The “Mau Mau” Legal Hearings and Recognizing the Crimes of the British Colonial State: A Limited Constitutive Moment

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Abstract

This paper considers the changing capacity of law to hear cases of “historical injustice,” in particular crimes of colonialism, and the role of the hearing of these claims in law in provoking or supporting limited constitutive change. In 2009, the British law firm Leigh Day & Co. brought a civil action for damages for personal injuries on behalf of five Kenyan claimants, for harms suffered in detention under the British colonial administration in Kenya between 1952 and 1960. The action was brought against the British government, through the Foreign and Commonwealth Office, for their part in the creation and maintenance of the system of torture during the period of the “Emergency” in Kenya. Heard in the High Court of Justice in the United Kingdom, the hearing determined that the case could proceed to trial, yet was settled in 2013 by the British government. The paper considers how we may understand this hearing as part of a moment of limited constitutive legal and social change in the recognition of the injustice of the system of the British Empire, and considers the case within the context of the current discussions in Britain around British colonial responsibility for the broader harms of Empire, together with broader reparations claims for slavery and colonialism.

Obviously, I was aware that bad things were done by British imperialists. But I think it is true that one can study history in Britain, and live as a politically conscious citizen here, without being pressingly confronted with this legacy . . . . Unlike in Germany, there is little agonising about what your grandfather might have done. In a very British way, we just don’t talk about it.

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I. Introduction

In 2009, the British law firm Leigh Day & Co. brought a civil action for damages for personal injuries on behalf of five Kenyan claimants, for harms suffered in detention under the British colonial administration in Kenya between 1954 and 1959. The action was brought against the British government through the Foreign and Commonwealth Office, for their part in the creation and maintenance of the system of torture during the period of the “Emergency” in Kenya. Heard in the High Court of Justice in the United Kingdom, the two hearings determined that the case could proceed to trial, yet was settled in 2013 by the British government who continued to assert their lack of responsibility for the harms.

Kenya had been a British Crown colony. Having been “procured” by Britain in the carving up of Africa at the 1884-85 Congress of Berlin, it was formally established as a colony in 1920 and formed part of the British Empire that at the beginning of the twentieth century comprised an estimated quarter of the world’s landmass, and ruled over close to 500 million subjects. By the end of the second World War there were three types of British colonies: dominions (settler colonies which were self-governing such as Australia, South Africa, New Zealand and Canada), protectorates (which were self-governing under British protection), and Crown colonies which were effectively governed by Britain. Kenya fell into the last category of autocratic rule, in which the Governor, appointed by the British Crown, reported directly to the Colonial Office through the Secretary of State for the Colonies.2

With the introduction of settlers to Kenya by Britain, Kenyans, in particular the Kikuyu, became subject to increasingly harsh restrictions, including removal from much of their traditional lands, and co-option into the wage economy.3 Challenges to the colonial administration were made firstly through legislative means, yet the failure by the Colonial Administration to seriously address them led to the broad, yet disunited resistance movement known as the “Mau Mau.”4 In response to the increasing unrest, a State of Emergency was declared in Kenya on October 20, 1952, with the consent of the British Colonial Secretary, by the newly appointed Governor Evelyn Baring on his arrival to Kenya. In the early stages of the Emergency, Baring coordinated the policy and army, and a British battalion was brought in. New measures authorized under the State of Emergency, as Caroline Elkins outlines in her witness statement to the hearings, included

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2 While an extensive civil administration, including police, prisons, hospitals, and sometimes education (depending on whether missionaries were responsible for this) would be established and run by the Governor together with British appointed colonial officials, defence of the Empire and its colonies remained the province of the British army. I am grateful here to conversations with Alan Lester and to the excellent overview by Mandy Banton in her introduction to Administering the Empire, 1801-1968: A Guide to the Records of the Colonial Office in The National Archives of the UK 11-22 (2008).


4 Elkins, supra note 3, at 12-30.
“collective punishment, detention without trial, enforced villagization (the removal of populations from their homes to newly created villages), control of movements, confiscation of property, censorship, and the closing down of publications.”

On June 7, 1953, with the escalation of violence in Kenya, General George Erskine was appointed “Commander in Chief” East Africa Command by the British government, taking over responsibility for the Emergency, leaving the civilian government, as Huw Bennett outlines in his witness statement, “to ‘advise’ as to what methods were wise and appropriate to restore law and order.” East Africa Command was to be directly responsible to the War Office in Britain and the Secretary of State for War. Throughout the Emergency, Governor Baring continued to be answerable to the Colonial Office, and General Erskine to the War Office. It was the Colonial Office in Britain that approved the “Dilution Technique,” that made the use of torture in detention camps legal. Both the colonial administration in Kenya and the British government held responsibility for different aspects of the implementation of the Emergency, which lasted from October 20, 1952, to January 12, 1960 (with the establishment of the camps and their system of torture from 1954), although this responsibility was often blurred. Over this period an estimated 150,000 Kenyans were detained without trial in detention camps and “screening centres” throughout Kenya, under the directives of the British colonial administration and the British government and army.

The judgments of the two hearings included substantial documentary evidence of the structure of abuse of the British colonial administration in Kenya and its support by the British government. What was contested was not the nature of the abuse, but responsibility for it. This material as presented by the claimants was based on the archival work of three historians, Caroline Elkins, David Anderson, and Huw Bennett, who were expert prosecution witnesses. The judge presiding over the hearings commented:

> At a trial the court would have to conduct its own analysis of the documents to at least the same, and possibly even to a greater extent, than the historians have done in some areas of factual dispute. However, on the present evidence, some of which has been presented and collated for me by the parties for the purposes of the two hearings, I consider that I am justified in concluding that the available documentary base is very substantial indeed and capable of giving a very full picture of what was going on in government and military circles in both London and Kenya during the emergency.

This material ran counter to the official narrative in the United Kingdom that the Empire was about the spread of “British values,” that is, of the rule of law, “civilization,” and democracy. This has been echoed in public statements, such as by Prime Minister David Cameron, who on a visit to India in 2013, stated, “I think there is an enormous

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6 Id. at 5 (witness statement of Huw Bennett) (Feb. 18, 2010).
amount to be proud of in what the British Empire did and was responsible for,”8 and by then-Chancellor (and Prime Minister to be) Gordon Brown, who on a visit to Tanzania in 2005, declared, “We should celebrate much of our past rather than apologise for it.”9 While the “civilizing mission” has been represented as being at the heart of the spread of the British Empire, that this was alongside the quest for resources, geo-political advantage and land has been suppressed in public debate.

