



Restitution, Reconciliation, and Reparations for Namibia

Does International Law Provide
a Right to Restorative Justice?

International
Human Rights
Law Clinic Report



This report is a project of the International Human Rights Clinic, an experiential learning course at Johns Hopkins University –The Paul H. Nitze School of International Studies (SAIS). The views expressed herein are those of the authors and do not reflect the official position of SAIS or Johns Hopkins University.

Front Cover: Genocide Memorial Stone erected in the Swakopmund cemetery in 2007

Back Cover: National Flag of Namibia

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NO Shame

by Jephtha U. Nguherimo

my story is not old
it is being told

oh, the arrogance of victors
to set the timeline
the arrogance of the killers
to set guidelines

my story is not history
it is about the burden of memory
it is about speaking up
i can't keep my mouth shut

my story is about my identity
it is about my misery
it is about dispossession
it is about liberation

my story is righteous
it is timeless
it is extraordinary
it is revolutionary

my story is not old
oh, it is being told now
it is timeless
i can't remain silent

Acronyms

ACHPR

African Commission on Human and Peoples' Rights

AfD

Alternative für Deutschland

AU

African Union

AUADSWG

African Union Diaspora Sixth Region Facilitators Working Group-Europe

AUCIL

African Union Commission on International Law

CARICOM

Caribbean Community and Common Market

CERD

Convention on the Elimination of Racial Discrimination

CIDO

Citizens and Diaspora Directorate

CPAN

Caribbean Pan African Network

DKGSWA

Deutsche Kolonialgesellschaft für Südwest-Afrika

ECCHR

European Center for Constitutional and Human Rights

FTRLP

Fast-Track Land Reform Program

ICCPR

International Covenant on Civil and Political Rights

ICESCR

International Covenant on Economic Social and Cultural Rights

ICCPR

International Covenant on Civil and Political Rights

ICJ

The International Court of Justice

ICPRCP

The UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation

IDCARAN

Igualdad Racial, Diferencia Cultural, Conflictos Ambientales y Racismos en las Américas Negras

JD

Joint Declaration

LMP

Landless People's Movement

NTLA

Nama Traditional Leaders Association

OAU

Organization of African Unity

OHCHR

The Office of the High Commissioner for Human Rights

OTA

Ovaherero Traditional Authority

PLAN

People's Liberation Army of Namibia

SWA

South-West Africa

SWANU

South West Africa National Union



SWAPO

South West People's Organization

TWAIL

Third World Approaches to International Law

UDHR

Universal Declaration of Human Rights

UN

The United Nations

UNCN

United Nations Council for Namibia

UNDRIP

UN Declaration on the Rights of Indigenous Peoples

UNESCO

United Nations Educational, Scientific
and Cultural Organization

UNGA

UN General Assembly

UNHCR

United Nations Human Rights Council

UNSC

United Nations Security Council

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Throughout this entire process, both in Windhoek and beyond, we were met with unflagging kindness, generosity, and goodwill. We are deeply grateful

for the hospitality we received, which we hope to return in kind whenever our paths cross again. We commend all of the individuals and organizations who work, often thanklessly, to promote and protect the rights of indigenous peoples, including the victims and survivors of genocide, around the world. Your work is of the utmost importance.

Lastly, we would be remiss in not taking this opportunity to remember all of those who died during the Ovaherero and Nama Genocide, including those from other ethnic groups in Namibia. May they rest in peace.

— *International Human Rights Law Clinic*
Class of 2023-2024



Photo by Ashim D'Silva, Unsplash

Executive Summary

The national anthem of Namibia is called “Namibia, Land of the Brave.” And that patriotic description is well deserved. Namibia has been through turmoil and trial far in excess of many of its African neighbors. Yet it has survived, and today is in many ways a success story. That is not to say that it has solved all of its problems. But it has approached them with an eye toward reconciliation, not recrimination, and in a spirit of dialogue and democracy.

From 1884 to 1915, Namibia was colonized by the German Reich. Toward the end of that era, frustrated with the resistance of two of the country’s ethnic groups, the Ovaherero and the Nama, the German occupiers unleashed what may properly be called – without qualifiers – a Genocide. Although many territories around the globe suffered enormously during the colonial era, and while many colonizers demonstrated unimaginable brutality toward indigenous peoples, the case of Namibia may be unique, in that its colonial masters formally and explicitly targeted two of the country’s tribes for annihilation. This was done through written orders, whose texts are bone-chilling. They and other communities were victimized not only through mass murders, enslavement, sexual violence, and torture, but also by way of dispossession of land, culture, and identity.

Following its “liberation” from German domination, Namibia became a vassal state of South Africa, which imposed on it a regime of apartheid for three quarters of a century. Although the brutal killings stopped, the oppression did not: Namibians were no less denied their agency, their humanity, and of course their freedom. Independence came at last in 1990, but not without more violence, more deaths, and an unwelcome turn as a pawn in Cold War geopolitics.

Yet Namibia is today a case study not in resentment, but in finding a way forward. That is the remarkable reality that the class found during our project. And that is what this report is about.

The mission of the Johns Hopkins University School of Advanced International Studies Human Rights Law Clinic is to understand the value and the role of international law in addressing human rights concerns. In past years, we have studied pressing present-day problems: how does Georgia ensure that its law enforcement personnel are accountable to the people they are meant to serve? How has Peru adapted its legal system to accommodate the sudden influx of more than a million Venezuelan migrants? Our goal is to analyze, to understand, and to report: we of course do not presume, nor do we have the right, to judge.

This year, the Clinic has investigated how nations address the legacies of human rights atrocities that occurred long ago, focusing on Namibia’s experience of the Genocide. The questions that this inquest raises are profound, and they are of global importance. There can be no question that colonial-era violence has left not just scars, but open wounds, in many parts of the world. And the voices of people deprived of their liberty, now seeking restorative justice, are increasingly being heard.

Restorative justice can take many forms. It includes reparations – monetary payments seen as compensation for past wrongs – but it also requires restitution of property stolen, reconciliation with the past and acknowledgment of responsibility, and the perpetuation of memory, not least to assure non-recurrence. All of these have featured in the efforts of Namibia to pursue restorative justice for the Genocide of the early twentieth century.

While the long-needed international conversation about the debts owed by the colonizers to the colonized is in its early stages, the case of Namibia occupies a leading and influential position. In large measure, this is because Germany, unlike other western nations that subjected people of other races to abuse and exploitation, has been willing to come to the table to talk.

The consequences of the Genocide are still visible and still painful. Ancestral lands that had provided sustenance for untold generations were taken, and have never been restored. Communities were separated, marginalized, and exiled. Languages, cultures, and sacred objects disappeared into oblivion. And while the Namibian government has undertaken numerous and varied efforts to address these issues, there is only so much it can be expected to do on its own.

In 2006, the Namibian National Assembly invited Germany to engage in dialogue. The resolution was proposed by the then-Paramount Chief of the Ovaherero people, one of the two principal targets of the Genocide of a century earlier. He called for dialogue with Germany, “to try to resolve this matter amicably, and thereby strengthen and solidify the excellent relationship” between the two countries. The motion was passed unanimously, but there was no immediate progress toward formal bilateral talks.

Ten years later, a lawsuit was filed in New York City, alleging that the Genocide was a violation of international law for which Germany was answerable in damages. Although the suit ultimately failed on sovereign immunity grounds (the appellate court affirming its dismissal wrote, “The terrible wrongs elucidated in Plaintiffs’ complaint must be addressed through a vehicle other than the U.S. court system.”), the exercise put down a marker: the campaign to achieve restorative justice was a matter not only of diplomacy but of law. The German government quite obviously heard that message.

Discussions over the following years resulted in what came to be called a Joint Declaration, agreed by the parties in 2021. The text of the Declaration is reproduced in the Appendix to this report. The “JD” is in many ways remarkable: Germany expressed its contrition in no uncertain terms, and Namibia accepted the apology, “to heal the wounds of the past and create a lasting partnership for the future.” And the German side agreed to grant more than one billion Euros, over 30 years, to Namibia’s development.

And yet, both in its content and in its process of negotiation, the JD is widely seen in Namibia as seriously flawed. Much of our study has focused on this instrument, as we have attempted to understand its place in the international legal landscape, as well as its prospects for eventual implementation.

The Joint Declaration was negotiated between two governments, with representatives of the affected communities participating only indirectly as members of “technical committees” providing advice, but without a formal role. This engendered great dissatisfaction, given that the parliamentary resolution of 2006 specifically called for the Nama and Ovaherero, as the principally injured parties, to take the lead. And the U.N. Declaration on the Rights of Indigenous Peoples (“UNDRIP”), adopted in 2007, supports this approach, proclaiming that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures.”

Both the German and the Namibian government positions, however, suggest that any resolution must be between the two states, and not between Germany and the two communities. The late President Hage Geingob insisted that all Namibians were affected by the Genocide, and that it is the role of the State to act on behalf of all of its people, not dividing them along ethnic lines. Given the efforts invested to create “One Namibia” out of a mosaic of diverse cultures, this is a compelling argument. But it is hardly resonant with groups whose ancestors were brutally killed, and whose land and culture were taken from them.

Controversies surround the JD with respect not only to the “Who?” but to the “What?” Many stakeholders point out that two critical things are missing from the Declaration. First, what happened to the Ovaherero and Nama in 1904-08 is described as “events that, from today’s perspective, would be called genocide.” That strikes many as an artful dodge. They point out that there is no reason not to use the word “Genocide” without modification. Both the 1948 Convention and customary international law recognize that the occur-

rence of this crime may be determined objectively regardless of when it occurred, and the facts amply justify that conclusion here.

The other omission from the JD is the word “reparations.” Neither of these objections is a semantic quibble. The term “reparations” implies a legal obligation, while the German funding commitment in the JD is framed as a voluntary payment to support reconstruction and development “for the benefit of the descendants of the particularly affected communities,” and for projects to promote “reconciliation, remembrance, research and education.” It is troubling, especially to the current leadership of the Ovaherero and the Nama, that Germany has confessed moral guilt in clear language (“Germany apologizes and bows before the descendants of the victims, [and] asks for forgiveness for the sins of [its] forefathers”), but it has not acknowledged that it is guilty of a crime. And they point out that the 2006 resolution specifically insisted that negotiations be focused on reparations for the affected communities, and nothing less.

There are other concerns. Some see the monetary pledge as simply inadequate in amount, not properly reflecting the scope and scale of the atrocities. There is worry that, if the grant funds are paid to the central government, no enforcement mechanism will ensure that they are earmarked for the victimized groups (especially in light of the government’s “One Namibia” policy). And those objecting to the Declaration in its current form also point to the clause declaring it to be fully and finally dispositive of all claims deriving from the Genocide, which they see that as too high a price to be paid for what they see as too little and too late.

The Joint Declaration has not yet been formally signed, and is not yet in force. Discussions are ongoing, albeit behind closed doors, about a possible supplement, annex, or replacement. In the conclusion of this report, we respectfully offer some recommendations for negotiators and other stakeholders to consider.

Meanwhile, some representatives of the affected communities, led by Bernardus Swartbooi, a Member of the National Assembly, have initiated litigation in the High Court of Namibia. They challenge the JD as violative of both international law (citing, among other instruments, UNDRIP) and Namibia’s own constitutional architecture (assigning to the legislature the power to approve ratification of international agreements). The case is progressing, if slowly, and the courts may yet resolve at least some of the open legal questions surrounding the Declaration. Of course, the very fact that the challenge is being pursued, and defended, in public judicial proceedings is powerful evidence of the democratic gains seen through the 34 years of Namibia’s independence.

Our report is an effort to introduce readers to the issue of restorative justice, as seen through the case study of Namibia. Striving to right wrongs of the past is, of course, a worldwide movement, debated in legislatures, universities, international institutions, and public meetings everywhere. And international law has a major role to play in understanding what happened, and in guiding conversations about crimes, rights, and remedies.

What we have learned from our study of Namibia is that it is possible to seek out and to pursue solutions in a spirit of cooperation, dialogue, and focus on what comes next. That is not to say that there are easy solutions. It is not to say that anyone, including the Namibians and Germans as they continue their conversation, will find an outcome that pleases everyone.

We enjoyed the hospitality of numerous Namibian institutions and individuals during our visit to Windhoek in January. We have had the pleasure of meeting Namibians, and other friends of Namibia, of diverse backgrounds, who patiently introduced us to the history of their country and to their hopes for its future. Without them, it would not have been possible for the SAIS International Human Rights Law Clinic to produce this report. We will always be enormously grateful for the lessons they have taught us.

Research Methods and Design

Project Goals

The objective of this report is to examine the application of international law relating to restorative justice for past atrocities in Namibia, with specific attention given to the Genocide targeted at the Nama and Ovaherero. Our analysis seeks to investigate relevant portions of international law, Namibian government policies, and the impact of political bodies, international NGOs, multilateral organizations, local civil society organizations, the media, and academia in the implementation of these policies.

Namibia is a timely case study for this analysis. In 2021, the German and Namibian governments agreed to a Joint Declaration in which Germany apologized for the atrocities and promised €1.1 billion in development aid. Many communities within Namibia have found this agreement to be sorely lacking, and are currently attempting to pursue legal action within Namibia to nullify it in order to renegotiate. We seek to understand the legal instruments and institutions that played roles in reaching the recent agreement with Germany.

The goal here is to provide an objective legal analysis of the implementation of applicable international law through the different systems and actors at play within this context. We do not presume to act as judges. We want to appreciate how governments cope with human rights problems both past and present through the lens of their legal systems. We hope that our findings will be useful to those working in Namibia and in other quests for restorative justice.

Case Selection and Study Design

Global pressure has been steadily mounting since the advent of the modern international system to seek redress to historical atrocities. International human rights law has gradually generated a set of

norms against abuses. But to many descendants of victims, the law seems hollow when mass murder and genocide has gone unaddressed. Rectifying these past wrongs requires states to go beyond words and provide recourse for individuals whose rights have been ignored or downplayed, even when the initial violation occurred more than a century ago.

In Namibia's case, the German Genocide that primarily targeted the Nama and Ovaherero communities was perpetrated in 1904-1908. After a long history of attempts at seeking redress, the recent Joint Declaration (JD) by the German and Namibian governments and the resulting blowback have brought restorative justice back into domestic and international focus.

We have chosen Namibia as the subject of our study for several reasons. First, the negotiation of the JD has revealed a measure of progress that has not been seen in other contexts. Second, the government of Namibia has confronted this issue, if not with the openness and transparency that some have wished, with the objective of strengthening its relations with its former colonial power. In addition, Namibian interlocutors welcomed our study, and we were granted access to the government and to community leaders and foreign stakeholders at the highest levels. The experiences of Namibia – including those still being undertaken and planned – may well serve as a model for the efforts of other former colonies in achieving restorative justice.

Our analysis proceeds as follows: (a) an overview of the underlying history of German colonialism, including the Genocide and its far-reaching consequences; (b) the tenets of restorative justice as they apply to Namibia; (c) the JD and its criticisms; (d) the JD through the lens of international law; and last, (e) a discussion of the JD and its place in the global conversation on reparations.

Methodology

During the Fall 2023 semester, the class began our study of restorative justice. We also studied Namibia's legal system, politics, and history, and in particular, the history of the Nama and Ovaherero Genocide. After a month of initial research, the class divided into several subgroups to gain further familiarity with Namibia and its legal system, history, demographics, government, political parties, law, and institutions. Background desk research included identifying relevant actors and conducting background consultations with academics, activists, and other interested parties.

The project team visited Namibia from January 13-20, 2024. We conducted a total of 14 interviews with government officials, subject matter experts, representatives of civil society, leaders of ethnic communities, and foreign and other stakeholders. Interviews were conducted in English. Our meetings were in Windhoek, with the exception of a visit to Swakopmund. We were able to conduct a number of additional interviews remotely, after our return from Namibia.

When scheduling interviews, all key stakeholders were given a written description of the project and research goals, and during each meeting, this information was repeated for interviewees' reference. Audio recordings were not taken of meetings but, when allowed, researchers took written or digital notes.

In May 2024, the research team published this report, and presented its findings and recommendations to the public. The in-person presentation took place at the Johns Hopkins School of Advanced International Studies building at 555 Pennsylvania Avenue, Washington, D.C. with an option for virtual attendance.

Project Limitations

This report is necessarily limited in scope. Due to practical constraints, the team could spend only one working week in Namibia. This restricted the quantity and the depth of the interviews conducted in person, and resulted in some stakeholders being interviewed virtually, or omitted altogether. Our in-person interviews were primarily concentrated in Windhoek. While we were able to speak with leaders in some minority communities, we did not conduct ethnographic research and thus cannot claim to have achieved a perspective on the views of Namibian citizens.

Despite these limitations, the analysis and findings set out in this report reflect the students' best efforts at thorough and meticulous research. The International Human Rights Law Clinic team believes strongly that this report can help to elucidate the current struggle for restorative justice in Namibia and to catalyze positive change in addressing this issue of truly global significance.



Photo by Aylin Azucena Duarte



Photo by Ndimiso Silindza. Unsplash

History of Namibia

Germany: The Colonization of Namibia

The first European contacts with what is today Namibia occurred in 1486 and 1488, when the Portuguese sailors Diogo Cão and Bartolomeu Dias arrived on the Namibian coast from the Cape of Good Hope.¹ However, it was not until the 1860s that Europeans established a permanent presence in Namibia. In 1884, Otto von Bismarck, the Chancellor of the German Empire, convened the West African Conference of Berlin, where European powers embarked upon what came to be called “the Scramble for Africa,” dividing up the continent into colonies delimited by arbitrary national borders.² Von Bismarck proclaimed South West Africa (Namibia) a German protectorate.³ This claim was motivated primarily by Franz Lüderitz, a tobacco merchant from Bremen, who had bought up coastal land in the area in 1882.⁴

Germany actively established itself in South West Africa, first occupying Ovaherero lands located near the geographic center.⁵ By the end of the nineteenth century, German settlers had begun to expropriate land from the local communities and to set up farms. The new arrivals started displacing the Ovaherero and Nama people who had previously resided in the southern region of today’s Namibia, where they had established prosperous agricultural communities. The arrival of the Germans impacted the primary subsistence activity of these indigenous groups since

large herds of their cattle were confiscated, driving their owners to the desert.⁶

The first major resistance to German colonization was by the Nama, who were mainly sheep and cattle pastoralists. On the other hand, Ovaherero people initially did not resist, accepting “protection” from the German Empire because they sought military support in their constant conflicts with the Nama. Germany offered the Ovaherero a treaty of friendship, but did not provide the expected military assistance, resulting in an Ovaherero uprising against the colonial power. This led to the start of the German-Herero conflict in 1904. The German-Herero war also quickly embroiled the Nama people, who were no match to their adversaries in armaments or experience.⁷

The armed conflict between Germany and the two ethnic groups lasted approximately four years, resulting in a massacre of at least 60,000 Ovaherero and 10,000 Nama (some analysts estimate that the numbers were far larger).⁸ The mass killings of the Ovaherero, and later the Nama, were carried out pursuant to explicit extermination orders (“Vernichtungsbefehle”) of the military command. Yet the elimination of resistance and the confiscation of cattle were not the Germans’ only main objectives. The rebellion was their justification for securing Great Namaraqualand – an area rich in cattle and sheep that had once belonged to the Ovaherero and

1 Houses of Parliament, Report on the Natives of Southwest Africa and their Treatment by Germany. (1918). <https://archive.org/details/b32172266>

2 Britannica. (n.d.). History of Namibia. Encyclopedia Britannica. <https://www.britannica.com/topic/history-of-Namibia>.

3 “Namibia,” South African History Online. <https://www.sahistory.org.za/place/namibia>.

4 Ibid.

5 Ibid.

6 Ibid.

7 George Steinmetz, and Julia Hell, “The Visual Archive of Colonialism: Germany and Namibia,” ResearchGate, December 2006. https://www.researchgate.net/publication/30960653_The_Visual_Archive_of_Colonialism_Germany_and_Namibia

8 Ibid.



Historical photos taken during the genocide displayed in the Swakopmund Genocide Museum

Nama people.⁹ Historians have found that at that time the Ovaherero possessed 50,000 head of cattle and at least 100,000 small livestock.¹⁰ The extermination campaign consummated a period of extreme cruelty and misery, where the orders included showing no mercy on women and children.¹¹

The vast majority of the Ovaherero and Nama deaths were not the result of military conflicts. They were caused when people were taken prisoner and forced into slave labor, building roads and railways, as well as working in mines and on farms. Many died due

to the harsh conditions in German prisoner-of-war centers such as Shark Island, a coastal island off southwest Namibia used as a concentration camp where Ovaherero and Nama people resisting colonialism were tortured and starved to death.⁸ The prisoners lived under horrific conditions, lacking food, water, and medical attention. Armed resistance of the Ovaherero and Nama ended in 1907, because the drastically reduced populations did not have the weaponry or the strength needed to continue.

9 Innes, D. (1977). Imperialism and the National Struggle in Namibia. *Review of African Political Economy*, 9, 44-59. <http://www.jstor.org/stable/3997901>

10 Houses of Parliament, Report on the Natives of Southwest Africa and their Treatment by Germany. (1918).

11 Ibid.

German colonialism in Namibia did not last long. Shortly after World War I began, the need to concentrate on European theaters and threats of invasion by neighboring South Africa (then a British colony) forced Germany to surrender the territory to South African control in 1915. Germany lost its remaining colonies as a result of its defeat in the War, and Namibia remained subject to South African rule.

