De Standaard*, 18 juli 2020.
[455] K. VIDAL, "Nog voor officiële uitnodiging kampt Congocommissie al met afzegging", *De Standaard*, 15 July 2020.

**167.** Another problematic issue is the time frame set for the activities of the Special Commission. The fact that the initial time period of the Commission is one year can be regarded as "*untenable*".[456] Furthermore, it has been suggested that the initiative would have been benefitted from an open call to the communities about their opinions and recommendations, which would require more time and a slower pace. Overall, the Commission would benefit from a more realistic timeframe, allowing for a thorough and constructive process.

**168.** It has also been argued that the Special Commission lacks involvement of the people from DRC, Rwanda and Burundi. The commission aims inter alia at contributing to reconciliation between the Belgian, Congolese, Rwandese and Burundian people. However, reconciliation seems impossible if one party unilaterally decides which aspects of the shared history deserve priority and should be addressed.[457] Therefore, it has been suggested that the consultation with the population of the former Belgian colonies and the joint determination of the agenda of the Commission are required.[458]

**169.** The work and reports of the Special Commission should not imply the end of the discussion on Belgian colonialism and its impact. It should lead to an open and reflective attitude towards the Belgian colonial past and it should be followed by concrete measures. A creative approach to the appropriate consequences is required, which includes for example focusing on raising public awareness and supporting sustainable initiatives in the Afro-Belgian communities and in the former Belgian colonies.[459] Furthermore, the Commission should keep in mind that there exist different truths: not only the factual truth is relevant, attention should also be given to the personal, narrative truth. Therefore, victims and their descendants should be able to share their experience and their stories. The process of this dialogue and personal testimonies could give the Commission a more human aspect and create more affinity with society.[460]

### e. Towards financial compensation?

**170.** The establishment of the truth commission and expression of regrets by the Belgian King could open the door to financial compensation for Belgian colonialism. Before diving deeper into this possibility, some foreign precedents of monetary compensation for colonialism or events related to colonialism are discussed.

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[456] O. U. RUTAZIBWA, ""Congo" Commissie – why I will not participate in the expert group", 21 July 2020, https://oliviarutazibwa.wordpress.com/2020/07/21/congo-commissie-why-i-will-not-participate-in-the-expert-group/.
[457] K. VIDAL, "Hoeveel vrijheid krijgen experts van politici?", *De Standaard*, 18 juli 2020.
[458] *Ibid.*
[459] *Ibid.*
[460] S. VANDEGINSTE, "Ons koloniale verleden is nooit voorbij", De Standaard, 16 June 2020.

*e.1. Precedents*

**171.** As already mentioned above, Italy and Libya concluded an agreement in 2008, in which Italy committed to pay 5 billion dollar worth of investments in Libyan infrastructure for the next 20 years as compensation for the excesses and crimes against Libyans during the Italian colonial rule.[461]

**172.** The Netherlands have built some experience with regard to monetary compensation. In 2011, a Dutch Court awarded the widows of the victims of the masse execution in Rawagedeh in 1949 a substantial amount of monetary compensation.[462] In 2013 this compensation arrangement was expanded to widows of the mass executions in Sulawesi, and in 2015 a judge ruled that also the children of the victims were entitled to compensation, provided there was sufficient evidence.[463] Consequently, the Netherlands have drawn up a civil settlement scheme aimed at compensating the damage suffered to widows of victims of executions in the former Dutch East Indies comparable to the cases of Rawagedeh and Sulawesi, so that all widows are able to claim compensations for the deaths of their husbands.[464]

**173.** With regard to the Japanese case, in 1965, Japan and South Korea signed a treaty to normalize the bilateral relations, whereby Japan committed to paying 800 million US dollars as economic cooperation and in exchange, South Korea agreed upon the "*final and complete*" settlement with regard to the dark period of Japanese colonial rule in South Korea.[465] Japan still relies on this treaty today to reject possible claims from South Korean victims of the Japanese colonial rule, while South Korea on the other hand refuses to accept that this treaty terminates the individuals' right to reparations from Japan for the harm caused by its colonial rule.[466] In 2011, the Korean Constitutional Court ruled that the comfort women's constitutional rights were violated by the failure of the Japanese government to help them, which rendered the compensation waiver of the 1965 Treaty unconstitutional.[467] This led Japan to issue official apologies and

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[461] See para. 145-146.