Yet as the hearings in the High Court of Justice demonstrated, what was being spread was a system of terror and torture. Mr. Justice McCombe, who presided over the hearings, was to comment in a footnote in response to the argument of the lawyers for the British government that if a “system” of torture was to be recognized, it would “require proof of far more than violence that was widespread and frequent” and who in order to make this point drew a parallel to “the products of the policy directives of the Wannsee Conference held on 20th January 1942”: “I must admit to personal surprise and regret, wherever legal liability may lie, that one reads about what happened in this British Colony so soon after the lessons of that historical parallel ought to have been well learnt.”10 We could further add, that the British government even thought to draw such a parallel in their legal argument, apparently wantonly, is astonishing.

Cases of colonial era harm have generally failed to be heard in law. They have either fallen outside dominant understandings of state crime, or outside the abilities of law as an institution to address them. Claims for colonial era reparations have had no hearing. That this hearing succeeded at all, was a surprise to those involved. Brought as a torts case for damages, it sat beyond the statute of limitations, with any eventual case likely to be heard sixty years after the commission of harms. That the British government had a case to answer was also unexpected—judgment in the first hearing found that the claim against the British government was a viable one and fit for trial, against the contestations of the Government that it could not be held responsible.

This paper considers the changing capacity of law to hear cases of “historical injustice,” in particular crimes of colonialism, and considers this shift as part of a moment of constitutive social and legal change. I place the Mau Mau hearings within the context of the current discussions in Britain around British colonial responsibility for the broader harms of Empire. In the hearing of the claims brought against the British Government by Kenyans tortured under the mandate of the “Emergency,” we can observe the potential of this as a constitutive moment in both ushering in a new legal order in which colonial harms can be heard and redressed, as well as changing the public and political landscape

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10 Mutua I, supra note 5, at para. 117 n.18.
of how the British Empire is collectively remembered and discussed. In this way, we can understand the hearings as constituting a “foundational moment”\(^\text{11}\) of establishing a new normative foundation for a British public understanding of Empire.

In the application of established tort law to colonial era harms, and the opening up of the possible creation of a new category of duty of care of negligence by Justice McCombe, we can understand these hearings as being legally constitutive. The release of Foreign and Commonwealth Office documents that had been sitting in boxes since the British retreat from Kenya during the first hearing, and the revelation that they contain material on an estimated thirty-seven former British colonies, further provides a possible pathway for future legal claims. Yet that this was a limited constitutive moment can be observed in the British government’s failure to accept responsibility despite its reparations settlement, the high bar of documentary evidence required for success in these kinds of claims, and in the hearing of the claims within a restricted public narrative of “Britain as savior.”

I argue that while the ability to have this case heard in Britain demonstrates a shifting appreciation of the harms of Empire, the absence of a broader public appreciation of the structural nature of these harms—as constitutive of Empire, not exceptional to it—means that the claims brought and heard in their particularity will fail to have a more extensive constitutive impact. It is in their particularity, however, as legal claims focused on individual harms that demand recognition by Britain as the colonial power, located within the system of authority in colonial Kenya, that we can observe their contribution to the emerging fault lines within Britain that acknowledge the nature of Empire. What we may understand as a legal transition whereby law asserts jurisdiction over colonial era harms, that is located within a broader emerging social transition, allows law the potential to play a critical role in the support of these conversations that contest public narratives of Empire as benevolent. We may thus see this hearing as part of a legal and social transition in which the practice of Empire as harm comes to be recognized as such, and can be understood to contribute to the emerging fault lines in Britain’s legacy of Empire.

II. Bringing the Empire to Account

That the British Government for its actions as Empire should even be brought to account has been a matter of some controversy. Priyamvada Gopal points out how much of the rhetoric has been around appreciation rather than apology, that “emancipation and decolonisation have become prominent themes for national self-congratulation in Britain.”\(^\text{12}\) The rule of law and democracy has been viewed as a particularly British export, for which the “oppressed” must demonstrate gratitude. Even the legacy of slavery—which devastat-

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\(^{11}\) I discuss this concept further in my book, Jennifer Balint, Genocide, State Crime and the Law: In the Name of the State 6, 88 (2012), drawing on Elizabeth Jelin’s earlier use of the term.

\(^{12}\) Priyamvada Gopal, Redressing Anti-imperial Amnesia, 57 Race & Class 18, 19-21 (2016).
ed many African nations and families—has been turned into a story of justice. As Cath-
eryne Hall notes, “Slavery was displaced by abolition in the national imagination—Britons
could be proud of their history,” and thus Britain can imagine itself as liberator, rather
than enslaver.13 Years of exploitation and violence are thus cancelled out, due to Britain’s
efforts in the abolition of slavery, explained through the humanitarianism impulse within
liberalism. This neglects the recorded £20 million paid in compensation to the slave-
owners for the loss of what was considered their property14 (estimated today at £11.6 bil-
lion), and arguments that it was economic rationalism, not humanitarianism, that ended
slavery.15 No compensation was paid to any slave, and the history of who were the slave
owners has been largely hidden: as David Olusoga points out, “[H]eritage plaques on
Georgian townhouses describe former slave traders as ‘West India merchants,’ while slave
owners are hidden behind the equally euphemistic term ‘West India planter.’”16

Britain as Empire has been integral to the modern identity of the United King-
dom. A British government poll held around the time of the 2014 Commonwealth
Games, in answer to the question “Thinking about the British Empire, would you say it is
more something to be proud or more something to be ashamed of?,” found that fifty-
nine percent of respondents replied it was “more something to be proud of,” with nine-
teen percent answering “more something to be ashamed of,” and twenty-three percent
“don’t know.”17 Britain’s contemporary self-imagination is built on its historical construc-
tions of difference between “nation” and “empire,” “metropole” and “colony.”18 It is not
that Empire has been erased from British memory—rather, it has been enshrined as core
to British national pride. It is this in part that fueled the debate leading up to the Brexit
referendum (and the final vote for Britain to leave the European Union on June 23, 2016).
The Leave campaign largely centered on a call to British sovereignty, rather than remain-
ing a perceived satellite of Europe. It was about being central, not peripheral, Empire not
servant. Timothy Garton Ash, in his commentary on the result, noted the power of this

14 Id. at 118.
15 Eric Williams, Capitalism and Slavery (1994).
18 Catherine Hall & Sonya O. Rose, Introduction: Being at Home with the Empire, in At Home with the Empire: Metropolitan Culture and the Imperial World 8 (Catherine Hall & Sonya O. Rose eds., 2006).
narrative: that “it has built, day after day, year upon year, on an emotionally appealing narrative of the plucky freedom-loving island that became a mighty empire.”