The League of Nations Mandate

Following the proclamation of the Treaty of Versailles, the League of Nations was founded as the first inter-governmental organization with the principal mission of promoting world peace. Article 22 of its founding Covenant established a “mandate” system to manage the former colonies of Germany and the Ottoman Empire that were deemed unfit to govern themselves.¹² There were three classes of mandate, based on a territory’s location, former colonial power, and level of political and economic development. An Allied power was assigned to each of the different mandates.¹³

On December 17, 1920, the United Kingdom, through its colony that is today the Republic of South Africa, was assigned the governance of South West Africa under a “Class C Mandate,” the type covering what the League considered to be the least developed nations, South Africa was given full authority over the territory, and was encouraged to promote progress amongst its people.¹⁴

The colony entered a period of crisis in the years following the establishment of the mandate when Abraham Morris, a prominent member of the Bondelswarts Nama community, returned from exile. Morris had led resistance movements against the Germans in 1903 and had been forced to flee shortly thereafter.¹⁵ When he returned in May of 1922, violence broke out when his followers refused to hand him over or surrender their weapons to the authorities. South African government troops clashed with Bondelswarts Nama in June of that year, leading the League of Nations to adopt a resolution to investigate the matter.¹⁶ During this time, the inhabitants of South West Africa had no substantial role in their own governance, and indigenous and other non-white inhabitants faced systematic oppression.

In July of 1925, South Africa approved the South West Africa Constitution Act of 1925, which allowed limited self-government in the colony, but only white Europeans could vote in legislative elections.¹⁷ When South Africa became independent from the United Kingdom in 1934, any possibility that the British might moderate the conditions imposed on South West Africa was eliminated. Along with the denial of voting rights to non-white people, indigenous ancestral communities and lands were dispossessed and allocated to white settlers’ ranches, and very minimal government spending was dedicated to the interests of the vast majority of citizens.

South Africa governed South West Africa in this manner until 1946, when the newly-created Unit-

12 Britannica, T. Editors of Encyclopaedia. “mandate.” Encyclopedia Britannica, August 13, 2021. <https://www.britannica.com/topic/mandate-League-of-Nations>.

13 League of Nations. *The Covenant of the League of Nations, Including Amendments in Force, February 1, 1938*. [With French Text and List of Members of the League]. London :H.M. Stationery Off., 1938

14 Myers, Denys P. “The Mandate System of the League of Nations.” *The Annals of the American Academy of Political and Social Science* 96 (1921): 74–77. <http://www.jstor.org/stable/1014872>, 76.

15 “Namibia,” Namibia | South African History Online, accessed November 14, 2023, <https://www.sahistory.org.za/place/namibia>.

16 “South Africa/Namibia (1920-1990),” Government Public Service and International Studies, accessed December 21, 2023, <https://uca.edu/politicalscience/home/research-projects/dadm-project/sub-saharan-africa-region/south-africanamibia-1920-1990/>.

17 Ibid.

ed Nations General Assembly recommended that the country be placed under UN trusteeship, the system that replaced League mandates. South Africa, however, refused to transmit information to the UN, claiming that since the Mandate had lapsed with the dissolution of the League of Nations, it was therefore entitled to retain full control over the territory.¹⁸

The General Assembly requested the International Court of Justice to issue an advisory opinion on this question, and the Court responded by holding that because the UN was the successor to the League, South Africa still had obligations towards the Territory under United Nations oversight, including the duty to report on its performance of the supervisory functions assigned under the trusteeship.¹⁹ After it once again refused to comply, the General Assembly declared that South Africa had failed to fulfill its obligations, and officially terminated the trusteeship in 1966.²⁰ The United Nations assumed direct responsibility for the governance of South West Africa, until the ultimate goal of independence could be achieved.

The UN Council for South West Africa

On May 19, 1967, the General Assembly adopted Resolution 2248 (S-V) establishing the United Nations Council for South West Africa.²¹ The Council initially consisted of 11 member states, but was later expanded multiple times. It was entrusted with the

administration of the Territory until independence, including the maintenance of law and order, and was directed to report on its activities annually to the General Assembly. In 1968, the Assembly proclaimed that the Territory would thenceforth be known as Namibia, and the Council was renamed the United Nations Council for Namibia (UNCN).²² It requested the withdrawal of South African administration and military forces from the country. However, South Africa repeatedly rejected what it called the unlawful termination of the League mandate, and blocked the Council from entering the Territory, limiting its ability to lay the groundwork for independence.²³

Throughout its period of domination of South West Africa, South Africa imposed an apartheid system, and it sought to maintain this institution, protecting white-minority rule and its own economic interests in the Territory's natural resources.²⁴ Political resistance grew in response to the apartheid policies with the formation of indigenous independence movements and political parties, including the South West Africa People's Organization (SWAPO) and the South West Africa National Union (SWANU). A representative of SWAPO, Mrs. Putuse Norah Appolus stated their case:

Our people are in fact being brutalized and humiliated by a regime that is deaf to all entreaty, by a regime which uses force and racism as instruments of policy... The time has come when the United Nations must seriously consider using powers under Chap-

18 "UNTAG," United Nations, accessed November 14, 2023, <https://peacekeeping.un.org/fr/mission/past/untagS.htm>.

19 "Namibia," Namibia | South African History Online, accessed November 14, 2023, <https://www.sahistory.org.za/place/namibia>.

20 "UNTAG," United Nations, accessed November 14, 2023, <https://peacekeeping.un.org/fr/mission/past/untagS.htm>.

21 General Assembly Resolution No. 2248 (S-V). 1967. Question of South West Africa. Available at <https://digitallibrary.un.org/record/203189?ln=en>

22 UNTAG," United Nations, accessed November 14, 2023, <https://peacekeeping.un.org/fr/mission/past/untagS.htm>.

23 Geeta, K. Srimad Bhagavad. 1993. "Role of the United Nations in Namibian Independence." *International Studies* 30 (1): 15–34. <https://doi.org/10.1177/0020881793030001002>.

24 Howard, Lise Morjé. 2002. "UN Peace Implementation in Namibia: The Causes of Success." <https://lisehoward.georgetown.domains/wp-content/uploads/2018/11/Howard-2002-UN-Peace-Implementation-in-Namibia-The-Causes-of-Success.pdf>.

*ter-VII of the Charter for an armed solution of the problem of Namibia.*²⁵

The Council and the UN faced several limitations in facilitating the independence of Namibia, including South Africa's non-compliance, conflicting interests due to Cold War dynamics in the Security Council that led to stalemates, and scant enforcement mechanisms. Meanwhile, liberation movements such as SWAPO received international backing and support, predominantly from the USSR, China, and Angola.²⁶ The General Assembly issued several resolutions calling on the Security Council to facilitate the withdrawal of South Africa through sanctions or military intervention, which would have been binding under Chapter VII of the Charter. However abstentions and vetoes from the United States, France, and the United Kingdom meant that those efforts were doomed to failure, and little advancement toward independence could be realized.²⁷

A degree of progress was made in 1969 when the Security Council called for South Africa's complete withdrawal, taking note of previous resolutions (although not invoking its powers under Chapter VII). After further refusals to comply, the Council formally

condemned South Africa's actions in 1970,²⁸ and again requested an advisory opinion from the ICJ. In 1971, the ICJ held that South Africa's continuing presence in Namibia was illegal, and directed states not to engage in any actions that might tend to legitimize it.²⁹ However, even then, progress toward independence was halting and weak over the next decade, as South Africa continued its recalcitrance.

The General Assembly attempted to advance independence in 1973, by recognizing SWAPO as "the authentic representation of the Namibian people" in Resolution 3111.³⁰ The UNCN also tried to accelerate the independence process in that same year, through a mechanism to provide recommendations on economic and legal matters and information dissemination to the independence movement.³¹ In 1974, the UNCN adopted a Decree on the Natural Resources of Namibia, which required the Council's consent for the exploitation of raw materials, but many nations did not view the decree as legally binding.³² Hence, with limited enforcement capabilities or even physical access to Namibia, and in light of a failed arms embargo, the Council served more as a "lobby group

- 25 Hasan, Najmul. 1975. "Namibia: South— West Africa." *Pakistan Horizon* 28 (3): 61–78. https://www.jstor.org/stable/pdf/41393277.pdf?refreqid=fastly-default%3A1cd1f66a10b5618b356ae431d5dc0b9d&ab_segments=&origin=&initiator=&acceptTC=1. Pg. 12
- 26 Iskarik, Pavel. "SWAPO's Version of History in Namibia." University of SS. Cyril and Methodius in Trnava (2019), Available at https://www.sav.sk/journals/uploads/11261147Asian%20and%20African%20Studies_2_2019_02_Miskarik.P_SWAPO%E2%80%99S%20VERSION%20OF%20HISTORY%20IN%20NAMIBIA.pdf
- 27 Isaak I. Dore, "Self-Determination of Namibia and the United Nations: Paradigm of a Paradox," *Harvard International Law Journal* 27, no. 1 (Winter 1986): 159-192; SAXENA, S.C. "NAMIBIA AND THE UNITED NATIONS." *The Indian Journal of Political Science* 36, no. 3 (1975): 274–96. <http://www.jstor.org/stable/41854677>.
- 28 Hasan, Najmul. 1975. "Namibia: South— West Africa." *Pakistan Horizon* 28 (3): 61–78. https://www.jstor.org/stable/pdf/41393277.pdf?refreqid=fastly-default%3A1cd1f66a10b5618b356ae431d5dc0b9d&ab_segments=&origin=&initiator=&acceptTC=1.
- 29 Saunders, Christopher. "The Role of the United Nations in the Independence of Namibia." *History compass* 5, no. 3 (2007).
- 30 Isaak I. Dore, "Self-Determination of Namibia and the United Nations: Paradigm of a Paradox," 164.
- 31 Arts, Karin. "The Legal Status and Functioning of the United Nations Council for Namibia." *Leiden Journal of International Law* 2, no. 2 (1989): 194–208. doi:10.1017/S092215650001266.
- 32 Isaak I. Dore, "Self-Determination of Namibia and the United Nations: Paradigm of a Paradox," *Harvard International Law Journal* 27, no. 1 (Winter 1986): 159-192

for Namibia's independence" than as an administrator of the country.³³

The Inexorable Drive to Independence

In 1977, the United States, the United Kingdom, France, West Germany, and Canada established the Western Contact Group to assist with negotiations towards independence. The Contact Group became the mediator among SWAPO, South Africa, and other front-line states (Botswana, Tanzania, Angola, Mozambique, and Nigeria) promoting informal cooperation.³⁴ It brokered a compromise between South Africa and SWAPO, which was later the basis for Security Council Resolution 435 in 1978.³⁵

Resolution 435 planned for the end of South Africa's illegal administration through the establishment of a United Nations Transition Assistance Group (UNTAG), which was tasked with facilitating free and fair elections to transfer power to the people of Namibia.³⁶ The Resolution included a specific timetable for elections and instructions for SWAPO, South Africa, and the UN itself. The Contact Group was expected to operate alongside the Security Council to administer Namibia's transition to independence, but the geopolitical concerns of the United States and South Africa, especially because of Cuba's influence and military

presence in Angola during the Cold War, hindered the implementation of the Resolution.³⁷

The United States insisted that Namibia's independence be tied to the removal of Cuban troops from Angola, delaying the process. This demand was not supported by all Contact Group members, and it even drove France to withdraw from the Group in 1983.³⁸ Nevertheless, these Cold War dynamics, coupled with South Africa's opposition and growing armed struggles with SWAPO stalled the implementation of Resolution 435 and therefore the achievement of independence for Namibia.

In the 1980s South Africa became increasingly isolated internationally, and its apartheid regime attracted mounting international condemnation.³⁹ Only in 1988, however, after South Africa experienced military setbacks, and nearing the end of the Cold War, was the United States Secretary of State able to arrange negotiations among Cuba, Angola, and South Africa, resulting in the Angola/Namibia Accords and, at long last, the implementation of Resolution 435.⁴⁰

The Tripartite Accord was signed in December of 1988, providing for independence for Namibia, with South Africa agreeing to implement Resolution 435 contingent on the withdrawal of Cuban forces in Angola. In 1989, UNTAG was finally able to be

33 Saunders, Christopher. "The Role of the United Nations in the Independence of Namibia." *History compass* 5, no. 3 (2007): 738.

34 UNTAG," United Nations, accessed November 14, 2023, <https://peacekeeping.un.org/fr/mission/past/untagS.htm>.

35 Saunders, Christopher. "The Role of the United Nations in the Independence of Namibia." *History compass* 5, no. 3 (2007): 739.

36 Geeta, K. Srimad Bhagavad. 1993. "Role of the United Nations in Namibian Independence." *International Studies* 30 (1): 15-34. <https://doi.org/10.1177/0020881793030001002>.

37 Wiechers, Marinus. "Namibia's Long Walk to Freedom." United States Institute of Peace, 2010. https://www.usip.org/sites/default/files/Framing%20the%20State/Chapter4_Framing.pdf.

38 Geeta, K. Srimad Bhagavad. 1993. "Role of the United Nations in Namibian Independence." *International Studies* 30 (1): 15-34. <https://doi.org/10.1177/0020881793030001002>; Howard, Lise Morjé. 2002. "UN Peace Implementation in Namibia: The Causes of Success." <https://lisehoward.georgetown.domains/wp-content/uploads/2018/11/Howard-2002-UN-Peace-Implementation-in-Namibia-The-Causes-of-Success.pdf>.

39 "The Namibian Struggle for Independence - 1966 - 1990 - a Historical Background," South African History Online, accessed November 15, 2023, <https://www.sahistory.org.za/article/namibian-struggle-independence-1966-1990-historical-background>.

40 Ibid.

deployed to ensure free, fair, and peaceful elections. Three main components of the UNTAG mission facilitated the process: (1) establishment of UNTAG offices, (2) military disarmament and civilian policing, and (3) preparations for, and the holding of, elections. In addition, the United Nations High Commissioner for Refugees (UNHCR) provided support for the return of people who had fled during the armed conflicts.⁴¹ The drafting of a new Namibian Constitution began at the same time, with the development of the Constituent Assembly to be elected under UNTAG supervision.⁴² The first elections in independent Namibia boasted a 97% voter turnout, with SWAPO winning the majority of Constituent Assembly seats.⁴³

On March 21, 1990, Namibia officially adopted its new Constitution, and President Sam Nujoma formally declared it an independent state.⁴⁴ Independence was a result of prolonged international diplomatic and UN efforts, as well as regional initiatives, but its true drivers were the resilience and unyielding determination of the people of Namibia.

SWAPO in the Independence of Namibia, and Since

The South West African People's Organization is today a political party that has maintained control of the Namibian presidency, National Assembly, and National Council since independence.⁴⁵ In 1959,

South African officials forcibly removed Windhoek's Black population to a township called Katutura, leading to open protests during which occupation forces fired into the crowd, killing several. Following that provocation, Namibians organized to confront the injustices of South African occupation, and specifically, the imposition of apartheid. SWAPO drafted its constitution and presented itself as both a political movement and resistance to South Africa's presence in Namibia⁴⁶.

In 1964 SWAPO began its armed operations. Its militant wing, named the People's Liberation Army of Namibia (PLAN), first engaged with South African forces in 1966, when poorly armed and equipped PLAN soldiers met South African troops and helicopters in combat, suffering major casualties. SWAPO then regrouped outside the Territory, constructing exile camps in Tanzania and neighboring Angola to shelter Namibian political refugees fleeing persecution and apartheid. In 1966, South Africa designated SWAPO as a terrorist organization. Apartheid rules in newly constructed Namibian townships caused thousands of people to flee to SWAPO camps, where they worked to support SWAPO or trained with PLAN for armed combat.

As South Africa's apartheid brutality gained increasing international attention and criticism, SWAPO began to expand diplomatically in exile, establishing offices in Cairo, Algiers, and at the UN.⁴⁷ It also

41 Howard, Lise Morjé. 2002. "UN Peace Implementation in Namibia: The Causes of Success." <https://lisehoward.georgetown.domains/wp-content/uploads/2018/11/Howard-2002-UN-Peace-Implementation-in-Namibia-The-Causes-of-Success.pdf>, pg. 108.

42 Szasz, Paul C. "Creating the Namibian Constitution." *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 27, no. 3 (1994): 346–57. <http://www.jstor.org/stable/43110711>.

43 "UNTAG," United Nations, accessed November 14, 2023, <https://peacekeeping.un.org/fr/mission/past/untagS.htm>.

44 Freeman, Linda. "The Contradictions of Independence: Namibia in Transition." *International Journal* 46, no. 4 (1991): 687–718. <https://doi.org/10.2307/40202726>.

45 Britannica, T. Editors of Encyclopedia. "SWAPO Party of Namibia" *Encyclopedia Britannica*,

46 Miskarik, Pavel. "SWAPO's Version of History in Namibia." University of SS. Cyril and Methodius in Trnava (2019), Available at https://www.sav.sk/journals/uploads/11261147Asian%20and%20African%20Studies_2_2019_02_Miskarik.P.SWAPO%E2%80%99S%20VERSION%20OF%20HISTORY%20IN%20NAMIBIA.pdf

47 Vigne, Randolph. "SWAPO of Namibia: A Movement in Exile." *Third World Quarterly*, vol. 9, no. 1, 1987, pp. 85–107, www.jstor.org/stable/pdf/3991848.pdf?refreqid=fastly-default%3Ae657ebf721dcea0a1c313bfa3668d7e7&ab_segments=&-origin=&initiator=&acceptTC=1. Accessed 5 Jan. 2024.

started receiving support from regional neighbors including Tanzania, Zambia, and Angola, as well as Ethiopia, Liberia, Zimbabwe, Egypt, and Algeria. However, condemnation by the United States, the United Kingdom, West Germany and other western powers of South Africa's conduct in Namibia failed to stop the continuing occupation.⁴⁸ It was not until the passage of UNSC Resolution 2248, in 1967, that pressure culminated in collective international action. Still South Africa refused to comply and kept its military in Namibia, to which SWAPO responded with dramatic increases in its armed presence, deploying troops from camps based out of Tanzania and Angola.

Throughout the late 1960s and early 1970s SWAPO focused on military development, committing several hit-and-run attacks on South African personnel in East Caprivi, Kavangoland, and Ovamboland.⁴⁹ Internationally and diplomatically, the Organization expanded relations with France, East Germany, Romania, Sweden, and Yugoslavia in Europe, and opened offices in the United Kingdom, New Delhi, and Melbourne,⁵⁰ establishing a presence on five continents. In 1971, a major event catalyzed SWAPO's political profile in Namibia: it played a large part in organizing a 13,500-strong labor strike against discriminatory hiring laws, using its complex international network to help amplify the voices of the Namibian public and spotlight the abuses of South African occupation.⁵¹

The 1970s were a period of development, conflict, and reconfiguration for SWAPO. As Angola achieved independence in 1974, SWAPO utilized its position there to attack South African forces in the north of Namibia, specifically in Ovamboland,⁵² where PLAN conducted small-scale incursions against Ovambo chieftains loyal to South Africa. Meanwhile, SWAPO worked to redefine its constitution after a period of infighting between its youth leaders and older officials, led by Sam Nujoma.⁵³ In the Nampundwe Conference of 1976, SWAPO hashed out a new "Political Program," reorganize its military operations under a newly established Secretary of Defense. The unification of Ovamboland, Namaland, and Hereroland as one nation of Namibia was emphasized as the key political goal. SWAPO took a broadly socialist ideological stance, repositioning itself as a party of all Namibians against the classism and exploitation forced on them by the South African occupiers.

In 1978, years of diplomatic relationship building with the UN culminated in General Assembly Resolution 3111, recognizing SWAPO as the "authentic representative of the Namibian people." At that time, polls showed that 83% of the Namibian population identified as SWAPO supporters. South Africa, which had faced a decisive defeat in Angola, was beginning to feel pressure from western allies to withdraw from Namibia. It did not yield to that pressure. To the contrary, in May 1978, South African Defense Forces invaded Cassinga camp, one of the SWAPO strong-

48 Randolph Vigne, "SWAPO of Namibia: A Movement in Exile," *Third World Quarterly* 9, no. 1 (January 1987): 85-107, <https://doi.org/10.1080/01436598708419963>.

49 UN. Decolonization Sites, file 21, https://www.un.org/dppa/decolonization/sites/www.un.org.dppa.decolonization/files/decon_num_9-2_0.pdf

50 "SWAPO of Namibia: A Movement in Exile." *Third World Quarterly*, vol. 9, no. 1, 1987, pp. 85-107, www.jstor.org/stable/pdf/3991848.pdf?refreqid=fastly-default%3Ae657ebf721dcea0a1c313bfa3668d7e7&ab_segments=&origin=&initiator=&acceptTC=1.

51 Ibid

52 United Nations Department of Political Affairs. Decolonization, Issue of Namibia. New York, NY: UN Headquarters, December 1977. https://www.un.org/dppa/decolonization/sites/www.un.org.dppa.decolonization/files/decon_num_9-2_0.pdf

53 Leys, Colin, and John S. Saul. "Liberation without Democracy? The Swapo Crisis of 1976." *Journal of Southern African Studies*, vol. 20, no. 1, 1994, pp. 123-147, www.jstor.org/stable/pdf/2637123.pdf?refreqid=fastly-default%3A9cc4eb51e-186b9aba013f598561c11b9&ab_segments=&origin=&initiator=&acceptTC=1. Accessed 5 Jan. 2024.

holds in Angola, and killed more than 600 Namibians, mostly women and children. Tensions between SWAPO and South Africa heightened.