[462] Rechtbank Den Haag (NL) 14 September 2011, 354119 / HA ZA 09-4171, *NJF* 2011/427; N. L. IMMLER, "Hoe koloniaal onrecht te erkennen? De Rawagede-zaak laat kansen en grenzen van rechtsherstel zien", *Low Countries Historical Review* 2018, (57) 58.

[463] Rechtbank Den Haag (NL) 11 March 2015, C-09-467005 HA ZA 14-0651, *NJF* 2015/221.

[464] Bekendmaking van de Minister van Buitenlandse Zaken en de Minister van Defensie van 10 September 2013, nr. MinBuZa.2013-256644, van de contouren van een civielrechtelijke afwikkeling ter vergoeding van schade aan weduwen van slachtoffers van standrechtelijke executies in het voormalig Nederlands-Indië van vergelijkbare ernst als Rawagedeh en Zuid Sulawesi, Staatscourant nr. 25383, 10 September 2013. See also A. BUFALINI, "Italian Colonialism in Somalia: issues of reparation for the crimes committed", *Sequência (Florianópolis)* 2017, (11) 31; L. VAN DEN HERIK, "Historical Inquiry as a Form of Colonial Reparation?", *Harvard International Law Journal*, Online Scholarship Symposium 2018, https://harvardilj.org/wp-content/uploads/sites/15/Herik-Reparations.pdf,, 4.

[465] Treaty on Basic Relations between Japan and the Republic of Korea of 22 June 1965, *United Nations Treaty Series* 1966, 43.

[466] R. HARDING and E. WHITE, "Divided by history: why Japan-South Korea ties have soured", T*he Financial Times,* 24 October 2019.

[467] J. KINGSTON, "Contextualizing the Centennial of Japanese Colonial Rule in Korea", *Asian and African Studies* 2011, (71) 92.

pay around 9 million US dollars to a foundation for comfort women,[468] although Japan did not regard this sum of money as official state compensation for the caused harm.[469] The agreement only lived a short life: South Korea decided to suspend the fund in 2018, since it argued that the system did not sufficiently reflect the opinions of the victims, which fits the more critical stance South Korea took in the last years.[470] Along the same lines, the Korean Supreme Court issued several judgements in 2018, allowing the establishment of claims against Japanese companies for the use of forced labour during the Japanese colonial rule.[471] The Court ordered two Japanese companies, Nippon Steel & Sumitomo Metal and Mitsubishi, to compensate South Koreans who were forced to work for them during the Japanese occupation of Korea, stating that the individual victim's rights to seek redress should not be impeded by the 1965 Treaty.[472]Japan reacted angrily, stating that the Japan-Korea Treaty finally and irreversibly settled issues like these.[473] The conflict seems to continue: the South Korean plaintiffs obtained court orders that allow the forcible liquidation of the assets of the firms, but have not managed to deliver them to the companies and therefore they filed an appeal with the UN Human Rights Council, asking to put pressure on the Japanese government.[474] Recently, South Korea announced its willingness to cooperate with Japan in finding a solution for the compensation of victims of forced labour during Japanese colonial rule, for example through the establishment of a joint consultative body, which was immediately turned down by the Japanese government.[475]

**174.** Lastly, the United Kingdom has also awarded certain monetary compensation for events during its colonial period. An English court ruled in 2012 that the Kenian Mau-Mau population had the right to claim compensation from the United Kingdom for abuse and torture inflicted on the Kenyan people by British colonial officials and Kenyan 'home guards' under British command, after which the government agreed upon paying monetary compensation of a total amount of 19.9 million pounds.[476]

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[468] N. KUMAGAI, "The Background to the Japan-Republic of Korea Agreement: Compromises Concerning the Understanding of the Comfort Women Issue", *Asia- Pacific Review* 2016, (65) 65.
[469] *Ibid.* 75.
[470] B. HAAS, "Anger in Japan as South Korea dissolves 'comfort women' foundation", *The Guardian*, 21 November 2018; C. SANG- HUNG, "South Korean Court Orders Mitsubishi of Japan to Pay for Forced Wartime Labor", *The New York Times*, 29 November 2018.