The British Empire has been justified as a bearer of the rule of law, democracy, and good governance. Alan Lester, in a recent piece, notes that “Unlike the other European empires, Britons tell themselves, theirs was an empire founded on humanitarian compassion for colonised subjects.” This argument, he suggests, runs as follows: “Everyone—Nigerians, Afghans, and Chinese included—should be grateful for the rule of law, the English language, modern education, railways and free trade, all things that Britain provided in order to usher in the modern age.” Yet as he points out, “Democracy was not actually a concept with which British elites were comfortable—or with which colonised peoples were familiar throughout most of the era of Britain’s imperial rule. Rather, it was something hard won, largely once the British had left.” Further, he shows how this view of history neglects a number of core issues, including the benefit to the British landowners, traders, settlers, and producers of this racist and exclusionary imperial governance. Zoë Laidlaw has further discussed, drawing on the work of Martin Wiener, how “The British pointed to the benefits of the rule of law as a justification for empire.” Yet, as she continues, “it is undeniable that the law frequently underpinned discrimination against the colonized.”

This discourse of freedom and emancipation that underpins the British collective memory of Empire further discounts Indigenous struggles against the Empire as constituting the very freedom that Britain alleges to have been exporting. Gopal argues for an appreciation of an understanding of the contestation of freedom as constitutive: that “different episodes of both subjection and struggle from the end of slavery to post-war


21 Id.

22 Id.


24 Laidlaw, supra note 23, at 822.
decolonisation were fundamental to how freedom was understood and asserted in the colonies, influencing, in turn, how it was understood and reframed in the imperial centre.”

This further challenges the narrative of the centrality of “British values” to the colonial enterprise.

This colonial narrative of Britain as savior continues in neo-colonialist international relations discourse, as exemplified by the declaration of then Prime Minister Tony Blair on entering the war on Iraq: “If we can establish and spread the values of liberty, the rule of law, human rights, and an open society then that is in our national interests too. The spread of our values make us safer.” Derek Gregory has termed this the “colonial present,” showing how both Britain and the USA demonstrate amnesia towards the colonial past, together with nostalgia towards it. Drawing on Edward Said’s concept of “imaginative geographies,” Gregory shows how both countries continue to mobilize a “clash of civilizations” narrative, defining “our” development against “their” barbarism, observed in the narratives of freedom underpinning recent wars such as that in Iraq and Afghanistan.

While colonialism was officially repudiated as an international practice in the United Nations’ 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, there has been little recognition by former colonial powers of the legacies of colonialism. The United Nations’ 2008 Declaration on the Rights of Indigenous Peoples, the result of Indigenous People’s activism, comes closest to recognition of the legacies of colonialism and means of redress, its Annex stating as a core principle of the Declaration:

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.

The four settler colonial states of Australia, New Zealand, Canada, and the USA initially voted against the Declaration, with the United Kingdom voting in favor, yet stating: “[T]he Declaration was non-legally binding and did not propose to have any retroactive application on historical episodes.”

25 Gopal, supra note 12, at 24.
28 Id. at 17, 57-59.
Catherine Lu has argued that colonialism is “still a raw and corrosive ingredient in contemporary international relations between former colonizing countries and their colonial subjects.”31 There is scant recognition of the benefits gained by Britain as a result of Empire. As Hall points out:

We, the peoples of Europe, whether indigenous, settled, or diasporic, are implicated in these histories whether we are direct descendants or not—our modern societies have benefited from the wealth created by slavery and we live in patterns of deep inequality which bear the traces of that history.32

Yet, despite critical scholarship that centrally engages with these legacies of colonialism, this relationship between prosperity and oppression is rarely publicly articulated.33 While much work has outlined the false premise of the congratulatory tone of British imperialism, it has largely failed to penetrate the popular narrative.34 The public historical display of the opening ceremony of the 2012 London Olympics told a tale of agrarian industry morphing into the Industrial Revolution followed by the development of the National Health Scheme and finishing with the multicultural family. This celebratory sweep however, failed to make the link between the growth of industry in Britain and the pillaging of resources from its colonies, or why in fact a multicultural family is able to live in Britain today.35 This “hiving off of imperial history from British history,”36 as Gopal astutely observes, means that the colonial legacy and its intertwining with British history and current identity has been mis-remembered, or as Lester suggests: “[T]o remember empire in this way is an act of incredible selectivity, if not wilful forgetting.”37

This separation of the two, center and periphery, Empire and island, has served Britain well. It can be an “island” with its own narratives and customs—unconnected to its practice as Empire. The “nomos” of Britain, to borrow from Robert Cover,38 then becomes the rocky cliffs and sandy shores of the United Kingdom, not stretching beyond to the nations it populated and governed. “Britain,” with its small villages, green gardens and painted pottery, can thus be celebrated as such, without recognition of its colonial being.

32 Hall, supra note 13, at 119.
35 I am grateful to Ralph Wilde for this observation.
36 Gopal, supra note 12, at 20.
37 Lester, supra note 20.
We are seeing slowly emerging cracks in this public edifice. In 2002 the then Foreign Secretary Jack Straw stated: “A lot of the problems that we are having to deal with now—I have to deal with now—are a consequence of our colonial past.” And in 2011, Prime Minister David Cameron stated in an earlier comment in response to the conflict in Pakistan over Kashmir, “I don’t want to try to insert Britain in some leading role where, as with so many of the world’s problems, we are responsible for the issue in the first place.”

Into these fault lines—and fuelling them—have been a growing number of claims made against the British government for the harms of Empire and their enduring legacies. Reparations have not been on the British agenda. Rather, it has been a claim that has been made on Britain and on other slave-owning and colonial nations. That something is owed by Britain, and other colonial powers, is being increasingly raised. This is both directly in relation to the slave trade as well as in relation to the harms that constituted Empire and their legacies, including continuing structural inequalities and personal loss. It has prompted public responses such as the statement of “deep sorrow” by then Prime Minister Tony Blair on the bi-centenary of the British act abolishing the slave trade, in which he added to expressions of regret from City Council of Liverpool, which had been a major slave trading port, and the Church of England, which had owned a plantation in Barbados that relied on slave labor.

Aimé Césaire characterized the African colonial experience as follows:

The great historical tragedy of Africa has been not so much that it was too late in making contact with the rest of the world, as the manner in which that contact was brought about; that Europe began to “propagate” at a time when it had fallen into the hands of the most unscrupulous financiers and captains of industry; that it was our misfortune to encounter that particular Europe on our path, and that Europe is responsible before the human community for the highest heap of corpses in human history.

It is to this historical reality that the claims made force recognition on a British public narrative that does not include the harms of the colonial past and its continuing legacies.


43 In the debate on the Church of England Apology, one Reverend noted: “We were directly responsible for what happened. In the sense of inheriting our history, we can say we owned slaves, we branded slaves, that is why I believe we must actually recognise our history and offer an apology.” Church Apologises for Slave Trade, BBC News, Feb. 8, 2006, http://news.bbc.co.uk/1/hi/uk/4694896.stm.