South Africa administered a general legislative election in Namibia later in 1978: the first in the Territory that allowed all races to participate. SWAPO boycotted the election, however, encouraging people not to vote, on the grounds that South Africa intended to remain in military control over the country regardless of the outcome. The Democratic Turnhalle Alliance, a South Africa-loyalist amalgamation of political parties, won the balloting, gaining 41 out of 50 seats in the legislature.

SWAPO leader Sam Nujoma worked with the United Nations toward the implementation of Security Council Resolution 435, adopted in 1978, which not only reaffirmed SWAPO's role as the sole political representative of Namibia, but also joined in Nujoma's and SWAPO's insistence that a ceasefire was necessary to achieve independence.⁵⁴ In 1986, at a convention in Vienna, Nujoma said:

I signed and deposited a letter with the Office of the Secretary-General, expressing SWAPO's readiness, which I have repeated several times since, to sign a ceasefire with Pretoria as a first step in the implementation of Resolution 435. As we approach August 1, which is offered [by South Africa] as a possible date for implementing the UN Plan, I wish to state, once again, that SWAPO is ready, provided that no irrelevant and diversionary elements are introduced.

A year later, the largest altercation and ultimately one of the most pivotal battles between SWAPO and South Africa took place at Cuito Cuanavale. Angolan troops backed by Cuban forces and SWAPO drove South African Defense Forces and Angolan militants under

UNITA out of the country. The victory was one of the most significant military steps toward Namibian independence, since it exposed the extreme vulnerability of South Africa's once fearsome armed forces.⁵⁵

In 1988, South Africa accepted the terms of Resolution 435. As a part of the agreement, South Africa, SWAPO, and PLAN accepted a ceasefire, and PLAN disarmed and returned its weapons to Windhoek as a condition of the armistice. The following year, UN forces were deployed to oversee the implementation of elections and the withdrawal of South African forces from Namibia. The 1989 election was Namibia's first without South African occupation or supervision, and the nation's legislature, the National Council and National Assembly, along with the presidency, were contested. SWAPO's leader Sam Nujoma was elected president, and SWAPO, with 58% of the vote, won 41 out of 72 parliamentary seats. The Democratic Turnhalle Alliance came in second with 21 seats.

The newly elected SWAPO government was tasked with writing the nation's Constitution and began the pivot from a force for liberation into a governing democratic party. After independence in March of 1990, the country gradually assumed its position within the global and African communities of independent states. Since Namibia was a latecomer in African decolonization, SWAPO moved quickly in creating a constitution, reflecting the need for political compromise and negotiation.⁵⁶ The Constitution that entered into force included a bill of rights, an independent judiciary, a set of fundamental freedoms that may not be derogated, and the framework to implement an electoral system of proportional representation. It provided for a universally elected President as well as a National Assembly, a Prime Minister selected by the legislature, and a cabinet of Ministers appointed by

54 "SWAPO of Namibia: A Movement in Exile." *Third World Quarterly*, vol. 9, no. 1, 1987, pp. 85-107, www.jstor.org/stable/pdf/3991848.pdf?refreqid=fastly-default%3Ae657ebf721dcea0a1c313bfa3668d7e7&ab_segments=&origin=&initiator=&acceptTC=1.

55 "Battle of Cuito Cuanavale 1988 | South African History Online." www.sahistory.org.za, 30 May 2011, www.sahistory.org.za/article/battle-cuito-cuanavale-1988.

56 John A. Marcum, "Namibia's Independence and the Transformation of Africa," *SAIS Review* 10, no. 2 (1990): 158.

the President from among the Members of Parliament⁵⁷.

Namibia remains exceptional as the first post-apartheid democracy, having successfully implemented its democratic government structure almost immediately as an independent nation. The first three decades after independence were characterized by the political hegemony of SWAPO in the multi-party constitutional framework.⁵⁸ This too was unique among post-colonial African states, insofar as its liberation movement was able to consolidate and hold onto national, regional, and local power.⁵⁹

Although SWAPO remains in power today, the 2019 presidential and National Assembly elections marked a rupture in its overwhelming influence as a political party. The late President Hage Geingob was re-elected for a second term, but his percentage of votes dropped dramatically from the previous election, probably due to the loss of faith in the party amidst the effects of the growing economic recession. SWAPO's efforts to address socioeconomic hardship have been seen among substantial portions of the population as having primarily benefited the elite and international partners, fostering distrust of its governance and prompting new candidates to seek office.

While SWAPO was the driver of the implementation of free and democratic elections, it still has used its political control to pursue power consolidation – for example, amending the Constitution to permit a third term for President Nujoma, SWAPO's leader for nearly four decades. The party has also been accused of

catering to the majority Ovambo population, abandoning the ethnic minority groups which it had represented in the initial stages of conflict.

No party or coalition has seriously challenged SWAPO's dominance since independence.⁶⁰ Since 1989, it has promoted a platform of African nationalism fueled by its role in the liberation movement. The party's ideology tends toward neoliberalism, with support for social democracy, although some SWAPO politicians have espoused more socialist and even Marxist views in line with the party's original political philosophy⁶¹.

In its 2014 manifesto, SWAPO stressed that its current priorities are the rule of law, economic development, trade expansion, sound fiscal and monetary policy, as well as land reform, infrastructure development, and quality healthcare distribution⁶². While the party still retains a two-thirds majority in Parliament, and has controlled the presidency without interruption since 1990, some younger politically active Namibians have begun to explore other options. While this may certainly signal a challenge for the party during upcoming general elections in 2024, most observers predict that SWAPO will retain the presidency and will hold a majority in Parliament for the foreseeable future.

57 Laurel Miller, Louis Aucoin, and Marinus Wiechers, "The Role of Constitution Making in the Creation of an Independent Namibia," essay, in *Framing the State in Times of Transition: Case Studies in Constitution Making* (Washington, DC: United States Institute of Peace Press, 2010), 91.

58 Henning Melber, "Namibia since Independence," *Oxford Research Encyclopedia of African History*, 2022, <https://doi.org/10.1093/acrefore/9780190277734.013.1127>.

59 Ibid.

60 Mendelsohn, John. "SWAPO the beginning of the political challenge" *French Institute of International Relations*, May 2022. <https://www.ifri.org/en/publications/notes-de-lifri/swapo-beginning-political-challenge>

61 Totemeyer, Gerhard. "The Management of a Dominant Political Party system with particular reference to Namibia." *Friedrich Ebert Stiftung and FRELIMO* (December, 2007). <https://library.fes.de/pdf-files/bueros/namibia/05913.pdf>

62 SWAPO Party. "2014 SWAPO Party Election Manifesto." Available at https://www.kas.de/documents/252038/253252/Manifest_Swapo.pdf/e9a6b462-08ee-cc3f-6630-7ebf77a78651

Geography and Demographics

Namibia is located in southwest Africa, bordered by South Africa, Botswana, Zambia, and Angola.¹ One of Africa's youngest countries, Namibia is one of the driest and most mineral-rich in the region.² Its geography is largely desert in the south and along the coast, and steppe in the northwest and central regions.³ The population of 2.56 million is concentrated in the Central Plateau – home to the capital, Windhoek, and to most of the nation's arable land – and parts of the Bushveld near the northern border with Angola, which receives more precipitation than much of the country.⁴ The southern and coastal regions of Namibia are largely uninhabited, covered by the Namib and Kalahari deserts.⁵ Namibia is second only to Mongolia as the world's least densely populated country, with 3.13 people per square kilometer.⁶ While over twenty percent of Namibians work in agriculture, only 1% of the land is arable, and the majority of productive land is owned by individuals of

German descent, many of whom do not currently live in Namibia.⁷

Namibia's small but diverse population includes over 10 different ethnic and language groups, with distinct cultural identities, histories, traditions, and ways of life.⁸ At present, 50% of Namibians identify as Ovambo, 9% as Kavango, and 7% each as Ovaherero and Damara. Approximately 6.5% are of both European and African ancestry, 6% are of European ancestry alone, 5% are Nama, 4% are Caprivian, 3% are San, 2% are Rehoboth Baster, and half of a percent are Tswana.⁹

The Ovambo people, the largest ethnic group, have generally resided in the northern regions, and are known for settled agricultural practices and sophisticated social structures.¹⁰ The Ovaherero historically inhabited central Namibia, with a more pastoralist

1 BBC News, "Namibia country profile," last modified July 21, 2023, <https://www.bbc.com/news/world-africa-13890726>

2 CIA World Factbook, "Namibia- Country Summary," last modified December 6, 2023, <https://www.cia.gov/the-world-factbook/countries/namibia/summaries/>

3 James Suzman, "Minorities in Independent Namibia," Minority Rights Group International, accessed November 10, 2023, <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-152-Minorities-in-Independent-Namibia.pdf>

4 The World Bank, "Population total, Namibia," last modified 2022, <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=NA>

5 Encyclopedia Britannica, "Namibia: Land," accessed October 2023, <https://www.britannica.com/place/Namibia#ref43993>

6 World Population Review, "Namibia Population 2023, Live," accessed October 2023. <https://worldpopulationreview.com/countries/namibia-population#:~:text=Namibia%20is%20one%20of%20the,2%20people%20per%20square%20kilometers.>

7 Republic of Namibia, Office of the President, National Planning Committee, "Is Agricultural Productivity an engine for growth?" 2018, <https://www.npc.gov.na/wp-content/uploads/2023/06/Is-Agricultural-Productivity-an-engine-for-growth-Research-Paper-2018.pdf>; CIA World Factbook, "Namibia," last modified December 6, 2023, <https://www.cia.gov/the-world-factbook/countries/namibia/>; Jeremy Sarkin, interview by authors, November 16, 2023.

8 Namibian.org, "The People of Namibia," accessed October 2023, <https://namibian.org/namibia/people/>; Suzman, "Minorities in Independent Namibia."

9 CIA World Factbook, "Namibia- Country Summary."

10 Yale Human Relations Area Files, "Ovambo," accessed November 2023, <https://ehrafworldcultures.yale.edu/cultures/fx08/summary>

lifestyle and cultural traditions.¹¹ The Nama have lived in the areas around the Orange River in southern Namibia and northern South Africa, moving to central Namibia prior to the time of German colonialism.¹² The lack of fixed settlements of the Ovaherero and Nama, compared with the agrarian lifestyle of the Ovambo, reflects the geographic differences between Namibia's steppe-like northern region, compared with the central area, which is more arid and better suited to herding rather than farming. The San, considered to be the oldest peoples in Namibia, have traditionally hunted and gathered, a lifestyle which was particularly affected by the restrictions and the eventual Genocide under German colonial rule. As Ovaherero communities were pushed off their land by Germans at that time, many were forced to relocate to San areas in northern Namibia.¹³ The Ovambo, who resided in northern Namibia as well, were largely not dislocated from their land.¹⁴

German colonization between 1884 and 1915 changed traditional tribal territories, contributing to lasting demographic shifts among various ethnic groups, particularly the Ovaherero. Between 1904 and 1908, at the time of the Genocide, the population declined

from approximately 80,000 to 15,000, and the Nama from roughly 20,000 to less than 10,000.¹⁵

Windhoek is Namibia's largest city, with a population of 477,000.¹⁶ It holds the country's government, universities, and most large civil society and cultural organizations, as well as being the center for business in Namibia.¹⁷ There are several smaller cities with populations in the tens of thousands. The second and third largest are Walvis Bay (around 62,000) and Swakopmund (about 45,000), which sit next to each other about halfway up the coast.¹⁸ In Walvis Bay, tourism and fishing are major industries, as they also are in Swakopmund, though that city's largest industry is mining—the result of being home to the largest open cast uranium mine in the world.¹⁹

While English is the official language of Namibia, used in government and business, only about 3.4% of the population speak it at home. By far the most common languages in daily use are the dialects of Oshiwambo, which are spoken by 48.9% of Namibians. Afrikaans is spoken at home by 10.4% of the population, with Otijherero spoken by 8.6%, followed closely by Kavango languages at 8.5%.²⁰ In the

11 Wolfgang Werner, "A Brief History of Land Dispossession in Namibia," *Journal of Southern African Studies* 19, no. 1 (1993): 135–46. <http://www.jstor.org/stable/2636961>.

12 This is Namibia, "The Nama- Denizens of the South," accessed November 2023, <https://thisisnamibia.com/culture/the-nama-denizens-of-the-south/>

13 World Directory of Minorities and Indigenous Peoples, "San," accessed November 2023, <https://minorityrights.org/minorities/san/>

14 Eduard Gargallo, interview by authors, November 16, 2023.

15 Nora McGreevy, "Germany Acknowledges Genocide in Namibia but Stops Short of Reparations," *Smithsonian Magazine*, June 4, 2021, <https://www.smithsonianmag.com/smart-news/germany-acknowledges-genocide-namibia-stops-short-reparations-180977886/>

16 World Population Review, "Windhoek Population 2023," accessed December 2023, <https://worldpopulationreview.com/world-cities/windhoek-population>

17 Info Namibia, "Windhoek," accessed December 15, 2023, <https://www.info-namibia.com/activities-and-places-of-interest/windhoek/windhoek#:~:text=Windhoek%20today>

18 World Population Review, "Population of Cities in Namibia 2023," accessed December 21, 2023, [https://worldpopulationreview.com/countries/cities/namibia#:~:text=Walvis%20Bay%27s%20population%20is%20about%2063%2C000%20people.](https://worldpopulationreview.com/countries/cities/namibia#:~:text=Walvis%20Bay%27s%20population%20is%20about%2063%2C000%20people.;); Suzman, James. "Minorities in Independent Namibia," page 2.; CIA World Factbook, "Namibia."

19 Swakopmund Municipality. Invest in the Future of Swakopmund, Namibia!" 2019. <https://swakopmun.com/wp-content/uploads/2020/05/INVEST-IN-SWAKOPMUND-PROFILE-2019-FINAL.pdf>

20 Namibia Biodiversity Database, "Namibian Languages," accessed December 20, 2023, <https://biodiversity.org.na/NamLanguages.php>



Map of Namibia²¹

21 Obeid, Selma, and John Mendelsohn. 2022. "SWAPO: The Beginning of the Political Challenge." https://www.ifri.org/sites/default/files/atoms/files/elobeid_mendelsohn_swapo_2022.pdf.

education system, a wide variety of languages are used for instruction through the third grade, depending on the region and the predominant languages in use there. After this point, English is the primary language of instruction.²² A variety of other languages, including German, are spoken by smaller numbers of Namibians, with about a total of around thirty languages in regular use in the country.²³

Namibia's urban-rural divide is reflected across the country through differences in health, education, and socioeconomic status. More than half (54%) of Namibians live in rural areas, with 37% of them living below the poverty line, as compared to 15% of those who live in cities.²⁴ The overall poverty rates are higher for women (32%) than for men (26%). Further, from 2004 to 2014, urban Namibia had an infant mortality rate of 35 deaths per 1000 live births, while rural areas had 46 deaths per 1000 live births. Further illustrating geography-dependent resources discrepancies, 9% of Namibian children under the age of five living in urban areas are underweight, whereas 16% in rural areas are. Between 2004 and 2012, 52% of youth in cities and towns completed school through the age of 14, as compared with 17% in rural areas.²⁵ Namibia spends more on education as a percent of GNP than other countries in the region, and overall school enrollment has risen over time.²⁶ Currently, HIV is one of the largest barriers to expanding educational access in Namibia.²⁷

22 Government of the Republic of Namibia, "Education for All National Plan of Action," July 16, 2002, page 12, https://planipolis.iiep.unesco.org/sites/default/files/ressources/namibia_efa_npa.pdf

23 Namibia Biodiversity Database, "Namibian Languages."

24 Namibian National Planning Commission, *The Root Causes of Poverty* (June 2023), accessed December 21, 2023, <https://www.npc.gov.na/wp-content/uploads/2023/06/Root-Causes-of-Poverty.pdf>.

25 Population Reference Bureau, "The Urban/Rural Divide in Health and Development, 2015, page 11, <https://www.prb.org/wp-content/uploads/2015/05/urban-rural-datasheet.pdf>

26 Government of the Republic of Namibia, "Education for All National Plan of Action," page 8, chart 2, 3.

27 Government of the Republic of Namibia, "Education for All National Plan of Action," page 28.

Economic Situation

Economic History of Namibia

Prior to German colonization, Namibia's economy was largely based on subsistence agriculture and nomadic pastoralism, practiced by indigenous groups like the San, Herero, and Nama peoples. Barter trade, primarily in cattle and iron, was common.¹

The establishment of colonial rule in 1884 marked the beginning of significant economic transformation. The German administration implemented policies favoring European settlers, leading to the dispossession of land and livestock from indigenous communities. The colonization era also brought the development of infrastructure like railways and ports to facilitate trade and resource extraction. The discovery of diamonds in 1908 near Lüderitz led to a mining boom, significantly contributing to the colonial economy.²

After World War I, when Namibia – then known as South West Africa – came under South African mandate, racial inequality and economic disparity became further entrenched. During this period, mining, particularly for diamonds and uranium, continued to be the backbone of the economy.

Agriculture also developed, but largely benefited the white minority.³

An Economic Snapshot Today

When Namibia gained independence in 1990, it inherited an economy with considerable infrastructure but significant inequality. Today, the country's economy has diversified modestly, mainly bolstered by sectors including agriculture, tourism, fishing, and mining.⁴

In recent years, Namibia has experienced substantial developments in its fishing and tourism industries. Fishing, always a crucial part of the economy, continued to thrive despite global challenges. In 2022, the government implemented new policies aimed at sustainable fishing practices, attempting to ensure the long-term viability of fish stocks.⁵ These included stringent regulations on quotas and a focus on eco-friendly fishing methods.⁶ Throughout 2023, the industry faced various challenges, including illegal, unreported, and unregulated fishing, rising fuel costs, and concerns over declining biomass in key fish stocks like horse mackerel.⁷ Despite these impediments, the industry has remained a major contributor to Namibia's GDP, showcasing resilience and

1 Wallace, Marion. *A History of Namibia: From Earliest Times to 1990*. Columbia University Press, 2011.

2 Ibid.

3 Melber, Henning. "Land & Politics in Namibia." *Review of African Political Economy* 32, no. 103 (March 2005): 135–42. <https://doi.org/10.1080/03056240500121065>.

4 Mbuende, Tjivingurura. "Unlocking Namibia's Economic Growth and Opportunities in 2023." *Namibia Economist*, February 9, 2023. <https://economist.com.na/76922/columns/unlocking-namibias-economic-growth-and-opportunities-in-2023/>.

5 Erasmus, Victoria, and Abigail Frankfort. "Fish Waste to Future Wealth: How Namibia's Fisheries Are Collaborating on Sustainable Innovation." *World Economic Forum*, October 16, 2023. <https://www.weforum.org/agenda/2023/10/namibia-fisheries-are-collaborating-on-sustainable-innovation/>.

6 Ibid.

7 "A Look at the Fishing Industry in 2023." *Africa-Press*, December 22, 2023. <https://www.africa-press.net/namibia/all-news/a-look-at-the-fishing-industry-in-2023>.

adaptability. The fishing sector has remained the third-largest national employer after mining and agriculture, contributing about 20% to overall export earnings.⁸

Namibia’s tourism industry showed significant signs of recovery and growth after the setbacks of the Covid-19 pandemic. By 2023, the sector was poised for further expansion, with monthly foreign tourist arrivals averaging 11,431 during the first two months of the year, a substantial increase from the average of 5,223 in the same period in 2022. February 2023, for example, saw a 107% year-on-year increase in foreign arrivals, reaching about 82% of pre-pandemic levels.⁹

The occupancy rate in hospitality establishments across Namibia reflected this positive trend. In April 2023, the national occupancy rate stood at 51.8%, a significant improvement from 36.5% in the same month of the previous year.¹⁰ This was the highest monthly occupancy rate recorded for the year up to that point. Additionally, the year-to-date average in 2023 was close to the pre-pandemic levels of 2019. Most visitors were from Germany, Austria, and Switzerland, comprising over 40% of all arrivals in March 2023, compared to 30% in 2019.¹¹

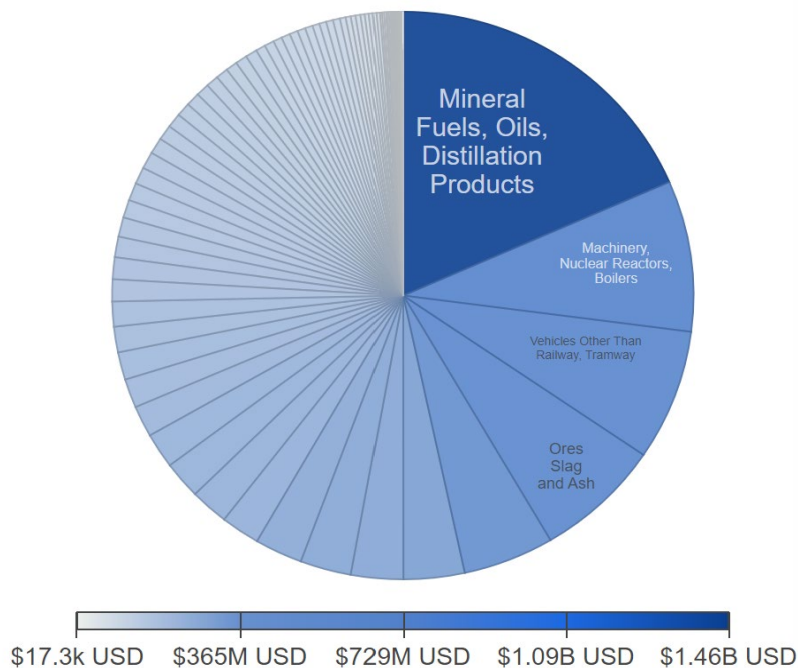


Figure 1. Namibia Imports by Category in U.S. Dollars in 2023

Source: Trading Economics, “Namibian Imports by Category,” United Nations COMTRADE, 2023.