[471] Y. LEE, "Moon Says Koreans Have Right to Sue Over Colonial Forced Labor", Bloomberg, 14 December 2018; C. SANG-HUN, "South Korean Court Orders Mitsubishi of Japan to Pay for Forced Wartime Labor", *The New York Times*, 29 November 2019.
[472] C. SANG- HUNG, "South Korean Court Orders Mitsubishi of Japan to Pay for Forced Wartime Labor", *The New York Times*, 29 November 2018.
[473] X., "Japan angry at Korean court's Nippon Steel decision, Seoul urges calm", *Reuters,* 9 January 2019.
[474] O. HYUN-JU, "Korean forced labor victims file appeal with UN", *The Korean Herald*, 30 October 2019; J. LEE, "South Korean forced labor victims to seek Japan's Mitsubishi asset sale", *Reuters*, 16 July 2019.
[475] A. SUNG-MI, "Seoul to work with Tokyo to resolve forced labor issue", *The Korean Herald,* 8 January 2020.
[476] EWHC (QB) (UK) 5 October 2012, No: HQ09X02666 www.bailii.org/ew/cases/EWHC/QB/2012/2678.html; J. BALINT, "The "Mau Mau" Legal Hearings and Recognizing the Crimes of the British Colonial State: A Limited Constitutive

*e.2. The Belgian case*

**175.** Financial compensation for Belgian colonialism is a complicated issue. Different voices are in favour of the provision of monetary compensation by the Belgian State. It has been argued that the roots of this financial compensation lie in the existence and recognition of human rights, since many events from the Belgian colonial period are considered serious human rights violations today.[477] Furthermore, the Belgian State has benefitted enormously from the exploitation of the former colonies, together with many Belgian companies.

**176.** With regard to the question of what the use of financial compensation would be, it has been argued that these compensations should focus on the strengthening and support of Congolese informal institutions aimed at ameliorating the lives of Congolese people.[478] Regarding possible forms, the compensation can consist of payments by the monarchy and the heirs of colonial corporations, but also of the repatriation of stolen art.[479]

**177.** The calculation of the amount of the compensation and the determination of the recipients and payer present various difficulties. For example, the examination of the exact involvement of the Catholic Church in the colonial rule and their responsibility to contribute to the payment of financial compensation could pose a challenge.[480] Similar difficulties arise when attempting to determine the degree of responsibility of Belgian colonial corporations. Ultimately, it has been argued that the parliamentary commission should be given the room to examine these difficult questions.[481] The mandate of the Special Commission indeed includes the examination of possible 'financial consequences', which refers to monetary compensation. The Commission also received the task to analyse the economic impact of the colonisation on Belgium and the former colonies, including the ways in which the profits of the exploitation of these colonies have been transferred to Belgium and the various persons, corporations and institutions that have benefited from these profits.[482] It has been suggested that this research is indispensable since it provides a starting point for where to look for funds when financial compensation is discussed.[483] The road to financial

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Moment", *Critical Analysis of Law* 2016, 261-285. However, later claims were rejected: EWHC (QB) (UK), 2 August 2018, No. HQ13X02162 www.bailii.org/ew/cases/EWHC/QB/2018/2066.html.

[477] C. DIKIEFU BANONA and J-S. SÉPULCHRE, "'Na "diepste spijt" van de Belgische koning, is het tijd voor herstelbetalingen aan Congo'", *Knack*, 30 June 2020.