44 Aimé Césaire, Discourse on Colonialism 23 (1972).
III. The Mau Mau Hearings

The claims against the British government in relation to the harms perpetrated against those known as the “Mau Mau” were first made to the Kenya Human Rights Commission in Nairobi in 2003, who began the collection of these testimonies. Prior to this, in 2002, John Nottingham, a former District Officer of the Colonial Administration during the Kenya Emergency, had approached the British law firm Leigh Day & Co., together with some former Mau Mau members, about a possible case. With the lifting of the ban of the “Mau Mau” as a prohibited organization—a legacy of the British colonial administration, yet one which the incoming government was loath to overturn—individuals who had been subject to torture and detainment as part of the “Emergency” in place in Kenya from 1952 to 1960 were able to begin to speak publicly of the harms to which they had been subjected. As one witness, Paulo Muoka Nzili, noted in his witness statement: “The Mau Mau Veterans Association could not meet until the ban was lifted by President Kibaki in 2003. We could not talk about the past, there was no recognition of who we were or what we had been through, so I just tried to forget about it.”

The word “Mau Mau” had become synonymous with brutality, following the official British narrative which omitted its genesis as a story of self-determination. It was, however, a complicated story, both liberation struggle and civil war, and politically it had become expedient to keep it criminalized in the wake of Kenyan independence. With its de-criminalization, the Kenya Human Rights Commission began gathering testimonies, and in 2005 contacted Leigh Day to investigate the possibility of their bringing a claim for damages.

At the same time, academic work that detailed the system of abuse supported and perpetrated by the Kenyan colonial administration and the British government had just been published by two historians, Caroline Elkins of Harvard University, and David Anderson of Oxford University. Huw Bennett of University of Wales was completing a Ph.D. detailing the British army’s involvement. This research that was based on primary documentation from the time proved to be central to the success of the hearings, together with material released by the Foreign and Commonwealth Office—known as the Hanslope Archives—that had remained hidden since the withdrawal of Britain from Kenya.

Five individuals were named to lead the case against the British government: Paulo Muoka Nzili, Wambugo Wa Nyingi, Jane Muthoni Mara, Susan Ngondi and Ndiki.

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45 Mutua I, supra note 5 (witness statement of Paulo Muoka Nzili, appellant).
Mutua. Leigh Day conducted interviews with a further 15,000 Kenyans, resulting in 5,228 individuals being joined to the claim. Brought against the Foreign and Commonwealth Office in 2009, this was a civil action for damages for personal injuries. The claim read in part that the Foreign and Commonwealth Office “is liable to them . . . by causing and/or permitting, and/or failing to take adequate measures to prevent, their torture and/or inhuman and degrading treatment and false imprisonment by employees and agents of the [British] Colonial Administration.” A letter delivered in person the following day by the five claimants to British Prime Minister Gordon Brown stated:

We are Kenyans in our 70s and 80s who have travelled to London from our rural villages to tell the world of the torture and trauma we lived through at the hands of the British colonial regime. With the support of the Kenyan Human Rights Commission, we have come to London to issue our legal claims.

These claims were further supported in the witness statements made by three of the lead claimants in 2010 (Ndiki Mutua withdrew his claim and Susan Ngondi passed away before the commencement of the hearings). Each statement detailed the torture and detainment they had been subjected to, and the ongoing traumatic legacies of this treatment, including the severe impact on family life, on health, on employment and on emotional wellbeing. Each of the statements ended with a plea to the British government for recognition of the harms perpetrated. As Wambugu Wa Nyingi concluded:

I have brought this case because I want the world to know about the years I have lost and what was taken from a generation of Kenyans. If I could speak to the Queen I would say that Britain did many good things in Kenya but that they also did many bad things. The settlers took our land, they killed our people and they burnt down our houses. In the years before independence people were beaten, their land was stolen, women were raped, men were castrated and their children were killed. I do not hold her personally responsible but I would like the wrongs which were done to me and other Kenyans to be recognised by the British Government so that I can die in peace.

The claims were heard in two hearings before the British High Court of Justice, which followed two unreported judgments on the claims. The first hearing, held between April 7 and 14, 2011, focused on whether a claim could indeed be brought against the British government. The claimants set out five separate grounds for claiming the United Kingdom government was liable in tort for damages for personal injuries sustained by the five claimants. One of the claims was struck out, that the liability of the former Colonial Administration in Kenya transferred to the United Kingdom government at the time of independence in 1963, but four were upheld as issues for trial: that the United Kingdom government holds joint liability together with the Colonial Administration and individual perpetrators, both through the British Army and the former Colonial Office, that the

50 Claim Form, High Court of Justice, June 23, 2009.
52 Mutua I, supra note 5 (witness statement of Wambugu Wa Nyingi, appellant).
United Kingdom Government is liable for the authorization of the method of torture known as the “dilution technique” by the Secretary of State for the Colonies on July 16, 1957, and that the United Kingdom Government “is liable in negligence for breach of a common law duty of care in failing to put a stop to what it knew was the systematic use of torture and other violence upon detainees in the camps when it had a clear ability to do so.”

The second hearing, held between July 16 and 20, and July 23 and 25, primarily considered whether an issue of limitations exists, given that the acts occurred from 1952 on, which fell outside the existing statute of limitations. It also considered a new claim put forward, that “The United Kingdom government, through General Erskine and his successors, is vicariously liable for such assaults upon the Claimants as aforesaid as were committed by members of the Colonial Administration’s security forces,” together with an amended claim of “joint liability by common design to restore law and order.” The relevance of the United Kingdom Human Rights Act 1998 and the underlying European Convention on Human Rights, together with public international law were also considered.

The hearing found that a case could proceed—that a “fair trial” was practicable—and that the principle of vicarious liability could also be applied (in addition to those of joint liability and duty of care established in the first hearing) in relation to the responsibility of the British government for the perpetration of the abuses by members of the British army and by members of the Colonial security forces engaged in guarding prisons and camps.

Both judgments relied heavily on the documentary evidence, in particular the Minutes of the Chief Secretary’s Complaints Coordinating Committee that had been established by the Executive Council to record complaints from detainees and determine their validity, records of legal cases, inquiries and commissions, letters written by detainees outlining the abuse, together with Executive Council and War Council records. This documentary evidence was further bolstered by the surprise admission by the British government in the middle of the first hearing that there existed even more documentation than that currently held at the British National Archives in Kew and at the Kenyan National Archives in Nairobi. Expert historical witness David Anderson had referred in his witness statement to the materials that he had not been able to locate, yet which he believed were 300 boxes of materials secretly taken from Kenya by the British government on the eve of Independence. This obliged the British government to search for these, and

53 Id. at para. 13.
54 Mutua II, supra note 7, at para. 21.
55 Id. at para. 22.
56 Justice McCombe found that the Convention and Act could not be applied: “In my judgment, the law of England has not yet progressed as far as the claimants would have me travel in this respect,” and that public international law did not offer anything further to the case. Id. at para. 151.
the archives found at Hanslope Park, consisting of 8,800 files, proved to be critical to the success of the hearings.57