The central region of Namibia recorded the lowest occupancy rate in April 2023, at 37.3%, compared with the coastal and northern areas. Leisure visits continued to be the main driver of tourist inflows, accounting for 91.9% of visitors in March 2023.¹² The growing share of visitors coming from Namibia’s main source markets was due in part to the increase in the availability of direct flights and government projects to boost the tourism sector.¹³

8 “Hake and Rock Lobster Tacs for 2022/23 Fishing Season Set.” Namibia Economist, September 23, 2022. <https://economist.com.na/73726/agriculture/hake-and-rock-lobster-tacs-for-2022-23-fishing-season-set/>.

9 Dlamini, Matthew. “Tourism Sector Poised for More Growth.” The Namibian, April 24, 2023. <https://www.namibian.com.na/tourism-sector-poised-for-more-growth/>.

10 Dlamini, Matthew. “Tourist Inflows up Ahead of Peak Season.” The Namibian, May 24, 2023. <https://www.namibian.com.na/tourist-inflows-up-ahead-of-peak-season/>.

11 Ibid.

12 Ibid.

13 Ibid.

In general, Namibia experienced real GDP growth of 4.6% in 2022, driven by the recovery of primary industry (especially the increase in diamond production) post-Covid.¹⁴ The inflation rate averaged 6.1% in 2022, influenced by global commodity price fluctuations and supply chain disruption.¹⁵ The fiscal deficit averaged 7.5% of GDP in the same period, with public debt reaching 67% of GDP.¹⁶ The headcount poverty ratio in Namibia was 17.4% as of 2019 (117th among 157 countries on the Human Capital Index), with a Gini coefficient (reflecting income inequality) of 59.1 (as of 2015), highlighting the continued significant challenges in wealth allocation.¹⁷

The Namibian government's fiscal policies have been focused on economic revival and caring for the poor, with the recent budget shifting "from consolidation to sustainability."¹⁸ Over the coming years, revenue and expenditures are expected to rise, leading to a projected deficit of 9.8 billion Namibian dollars (USD 520,000,000), about 4.6% of the Namibian GDP.¹⁹ The Namibian dollar is pegged 1:1 to the South African rand.²⁰ Monetary policy has seen the Bank of Namibia increasing interest rates to combat inflation, with efforts to maintain a balance between economic growth and fiscal responsibility.²¹

Following an initial period of economic turbulence in the early 2000s, Namibia's real GDP has slowly risen, compounding at an annual rate of roughly 3.8% on average.²² This measurably steady, yet limited, rate of

growth over the past three decades can be attributed to the national government's consistent implementation of policies supporting a free-market liberalism approach; enacting legislation such as the Foreign Investment Act and creating an Export Processing Zone (EPZ) to attract foreign economic activity and accelerate the nation's economic development.²³

Key Trade and Economic Data

Today, Namibia is a member of the Southern African Development Community (SADC) and the Southern African Customs Union (SACU), having joined the two regional blocs at independence. As of August 2023, Namibia had also deposited its instruments of ratification for the newly operational African Continental Free Trade Area (AfCFTA) – an intra-regional regime expected to become the world's largest free trade area by number of countries, total territory, and population, at a combined GDP of roughly 3.4 trillion US dollars.²⁴ Namibia became a member of the World Trade Organization in 1995.

Though Namibia remains a largely import-heavy, export-driven economy with a weak in-country manufacturing base and low population density, its strategic economic trade relationships across Africa through SADC and SACU have enhanced the country's exports in the mining, agricultural, and fishing sectors. As Figure 2 demonstrates below, South Africa remains the country's largest single bilateral trading

14 Bank of Namibia. "2022 Annual Report."

15 Ibid.

16 Bergh, Floris. "2023/24 Namibian Budget in Review: Shifting from Consolidation to Sustainability." *Namibia Economist*, March 1, 2023. <https://economist.com.na/77446/special-focus/2023-24-namibian-budget-in-review-shifting-from-consolidation-to-sustainability/>.

17 The World Bank. "The World Bank in Namibia."

18 Bergh, Floris. "2023/24 Namibian Budget in Review."

19 Ibid.

20 ITA. "Namibia – Country Commercial Guide." (2022)

21 Bank of Namibia. "Namibia's Monetary Policy Framework."

22 IMF. "Namibia: Recent Economic Developments and Selected Economic Issues." (1995)

23 Namibia High Commission London. "Namibia's Economy."

24 ITA. "African Continental Free Trade Area." (2023)

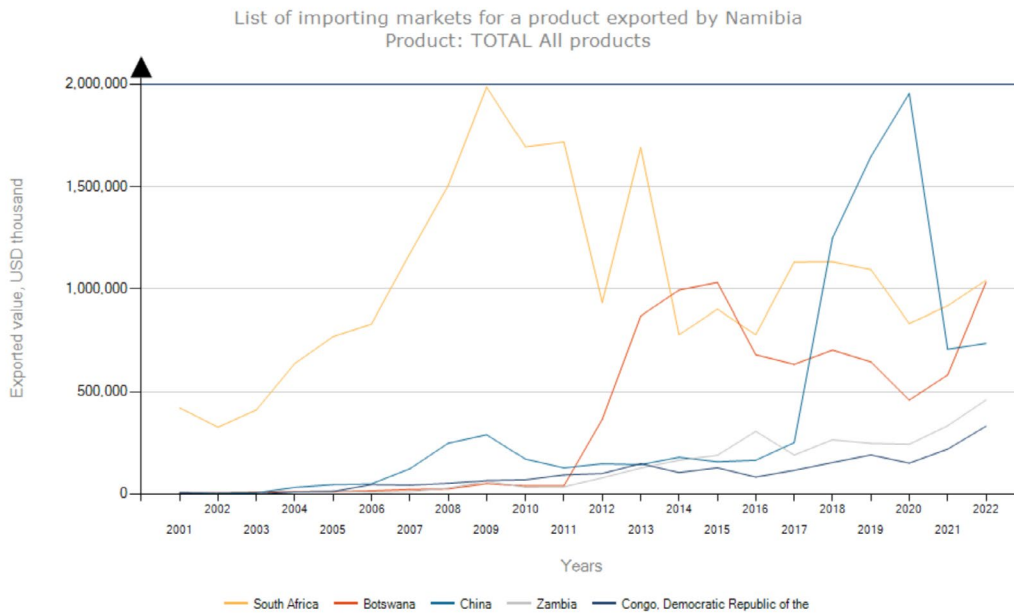


Figure 2. Markets importing Namibian goods from 2001-2022

Source: ITC, “List of importing markets for a product exported by Namibia,” ITC Trade Map, 2022.

partner, with the neighboring nation accounting for a sizable amount (roughly 16.2%) of Namibia’s export volume (USD 1.03 billion). Namibia’s eastern neighbor, Botswana, trails closely with a share of roughly 16% of exports (USD 1.01 billion). By share of export volume, top importers of Namibian goods outside Africa include the member states of the European Union at an aggregate of 20.3% (USD 1.39 billion), China at 11.5% (USD 729 million), and the UAE at 3.29% (USD 208 million).²⁵

Despite these strong external indicators of macro-economic partnership, development of trade relationships since independence, and Namibia’s status as an ‘upper middle-income’ country relative to the global economy, economic gains made since the country’s post-Covid recovery have been minimal when compared to the overall national growth trajectory. The employment rate is expected to remain depressed below pre-pandemic levels, yet poverty

rates will continue to be elevated above.²⁶ The gaps in accessibility of services across sectors and economic opportunities for advancement remain wide for many Namibians along racial, and to a measurable extent ethnic, fault lines, producing conditions of multidimensional poverty.

Covid-19 and Continued Challenges

In 2019, the overall national unemployment rate sat at 20.00%, and among youth at 38.16% (above the global average of 15.24%).²⁷ Prior to the pandemic, roughly 18% of Namibians were living under the international poverty line of USD 1.90 per day. By 2022, over a fifth of the population – largely women and youth – remained unemployed, yet 18% of the overall population continued to remain in poverty.²⁸ Facing these and other indicators of significant inequality,

25 Trend Economy, “Namibia’s exports 2022 by country.” (2023)

26 World Bank, “Overview: Economic Outlook.” (2023)

27 Macrotrends, “Namibia Unemployment Rate 1991-2024.” (2023)

28 WFP. “Namibia.” (2023)

the Namibian government adopted Vision 2030 and other national development frameworks with the aim to reduce extreme poverty and income disparity.²⁹ While signs of improvement have been captured by the World Bank over the years, more drastic measures will be required if the country is to achieve its intended target by 2030.³⁰

With the arrival of Covid, Namibia's economy also saw a contraction of roughly 8.0% in 2020, before returning to positive GDP growth at a rate of 2.7% in 2021 and 3.9% in 2022. Accompanying the implementation of lockdowns and other pandemic public health protocols, many laborers saw reductions in income, and for others, job loss. Government support in the form of an Economic Stimulus and Relief Package, as well as approved relief to borrowers disbursed by the Development Bank of Namibia (DBN) and AgriBank, supported domestic economic adjustments demanded by the crisis. Of note for Namibia's labor force, was a one-time N\$750 Emergency Income Grant, designed to protect both formal and informal sector workers from losses incurred during the pandemic and from resulting limitations to movement. Students, however, were excluded.³¹

Although the global effects of the pandemic have abated, in 2023, the World Bank highlighted three persistent socio-economic challenges to Namibia's national development agenda: (1) intergenerational economic disparities tied to issues of geography and accessibility of economic opportunity; (2) interconnected realities of persistent poverty levels, untapped human capital, and poor basic service access across less privileged portions of Namibian society; and (3) slow job creation and persistently elevated unemployment.³²

29 Aiken, Drew. "Inequality in Namibia: Decreasing but Still significant." O'Neill Institute, May 28, 2018. <https://oneill.law.georgetown.edu/inequality-in-namibia-decreasing-but-still-significant/>.

30 Ibid.

31 Orkoh, Emmanuel, et al. "COVID-19 emergency income grant and food security in Namibia."

32 World Bank, "Overview: Economic Outlook." (2023)



Tintenpalast Windhoek

Government Structure

Since independence in 1990, Namibia has been a constitutional multiparty democracy.¹ The central government includes the executive branch, legislature, judiciary, eight agencies, and several state-owned enterprises commonly referred to as Parastatals.²

Geographically, Namibia is organized into 14 regions, with 121 constituencies divided among them.³ Each region maintains a Regional Council, whose members are elected,⁴ with each constituency represented by a single councilor.⁵ Under Article 102 of the Constitution,⁶ a Council of Traditional Leaders was established in 1997 to advise the President on “(a) the control and utilization of communal land; and (b) all such other matters as may be referred to it by the President for advice.”⁷ It includes “representatives of Traditional Authorities” as designated by the Traditional Authorities Act of 1995.⁸

The Executive Branch

The executive branch is led by the President whose role is outlined in Chapter Five of the Constitution. Article 27 provides that the President is head of state, head of government, and Commander-in-Chief of the defense forces.⁹ Presidential elections are held every five years and presidents may serve no more than two terms.¹⁰ Elections are “by direct, universal and equal suffrage.”¹¹ Candidates for the presidency must be “citizens of Namibia by birth or descent,”¹² at least 35 years of age, and “eligible to be elected to office as a member of the National Assembly.”¹³

Presidential candidates must receive at least 50 percent of votes cast to be elected.¹⁴ Article 28 provides that if no candidate receives fifty percent, a runoff election is held between the two candidates who received the most votes.¹⁵

Nangolo Mbumba is Namibia’s current President, succeeding Dr. Hage G. Geingob, who died in office

1 Legal Assistance Centre, “Namibian Constitution,” Legal Assistance Centre, accessed February 23, 2024.

2 Government of Namibia, “About Government,” Government of Namibia, 2023, <https://www.gov.na/about-government>.

3 Ibid.

4 Ibid.

5 Ibid.

6 Legal Assistance Centre, “Namibian Constitution, Article 102” Legal Assistance Centre, accessed February 23, 2024.

7 FAO, “Council of Traditional Leaders Act, 1997 (No. 13 of 1997),” FAOLEX Database, accessed November 15, 2023, <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC137284/>.

8 Ibid.

9 Legal Assistance Centre, “Namibian Constitution, Article 27,” Legal Assistance Centre, accessed February 23, 2024.

10 Ibid., Article 29.

11 Ibid., Article 28.

12 Ibid.

13 Ibid.

14 Ibid.

15 Ibid.

on February 4, 2024.¹⁶ President Mbumba had served as President Geingob's Vice President, and assumed the presidency immediately upon his predecessor's death,¹⁷ under Articles 29 and 34 of the Constitution.¹⁸ Since former President Geingob was serving his second term¹⁹ when he passed away, Mr. Mbumba will remain President until the conclusion of Geingob's term in March 2025.²⁰ The new President has appointed Deputy Prime Minister Netumbo Nandi-Ndaitwah to be his Vice-President.²¹ She had already been designated as the SWAPO candidate for the presidency in the 2024 elections,²² which will be held in late November.²³ Upon his elevation, President Mbumba indicated that he will not contest that ballot.²⁴ Ms. Nandi-Ndaitwah, assuming that she is elected, will be Namibia's first female President.

Executive power is vested in the Cabinet²⁵ under Chapter Six of the Constitution.²⁶ All Cabinet members must also be members of Parliament.²⁷ The current Cabinet includes the following positions²⁸:

- President
- Vice President
- Prime Minister
- Deputy Prime Minister & Minister of International Relations and Cooperation
- Attorney General
- Director General of National Planning
- Director General of the Intelligence Service
- Minister of Presidential Affairs
- Minister of Gender Equality, Poverty Eradication, and Social Welfare
- Minister of Agriculture, Water, and Land Reform
- Minister of Defence and Veterans Affairs
- Minister of Education, Arts, and Culture
- Minister of Environment, Forestry, and Tourism
- Minister of Finance and Public Enterprises
- Minister of Fisheries and Marine Resources
- Minister of Health and Social Services
- Minister of Home Affairs, Immigration, Safety, and Security

16 Nyasha Nyaungwa, "Namibia Interim President Says No Plan to Run in This Year's Election ...," Reuters, February 4, 2024, <https://www.reuters.com/world/africa/namibia-interim-president-says-no-plan-run-this-years-election-2024-02-04/>.

17 Ibid.

18 Legal Assistance Centre, "Namibian Constitution, Articles 29 and 34," Legal Assistance Centre, accessed February 23, 2024.

19 The President of Namibia," Republic of Namibia - Office of the President, accessed November 15, 2023, <https://op.gov.na/the-president1>.

20 Ben Payton, "Namibia Mourns Leader Who Put Country on Energy Map," African Business, February 5, 2024, <https://african.business/2024/02/energy-resources/namibia-mourns-leader-who-put-country-on-energy-map>.

21 Nyasha Nyaungwa, "Namibia Interim President Says No Plan to Run in This Year's Election ...," Reuters, February 4, 2024, <https://www.reuters.com/world/africa/namibia-interim-president-says-no-plan-run-this-years-election-2024-02-04/>.

22 Ibid.

23 NDI, "Elections Calendar," National Democratic Institute, accessed November 15, 2023, <https://www.ndi.org/elections-calendar-all>.

24 Nyasha Nyaungwa, "Namibia Interim President Says No Plan to Run in This Year's Election ...," Reuters, February 4, 2024, <https://www.reuters.com/world/africa/namibia-interim-president-says-no-plan-run-this-years-election-2024-02-04/>.

25 Government of Namibia, "About Government," Government of Namibia, 2023, <https://www.gov.na/about-government>.

26 Legal Assistance Centre, "Namibian Constitution, Articles 35 and 40," Legal Assistance Centre, accessed February 23, 2024.

27 Ibid., Chapter 6, Article 35.

28 Government of Namibia, "About Government," Government of Namibia, 2023, <https://www.gov.na/about-government>.

- Minister of Higher Education, Training, and Innovation
- Minister of Industrialization and Trade
- Minister of Information and Communications Technology
- Minister of Justice
- Minister of Labour, Industrial Relations, and Employment Creation
- Minister of Ministry Mines and Energy
- Minister of Sport, Youth, and National Service
- Minister of Urban and Rural Development
- Minister of Works and Transport
- Secretary to the Cabinet

The President appoints the Prime Minister, Ministers and Deputy Ministers, the Attorney General, the Director General of Planning, and the Head of the Intelligence Service.²⁹ The Prime Minister serves as “Chief Advisor”³⁰ to the President and is “overall coordinator of the Government Offices, Ministries and Agencies.”³¹ The President also appoints the Auditor-General and the Governor and Deputy Governor of the Central Bank, on the recommendation of the Public Service Commission,³² and the Chief of the Defense Force, the Inspector-General of Police, and the Commissioner of Prisons, on the recommendation of the Security Commission.³³

The agencies of the central government are³⁴:

- Anti-Corruption Commission
- Electoral Commission
- Namibia Central Intelligence Service
- National Planning Commission
- Office of the Attorney General
- Office of the Auditor General
- Office of the Ombudsman
- Public Service Commission

The Legislative Branch

Chapters Seven and Eight of the Constitution provide for a bicameral legislature, designated the Parliament of the Republic of Namibia, with the National Assembly as the lower house and the National Council as the upper house.³⁵ The National Assembly is led by the Speaker,³⁶ and includes 96 elected members and eight non-voting members appointed by the President.³⁷ Every National Assembly sits for a term of no more than five years, although the President may dissolve an Assembly earlier.³⁸

Under Article 44, the National Assembly “shall be representative of all the people”³⁹ and act as “the principal legislative authority in and over Namibia.”⁴⁰ Under these terms, the National Assembly may “make and repeal laws for the peace, order and good govern-

29 Legal Assistance Centre, “Namibian Constitution, Article 32,” Legal Assistance Centre, accessed February 23, 2024.

30 Namibia High Commission London, “Namibia’s Government,” Namibia High Commission London, accessed February 8, 2024, <https://www.namibiahc.org.uk/government.php>.

31 Namibia High Commission London, “Namibia’s Government,” Namibia High Commission London, accessed February 8, 2024, <https://www.namibiahc.org.uk/government.php>.

32 Legal Assistance Centre, “Namibian Constitution, Article 32,” Legal Assistance Centre, accessed February 23, 2024.

33 Ibid.

34 “Government of Namibia - HOME,” Government of Namibia, accessed November 15, 2023, <https://www.gov.na/>.

35 Ibid.

36 “Members of 7th National Assembly – Namibian Parliament,” Parliament of the Republic of Namibia, accessed November 16, 2023, <https://www.parliament.na/1903-2/>.

37 Legal Assistance Centre, “Namibian Constitution, Article 46,” Legal Assistance Centre, accessed February 23, 2024.

38 Ibid., Article 32.

39 Ibid., Article 44.

40 Ibid., Article 63.

ment of the country in the best interest of the people of Namibia”⁴¹ with the “assent of the President.”⁴² If the President does not assent to a bill, he or she must then “inform the Speaker who shall inform the National Assembly thereof, and the Attorney General who may then take appropriate steps to have the matter decided by a competent Court.”⁴³ If the proposal is not found to be unconstitutional then the President “shall assent to said bill,” but only if it is passed by a two-thirds majority in the National Assembly.⁴⁴

The National Council is led by a Chairperson and Vice Chairperson,⁴⁵ and includes two representatives from each region selected from and by the Regional Councils.⁴⁶ Members of the National Council serve six-year terms.⁴⁷ Under Article 75, the National Council has the power to consider any bill that has been passed by the National Assembly and referred to it.⁴⁸ The National Council may then make recommendations to the National Assembly, with or without proposing amendments.⁴⁹ If the National Council votes to confirm the bill in its original form, it is referred to the President by the Speaker of the National Assembly.⁵⁰ If the National Council recommends amend-

ments, the bill returns to the National Assembly for further review.⁵¹ The National Assembly may accept, reject, or alter those amendments.⁵² If the National Assembly votes again to pass the bill it is immediately referred to the President and does not return to the National Council for further consideration.⁵³

The legislature must abide by “all existing international agreements binding upon Namibia”⁵⁴ unless and until “the National Assembly, acting under Article 63(2)(d) [of the Constitution], otherwise decides.”⁵⁵ Further, “the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia”⁵⁶ unless the Constitution or Parliament determines otherwise.⁵⁷

The Judiciary

Chapter Nine of the Constitution provides for the independent judicial branch, including a Supreme Court, a High Court, and Lower Courts.⁵⁸

41 Ibid.

42 Ibid., Article 44.

43 Ibid., Article 64.

44 Ibid.

45 “Members of 6th National Council,” Namibian Parliament, accessed November 15, 2023, <https://www.parliament.na/members/>.

46 Legal Assistance Centre, “Namibian Constitution, Articles 69 and 108,” Legal Assistance Centre, accessed February 23, 2024.