[478] K. MAGENDANE, "De magere brief van de koning", *De Standaard*, 4 July 2020; J. VERSTRAETE, D. VAN DEN BUIJS and R. ARNOUDT, "Belgen met Congolese roots: "Brief waarin koning Filip spijt over koloniaal verleden uitdrukt, mag geen eindpunt zijn"", *VRT NWS*, 30 June 2020.

[479] X, "Sorry is niet per se hetzelfde als spijt", *De Morgen*, 1 July 2020.

[480] T. VAN DIEPEN, "Brand is geblust maar vraag naar herstelbetalingen zal terugkeren", *Het Belang van Limburg*, 1 July 2020.

[481] B. CASTEL, "Alexander De Croo: 'Onze ontwikkelingshulp in Congo is geen Wiedergutmachung'", *Knack*, 30 June 2020.

[482] Par. 3(3) of the Establishment Act.

[483] L. DE WITTE, "Er is zo veel dat we nog niet weten over onze rol in Congo", *De Standaard*, 1 July 2020.

compensation for colonialism seems still very long, with various obstacles and difficulties, leaving room for further research on this issue.

# CONCLUSION

178. Belgium's colonial past is marked by brutality, violence and consistent discrimination. Both under the rule of King Leopold II and later as a Belgian colony, the Congolese population was exploited and suppressed. Racism was common ground in the former Rwandese and Burundian colonies. Recently, the question of how Belgium should come to terms with its colonial past has become prominently present in the public debate. The discussion was sparked in 2019 by a report of the UN Working Group of Experts on People of African Descent, recommending Belgium to face its colonial history by issuing official apologies and establishing a truth commission. The Belgian prime minister and federal government did not seem very enthusiastic to follow these suggestions, dismissing the report as "*strange*". However, roughly one year later, the Black Lives Matter movement spread to Belgium, targeting the Belgian colonial past and its continuing repercussions both in the Afro-Belgian communities and in the former colonies. This reignition of the debate eventually lead to the establishment of a parliamentary truth and reconciliation commission. Another recent remarkable development was the expression of "*deep regrets*" for the colonial past in Congo by the Belgian King on the 60th anniversary of the Congolese independence. The door to other possible forms of reparations for colonialism, such as official apologies and financial compensation, seems to have opened.

179. The previous mentioned developments provide support for the view that Belgium bears a certain responsibility with regard to its colonial past and that some forms of reparations (in the broad sense) are not out of place, which can be backed up with moral, philosophical and sociological arguments. However, it is a more difficult question whether there are also legal arguments that justify reparations for colonialism. This dissertation has therefore examined the possible legal responsibility of Belgium to issue reparations for its colonial past under the international law of State responsibility.

180. After analysing the different conditions for State responsibility, it became clear that the principle of intertemporal law and non-retroactivity poses the main hurdle for the establishment of Belgian State responsibility. This principle dictates that legal rules cannot be applied to situations that occurred before these rules came into existence. This implies that many human rights instruments cannot be applied to colonialism or specific events during the colonial period, since most of these instruments were only enacted after the independence of the former Belgian colonies. Therefore, although it has generally been recognized that Belgium caused grave human rights violations in its former colonies, current human rights instruments cannot be used to establish Belgian State responsibility. Examining whether it is possible to overcome the hurdle of non-retroactivity, various possible exceptions to the principle of intertemporal law were discussed and assessed. This included, among others, the retrospective acceptance of responsibility, the special status of human rights and *ius cogens*, natural law arguments and analogies with exceptions in national law and international criminal law. This led to the conclusion that in current international law, there does not seem to exist an exception to the principle of intertemporal

law with sufficient support. Consequently, it was examined whether the application of international law in force during the colonial period could lead to the establishment of an internationally wrongful act. The issue of forced labour was used as a case study, leading to the same conclusion that it is not possible at this moment to establish Belgian State responsibility to provide reparations for colonialism. This inability of international law to provide a legal basis for reparations for colonialism can be criticized from a TWAIL perspective. International law does not allow legal redress for historical injustices such as colonialism because international law has been predominantly developed by Western States, the main perpetrators of these historical wrongs. The current international legal system, which is still inherently Western, prevents the emergence of a possible exception to the principle of intertemporal law. Therefore, international law is in need of a reform that includes the participation of the global south in order to correct the present imbalance.