Justice McCombe stated in his opening paragraph of the judgment of the first hearing: “Suffice it to say that if the allegations are true (and no doubt has been cast upon them by any evidence before the court), the treatment of these claimants was utterly appalling.”58 Further:

The materials evidencing the continuing abuses in the detention camps in subsequent years are substantial, as is the evidence of the knowledge of both governments that they were happening and of the failure to take effective action to stop them.59

It was the system established by the Kenyan colonial administration in collaboration with the British government that was at the core of the claims made to the court. As Justice McCombe found in the first hearing:

The existence of a Colonial Government does not preclude, in my view, a separate and individual role for the paramount Government of the country whose colony a particular territory is . . . . In the present case, the evidence so far available suggests that this colonial power played a distinctly “hands on” role in the management of the Emergency. It was not standing aloof, merely offering advice and assistance when the local government asked for it.60

Yet he was also at pains to stress that the hearing was not yet at trial stage:

For the avoidance of doubt on the part of any persons interested in the outcome of these applications, beyond the direct circle of the parties and their advisers who will appreciate the ambit of my decision, I am NOT finding that the defendant is liable for the injuries inflicted upon the claimants. I am simply deciding that the issue of whether it is so liable, on these formulations of the claimants’ case, is fit for trial. Nor am I deciding there was a system of torture of detainees in the camps in Kenya during the Emergency; I merely decide that there is viable evidence of such a system which will have to be considered at trial.61

The claims were set to go to a full trial, when the British government settled. Arguably, this was due to substantial international pressure placed on the British government to reach a settlement. Archbishop Desmond Tutu had made a number of representations to the government, together with members of the “Group of Elders” Lakhdar Brahimi and Graça Machel. In a 2012 letter to Prime Minister David Cameron, they wrote that they were “concerned at the stance the British Government has taken by relying on legal

57 Mutua I, supra note 5; id. at para. 130 (Justice McCombe noting in judgment that “[t]he evidence shows that those new materials were removed from Kenya upon independence precisely because of their potential to embarrass the UK Government”). They were agreed to include “2000 pages of War Council and Security Council official minutes, 5,400 pages of War Council memoranda, 4000 pages of Intelligence Committee reports, 2000 pages of Emergency Committee reports.” Mutua II, supra note 7, at para. 57.
58 Mutua I, supra note 5, at para. 1.
59 Id. at para. 128.
60 Id. at para. 132.
61 Id. at para. 134 (emphases in original).
technicalities in response to the allegations of torture of the worst kind including systematic beatings, castrations and sexual abuse of women.” Further, they expressed their concern at the apparent hypocrisy of the British government as a champion of human rights: “In concrete terms, what message does the British government’s obstructive stance to these allegations of torture send out to African governments and leaders who act with impunity?” Approaches were also made from leading international and national NGOs in 2013, in the face of a planned appeal by the British government against the hearings proceeding to a full trial. The letter sent by Liberty UK, and signed by leading national and international human rights NGOs, concluded:

The stance the British government has taken to these issues is entirely inconsistent with the spirit of the United Nations Convention Against Torture, its international legal obligations and the ethical values to which Government Ministers frequently lay claim. Britain’s complete unwillingness to deal honourably with victims of its own breaches of human rights in Kenya undermines Britain’s moral authority in the world. Accordingly, we would ask you to meet with the victims and seek to resolve their concerns as soon as possible.

The British government negotiated a settlement, announced on June 6, 2013. This included monetary reparations to the three lead claimants and the 5,228 Kenyans whose claims had been gathered by Leigh Day (each claimant received £2,600), a monument built in Nairobi to victims in Kenya that was unveiled on September 12, 2015, and an apology given by the Foreign Minister William Hague in the House of Commons. Extracts from the apology were read out by the British High Commissioner in Nairobi to Mau Mau veterans. Including costs, the settlement value was £19.9 million. Archbishop Desmond Tutu stated, “The settlement is a balm for both the victims and perpetrators of shocking abuses that took place during the so-called Mau Mau uprising in Kenya between 1952 and 1960—and more broadly, for all the people and nations subjugated by Europe in the colonial age.”

IV. Hearing Colonial Harm

A question that we may ask, is why now? These claims of colonial harm have not been heard successfully before law previously. We could answer this question in two ways. Firstly, by understanding how this case fits within the structure of law and legal possibilities. Secondly, by considering the normative environment into which these claims were brought. In this way, we can make a contribution to understanding both the normative and structural conditions of law’s capacity to hear particular cases of harm—and how

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62 Letter from Archbishop Desmond Tutu, Lakhdar Brahimi and Graça Machel to Prime Minister David Cameron, CC Deputy Prime Minister Nicholas Clegg and Foreign Secretary William Hague, Feb. 2012.

63 Letter from Liberty to Prime Minister David Cameron on behalf of international and national human rights NGOs, CC Deputy Prime Minister Nick Clegg and Foreign Secretary William Hague, Mar. 27, 2013.

these hearings may be understood to play a constitutive role as a moment of legal and social transition.

As a case with strong documentary evidence, the case fitted well into the structures of legal process. Without the enormous supporting documentary material, the claims would not have had this hearing, nor have been set for full trial. The combination of the oral testimonies that could be given publicly in the wake of the decriminalization of the Mau Mau organization in Kenya, the publication of significant historical accounts of the system of abuse under the Kenyan colonial administration, which drew substantially on the colonial record, and the addition of thousands of more records through the discovery of the Hanslope Archives, resulted in a successful hearing of claims. Law’s preference for documentary evidence over oral testimony means records are given priority. While this can be problematic in hearings where written records do not exist, in this situation it underpinned the success of the hearings. It meant, however, that future claims may not be as successful.

That governments and companies may be found responsible for harms occurring outside their immediate geographical jurisdiction, yet for which they owe joint or vicarious liability, is an emerging area in law. This was discussed in substance in the 2012 hearing, and the judgment found that the area of “vicarious liability” is an expanding one. In light of this, Justice McCombe stated:

It strikes me that, if my approach adopted in the earlier judgment is correct, it may be found at a trial that the detention of persons such as the claimants was part of a joint exercise by the UK government and the Colonial Administration to control the rebellion, giving rise to duties such as those owed by the prison authorities to prisoners and attracting the same basis of liability as was found to exist in Lister’s case and the other cases cited above. The liability may not be far different in character from that upon which the claimants seek to rely in the claim based upon “common design to restore law and order”, to which I return below. As I venture to suggest below, the boundaries between these routes to common or joint liability in tort may be narrowing.