47 Ibid., Article 70.

48 Ibid., Article 75.

49 Ibid.

50 Ibid.

51 Ibid.

52 Ibid.

53 Ibid.

54 Ibid., Article 143.

55 Ibid.

56 Ibid., Article 144.

57 Ibid.

58 Ibid., Article 78.

The Supreme Court is presided over by a Chief Justice and includes four other justices.⁵⁹ It hears appeals from the High Court on matters of “the interpretation, implementation and upholding of [the] Constitution and the fundamental rights and freedoms guaranteed thereunder.”⁶⁰ The Supreme Court also has authority to decide questions referred to it by the Attorney-General, as well as such other matters as may be authorized by statute.⁶¹

The High Court is led by a Judge-President and currently includes 11 other judges.⁶² It has original jurisdiction over “civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of [the] Constitution and the fundamental rights and freedoms guaranteed thereunder.”⁶³ The High Court also has appellate jurisdiction over cases decided by Lower Courts,⁶⁴ which are courts of general jurisdiction handling civil and criminal matters not reserved to other tribunals.

The President appoints the Chief Justice, other justices of the Supreme Court, the Judge-President of the High Court, other judges of the High Court, the Ombudsman, and the Prosecutor-General, on the recommendation of the Judicial Service Commission.⁶⁵ Under Article 85, that Commission includes the Attorney General, the Chief Justice, a Judge appointed by the President, and two lawyers who are nominated “by the professional organisation or organisations representing the interests of the legal profession in Namibia.”⁶⁶

59 “Supreme Court Judges,” Superior Court Judges, accessed November 15, 2023, <https://ejustice.moj.na/ORGANISATIONAL%20STRUCTURE/Pages/SupremeCourtJudges.aspx>.

60 Legal Assistance Centre, “Namibian Constitution, Article 79,” Legal Assistance Centre, accessed February 23, 2024.

61 Ibid.

62 “High Court Judges,” Namibia Superior Court Judges, accessed November 15, 2023, <https://ejustice.moj.na/ORGANISATIONAL%20STRUCTURE/Pages/HighCourtJudges.aspx>.

63 Legal Assistance Centre, “Namibian Constitution, Article 80,” Legal Assistance Centre, accessed February 23, 2024.

64 Ibid.

65 Ibid., Article 32.

66 Ibid., Article 85.

Political Parties

Since independence, the Namibian political space has been dominated by SWAPO, which has continuously controlled a majority of seats in the National Assembly. Every President since independence has been a member of SWAPO. While in 2019 SWAPO underperformed its previous outcomes, it still walked away with 65.5% of votes for the National Assembly (see Figure 1).¹ Crucially, however, the number of seats won by SWAPO candidates fell short of the two-thirds majority that had previously allowed it to make constitutional amendments without the support of other parties.²

SWAPO is perceived by many within Namibia as a primarily Ovambo party.³ Its support base remains among the Ovambo, who constitute roughly 51% of the total Namibian population. SWAPO won nearly 95% of their votes in 2007,⁴ although in more recent elections, it has lost ground in its base. The party still managed to carry predominantly Ovambo regions with about 80% of the vote in 2019.⁵ While the twice-elected and recently deceased President, Dr. Hage G. Geingob, was not Ovambo, the current President, Nangolo Mbumba, is, and the leadership of the party continues to be dominated by people of that ethnicity.⁶ Minority group members have accused

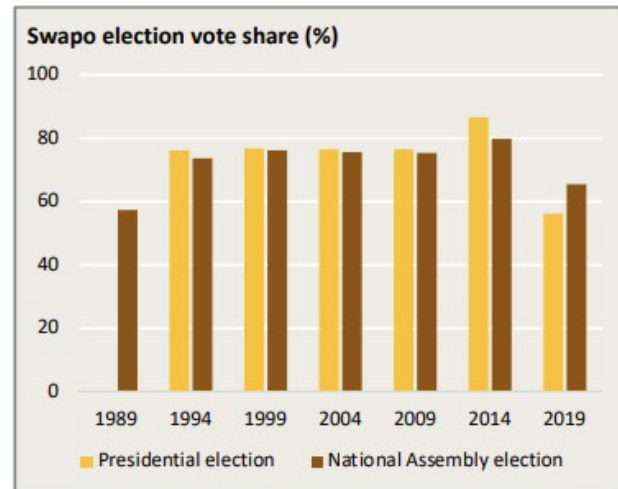


Figure 1⁷

https://www.ifri.org/sites/default/files/atoms/files/elobeid_mendelsohn_swapo_2022.pdf

SWAPO of “favoring the majority Ovambo in allocating services,” especially in disputes over land reform.⁸

The Ovambo were not dispossessed of very much of their land by the successive German and South African colonial regimes, and they suffered little, if at all, from the mass killings in the first decade of the twentieth century. For those reasons, SWAPO’s legitimacy as an interlocutor with Germany on genocide issues

- 1 Henning Melber, “Namibia’s Parliamentary and Presidential Elections: The Honeymoon Is Over,” *The Round Table* 109, no. 1 (January 2, 2020): 13–22, <https://doi.org/10.1080/00358533.2020.1717090>; Selma EL Obeid and John Mendelsohn, “SWAPO: The Beginning of the Political Challenge,” IFRI, Notes de l’Ifri, May 2022. Figure below from Melber.
- 2 Melber, “Namibia’s Parliamentary and Presidential Elections”; “Namibia Votes as Ruling Party Faces Unprecedented Challenge,” *Voice of America*, November 27, 2019, https://www.voanews.com/a/africa_namibia-votes-ruling-party-faces-unprecedented-challenge/6180098.html.
- 3 Eduard Gargallo, Interview, November 16, 2023; Jeremy Julian Sarkin, Interview, Zoom, November 16, 2023.
- 4 Gerhard Töttemeyer, “The Management of a Dominant Political Party System with Particular Reference to Namibia,” n.d.
- 5 Obeid and Mendelsohn, “SWAPO: The Beginning of the Political Challenge.”
- 6 Sarkin, Interview. The current president of Namibia is Ovambo.
- 7 Melber, “Namibia’s Parliamentary and Presidential Elections.”
- 8 “Namibia: Freedom in the World 2022 Country Report” (Freedom House), accessed November 16, 2023, <https://freedomhouse.org/country/namibia/freedom-world/2022>; Eduard Gargallo, “Beyond Black and White: Ethnicity and Land Reform in Namibia,” *Politique africaine* 120, no. 4 (2010): 153–73, <https://doi.org/10.3917/polaf.120.0153>.

has been called into question by the ethnic groups that did lose both lives and land.⁹

SWAPO has also been embroiled in controversy relating to corruption. Multiple SWAPO officials have resigned from government positions after corruption-related scandals.¹⁰ Most recently, WikiLeaks published documents revealing that the Icelandic fishing company Samherji had bribed numerous members of SWAPO governments to gain lucrative fishing licenses.¹¹

SWAPO's party program is broad and heterogeneous, devoted to promoting economic growth. Its 2019 Manifesto described its economic philosophy as "socialism with Namibian characteristics," noting that the term is intended to include open market principles and techniques to develop the economy.¹² Despite its ideological vagueness, SWAPO has been fairly successful and pragmatic at promoting growth in the country. Namibia is one of only eight "upper middle income" countries in Africa. It capitalized on the global commodity boom, increasing investment in mining exports. While this did lead to an overreliance on natural resources, "a significant public expenditure spree" managed to spread the growth in tradable goods "to the non-tradable section of the economy."¹³ And impressively, "between 2000 and 2015 income and consumption per capita expanded at an average annual rate of 3.1%, poverty rates halved, and access to essential public goods expanded rapidly."¹⁴ The end

of the boom, however, caused some belt-tightening, and unemployment, inequality, poverty, and a large informal sector remain significant obstacles.¹⁵ Today, Namibians of all stripes are frustrated with those and other lingering issues, including drought, lack of access to education, and corruption on a local as well as national level.¹⁶

In the past, SWAPO used its parliamentary supermajority to push through constitutional amendments. For example, in 1999 it amended the Constitution to allow a third term for President Nujoma.¹⁷ And in 2014, it promoted a bill that, according to Freedom House, "comprised 40 alterations to the Constitution, [including] increasing the membership of the National Assembly from 72 to 96, [adding] new President-appointed Members of Parliament, [limiting] the National Council's power to review certain bills, and granting of power to the president to appoint the head of the intelligence agency." SWAPO was criticized for rushing passage of the measure in advance of national elections, a move which was seen by many to be self-serving, given its dominant position.¹⁸

Despite these issues, no opposition political party poses a serious threat to SWAPO's dominance (see Figure 2). Its most significant challenger is the Popular Democratic Movement (PDM), which commands the next highest number of seats in Parliament. Until 2017, the PDM was known as the Democratic Turnhalle Alliance—it changed names in part to distance

9 Gargallo, Interview.

10 Obeid and Mendelsohn, "SWAPO: The Beginning of the Political Challenge."

11 "Fishrot: The Corruption Scandal Entwining Namibia and Iceland," BBC News, February 27, 2023, sec. Africa, <https://www.bbc.com/news/world-africa-64526018>.

12 Nangula Shejvali, "Spot The Difference," Institute for Public Policy Research, Namibia Votes 2019, no. 3 (November 2019), https://ippr.org.na/wp-content/uploads/2020/01/NAMVOTES03_WEB.pdf.

13 Miguel Santos, Douglas Barrios, and Ricardo Hausmann, "A Growth Diagnostic of Namibia," SSRN Electronic Journal, 2022, 7, <https://doi.org/10.2139/ssrn.4046828>.

14 Santos, Barrios, and Hausmann, 7.

15 Santos, Barrios, and Hausmann, 7.

16 Shejvali, "Spot The Difference."

17 Parliament of the Republic of Namibia. Hansard. 15 October 1998, pp 207–208.

18 "Freedom in the World 2015 - Namibia," Refworld, accessed January 6, 2024, <https://www.refworld.org/docid/55c084fb1b.html>.

itself from allegations that it had cooperated with the South African apartheid regime.¹⁹ The party has been sharply critical of SWAPO, accusing it of “practising a ‘black apartheid’ for the benefit of the Ovambo, who get employment in the south and resettlement land in spite of already having well-paid public jobs and/or land in Ovamboland.”²⁰

In 2019, the PDM was the main beneficiary of SWAPO’s decline.²¹ It has tended to draw support from a coalition of “ethnically-based parties,” and it advocates for devolution of centralized power to local, traditional authorities.²² On other major political issues, PDM’s 2019 manifesto has some ambitious proposals. For example, on the issue of drought, PDM promotes the construction of a set of desalination plants and a “cross-water line to pump water into the interior for aggressive agricultural modernization and diversification.”²³ Broadly speaking, however, PDM has not significantly differentiated itself from SWAPO on many economic issues.²⁴

Opposition parties other than the PDM tend to represent the interests of particular ethnic groups.²⁵ The third largest party, the Landless People Movement (LPM), was founded in 2017, and is “exclusively rooted in a particular regional-ethnic stronghold among the Nama communities.”²⁶ The LPM has campaigned on a policy of land reform and reparations for the colo-

nial-era Genocide.²⁷ The National Unity Democratic Organization (NUDO), is firmly based in Ovaherero areas of the country: its current leader, Esther Muinjangu, is the chairperson of the Ovaherero Genocide Foundation.²⁸ And the United Democratic Front is predominantly supported by the Damara people.²⁹

Namibia is a functioning and free democracy, despite the dominance of SWAPO. As Freedom House notes, there are scarce formal restrictions on other political parties, nor do they “encounter intimidation or harassment during election campaigns.”³⁰ While no other party has the economic or organizational resources to pose a real challenge to it in the immediate future, SWAPO’s electoral heft may be waning, as opposition parties made significant gains in the 2019 parliamentary vote and the 2020 local elections.³¹ While SWAPO’s candidate for the presidency is still expected to win in 2024, observers anticipate that her victory will be by a far slimmer margin than President Geingob’s in 2019.

19 Hunter et al., *Spot the Difference*.

20 Gargallo, “Beyond Black and White.”

21 Melber, “Namibia’s Parliamentary and Presidential Elections.”

22 Hunter et al., *Spot the Difference*; “Political Parties in Namibia,” Information Brochure (Konrad Adenauer Stiftung, January 2022), <https://www.kas.de/documents/279052/279101/Political+Parties+in+Namibia.pdf/df70eb05-793a-d3f1-9996-8f030b8dc825?version=1.0&t=1643973804619>.

23 Shejavali, “Spot The Difference,” 7.

24 Shejavali, “Spot The Difference.”

25 Töttemeyer, “The Management of a Dominant Political Party System with Particular Reference to Namibia.”

26 Melber, “Namibia’s Parliamentary and Presidential Elections.”

27 “About LPM,” Landless People’s Movement (blog), accessed November 16, 2023, <https://www.lpmparty.org/about-lpm/>.

28 Melber, “Namibia’s Parliamentary and Presidential Elections.”

29 “UDF at Crossroads,” *The Namibian* (Accessed via Internet Archive), November 1, 2013, <https://archive.ph/2c5Xl>.

30 “Namibia: Freedom in the World 2023 Country Report,” Freedom House, accessed January 6, 2024, <https://freedom-house.org/country/namibia/freedom-world/2023>.

31 *Ibid.*

Political Party	1994	1999	2004	2009	2014	2019
SWAPO Party of Namibia	53	55	55	54	77	63
Democratic Turnhalle Alliance (DTA) renamed Popular Democratic Movement in 2017	15	7	4	2	5	16
United Democratic Front (UDF)	2	2	3	2	2	2
Democratic Coalition of Namibia (DCN)	1	0				
Monitor Action Group (MAG)	1	1	1	0	0	
South West African National Union (SWANU)	0	0	0	1	1	1
Workers' Revolutionary Party (WRP)	0				2	0
Congress of Democrats (CoD)		7	5	1	0	0
National Unity Democratic Organisation (NUDO)			3	2	2	2
Republican Party (RP)			1	1	1	2
Rally for Democracy and Progress (RDP)				8	3	1
All People's Party (APP)				1	2	2
Democratic Party of Namibia				0	0	
National Democratic Party (NDP)				0	0	0
United People's Movement					1	
Namibian Economic Freedom Fighters (NEFF)					0	2
Christian Democratic Voice (CDV)					0	1
Landless People's Movement (LPM)						4
National Patriotic Front (NPF)						0
Total number of seats	72	72	72	72	96	96

Figure 2: Seats in the National Assembly in Elections Since Independence

https://www.ifri.org/sites/default/files/atoms/files/elobeid_mendelsohn_swapo_2022.pdf

International Law and Institutions

The global human rights framework did not exist before the Second World War, but has gained momentum and force since then and has become a worldwide movement. The destruction of the first 45 years of the 20th century ushered in a new global order characterized by international institutions, non-governmental organizations, and an international legal regime to promote the security of both nations and people.¹

The United Nations

The United Nations was created as a global organization of states, tasked with the protection of human rights and the maintenance of international peace and security after the conclusion of World War II. The founding members sought “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small,” as recited in the Preamble to the Charter, as well as “to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace” as stated in Article 1.1³

The involvement of the United Nations in Namibia extends back to the predecessors of both. In 1920, a League of Nations Commission issued a mandate over South West Africa to the United Kingdom, through its South African colony, granting the latter effective authority over the territory that would later become Namibia.⁴ This mandate was issued after Germany, having lost World War I, was stripped of its overseas territories. The intent of the League’s mandate regime was to promote the development of those former colonies in the interests of the inhabitants. When South Africa became independent from the United

Kingdom in 1934, the mandate shifted to the new South African government.

However, the United Nations Trusteeship Council, which replaced the League of Nations structure, concluded that South Africa had abused the mandate in seeking to incorporate South West Africa and in failing to provide its required periodic reporting. The International Court of Justice, the judicial body of the United Nations, provided three Advisory Opinions on the status of South West Africa, in 1950, 1955, and 1956. The opinions in essence held that because the basic purposes of the mandate remained in place after the dissolution of the League of Nations, South Africa was not permitted to change the international legal status of the territory, and was still obligated to report to the United Nations on the state of its trusteeship. In 1966, Liberia and Ethiopia – the only African states that had been members of the League – asked the Court to revoke the mandate/Trusteeship, but the legal challenge was rejected on the grounds that the applicant states lacked standing to raise it.

In 1966, the General Assembly adopted Resolution 31/146, declaring that South Africa’s continuing occupation of the Territory was illegal, and later revoked the trusteeship, bringing South West Africa under the direct authority of the United Nations.⁶ The following year, the General Assembly created the United Nations Council for South West Africa “to administer South West Africa until independence, with the maximum possible participation of the people of the Territory.” Shortly thereafter, it accepted the suggestion that the area be called “Namibia.”⁷ The International Court of Justice issued another Advisory Opinion in 1971, confirming that South Africa’s continued presence in Namibia was illegal, and that all other member states were to refrain from aiding South Africa in its occupation.⁸ The General Assembly

1 Cmiel, Kenneth. (2004). The Recent History of Human Rights. *The American Historical Review*, 109(1), 117-135. <https://doi.org/10.1086/ahr/109.1.117>.

in 1976 declared that the South West Africa People's Organization (SWAPO) was "the sole and authentic representative of the Namibian people."⁹

South Africa initially opposed the jurisdiction of the United Nations over Namibia, attempting to create its own government to the exclusion of SWAPO. However, a "Contact Group," consisting of the United Kingdom, Germany, the United States, Canada, and France, facilitated a "Settlement Agreement," directing South Africa to facilitate elections in Namibia under the strict supervision of the United Nations and assisted by a United Nations Transition Assistance Group.¹⁰ Through the execution of this plan, despite various setbacks and crises throughout the 1980s, Namibia declared its independence and joined the United Nations as the 160th member state in 1990.^{2 11}

Human Rights-Focused Instruments and Institutions.

In 1946, 53 member states established the UN Commission on Human Rights to design an international legal framework to set standards for the behavior of states. The Commission drafted the Universal Declaration of Human Rights (UDHR), which was adopted by the General Assembly in 1948. The UDHR was the first document to recognize fundamental rights and freedoms as inherent, inalienable, and equal for all human beings, and represents the foundational document of international human rights law.³ The Declaration established a set of rules, according to which states were required to uphold human dignity and justice regardless of nationality,

ethnicity, gender, religion, or language. It recognized the rights to life, liberty, security, education, work, equality before the law, freedom of thought, opinion, and religion. It also prohibited discrimination, slavery, and torture and condemned cruel, inhuman, or degrading treatment or punishment.⁴ And it provided that it was applicable in wartime as well as in times of peace.

The Declaration was the impetus for more than 80 human rights treaties, conventions, statements of principles, and domestic laws that bind states to recognize, promote, and protect human rights. In 1966, the UN incorporated two Covenants into the international human rights framework, assigning more specific responsibilities to states to respect, ensure, and fulfill those rights: the International Covenant on Economic Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Namibia acceded to both treaties in 1994. The UDHR and these two Covenants constitute what is sometimes called the International Bill of Rights.⁵

In 2005, the General Assembly adopted 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.⁶ And in September 2007, the Assembly approved the Declaration of the Rights of Indigenous Peoples (UNDRIP) in response to the discrimination, oppression, marginalization, and exploitation that such groups face around the world. UNDRIP provides "minimum standards for the survival, dignity, and well-being of the Indige-

2 "The United Nations in Namibia | United Nations in Namibia." n.d. Namibia.un.org. <https://namibia.un.org/en/about/about-the-un#:~:text=Namibia%20joined%20the%20United%20Nations>.

3 UN, "Drafters of the Declaration." Retrieved in <https://www.un.org/en/about-us/udhr/drafters-of-the-declaration> and UN, "The Foundation of International Human Rights Law" Retrieved in <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law>

4 See the articles of the UDHR in: "Universal Declaration of Human Rights", Retrieved in <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

5 International Bill of Human Rights. Retrieved in <https://www.ohchr.org/en/what-are-human-rights/international-bill-human-rights>

6 Van Boven, T. (2005). Audiovisual Library on International Law. https://legal.un.org/avl/ha/ga_60-147/ga_60-147.html

nous Peoples.”⁷ Ten years later, General Assembly Resolution A/RES/71/321 allowed indigenous groups to participate directly in UN bodies’ discussions on issues affecting them.

The Genocide Convention

On December 9, 1948, the United Nations General Assembly adopted Resolution 260(III)A, which opened for signature and ratification the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). The Convention is applicable in both wartime and peacetime and defines the crime of genocide as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- *Killing members of the group;*
- *Causing serious bodily or mental harm to members of the group;*
- *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- *Imposing measures intended to prevent births within the group;*

- *Forcibly transferring children of the group to another group.*⁸

This definition was reinforced in the 1998 Rome Statute of the International Criminal Court (ICC), which created ICC jurisdiction over individuals accused of the crime of genocide.⁹ The Genocide Convention also criminalized “conspiracy to commit genocide,” “direct and public incitement to commit genocide,” “attempts to commit genocide,” and “complicity in genocide.”¹⁰

The Genocide Convention established the obligations of states, via its text as well as through interpretation by the International Court of Justice, not to commit genocide, to prevent it as best possible, and to enact legislation to give effect to the Convention in their domestic legal systems.¹¹ States must ensure that their domestic laws provide effective penalties against persons found to have committed genocide. Persons accused of the crime must be tried in a court of the state in which it was committed or by an international court with jurisdiction, and states agree to extradite individuals charged with genocide in accordance with applicable laws and treaties.