**181.** Regardless of the possible legal responsibility, various countries, including Belgium, have decided to make an effort to provide some form of reparation for colonialism. However, it seems difficult to choose appropriate and valuable measures to come to terms with the colonial past. The last chapter therefore discussed different reparation forms that can be meaningful for addressing the colonial history. Starting from the framework of the international law on State responsibility, two symbolic forms of reparations (official apologies and the establishment of a truth commission) were discussed, together with the recent developments in Belgium and the experiences of other countries.

**182.** The recent developments in Belgium regarding the approach to the colonial past have given this dissertation an extra dimension. At the moment of the start of this research, Belgian reparations for colonialism seemed only achievable in a rather far and undefined future. After the report of the UN Working Group, a year of radio silence passed by, gradually diminishing the hopes that the Belgian federal government would actually take up the recommendations. However, the spring and summer of 2020 marked a drastic change, with developments that seemed completely unimaginable one year before.

**183.** Firstly, the unpredicted expressions of regret by the Belgian King constituted a milestone for Belgium's approach to its colonial past. Remarkable was the link the King drew between colonialism and the current discrimination Afro-Belgians experience in the Belgian society. By explicitly recognizing this connection, he dared to openly address the issue of racism and discrimination and thereby opening the floor for concrete action. By not only reflecting on the past but also involving current problems, the King seems to send a signal that he acknowledges the concerns of the black communities in Belgium. However, the royal regrets also have their limits. Most importantly, they do not amount to an official apology. This reflects a certain caution and hesitance from the King's side, which was also evidenced by the omission of significant elements such as the mentioning of King Leopold II or a clear condemnation of colonialism. Official apologies for the Belgian colonial past by the federal government would

therefore constitute a valuable next step in the process of coming to terms with the Belgian colonial past.

184. Another other recent significant development was the establishment of the parliamentary truth and reconciliation commission. This initiative should definitely be welcomed and signifies an important step towards Belgian reparations for colonialism. However, there are some concerns, mainly regarding the operation of the commission. The Congolese, Rwandese and Burundian diaspora should be sufficiently involved, on the same level as the expert group and not as "second class" advisers. Furthermore, in order to allow for reconciliation with the population of the former Belgian colonies, the Commission should facilitate their participation, avoiding to slip into a one-sided and imposed reconciliation attempt. Lastly, the time frame for the work of the Commission raises some doubts, instead of the rather unrealistic and hasty schedule, the Commission would benefit from a slower pace, allowing for a thorough and constructive process. However, the Commission will start its operation in the fall of 2020 which means that it remains to be seen whether it will manage to respond to these concerns.

185. Although Belgium has thus recently made significant progress confronting its colonial past, there still seems a long road ahead towards reconciliation. In this regard, room remains for further research. Although this dissertation has discussed some elements of truth commissions, a detailed examination of the optimal practical operation of truth commissions dealing with colonial history fell outside the scope of this research. Therefore, it would be valuable to analyse how a truth commission like the recently instated Belgian one can make a real impact and how it should operate to take full advantage of the opportunity. Also the question of monetary compensation remains rather unexplored. Financial compensation for colonialism is a complicated issue, with a lot of different obstacles, and has only briefly been touched upon in this dissertation. It definitely provides interesting material for further research.

186. This dissertation has attempted to contribute to the discussion on reparations for colonialism in Belgium by providing a legal perspective through the lens of State responsibility and thereby uncovering some of the flaws of current international law. Despite the impossibility to establish Belgian State responsibility for colonialism, we can still be hopeful. The recent developments in Belgium provide proof that it is not unrealistic or impossible to start making reparations for the colonial past and that there exists a broad support base in the Belgian society.