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65 For example, Shoshana Felman, The Juridical Unconscious: Trials and Traumas in the Twentieth Century 134 (2002), argues that the Nuremberg trials had a more significant impact on international law than the Eichmann trial in part due to the former’s greater reliance on documentary evidence, as opposed to the latter’s more prominent featuring of victim’s verbal testimony; this can also be problematic, as demonstrated in an Australian Native Title case in which the memoir of a member of the Board of Protection for Aborigines was given preference over the oral evidence of continuity of connection to land by the Yorta Yorta people themselves. See Wayne Atkinson, 19 Seconds of Dungudja Wala (Yorta Yorta Word for Big River): Reflections Paper on The Yorta Yorta Native Title Judgment (2000), http://www.kooriweb.org/sljr/dungudjawala.htm.


67 Mutua II, supra note 7, at para. 80 (“[T]he idea we learnt as students, that (subject to very limited exceptions) vicarious liability for a tort only arises where the primary tort is committed by an employee within the scope of his employment, is far too narrow.”).

68 Id. at para. 84.
In his discussion of joint and vicarious liability, Justice McCombe expounded on these legal doctrines by relying on leading tort text books and on established and uncontroversial case law. Yet the application of these to the actions of the United Kingdom in a former colony under its administration was new.

It is in the discussion of negligence in the judgment that the novel aspects of these hearings may be found. As its key defence, the British government argued that “the constitutional arrangements under which the government of Kenya was the responsibility of the Colonial Administration under the Governor.” Justice McCombe responded (and it is worth quoting the judgment in full):

I do not accept, at least at this early stage of the proceedings, this slavish “Salomon v Salomon” style approach to the question “who is my neighbour”. We are dealing here with alleged acts of torture said to be known to both governments. On such a hypothesis, it is strange to suggest that, as a matter of fact or law, a paramount colonial government has to go through the elaborate rigmarole of dismantling the colonial constitution before it can stop the torture. Of course, the constitution of Kenya remained in place and was not revoked. However, the government in the UK had a separate existence and an active and very present interest and participation in the handling of the Emergency. The present evidence suggests to me that the Colonial Administration would have followed insistent instructions from the British government in London and the security forces would have followed such instructions from General Erskine, without any need to revoke the constitutional arrangements or even to threaten to do so. London was apparently paramount and “what London said, went”. The idea that torture of the type alleged could have been perpetrated as widely as it appears to have been if the British government or General Erskine had genuinely wanted it to stop seems, at least arguably, unlikely.

Justice McCombe found that “on any footing, this is an ‘exceptional case’ and it is of such a nature that judicial policy might positively demand the existence of a duty of care.” He outlined what we may understand as a duty of care drawing on a concept of “spheres of responsibility”: “The time must come when standing by and doing nothing, by those with authority and ability to stop the abuse, becomes a positive policy to continue it.” While recognizing that the law to date had not recognised a duty of care owed by the United Kingdom Government to claimants in such circumstances, Justice McCombe left the door open to essentially creating new common law through extending the tort of negligence to a new category of duty of care that is located in the possibilities, not formalities, of care and action. In including these harms of colony and Empire within ordinary tort law and in the expansion of legal doctrine to include colonial harms, we might understand this as constituting a form of legal transition.

The legal answer, however, only tells part of the story. We could argue that there is a changing appetite for recognizing this form of harm. The increasing bringing of
claims for genocide and other state crime, both through the new permanent International Criminal Court, but also through national courts such as most recently in Argentina, fits with the no-impunity international normative framework. 73 Not all state crimes are being heard, and those perpetrated by governments still in power fail to have a hearing. Colonial crimes can fit into this category—with no clear “end point,” these crimes fall outside conventional justice frameworks. 74 Alongside this, we can credit the business and human rights movement that has been gathering momentum for drawing attention to abuses perpetrated by corporations. 75 Given much public attention by the Special Representative on Business and Human Rights John Ruggie at the United Nations, with the development of the United Nations Guiding Principles on Business and Human Rights framework in 2011 (yet which fell short of criminalizing corporate behavior), 76 it has been employed in much torts litigation and regulation.

We can also identify a further and growing normative shift of recognition of British colonial empire harms. Much of the resistance to the dominant narrative of celebration of Britain’s colonial past and its continuing present can be found emerging at the grassroots. Most recently, the student led “Rhodes Must Fall” movement was created at the University of Cape Town in South Africa, protesting a statue of the British imperialist Cecil Rhodes on the campus grounds, as a focus for a larger debate about the decolonization of education in South Africa. This was taken up at other universities worldwide, including the University of Oxford in the United Kingdom, where students protested a much smaller statue of Rhodes at Oriel College, which has remained. “Rhodes Must Fall” in the United Kingdom has as its rallying call to “acknowledge and confront its role in ongoing physical and ideological violence of empire,” 77 and has prompted further awareness of the British imperial legacy. It had been Rhodes who was a chief proponent of the ideology of white supremacy, was the first Prime Minister of the Cape Colony from 1980 to 1896, and articulated a vision of the British “master race.” Yet it is the Rhodes Scholarship that is still the premier pathway for high-achieving students from Commonwealth countries to gain access to Oxford University and has been held by many of Australia’s prime ministers, among others.

Further work in relation to the remembrance of Britain’s role in the slave trade, as Hall notes, has been taken up by visual artists, writers, historians, curators and community groups in the last two decades. 78 A European network on slavery (EURESCL) has been

75 See The UN Guiding Principles on Business and Human Rights (Radu Mares ed., 2012).
76 I am grateful to Elise Groulx-Diggs for this point.
78 Hall, supra note 13, at 117.
established to focus, as Hall outlines, “on the slave trade, slavery abolition and their legacies in European histories and identities.” She also notes how the “port cities most intimately connected with the slave trade, as, for example, Nantes and Liverpool, have engaged in public projects that open up their connections through museums and memorials.” In the United Kingdom, the “Legacies of British Slave-ownership project” has been focused on making slavery visible, to “reinscribe slave-ownership onto modern British history.” It has been this research project on British slave owners that has, as Anita Rupprecht notes, made “publicly accessible, the records of the Slave Compensation Commission, instituted in 1833, to organise the payment of the £20 million paid to British slave owners on the ‘loss’ of their property as a result of the British Emancipation Act.”

In Australia, the “Minutes of Evidence” project, through the mediums of performance, education and research, “seeks to pursue new ways of connecting the past and the present, as well as connecting contemporary audiences, school children, educators and readers with histories of colonialism and their enduring effects.” These kinds of projects attempt a broader accounting and redress of colonial pasts and future justice.

These protests and projects can be seen to fit too within an older yet resurrected reparations movement. As pointed out by Daniel Butt, a key question on which this debate is centered is “Does historic colonialism continue to cause harm to persons living in the present—and if so, how much?” A core answer can be found in the statement made by M.K.O. Abiola, who was to become President of Nigeria. In a speech delivered in London in 1992, Abiola said:

Our demand for reparations is based on the tripod of moral, historic, and legal arguments. . . . Who knows what path Africa’s social development would have taken if our great centres of civilization had not been razed in search of human cargo? Who knows how our economies would have developed . . .