As of 2023, 152 UN member states and one observer state (State of Palestine), were parties to the Genocide Convention.¹² Of the 41 UN members that have not ratified it, 18 are in Africa, 17 in Asia, and six in

7 “United Nations Declaration on the Rights of Indigenous Groups” Retrieved in <https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples>

8 United Nations. (n.d.). Convention on the Prevention and Punishment of the Crime of Genocide. Retrieved from https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

9 UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: <https://www.refworld.org/docid/3ae6b3a84.html>

10 United Nations. (n.d.). Convention on the Prevention and Punishment of the Crime of Genocide. Retrieved from https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

11 United Nations. (n.d.) Ratification of the Genocide Convention. <https://www.un.org/en/genocideprevention/genocide-convention.shtml>

12 The Danish Institute for Human Rights. (n.d.) Signatories for Convention on the Prevention and Punishment of the Crime of Genocide. <https://sdg.humanrights.dk/en/instrument/signees/23>

the Americas.¹³ Germany acceded to the Convention in 1954, and Namibia did so in 1994.

Several interpretations of the Genocide Convention are also particularly relevant to its effect and implementation, and are crucial to an understanding of the obligations it established. In *Bosnia and Herzegovina v. Serbia and Montenegro*, the ICJ ruled that the obligation of states to refrain from committing genocide is firmly embedded in international law, and indeed, is central to the Convention.¹⁴ Further, in the related case of *Bosnia and Herzegovina v. Yugoslavia*, the Court held that the Convention does not have a territorial limitation and thus, even if the crime is committed by a state within its own territory, its prohibitions remain applicable and enforceable against any party involved.¹⁵ Lastly, several non-governmental organizations, including Human Rights Watch and Amnesty International, recognize the Genocide Convention as an element of international law which allows the exercise of universal jurisdiction. That is to say, due to the jus cogens nature of the prohibition of genocide under international customary law, if the Convention is not enforced within the territory in which the crime was allegedly committed, any state's courts may exercise jurisdiction over anyone accused of having committed or assisted in it.¹⁶

The Torture Convention and Relevant Customary Law

Contextual Overview

Torture is prohibited by treaties such as the ICCPR, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the principles enshrined in the constitutive documents of such regional bodies as the African Union, the Council of Europe, and the Organization of American States, alongside customary international law.

The ICCPR, in force since 1976, has been ratified by 113 of the 193 UN member states. This widespread ratification demonstrates a significant global consensus. Article 7 of the ICCPR explicitly prohibits torture and cruel, inhuman, or degrading treatment or punishment, reflecting a virtually universal commitment to eradicating such practices.¹⁷

The CAT, which came into force in 1987, further solidifies this obligation. The Convention, with 110 states parties, obliges them to take adequate measures to prevent torture within their borders and forbids the return ("refoulement") of a person to a state where there are substantial grounds for believing they would be in danger of being subjected to torture.¹⁸ Namibia acceded to the CAT in 1994.

The African Union has also significantly promoted human rights principles, including the prohibition of torture. The African Charter on Human and Peoples' Rights, adopted in 1981, emphasizes the impor-

13 United Nations. (n.d.) Ratification of the Genocide Convention. <https://www.un.org/en/genocideprevention/genocide-convention.shtml>

14 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, I.C.J. Reports 2007, p. 43

15 Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996, p. 595

16 Amnesty International. 2021. Genocide: The Legal Basis for Universal Jurisdiction. <https://www.amnesty.org/en/wp-content/uploads/2021/06/ior530102001en.pdf>

17 Article 7: No one shall be subjected to torture or other cruel, inhuman and degrading treatment or punishment. <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

18 OR, I. O. D. T. (2009). Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

tance of human dignity and prohibits all forms of exploitation and degradation, specifically mentioning torture.¹⁹ African states' unanimous ratification of this Charter demonstrates a regional commitment to these principles.

Beyond these treaties, the prohibition of torture is now widely recognized as a fundamental principle of customary international law, binding on all states regardless of their treaty obligations. It has been affirmed by international courts and tribunals, including the International Court of Justice, and is now considered a *jus cogens* norm, meaning that no derogation is permitted.²⁰

19 Organization of African Unity. African Charter on Human and Peoples' Rights: Came Into Force, 21st October, 1986. Organization of African Unity, 1986. https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf

20 *Prosecutor v. Anto Furundzija* (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, available at: <https://www.refworld.org/cases,ICTY,40276a8a4.html> [accessed 15 November 2023]



Photo by Aylin Azucena Duarte

The Genocide of the Ovaherero and Nama People

The German-Ovaherero Relations Preceding the Genocide.

The first German settlers in South-West Africa (SWA), present-day Namibia, were missionaries and merchants who engaged with ethnic groups for trading purposes. In 1867, German missionaries established the “Rhenish Mission Society of Berlin” at Otjimbingwe, and encouraged the migration of German artisans and their families to SWA.¹ The Mission traded goods in exchange for cattle and sheep. In 1870, the trading company Missions-Handels-Aktiengesellschaft specialized in the import of firearms and ammunition to SWA.² According to Namibian historian Effa Okupa, the first German settlers were ‘economic migrants’ trading with the semi-nomadic Ovaherero cattle herders.³ In August 1883, the tobacco trader Adolf Lüderitz acquired land from the Nama leader Joseph Fredericks, establishing the first trading post in Angra Pequena, later named Lüderitzland.⁴ After Lüderitz, more German investors visited SWA, to explore and exploit the mineral potential of the territory.

In 1884, the Berlin Conference—“the Scramble for Africa”—allowed the German Reich to visualize itself as an empire by colonizing African territories and establishing the South West African Protected Area.⁵ Heinrich Ernst Göring was appointed as the first governor and negotiated protection treaties with local tribes in exchange for land, capitalizing on the rivalries between the Ovaherero and Nama over grazing land. The Ovaherero and Nama had had an ongoing conflict over territories since 1881, when Mozes Witbooi, leader of the Nama, declared war on Kamaharero, chief of the Ovaherero.⁶ In October 1885, Göring negotiated an alliance with Kamaharero to defend their large droves of cattle against Nama raids in exchange for land. Göring also tried to negotiate with the Nama, but Hendrik Witbooi, son of Mozes, refused to sell cattle, supplies, or land to German settlers. The collection of Hendrik Witbooi’s letters shows that he distrusted the Germans:

I can’t understand exactly what the Germans are planning to do. They tell the chiefs of this country that they come as friends to prevent other powerful nations from taking their land away from them. But

- 1 UN Archives. (1971). Union of South Africa, Report on the Natives of South-West Africa and their Treatment by Germany. Claparède/71/2/7. p. 12 Geneva. <https://archives.ungeneva.org/aug-1918-union-of-south-africa-report-on-the-natives-of-south-west-africa-and-their-treatment-by-germany-prepared-in-the-administrators-office-windhuk-south-west-africa>
- 2 Drechsler, H. (1980). Let us die fighting: the struggle of the Herero and Nama against German imperialism (1884-1915). Zed Press. 19.
- 3 von Hammerstein, K. (2016). Ovaherero: Witnessing Germany’s “Other Genocide.” Contemporary French and Francophone Studies, 20(2), 267–286. 271. <https://doi.org/10.1080/17409292.2016.1143742>
- 4 Burden, Thomas (2017) “Rivers of Blood and Money: Ovaherero Genocide in German Southwest Africa,” The Student Researcher: A Phi Alpha Theta Publication: Vol. 2 , Article 2. http://digitalcommons.wku.edu/stu_researcher/vol2/iss1/2
- 5 Beyer, Greg. (2023). Germans in Southwest Africa: A History of Colonization & Genocide. The Collector. Montreal. <https://www.thecollector.com/german-colonization-southwest-africa/>
- 6 Mémorial de la Shoah. (2016). Le premier génocide du XXe siècle. Herero et Nama dans le Sud-Ouest africain allemand, 1904-1908. Exposition. Musée Centre de documentation. Paris. <https://genocide-herero-nama.memorialdelashoah.org/expositions.html>

*it looks to me as if they are the ones who are taking the land.*⁷

The new German settlements altered the political, social, and economic dynamics in South-West Africa and weakened the local communities. The protection treaties with Germany reduced the land and cattle available to the Ovaherero, the base of their livelihood and culture. The Ovaherero developed a strong sense of themselves as cattle herders for the production of milk and meat but also for ceremonial events.⁸ In Ovaherero culture, herds are a symbol of power in this world and felicity in the next.⁹ Besides, cattle herds determined social structures and relationships across families and groups. The loss of land and cattle produced a change in the power dynamics of the Ovaherero, eroded their cultural identity, and weakened their socioeconomic status.¹⁰ Furthermore, German settlers implemented a system of predatory loans that Ovaherero “borrowers” had to repay in cattle or land, which reduced even more herds and forced many community members to work as wage laborers.¹¹

The military alliance between Germany and the Ovaherero deteriorated as German settlers acquired more land and disrespected tribal authority, property, women, and traditions. By 1903, the Ovaherero had lost more than 25 percent of their land—3,500,000 hectares—and if the rate of alienation continued, within a few more years, their territory would have been too small for the tribe to survive.¹² Eventually, the coexistence between the German settlers and Ovaherero became strained. First, Göring committed



Witbooi meets with Leutwein and German administrative officials in 1896

the offense of trespassing on Ovaherero ancestral burial sites, which angered the indigenous population, forcing him to abandon the protectorate for his own security.¹³ Then, Germany failed to protect the Ovaherero from Nama attacks, leading Kamaharero to revoke the protection treaty in 1888.

Evidence suggests that Germany breached its treaty obligations because fomenting tribal wars served its imperial interests. As the Colonial Governor Theodor Leutwein put it, “make the native tribes serve our cause and to play them off against the other...it is more serviceable to influence the natives to kill each other for us.”¹⁴ Atrocities committed against work-

7 Choices Program. (2022). “Ovaherero-Nama Genocide. In *Confronting Genocide: Never Again?* Brown University. Department of History. Rhode Island. 24. <https://www.choices.edu/wp-content/uploads/2022/12/The-OvaOvaherero-Nama-Genocide.pdf>

8 Ibid. 22.

9 UN Archives. (1971). 21.

10 Schellenberg, R. (2023). *Composing the Blue Book: The Use of Oral Sources to Narrate German South-West Africa*, *The Oral History Review*, 50:1, 23-40. 26. <https://doi.org/10.1080/00940798.2022.2160263>

11 Choices Program. (2022). 24.

12 Bridgman, J.M. (1981). *The Revolt of Ovahereros*. University of California Press. California. 52.

13 Mémorial de la Shoah. (2023).

14 UN Archives. (1971). 10.

ers in farms and mines became commonplace and led to rebellion.¹⁵ German farmers treated workers as slaves, subjecting them to brutal floggings called *Väterliche Züchtigung* or “paternal chastisement,” permitted under an ordinance of 1886.¹⁶ They also raped and took native women by force as concubines with complete impunity.¹⁷ Germany had enacted rules that allowed settlers to commit a variety of abuses against the natives. According to the edict issued by the *Deutsche Kolonialbund*, “every coloured person must regard a white person as a superior being... In court, the evidence of one white man can only be outweighed by the evidence of seven coloured persons.”¹⁸ Abraham Kaffer, an elderly Nama man, recounted, “...the soldiers might molest and even rape our women and young girls, and no one was punished”.¹⁹ In this context, social unrest grew, and violent incidents between the indigenous communities and the newcomers became commonplace.

The Ovaherero and Nama Genocide (1904-1908).

Unrest among the Ovaherero intensified as the displacement of native groups from their ancestral territories expanded. In January 1904, Samuel Maharero called his people to arms and sent a letter to Governor Leutwein, justifying the revolt as a necessary response to countless injustices and threats to Ovaherero’s land, cattle, honor, and lives.²⁰ The Ovaherero attacked various German settlements in Okahandja, Karibib, and Omaruru, attempting to expel them from their land. The uprising, or ‘Ovaherero-Aufstand’ was, in essence, a liberation war, a



Samuel Maharero, the chief of the Ovaherero tribe during the Ovaherero Wars

war of resistance to land and cattle robbery, mistreatment, and exploitation by German newcomers.²¹ The attacks targeted settlers and traders perceived as the sources of maltreatment, while the lives of German women, children, and missionaries were spared.²² The Ovaherero killed 150 German settlers, struck

15 Baer, E.R. (2017). *The Genocidal Gaze. From German Southwest Africa to the Third Reich*. Wayne State University, Detroit.1.

16 Fraenkel, P. (1960). *The Namibian of South West Africa*. Minority Rights Group. Report 19. London. 10.

17 Beyer. (2023).

18 Fraenkel, (1960). 9.

19 Choices Program. (2022). 24.

20 Von Hammerstein, K. (2016). 272.

21 Ibid. 271.

22 Ibid. 272.

communication lines, and led small raids against colonial interests.²³

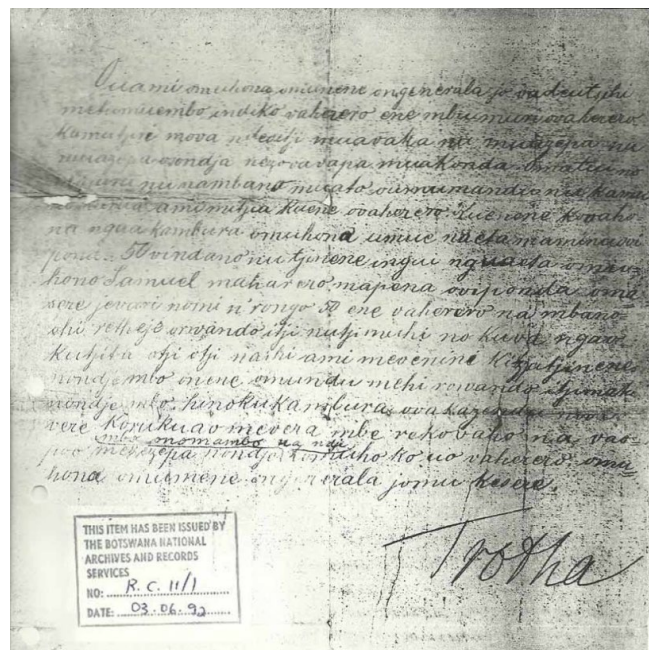
The inability to suppress the rebellion embarrassed the Reichstag and Kaiser Wilhelm II, who held strong beliefs regarding racial superiority.²⁴ Despite the technological advantages of the German forces, the tribal leadership showed a high degree of sophistication, and their knowledge of the terrain allowed the mobility and flexibility that foreigners lacked.²⁵ The conflict lasted longer than the Germans expected, and the desire of Governor Leutwein to enter negotiations with the Ovaherero was perceived in Berlin as a weakness, leading to his dismissal.²⁶

In June 1904, the Kaiser dispatched General Lothar von Trotha and 10,000 German soldiers to end the conflict decisively. Three months later, on August 11, 1904, German troops and horses were exhausted, as von Trotha planned to surround the Ovaherero at Waterberg. Yet the indigenous fighters broke through the encirclement and fled to the Omaheke Desert, reaching safety in the British Protectorate of Bechuanaland (now Botswana). Facing defeat and humiliation, on October 2, 1904, von Trotha issued the first Vernichtungsbefehl, or extermination order:

The Ovaherero are no longer German subjects. They have murdered and stolen, they have cut off the ears, noses, and other body parts of wounded soldiers... whoever delivers a captain will receive 1000 Marks, and whoever delivers Samuel Maharero will receive 5000 Marks. Ovaherero people will have to leave the land. Otherwise, I shall force them to do so by means of guns. Within the German boundaries, every Ovah-

erero, whether found armed or unarmed, with or without cattle, will be shot to death. I shall not accept any more women and children. I shall drive them back to their people or order shots to be fired at them. These are my words to the Ovaherero people.²⁷

The Schutztruppe, the German colonial armed force in SWA, pursued tens of thousands of Ovaherero, including men, women, children, and the elderly, to the desert, where they were shot, bayoneted, or beaten to death.²⁸ Von Trotha's mass killing made no distinction between combatants and non-combatants, unarmed men, women, or children.²⁹ Those who escaped death at the hands of the German troops



The last existing copy of the Vernichtungsbefehl (extermination order), signed by Lothar von Trotha

23 Beyer. (2023).

24 Ibid.

25 Bridgman, J.M. (1981). Ibid. 2.

26 Häubler, M. (2011). From destruction to extermination: Genocidal escalation in Germany's war against the Herero, 1904. *Journal of Namibian Studies*. ISSN: 1863-5954. 64. <https://namibian-studies.com/index.php/JNS/article/view/64/64>

27 Dreschler. (1980). 156.

28 Von Hammerstein. (2016). 269 and 274.

29 Morlang, Thomas. (2014). Schutztruppe (East Africa, Southwest Africa, Cameroon). *International Encyclopedia of the First World War*. Freie Universität Berlin. Berlin. https://encyclopedia.1914-1918-online.net/article/schutztruppe_east_africa_southwest_africa_cameroon

perished in the desert from thirst, starvation, and disease.³⁰ There are Ovaherero testimonies about German soldiers poisoning wells, as well as official reports of the Berlin General Staff confirming their intention to provoke dehydration as a weapon of control since “the waterless Omaheke would complete the task begun by a German force, the annihilation of Ovaherero people”.³¹ The Ovaherero, fighting to survive the extreme conditions of the desert, were forced to abandon their dead on their way to exile, unable to give them proper burials in accordance with Ovaherero tradition.

After the extermination order targeting the Ovaherero, the Nama leader Hendrik Witbooi declared war on Germany on October 3, 1904, attacking German settlements and food supplies and killing the local commissioner von Burgsdorff in the south.³² On April 22, 1905, von Trotha issued a Vernichtungsbefehl targeting the Nama.

*The Nama who chooses not to surrender and lets himself be seen in the German area will be shot until all are exterminated. Those who, at the start of the rebellion, committed murder against whites or commanded that whites be murdered have, by law, forfeited their lives. As for the few not defeated, it will fare with them as it fared with the Ovaherero, who in their blindness also believed that they could make war against the powerful German Emperor and the great German people. I ask you, where are the Ovaherero today?*³³

The extermination orders faced some opposition in Germany from missionaries, members of the Parliament, including August Bebel from the left-wing Social Democratic Party, and the conservative German Chancellor Bernhard von Bülow.³⁴ The colonial authority had sold significant desert areas as concessions to companies speculating on possible mineral finds.³⁵ For this reason, the economic value to German settlers of cheap labor was significant. Many German farmers and industrialists opposed the idea of wiping out the very people needed as workers on their farms, in their mines, and in the construction of their railroads. Pressured by Parliament and Chancellor von Bülow’s concerns about Germany’s international reputation, the Kaiser rescinded von Trotha’s extermination orders.³⁶ Nevertheless, in February 1905, Germans established concentration camps in Windhoek, Swakopmund, and Shark Island, where tens of thousands of Ovaherero and Nama survivors were incarcerated. Prisoners were dispossessed entirely of their land, cattle, and freedom as the Germans continued their farming and mining operations in SWA.³⁷

On October 29, 1905, Witbooi was shot in the leg and eventually died, leading to the capture of his family, who were sent to the Windhoek concentration camp.³⁸ Von Trotha had offered a reward for Witbooi alive or dead. When he died, Jacob Marengo became the leader of the Nama, and for nearly two years, Nama guerrillas and Ovaherero groups continued their resistance, using their knowledge of the terrain

30 Beyer. (2023).

31 Von Hammerstein. (2016). 275-276.

32 Harman, M. (2017). Timeline of the German and Ovaherero, Nama war and Genocide. Libcom. <https://libcom.org/article/timeline-german-and-herero-nama-war-and-genocide>

33 Peace Pledge Union. (n.d.). Namibia 1904. Peace Works, London. 3. <https://www.ppu.org.uk/sites/default/files/Genocide%20NAMIBIA%201904.pdf>

34 Von Hammerstein. (2016). 278.

35 Fraenkel. (1960). 9.

36 Harman. (2017).

37 Von Hammerstein. (2016). 267, and Beyer. (2023).

38 Harman. (2017).



Captain Hendrik Witbooi with rifle, ca. 1900

to inflict heavy losses on the German troops.³⁹ The concentration camps, far from marking the end of the extermination of the Ovaherero and Nama communities, became a second phase of the Genocide. The severe conditions in the camps caused the deaths of thousands from starvation, beatings, strenuous labor, and execution.⁴⁰ Germans forced men, women, and children into slavery during railroad construction,

making them pull heavy wagons since there were no horses.⁴¹ Many prisoners perished because of physical maltreatment and acts of cruelty, such as relentless floggings with the sjambok, a heavy rhinoceros-leather whip.⁴² Others died from starvation or were hanged for attempts to escape from the camps. Women and girls were regularly raped and beaten by the German guards.⁴³ According to the testimonies of Thomas Alfred Hite and Hendrik Fraser, German soldiers routinely violated girls about 13 to 15 years of age and ripped open workers with bayonets.⁴⁴ Family separation was commonplace, and children were taken away from their parents by force to work on settlers' farms.⁴⁵ Germans also subjected prisoners and mixed-race children born to abused women to the racist pseudo-scientific studies of Eugen Fischer, known as eugenics.⁴⁶ Fischer visited the concentration camps supposedly to study biological differences in humans, and the outcome of his "scientific work" was later used by Nazis to justify the extermination of Jews and other groups during the Holocaust. Germany traded a large number of human remains with scientists from the Berlin Pathological Institute and the Ethnological Museum, including Felix von Luschan, who requested preserved skulls and whole heads of Ovaherero and Nama prisoners.⁴⁷ Women were forced to clean the severed heads of people beaten or starved to death, scraping off the flesh with pieces of broken glass.⁴⁸ The practice of packaging and exporting human bones for "study" or display became widespread.