The broader movement for reparations originated in the Organization of African Unity, now succeeded by the African Union. In Abuja, Nigeria on June 28, 1992, the Organiza-
tion of African Unity swore in a twelve-member Group of Eminent Persons, whose goal was reparations for Africa. Throughout the 1990s a number of rallying events were convened, including the “Pan-African Conference on Reparations” held in Abuja, Nigeria in April 1993, and the Africa World Reparations and Repatriation Truth Commission that met in Accra, Ghana in August 1999 and produced “The Accra Declarations on Reparations and Repatriation” and which concluded that “the root causes of Africa’s problems today are the enslavement and colonization of African people over a 400-year period” and that Africans were owed US$777 trillion in compensation (plus annual interest). As Rhoda Howard-Hassmann notes, the Holocaust reparations discussions that further emerged in the 1990s in relation to life insurance companies and banks, influenced the African reparations claim, and “In some African eyes, it appeared that ‘white’ victims of mass atrocities were entitled to compensation, while non-white victims were not.”

More specific reparations movements have included a Jamaican Reparations Movement that had goals “specific to the enslavement of Africans in Jamaica and their descendants,” a Kenyan chapter of the Africa Reparations Movement that was concerned primarily with securing an apology for slavery and colonialism, and The Africa Reparations Movement (U.K.), based in London, that sought reparations for slavery and colonialism and the return of African artifacts, among other objectives. Alongside this was the growing movement in the USA for African-American reparations. This was encapsulated in the final statement of the United Nations “World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance” held in Durban in 2001, in which the harms of slavery and of colonialism and their ongoing consequences were noted, together with the right to seek “access to justice, including legal assistance where appropriate, and effective and appropriate protection and remedies, including the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”

With little to no movement in the domestic political sphere towards reparations for slavery and colonialism, domestic law is increasingly being sought after as a tool to obtain reparations. While there had been a call to international law, this has failed, so we can see the new approach as individual cases being brought domestically. The use of law of

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87 Howard-Hassmann, supra note 85, at 21.
88 Howard-Hassmann & Lombardo, supra note 86.
course is not a new tactic—in 1783, in Boston, Massachusetts, a freed African American woman named Belinda, taken as a slave from her home in what is now Ghana at the age of twelve, petitioned the Massachusetts legislature for a yearly allowance from the estate of her former owner, loyalist Isaac Royall, who had fled to England—but however it is one increasingly being utilized. Litigation has more recently been brought by the African-American reparations movement, including class action lawsuits against federal and state governments, and litigation against private corporations alleged to have profited from slavery. A 2003 Chicago ordinance that made businesses disclose their historic ties to slavery resulted in investment bank JP Morgan Chase issuing an apology and setting up a scholarship fund after admitting two banks that it incorporated had accepted 13,000 slaves as collateral and owned 1,250 of them through defaults. The British insurance company Lloyds of London, together with the US government, was sued in 2004 in New York by ten African-Americans for the company’s complicity in insuring the slave trading expeditions. In a different reparations model, a slave-era case from 1859 in Wayne Country, Virginia, was reopened in 2012 and the children of the Polley family declared freed.

With this has been a growing movement to bring reparations cases that focus on colonial era harms. Most recently, in the wake of the Mau Mau claims hearings, Jamaica has been leading a coalition of fourteen Caribbean states making a case for reparations for slavery against Britain, France, Spain, Portugal, Norway, Sweden, Denmark, and the Netherlands, focused around a Caribbean Community (CARICOM) Reparations Com-

91 Although the state legislators granted her petition, it required Belinda petitioning the legislature twice more in order for the annual payments to be enforced. Roy E. Finkenbine, Belinda’s Petition: Reparations for Slavery in Revolutionary Massachusetts, 64 William & Mary Q. 95 (2007).

92 For an overview, see Brooks, supra note 89. Lynda Morgan notes how lawyer Deadria Farmer-Paellmann of the Restitution Study Group brought suits against a number of corporations, with the intent of proving how extensively they profited from slavery and racial segregation, bringing a suit in 2002 in the Massachusetts Supreme Court in Boston entitled “A Petition to Appeal the Case against Corporations for Slavery Reparations.” Lynda Morgan, Reparations and History: The Emancipation Generation’s Ethical Legacy for the 21st Century, 99 J. Afr.-Am. Hist. 403 (2014). The companies included FleetBoston Financial, the Richmond, Virginia, railroad firm CSX, and Aetna Insurance Company, with an estimated $1.4 trillion sought, the amount then estimated to have been stolen in terms of labor costs from four million slaves, not including interest. See also Business & Human Rights Resource Centre, Slavery Reparations Lawsuit (re USA), https://business-humanrights.org/en/slavery-reparations-lawsuit-re-usa.

93 Morgan, supra note 92, at 417.


95 A case seeking the freedom of the children of the Polley family, left incomplete in 1859, was recommenced in 2012 in West Virginia. Testimony from the original trial was reheard, and the judge declared that the Polley children should have been freed in 1859, and in fact were free as of 1859, using the doctrine nunc pro tunc (“now for then”) which “allows courts the equitable power to remedy an injustice which existed due to the court's mistake or oversight in making a ruling.” Atiba R. Ellis, Polley v. Ratcliff: A New Way to Address an Original Sin?, 115 W. Va. L. Rev. 777, 788 (2012).
mission. The Commission was created in July 2013 in the wake of the Mau Mau settlement, to establish the moral, ethical and legal case for the payment of Reparations by the Governments of all the former colonial powers and the relevant institutions of those countries, to the nations and people of the Caribbean Community for the Crimes against Humanity of Native Genocide, the Trans-Atlantic Slave Trade and a racialized system of chattel Slavery.

This has had little comment from the nations it has sought to approach, with the British Foreign and Commonwealth Office responding in part that “We do not see reparations as the answer. . . . Governments today cannot take responsibility for what happened over 200 years ago.” There is also a new set of claims currently before the British courts, a broader class action that seeks damages for 40,000 Kenyans for the harms of the British colonial administration beyond torture and detention that was the focus of the earlier claims.

These cases of colonial harm have not been heard earlier. The Mau Mau case can be understood in the context of the growing reparations movement and the legal hearing of state crime. In itself, it has opened up the possibility of future claims, particularly through the possibility of the extension of a new category of duty of care that the judgment outlined. That is, when abuse is not stopped by those who can, this entails the abrogation of a duty of care. This is a principle both to be applied to colonial era harms, but also contemporary state crime.

V. Conclusion: A Limited Constitutive Moment

The extent to which we can understand the Mau Mau hearings as a moment of legal and social transition, however, is a critical question. Law asserting its jurisdiction over colonial-era harms is something new. Yet in the British government’s response to the hearings—the settlement—we can see a failure to engage with the structural nature of the harm as constitutive of Empire. In the statement of regret given to the House of Commons, Foreign Secretary William Hague misrepresented much of Justice McCombe’s findings. There was indeed recognition of harms: “The British Government recognise that Kenyans were subject to torture and other forms of ill treatment at the hands of the colonial administra-

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This recognition was of deep importance to those bringing the claims. This was followed by a statement of regret, albeit qualified: “The British Government sincerely regret that these abuses took place and that they marred Kenya’s progress towards independence.” Yet in the substance of the findings, it did not represent these fairly. It stated that “In 2011, the High Court rejected the claimants’ arguments that the liabilities of the colonial administration transferred to the British Government on independence, but allowed the claims to proceed on the basis of other arguments.” The “other arguments” included that the UK government had a direct and joint liability with the Colonial Administration for what occurred and owed a duty of care in its failure to stop the abuse. It also inferred that only “three of the five cases” could proceed to trial, yet this was a claim for damages, in which there were five original lead claims, and in which one had subsequently died and one withdrawn their claim, and it was on this basis that the court ruled. And the statement reiterated the government’s stance that it did not accept liability—which was to be a matter for the trial not the hearings, as the judge had made very clear, and continued its argument, which the judge had also refuted, that the trial required key witnesses. Further, the statement drew a line under future claims:

It is, of course, right that those who feel they have a case are free to bring it to the courts. However, we will also continue to exercise our own right to defend claims brought against the Government, and we do not believe that this settlement establishes a precedent in relation to any other former British colonial administration.

It was not British responsibility, but strategic concerns, that underpinned the public narrative of the statement. The settlement was couched in terms of being important for future economic and political relations, rather than as an important acknowledgement of British responsibility for these harms as integral to Empire.

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100 United Kingdom, Parliamentary Debates, House of Commons, Mau Mau Claims (Settlement), Secretary of State for Foreign and Commonwealth Affairs (Mr. William Hague), June 6, 2013, at col. 1692.

101 Id.

102 Id. at col. 1693:

We continue to deny liability on behalf of the Government and British taxpayers today for the actions of the colonial administration in respect of the claims, and indeed the courts have made no finding of liability against the Government in this case. We do not believe that claims relating to events that occurred overseas outside direct British jurisdiction more than 50 years ago can be resolved satisfactorily through the courts without the testimony of key witnesses, which is no longer available. It is therefore right that the Government have defended the case to this point since 2009.

103 Id.

104 Id.: The settlement I am announcing today is part of a process of reconciliation. In December this year, Kenya will mark its 50th anniversary of independence and the country’s future belongs to a post-independence generation. We do not want our current and future relations with Kenya to be overshadowed by the past. Today, we are bound together by commercial, security and personal links that benefit both our countries. We are work-
In not locating the harms within Empire, as part of the system of Empire, the settlement can be said to create limited constitutive social change. The settlement maintains the consistent political narrative of British values set apart from colonial-era harms. Yet the judgments of the two hearings noted something different. They recognized the system of oppression that existed, and the relationship between the Kenyan colonial administration and the British government.

In terms of the outcome of the legal hearing, the claims thus had mixed success. The compensation payments to the claimants were a critical acknowledgment of the harm they had suffered. So too the statement of recognition by the British government, in the British Parliament and to the Mau Mau Veterans in Nairobi. The memorial has been equally significant in Kenya. Yet while there has been recognition of atrocities perpetrated on Kenyans associated with the Mau Mau, there has been no recognition of the role of the British government in the perpetration of the torture and detention during the “Emergency” in Kenya. With the focus on development, on “strengthening a relationship that will promote the security and prosperity of both our nations,” there has been a failure to properly account for the scope and intent of the British colonial project.

The existence of these particular harms is now not disputed. Both the legal hearings and the political settlement recognized them as fact. It is who bears responsibility for their perpetration that remains in public contention. The vast amount of documentary material presented and recorded in the two judgments that demonstrates the complicity of Britain, can, I suggest, help open up a space for critical awareness and a moment of legal and social transition.

Tort law has its limitations—as a body of law which is directed toward the compensation of individuals, rather than the public, it has a limited mandate. Yet it also has a rectificatory role—to restore individuals to the condition in which they were before the wrong. This can be clearly impossible in the case of mass historical injustices, as poet Dan Pagis so powerfully points out in his Draft of a Reparations Agreement written after the signing of the reparations agreement between Israel and Germany. Yet while we can

Ining together closely to build a more stable region. Bilateral trade between the UK and Kenya amounts to £1 billion each year, and around 200,000 Britons visit Kenya annually.

105 Id.
107 Cranor, supra note 106, at 32 (drawing on Aristotle).
108 “All right, gentlemen who cry blue murder as always, / nagging miracle-makers, / quiet! / Everything will be returned to its place, / paragraph after paragraph. / The scream back into the throat. / The gold teeth back to the gums. / The terror. / The smoke back to the tin chimney and further on and inside / back to the hollow of the bones, / and already you will be covered with skin and sinews and you will / live, / look, you will have your lives back, / sit in the living room, read the evening paper. / Here you are. Nothing is too late. / As to the yellow star: / it will be torn from your chest / immediately / and will emigrate / to
understand that the individual trauma and loss cannot be repaired, we can put some thought towards what it may look like to address and recognize the structure which makes the harms possible and what role these kinds of hearings might play in doing this.

Part of this entails recognition of individual harms—which lies at the heart of many reparations claims. In the case of colonial era harms, this is both a particularist and a generalist harm. In restoring an individual, one cannot ignore the structure within which their harm was situated. At the heart of colonial era claims has been a push for recognition and recompense of what it means to have been colonized, and the continuing legacies of oppression and inequality that remain. These hearings go some way towards this, in their articulation of the system of colonialism in Kenya, and in their outlining of the terrible acts perpetrated. As legal hearings, they also point to the responsibility and duty of care of those in power to stop injustice.

It is, however, in the particularity of these hearings—as torts cases relying on individual harms—that we may begin to create these fault lines in the belief in the benevolence of Empire. These individual testimonies of harm—of torture, detention, gross physical assault—lay claims that belie the generalist claims of the Empire as good and bringing prosperity and stability. They disrupt the celebratory narrative of the British Empire. They are stories on the ground, what Mari Matsuda termed “looking to the bottom.” They begin the process of a broader structural awareness, that we can understand as a limited constitutive moment of legal and social transition. These hearings sit within the broader claims of destruction through colonialism and slavery—and give a particularist voice to them. They do not speak to the structure of Empire, but they do compel us to seek it out—and it is in this that we can see this claim, as others may do too, as forcing open the prism of the British colonial enterprise.