39 UN Archives. (1971). 96, and Choices Program. (2022). 26.

40 Beyer. (2023).

41 UN Archives. (1971). 99.

42 Dreschler. (1980). 234.

43 Choices Program, (2022). 26.

44 UN Archives. (1971). 100.

45 Ibid. 114.

46 Peace Pledge Union, n.d. 3.

47 Mémorial de la Shoah. (2023).

48 Shigwedha, V.A. (2016). The return of Ovaherero and Nama bones from Germany: "The victims struggle for recognition and recurring genocide memories in Namibia. In Ansett, E. and Dreyfus, M. (eds.). *Human Remains in Society: Curation and Exhibition in the Aftermath of Genocide and Mass-Violence*. Manchester University Press. 199. <https://academic.oup.com/manchester-scholarship-online/book/20698/chapter-abstract/180035633?redirectedFrom=fulltext&login=false>



Ovaherero in chains, ca. 1904-1908

The colonial war officially ended in March 1907 when Germany sent an overwhelming number of reinforcements to defeat the remaining Nama groups. Kaiser Wilhelm II issued a decree declaring all Nama lands to be German,⁴⁹ to be distributed as “compensation” to German farmers.⁵⁰ With the discovery of diamonds in 1908, German settlers began to prosper using forced African labor to extract mineral resources in SWA.⁵¹ The German Colonial Company (Deutsche Kolonialgesellschaft für Südwest-Afrika) safeguarded the interests of the new territories and their mineral resources, including gold, copper, and platinum, as well as diamonds.

The suppression of the Ovaherero and Nama uprisings differed from the other colonial wars in the German Empire in its relentless brutality aimed at the annihilation of the Ovaherero and Nama tribes.⁵² According to Edward Lionel Pinches, an English resident of the territory in 1896, the natives had been prosperous and the country well populated, but at the conclusion of the war, the indigenous population was not more than one-fifth of its former size.⁵³ When German settlers arrived, the Ovaherero and Nama accounted for around half of the population in SWA, estimated at 200,000 people.⁵⁴ During the Genocide, German forces murdered 65,000 Ovaherero

49 Harman. (2017).

50 Fraenkel. (1960). 9.

51 Ibid. 10.

52 Bundesarchiv. (2023). The war against Ovaherero in 1904. Federal Archives. Germany. Official Website. <https://www.bundesarchiv.de/DE/Content/Virtuelle-Ausstellungen/Der-Krieg-Gegen-Die-Ovaherero-1904/der-krieg-gegen-die-herero-1904.html>

53 UN Archives. (1971). 100.

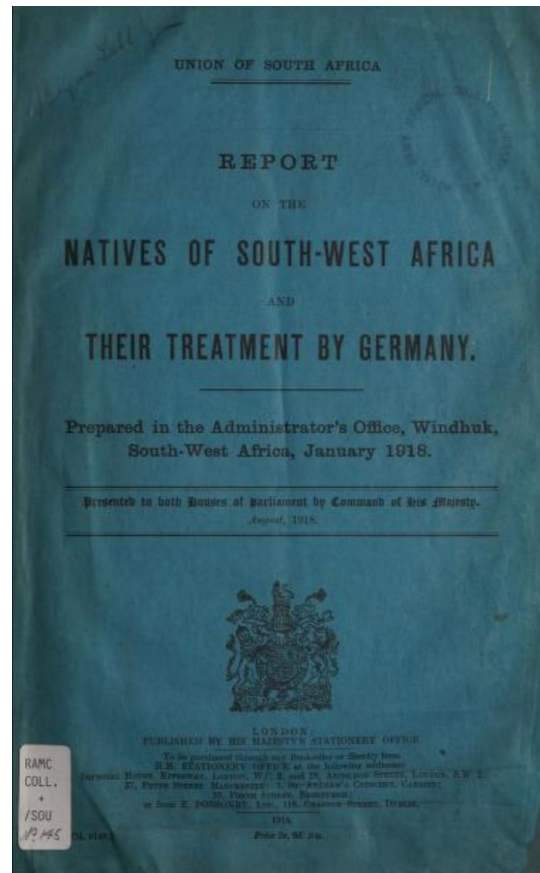
54 Bundeszentrale für Politische Bildung. (2021). Kaiserreich (1871-1918). Oberleutnant Techow. BArch R 1001/2122. Telegramvom 11. <https://www.bundesarchiv.de/DE/Content/Virtuelle-Ausstellungen/Der-Krieg-Gegen-Die-Herero-1904/der-krieg-gegen-die-herero-1904.html>

and 10,000 Nama, which accounted for 80 percent and 50 percent of their respective totals.⁵⁵ The inability to bury their dead adequately created profound emotional harm for cultures that place significant stress on decorating graves as testimony to past lives and that believe in communicating with ancestors.⁵⁶ In all, the Ovaherero and Nama irretrievably lost not only substantial portions of their populations and most of their economic resources – land and cattle – but their cultural identities – traditions, languages, and sacred sites – as well.

The 1918 Africa Blue Book – Context Beyond the South West Africa Colony

The unfathomable acts of violence against the Ovaherero and Nama peoples has been well-documented, but nowhere more extensively – and perhaps more controversially – than the 1918 “Atrocity Blue Book.” Formally entitled the “Union of South Africa – Report on the Natives of South-West Africa and Their Treatment by Germany,” the report was ordered by the British Crown, after the Germans left what is now Namibia and it fell under South African, and therefore British, authority. It was intended primarily as a means to document indigenous peoples’ “anxiety to live under British rule” after their prolonged barbaric treatment by the German colonial regime. The report was also intended to discourage German attempts to repossess the territory after the conquest by British-led South African forces, and amid rapidly deteriorating relations and shifting alliances following a war-ravaged Europe.

In 212 pages, the document captured in sordid detail the atrocities committed by the Second Reich. It was produced by the South African Administrator’s office in Windhoek, based on material compiled from over 40 primary accounts by Major Thomas Leslie O’Reilly, a British military magistrate appointed to Omaruru in



1916. It remains one of the most significant, detailed archival records in the aftermath of the Genocide to date.⁵⁷

The first section by O’Reilly provides an ethnographic lens on “Natives and German Administration,” containing direct text from German officials’ own documentation of the Genocide translated into English, as well as the primary accounts of survivors, paying particular attention to those of the Ovaherero. The second section conveys the theme “Natives and the Criminal Law,” managed by AJ Waters, a Prosecutor for the Protectorate beginning in 1915, and includes several examples of case materials heard by the Special Criminal Court.

The appendices of the report contain details and imagery of the “medical report on German meth-

55 Dreschler. (1980). 156.

56 Von Hammerstein. (2016). 283.

57 New African. s.v. “The Blue Book they didn’t want us to read: How Britain, Germany and South Africa destroyed a damning book on German atrocities in Namibia,” The Free Library, 2002.

ods of punishment,” including the bodies of hanged victims and chained prisoners, and letters from the German governor to district officers and colonial officials detailing settlers’ mistreatment of Black indigenous peoples in Lüderitzbucht. These accounts, particularly the narratives of resistance and the oral testimonies of some of the surviving groups’ leaders, including Daniel Kavezemba Kariko, Commander of the Ovaherero Armed Forces, and Chief Hosea Kutako, reflect O’Reilly’s own presence as a member of the Special Criminal Court, operating under martial law in order to source indigenous leaders’ accounts, directly and under oath.⁵⁸

After the Blue Book’s publication in London in 1918, on the eve of the 1919 Peace Conference at Versailles, debates on “international morality” and what would later become the foundations of international criminal law, picked up pace. The German Colonial Office swiftly released a counter-report in 1919, calling out the British’s own imperial acts of violence and attacking the Blue Book’s credibility as a product of the British crown. Ultimately, however, its goal was reducing the indigenous voices of both resistance and memory to nothing more than the complaints of “poor, primitive creatures,” with distorted perceptions of the events of the Genocide, not to be trusted as any more than “fancies with sanguinary atrocity stories”⁵⁹ The counter-narrative served only to exclude African perspectives, particularly those of surviving indigenous groups, altogether. When the Versailles Commission on Responsibility’s report came out in March, these African accounts of the Genocide

became “hidden histories,” not appearing at all in the final print.

The Versailles Commission’s official mandate was to report on, *inter alia*, “the facts as to breaches of the laws and customs of war committed by the German Empire and their Allies on land, on sea, and in the air during the present war.” But in the end, the drafters did not suggest in official documents “that the justice to be dispensed for atrocities would be circumscribed geographically or racially.”⁶⁰ Coverage of the British Empire’s own “alleged” atrocities as well as reports of “Indian prisoners of war in France, Germany, Turkey, and modern-day Iraq and Syria”⁶¹ was contained in the final product. But the extermination carried out against the Ovaherero and the Nama – the first Genocide of the 20th century – was not so much as mentioned, either in the Commission’s report or its 30-page annex. The report did discuss other mass injustices, such as the genocidal treatment of the Armenians in Turkey, even citing the 1916 British “Atrocity Blue Book” as a source.⁶²

Further erasure of the survivors of the Genocide took place when, in 1926, Britain and its South African colony reversed course from earlier tactics, and attempted to destroy all copies of the Blue Book. Guided by post-war motivations of reconciliation to ensure Germany’s ultimate rehabilitation and inclusion in the West’s new League of Nations framework – including the seamless integration of German-speaking white settlers in Namibia now under South Africa’s new framework of “rapid white settlement” and political infrastructure overhaul⁶³ – copies of the

58 Ibid

59 Germany. 1919. *The Treatment of Native and Other Populations of Germany and England : An Answer to the English Blue Book of August 1918 ‘Report on the Natives of South-West Africa and Their Treatment by Germany’*. Berlin: Engelmann.

60 Gevers, Christopher, “The ‘Africa Blue Books’ at Versailles: The First World War, Narrative, and Unthinkable Histories of International Criminal Law”, in *The New Histories of International Criminal Law: Retrials, The History and Theory of International Law*, eds. Immi Tallgren & Thomas Skouteris. (Oxford: Oxford Academic, 2019), 145-C9.N146. <https://doi.org/10.1093/oso/9780198829638.003.0009>

61 Ibid

62 Ibid

63 Ibid, 1

controversial report were systematically eradicated. A few copies seem to have survived, including one allegedly at The New York Public Library.⁶⁴

The systematic exclusion of post-Genocide Namibian voices from written public records and the diminution of their credibility through dismissive commentary set a problematic precedent for African populations' pursuit of justice in the 21st century. Further examination of and work to strengthen the archival record surrounding the 1904-08 Genocide remains critical an understanding of the geopolitical dynamics in the South-West Africa colony and beyond. The facts surrounding the production, and the destruction, of the 1918 Blue Book, must also be incorporated in examinations of Germany's other interactions with indigenous populations during the colonial period, before the First World War.



Genocide Memorial Statue in front of the National Museum of Namibia and the Independence Memorial Museum, Windhoek

64 976 F.3d 218 (2d Circ. 2020).

Effects of the Genocide on Other Indigenous Groups

The Damara and the San

The German Genocide against the Nama and the Ovaherero had a devastating effect on both of those peoples. But it also devastated at least two other ethnic groups—the Damara and the San—and recognition of the atrocity suffered by these parties has been far slower. In 2016, the late Paramount Chief of the Ovaherero people dismissed the loss as “collateral damage.”¹ The historical evidence paints a different picture. Indeed, the Namibian government’s inquiry into Ancestral Land Claims describes the Genocide as “directed at Nama and Ovaherero communities but also equally affecting Damara and San communities.”² This occurred in large part due to the dynamics between ethnic groups prior to colonization, but there were also specific crimes against the San that occurred after the Genocide.

The Damara and the San were triply victimized. Prior to colonization, they were marginalized by other ethnic groups. And to add insult to grievous injury,

those crimes have been minimized, although the continuing effects of the slaughter and dispossession continue to harm the Damara and San just as they harm other groups. The San have the unenviable position of being, in terms of such measures as economic status and educational attainment, one of the worst-off ethnic groups in Namibia.³ Any restorative justice for the Genocide of the Nama and Ovaherero must consider these groups that continue to be overlooked.

Prior to the Genocide

The Damara

The Damara are “one of the few communities who are believed to be the aboriginal or original inhabitants of Namibia.”⁴ They claim to have inhabited “large swathes of Namibia’s central and north-westerly landscapes.”⁵ A reprint of the 1918 Blue Book describes large Damara⁶ holdings over what is now modern-day Namibia:

- 1 Lee Garises, “The Damara and the Genocide,” Rosa Luxemburg Stiftung, accessed April 8, 2024, <https://www.rosalux.co.za/our-work/the-damara-and-the-genocide>.
- 2 “Report of the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution” (Windhoek, Namibia: Commission of Inquiry into Claims of Ancestral Land Rights and Restitution), 206–7, accessed March 28, 2024, https://opm.gov.na/press-releases/-/document_library/sql/view_file/1187368.
- 3 James Anaya, “The Situation of Indigenous Peoples in Namibia” (UN Human Rights Council, April 25, 2013), <https://primarysources.brillonline.com/browse/human-rights-documents-online/promotion-and-protection-of-all-human-rights-civil-political-economic-social-and-cultural-rights-including-the-right-to-development;hrdhrd99702016149>.
- 4 “Report of the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution,” 21.
- 5 Sian Sullivan and Welhemina Suro Ganuses, “Understanding Damara / ǀNūkhoen and ǁUbus Indigeneity and Marginalisation in Namibia,” in “Neither Here nor There”: Indigeneity, Marginalisation and Land Rights in Post-Independence Namibia, ed. Willem Odendaal and Wolfgang Werner (Windhoek, Namibia: Legal Assistance Centre, 2020).
- 6 Some texts refer to the Damara as “Berg-Damara.” As Sullivan and Ganuses explain in “Understanding Damara” on page 285, “The terms “Hill Damaras” (“Berg-Dama” / ‘!hom Dama’ / and the derogatory “klip kaffir”¹¹) and “Plains Damaras” (or “Cattle Damara” / Gomadama) were used to distinguish contemporary Damara or ǀNūkhoen (i.e. “Khoekhoegowab-speaking black-skinned people”) from speakers of the Bantu language oshiHerero.” There is also evidence that the terms Damara and Berg-Damara were used somewhat interchangeably, at least in later histories. As Sullivan and Ganuses explain, in 1963, Ruth wrote of “The Berg-Damaras (also known as the Damaras or the Berg-Damas). Where texts describe people as Berg-Damaras, we describe them as Damaras.

So much is certain, that [the Damara] inhabited these parts (i.e.. Damaraland) and those far southwards towards the Gariëb or Orange River long before the Namaquas (Hottentot) came from the south, and afterwards, when the invasion of the Hereros took place about one hundred and fifty or two hundred years ago, they were still to a great extent the owners of the mountainous parts of North Great Namaqualand and the undisputed masters of Hereroland, living in large and powerful tribes.⁷

A Damara Chief similarly related in an interview that:

We are the original inhabitants of the country now known as Hereroland. My people were here long before the Hereros and Hottentots came. Our Chief's village used, many years ago, to be at the place now known as Okanjande near the Waterberg. It was known to us by the name of Kanubis. Later on, the Ovambos (the Chief is certain that these were Ovambos: he says that the Hereros were in the Kaokoveld at that time) drove our people away and they trekked south, and had their chief town where Windhuk [Windhoek] now stands, we called it Kaisabis ...⁸

Successive Nama and Ovaherero conquests confined the Damara to much smaller territory in the mountainous regions. As the Commission of Inquiry into

Claims of Ancestral Land Rights and Restitution wrote: “[the Damara] had settled in the mountain strongholds of the Erongo, Brandberg, Auas, Khomas, Paresis and Otavi, seemingly having ended up there because their original space on the plains had been taken over by the migrant pastoralists communities.”⁹

The dispossession of the Damara's land went hand-in-hand with their enslavement by the Nama and Ovaherero. The Blue Book estimates that there were at least 30,000 to 40,000 Damara “in a state of slavery under the Hottentots¹⁰ or in a state of semi-independence under the, at times, rather doubtful “protection” of the Hereros.”¹¹ One German missionary stated that “One cannot speak of slavery among the natives here, but of serfdom. This serfdom is a result of birth, robbery, captivity after war and voluntary subjugation.”¹² Another more boldly described “slave-like relations [that] existed in central Namibia between Herero and Damara...Those experiencing conditions which look most like slavery are the people who were captured during raids against enemy neighbouring tribes.”¹³ The Dutch East India Company's H.J. Wikar also described a similar arrangement where the Namaqua held Damara captive as a source of domestic labor.¹⁴ Cape Commissioner Coates Palgrave wrote of the of the Damara's servitude to the Ovaherero in the village Okambahe in 1877:

7 From: South-West Africa, Jeremy Silvester, and Jan-Bart Gewald, eds., *Words Cannot Be Found: German Colonial Rule in Namibia: An Annotated Reprint of the 1918 Blue Book, Sources for African History*, v. 1 (Leiden; Boston: Brill, 2003), 181-82. This source obtains this quote from Rev. Hugo Hahn's article in “Cape Monthly Magazine” written in “about 1876.”

8 South-West Africa, Silvester, and Gewald, 183.

9 “Report of the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution,” 21.

10 Note that this is a Dutch name for the Nama. The Blue Book uses the terms Nama and Hottentot interchangeably. For example, on pages 183 and 184, the Blue Book refers to a slur for the Damara (“Chau-Damara,” a term which was deemed too indecent to directly translate even in 1918) as both a “Hottentot” and a “Nama” appellation without distinction. South-West Africa, Silvester, and Gewald, *Words Cannot Be Found*, 183-184. For more, see: A. Winifred Hoernlé, “The Social Organization of the Nama Hottentots of Southwest Africa,” *American Anthropologist* 27, no. 1 (1925): 1-24.

11 South-West Africa, Silvester, and Gewald, *Words Cannot Be Found*, 181.

12 Jakob Zollman, “Slavery and the Colonial State in German South West Africa 1880s to 1918,” *Journal of Namibian Studies: History Politics Culture* 7 (2010): 97, <https://namibian-studies.com/index.php/JNS/article/view/44/44>.

13 *Ibid.*, 98.

14 J.B. Gewald, “Untapped Sources: Slave Exports from Southern and Central Namibia up to the Mid-Nin[e]Teenth Century,” *The Mfecane Aftermath*, 419 - 435 (1995), January 1, 1995, 423.

They make gardens in which they grow mealies, pumpkins, and tobacco. In 1875 they had a mile of the riverbed under cultivation and harvested 300 muids of wheat, the greater part of which was sold for more than 40 shillings a muid. For people who have been so recently reclaimed from a perfectly savage state the progress they are making is astonishing. They are a provident people, and are fast becoming rich in cattle and goats... They have not that love for cattle which distinguishes the Hereros and Namaqua, and from the fact that so long as they have been known they have made gardens it is assumed as probable that they were originally a agricultural people, like the Ovambos ... They are industrious and make good servants.¹⁵

Under the Ovaherero, the Damara still had some autonomy. Chief Judas Goresib said that:

We were under the Hereros, but. governed in our own way according to our laws and customs. The Herero Chiefs at Omarurn, Tjaherani, and his successor Manasse, ruled the whole area, and we were under their protection. We paid the Hereros no tribute or taxation, but as they were very rich and had plenty of cattle our poor people worked for them as herds and got food for their labour. We were on friendly terms with the Herero Chiefs and, although there was trouble at times, we were recognised by them as a separate tribe and could always bring grievances and complaints to the notice of the Chiefs...¹⁶

The result of these arrangements is that by the time the Germans arrived, tens of thousands of Damara were living in at least some level of limited autonomy under the Nama or Ovaherero, and Damara land holdings were ever-dwindling.

Earlier interactions with the Europeans had varied effects—but in many ways, the Damara’s preexisting relationships were reinforced. First, they were quickly utilized by the Germans and other Europeans as a source of labor. In some cases, this was facilitated by some of the other tribes:

The Namaqua did not, however, raid solely for Ovaherero cattle. Alexander reported Ovaherero captives at Nama encampments in the vicinity of the Karas mountains. After observing ‘2 or 3 fine Damara boys, carried off by Namaquas in northern forays,’ Alexander bought one of these captives, a boy of about nine years old, for two cloth handkerchiefs and two strings of glass beads.¹⁷

Similarly, Henrichsen writes that the Germans entered into an agreement with the Ovaherero that “transformed pre-colonial relations between Herero omunene and Damara people of the region into colonially sanctioned labour, if not class, relations... [transferring] pre-colonial dynamics of marginalisation into colonial relationships of dependency, and as such cemented them.”¹⁸ Gottlieb Goresib, a Damara leader, said: “We hated the Hereros, but they treated us even better than the Germans.”¹⁹

The San

The San have a claim similar to that of the Damara to being the oldest group in Namibia, and indeed, they are considered one of the first identifiable groups to inhabit Southwest Africa. While the Damara were more pastoral and agricultural, the San have “lived in small, dispersed groups wherever resources permitted, and “evidence suggests that for the last two millennia or so, San have practiced a mixed economy

15 South-West Africa, Silvester, and Gewald, *Words Cannot Be Found*, 184.

16 South-West Africa, Silvester, and Gewald, 185.

17 Gewald, “Untapped Sources,” 430.

18 Dag Henrichsen, “‘Damara’ Labour Recruitment to the Cape Colony and Marginalisation and Hegemony in Late 19th Century Central Namibia,” *Journal of Namibian Studies: History Politics Culture* 3 (2008): 79–80, <https://doi.org/10.59670/jns.v3i.16>.

19 South-West Africa, Silvester, and Gewald, *Words Cannot Be Found*, 185.

of hunting and gathering, interspersed with spells of pastoralism.”²⁰

This dispersal has contributed to a dearth of scholarly analysis on the history of this group—particularly as parts of the San were historically referred to disparagingly as ‘Bushmen.’ The Report on Claims of Ancestral Land Rights argues that “until recently such small groups were overlooked in academic literature, as they were regarded as dependent upon their relations with the dominant indigenous groups, especially those that tried to utilise them as sources of labour and at times also tried to integrate them into their own structures.”²¹

Nevertheless, it is possible to piece together a general picture of the situation of the San prior to German contact. First, the San’s control over their land was similarly eroded by expansionary pressures from other ethnic groups: “With the inflow of the Bantu-speaking peoples in the 1500s, the San experienced gradual displacement caused by the resulting contestations and conflicts over access, control and utilisation of land territories.”²² Following this, as Suzman explains, pre-colonial interactions can be divided into three broad categories: “patron-client, cohabitation, and conflict.” Patron-client relationships varied from mutually beneficial partnerships with “goodwill” to arrangements far closer to slavery.²³ Both patron-client and cohabitation relationships meant that at least some San groups would have intermingled with Ovaherero and Nama groups by the

time of the Genocide, although the historical record on their numbers is not clear.

The relationship between the San and the Ovaherero and Nama was highly fraught. Vedder wrote that:

*One who possesses a herd of cattle which he calls his own, is called a master. One who has not acquired or inherited cattle is of no importance. It is compulsory for such a person to throw in his lot with an owner of property.... The poor led a wretched life.*²⁴

There are some reports of violence truly astonishing in its brutality. In 1877, “the wife of the hunter Green reported that she had witnessed a [Ovaherero] and twenty of his men first stun a captive Bushman with knobkerries (wooden clubs), then beat him raw with sjamboks (leather whips), before they finally burned him alive.”²⁵

When the Europeans arrived in force, the San started off as the beneficiaries of trade. Their hunting skills were peerless. A group of 100 San in the employ of the Boer hunter Van Zyl hold the record of killing the most elephants in a single day: a staggering 103. Their combined efforts yielded over 8,000 pounds of ivory.²⁶ The San’s rifles and marksmanship were turned against the Boers when they sought to establish the town of Upingtonia in what Gordon describes as the “first successful Namibian war of liberation.”²⁷ But by the end of the 19th century and the first few years of the 20th, the German colonial state was starting to oppress the San more effectively, impressing them as

20 James Suzman, “An Assessment of the Status of the San in Namibia” (Windhoek, Namibia: Legal Assistance Centre, 2001).

21 “Report of the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution,” 23.

22 “Report of the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution,” 23.

23 Suzman, “An Assessment of the Status of the San in Namibia.”

24 Gordon is quoting Vedder. Robert J. Gordon and Stuart Sholto-Douglas, *The Bushman Myth: The Making of a Namibian Underclass*, 2nd ed, Conflict and Social Change Series (Boulder: Westview Press, 2000), 31, <http://www.h-net.org/review/hrev-a0c0h5-aa>; Heinrich Vedder, Louis Fourie, and Carl Hugo Linsingen Hahn, *The Native Tribes of South West Africa*: C.H.L. Hahn, H. Vedder and L. Fourie (London: F. Cass and C, 1966), 175,207, <http://catalogue.bnf.fr/ark:/12148/cb33208600q>.

25 Gordon and Sholto-Douglas, *The Bushman Myth*, 31.

26 *Ibid.*, 38.

27 *Ibid.*, 41–42.

laborers, and punishing them brutally.²⁸ As Gordon notes, “farmers were legally entitled to administer personally up to twenty-five strokes and frequently did so.”²⁹ And their lives were “considered to be of even less worth than that of other blacks.”³⁰

The Genocide

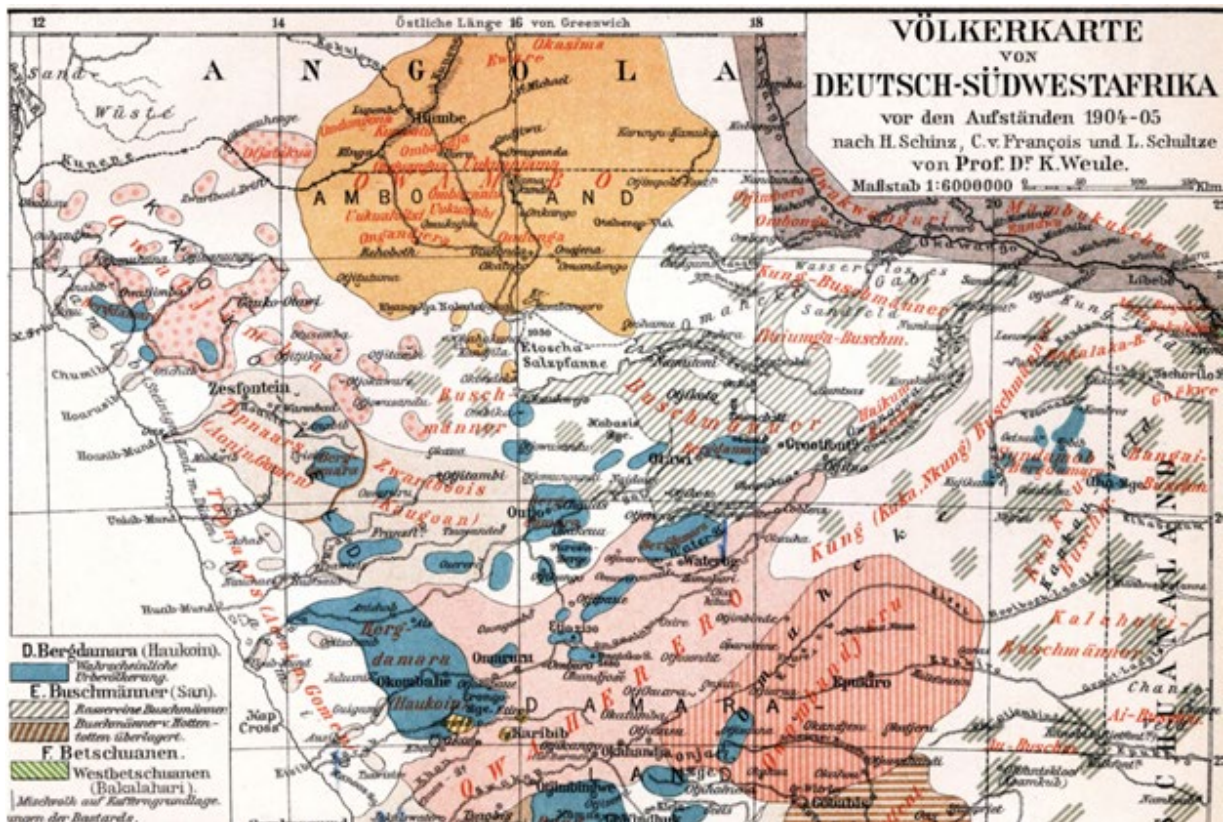
The histories of marginalization put the Damara and San in an unenviable position by the turn of the 20th century, and gave them a complex series of roles in the uprising and the ensuing Genocide. They both suffered tremendously during the Genocide, even though it was not explicitly targeted at them. As a map republished by the Report on Ancestral Claims suggests, “much of the land that was later expropriated was occupied by Damara and San communities.”³¹

But the San suffered additional systematic killings targeting them after 1908, and it has long been overlooked in histories of the event.

The Damara During the 1904-1908 Genocide

The classic history recites that the killing of Damara during the Genocide resulted from mere mistaken identity. The Blue Book’s account is perhaps the paradigmatic case of this narrative:

When the...extermination order began, thousands of these wild people met the fate intended for the Hereros. How was the newly arrived German soldier in the field to distinguish between a Berg-Damara and a Herero? He had orders to kill all men, women and children without mercy. Thousands and thousands of Berg-Damara servants went with their Herero masters towards the desert and died there on the way.



28 Ibid., 50-52.

29 Ibid., 51.

30 Ibid., 52.

31 “Report of the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution,” 43.

*The same fate was meted out to the majority of those who were servants and serfs to the Witboois and other Hottentot clans.*³²

The Blue Book goes on: “The Berg-Damaras never at any the rebelled or gave any trouble to their German masters, yet it availed them nothing.”³³ This version of events has taken hold in many later analyses. In 1986, Dr. Kaire Mbuende “argued the Damara did not take part in the revolt as such and were exterminated by German troops who could not distinguish them from the OvaHerero.”³⁴

This narrative has lately been undercut by a new appreciation of the efforts many Damara took in the wars of liberation, gained in large part from oral histories of descendants. As Samuel Maharero tried to organize a resistance, he sent Chief Kambazembi to speak with the Damara. The overture paid off: “during the battle of Hamakari, Chief Amburu !Hoab, Mutakume, Hoatabe, [and] Burutago Tsâdago formed alliances with the Herero under the leadership of Chief Samuel Maherero.”³⁵ The clans under these chiefs had better relationships with the Ovaherero in the Waterberg area, and at Hamakari they “fought...

until the bitter end, where they died alongside Herero people.”³⁶ Oral histories indicate that the Damara and Herero who fought at Hamakari had “close family ties.”³⁷

Some tales of Damara resistance fighters have entered folklore. One member of the Damara spoke of a leader named Gariseb who, lacking guns, lured the Germans into a mountain pass where his compatriots had prepared to drop heavy stones on them, killing them.³⁸ In addition to these tales of ingenuity, stories have also been passed down of Damara on the other side of the gun, collaborating with the Germans. German forces “relied heavily on the local expertise provided by the Damara,” particularly in the location of water holes.³⁹

In sum, while there were certainly Damara who “lived interspersed with leading rebellion tribes,” there were also others who “intentionally joined the rebellions,” others still who survived elsewhere, and even a group that fought for the Germans.⁴⁰ But the end result for much of the first two groups was annihilation. The Blue Book’s estimate, reprinted in the Report on Ancestral Claims and elsewhere, is staggering:

	Estimated 1904	1911	Decrease	% Reduction
Herero	80,000	15,130	64,870	81.1
Nama	20,000	9,781	10,219	51.1
Damara	30,000	12,831	17,169	57.23
Total	130,000	37,742	92,258	70.96

32 South-West Africa, Silvester, and Gewald, *Words Cannot Be Found*, 185–86.

33 South-West Africa, Silvester, and Gewald, 190.

34 Garises, “The Damara and the Genocide.”

35 Tsukhoe M., Garoes, “A Forgotten Case of the ǀNūkhoen / Damara People Added to Colonial German Genocidal Crimes in Namibia: We Cannot Fight the Lightning during the Rain,” *Future Pasts Working Papers*, no. No. 11 (December 2021): 9, <https://www.futurepasts.net/fpwp11-garoes-2021>.

36 Tsukhoe M., Garoes, 9.

37 Casper W. Erichsen, *What the Elders Used to Say: Namibian Perspectives on the Last Decade of German Colonial Rule* (Namibian Institute for Democracy, 2008), 18.

38 Erichsen, 18.

39 Erichsen, 16.

40 Tsukhoe M., Garoes, “A Forgotten Case of the ǀNūkhoen / Damara People Added to Colonial German Genocidal Crimes in Namibia: We Cannot Fight the Lightning during the Rain,” 11.

At least according to these sources, the Damara died in higher numbers and as a higher proportion of population than did the Nama.⁴¹ They can hardly be considered mere “collateral damage.”

The San during the 1904-1908 Genocide

Some groups of San died in circumstances similar to the Damara—some were caught up due to their cohabitation (with different levels of autonomy) with tribes involved with the rebellion and others died as freedom fighters who intentionally joined the rebellion. It seems that some San who were rounded up as part of attacks on other tribes were sent to Shark Island—this is consistent with accounts of the Damara.⁴² San recruitment for the rebellion was slightly different. As Gordon points out, the San had militarized earlier due to independent German pressures and had formed effective guerilla groups. One of them, led by Korob, fought alongside the Ovaherero and Damara at Hamakari. But Korob and his men lived to fight another day, raiding white farms in the Okarusu mountains. Some Ovaherero had also joined the group.⁴³ The Blue Books did not estimate San casualties from the 1904-1908 Genocide, likely due to the high degree of geographic dispersal of the San.

In addition to these direct effects, the Genocide had significant indirect effects on the San. The colonial authorities forced “large land companies to start selling off farmland” to settlers, at least partially with the aim of bringing in enough people to further pacify a previously rebellious population.⁴⁴ And “the urgency occasioned by the war resulted in the rapid extension of the railway line,” which in turn resulted in a “massive influx of white settlers” who started development projects. These settlers cordoned off game reserves, preventing the San from hunting their usual prey. The San were no longer able to subsist in their traditional way. And the increased develop-

ment by Germans caused them to impress increasing numbers of San into the labor force.⁴⁵ This escalating oppression led to an escalating violent response. San gangs intensified their raids on settlers and laborers, stealing stock and killing those who got in their way. The Germans responded with astonishing brutality.

Continuing Violence against the San: 1911-1915

Citing the “Bushman plague,” the governor Theodor Seitz issued the following order:

- 1. When patrol officers of the police are searching Bushmen areas, breaking up their settlements or searching for cattle thieves and robber bands, they must have their weapons ready to fire at all times, using of course the utmost caution.*
- 2. Firearms are to be used in the slightest case of insubordination against officials. When a felon is either caught in the act, or when being hunted down, “does not stop on command” but tries to escape through flight.*
- 3. The native police servant who is accompanying or guiding a patrol may carry a firearm, model 71 (Mauser rifle) with full responsibility in all areas where the Bushmen live.*

The way in which State officials are to act towards Bushmen is regulated by the following rules. Even though it may be difficult, one should strive to keep the Bushmen at work. Forced dislocation of a Bushman werft [encampment] may only take place if they have been stealing stock or robbing or have attacked Europeans or their native workers ...

If some of the male Bushmen who have been arrested are strong enough to work, they should be handed

41 “Report of the Commission of Inquiry into Claims of Ancestral Land Rights and Restitution,” 42.

42 Erichsen, *What the Elders Used to Say*, 33.

43 Gordon and Sholto-Douglas, *The Bushman Myth*, 53.

44 Gordon and Sholto-Douglas, 53.

45 Gordon and Sholto-Douglas, 54.

*over to the district authorities at Lüderitzbucht to work in the Diamond Fields.*⁴⁶

The “settler press and administration” referred to this policy as “Ausrottung” (extermination).⁴⁷ A minority of comparatively liberal Germans sought to argue against the mass killing of the San, contending that the Bushmen could be used as laborers if they were sufficiently “tamed.”⁴⁸ Police patrols were sent out. Despite directives to leave peaceful San unbothered, many were captured “in the hope that they would ‘habituate’ to the ‘dignity of civilization’ through the sweat of their brows.”⁴⁹ Adhikari notes that “Farmers were particularly keen on obtaining San children as they, unlike adults, were seen to be more easily resocialised as captive servants.”⁵⁰ The ‘liberals’ continued to argue for relative moderation, arguing against wanton killing or corporal punishment and advocating for a gradual approach of habituation to the new working arrangement. They were ignored. Many San were flogged, tortured, or killed.⁵¹ Pressure mounted on the administration to find a more permanent solution, such as mass deportation or murder. And rumors abounded that the San engaged in cannibalism and intended to kill every white farmer.⁵²

“Bushman patrols” were also sent out to kill any San they could find, in what the Blue Book described as “wholesale killing.”⁵³ One German soldier by the name of Walbaum described the process:

*After three kilometers we reached an open field where Jan [the guide] showed us to go down. One kilometer in front of us some Bushmen were busy digging out uintjies [tubers]. Now Jan did not want to walk in front anymore, because he did not want to have anything to do with the shooting. We discussed our next step for a moment so that we could encircle them. We had to sneak up to them like one does with game. On a sign, we all got up with our guns ready to shoot. We were about fifty to seventy meters away from them. The Bushmen stood in astonishment. When we approached them, ten or twelve men ran away. Falckenburg and one of our natives shot two. Unfortunately, I missed.*⁵⁴

Farmers were also empowered to kill San and feared no prosecution. In a deposition in a South African court case, a farmer by the name of Thomas bluntly said that:

*In 1911 I had a fight with Bushmen. I shot one and wounded, I believe, three or four. I was never tried by a German court for having shot these Bushmen. I have accompanied the German police and troops when they used to hunt Bushmen but I do not know how many Bushmen I shot then.*⁵⁵

And for many, “death was often preferable to capture.”⁵⁶ Walbaum describes a case he heard about in which a San boy’s heart was cut out, and personally

46 Robert J. Gordon, “Hiding in Full View: The ‘Forgotten’ Bushman Genocides of Namibia,” *Genocide Studies and Prevention* 4, no. 1 (April 2009): 34–35, <https://doi.org/10.3138/gsp.4.1.29>.

47 Gordon, 35.

48 Gordon and Sholto-Douglas, *The Bushman Myth*, 62.

49 Gordon and Sholto-Douglas, 69.

50 Mohamed Adhikari, “Settler Genocides of San Peoples of Southern Africa, c.1700–c.1940,” in *The Cambridge World History of Genocide: Volume 2: Genocide in the Indigenous, Early Modern and Imperial Worlds, from c.1535 to World War One*, ed. Ben Kiernan et al., vol. 2, *The Cambridge World History of Genocide* (Cambridge: Cambridge University Press, 2023), 93, <https://doi.org/10.1017/9781108765480.004>.

51 Gordon and Sholto-Douglas, *The Bushman Myth*, 71–74.

52 Gordon and Sholto-Douglas, 74.

53 Gordon and Sholto-Douglas, 78; South-West Africa, Silvester, and Gewalt, *Words Cannot Be Found*, 238.

54 Gordon, “Hiding in Full View,” 29.

55 Gordon, 36.

56 Gordon, 29.

attests to binding, humiliating, torturing, and killing a group of San.⁵⁷

The combination of organized military forces and ad-hoc vigilante groups combined to form a systematic campaign in which “several thousand” San were captured or killed.⁵⁸ As Gordon argues, “All the facilitative characteristics for genocide were present—deep structural divisions, identifiable victim groups, legitimating hate ideology and a breakdown of moral restraints, and what we might call “audience obliviousness” (toleration by local, national, and international communities).”⁵⁹ Adhikari supposes that “given more time, genocide would very likely have been the outcome.”⁶⁰ The saving grace for the San was the South African invasion of Namibia in 1915. Somewhat unexpectedly, the killings did not continue under this new set of colonizers. Gordon hypothesizes that the comparatively less powerful South African state could not support the actions of its vigilantes as easily, and that it did not yield itself as easily to “fascist self-delusion.”⁶¹

Aftermath for the Damara and San

The Damara and San were first victimized prior to the Genocide by other ethnic groups, particularly the Nama and Ovaherero. They were again victimized during the 1904-1908 Genocide, and the San experienced mass killings from 1911 to 1915. Both continue to suffer the consequences of these crimes, as they remain dispossessed of their land.

The Damara and San have been marginalized even from their own histories. As Gordon writes,

Indeed, so successful has this process of “invisibilization” been that even scholars with expertise on

those labeled Bushmen or San, when discussing the vulnerability of indigenous peoples to genocide, ignore this earlier history. Contemporary anthropologists specializing in the San have largely overlooked the long history of denigratory academic involvement with those labeled “Bushman.” Even genocide scholars specializing in Namibia ignore the Bushman or San case, ostensibly on the grounds that no one has done research on this issue.⁶²

Damara and San history is still woefully understudied. The Report on Ancestral Claims makes strong progress on this front, synthesizing significant amounts of evidence. But by its own admission, much more work needs to be done to gain clarity on issues like the precise boundaries of former Damara and San land holdings and the casualties they suffered.

Despite the complexities moving forward, one thing is clear: the Damara and San are owed a seat at the table, and they deserve the opportunity to make their case.

57 Gordon, 29–30.

58 Adhikari, “Settler Genocides of San Peoples of Southern Africa, c.1700–c.1940,” 93.

59 Gordon, “Hiding in Full View,” 35.

60 Adhikari, “Settler Genocides of San Peoples of Southern Africa, c.1700–c.1940,” 93.

61 Gordon, “Hiding in Full View,” 51.

62 Gordon, 30.



Photo by Peter Burdon, Unsplash

Land and Mining

Land Distribution and Land Reform.

One of the largest and most tangible losses resulting from the Genocide of 1904-1908 was the devastating dispossession of ancestral, pastoral, and agricultural land that belonged to the Nama and Ovaherero. Before the Genocide, settlers had control of around 3.7 million hectares¹. By 1913, German settlers claimed ownership of nearly four times that area, with 1,331 farms controlling 13.4 million hectares, or around 16.2% of Namibia's 82.4-million-hectare landmass.

After the exit of German forces, the apartheid policy under South African rule furthered the dispossession of land for affected communities. In 1920, South Africa established a Land Board which oversaw the distribution of land to settlers. Within three years, the Board had reassigned 5,000 hectares to white settlers from South Africa, and by 1938, allocated another 25 million hectares to them. By 1949, South Africa had complete autonomy over land distribution with the passage of Amendment Act 23, which transferred power to the territory's white legislative assembly. This body then set aside parcels of land to function as "native reserves," administered by the South African Native Trust, which were later consolidated into roughly 21.8 million hectares for native residential use.

In 1968, South Africa established six dominions for six different tribal groups, each with a governing body to supervise land administration. This system was implemented under the so-called "Development of Self-Government for Native Nations in South West

Africa Act".² Hereroland was given around 5.8 million hectares, and Namaland in the south was granted 2.2 million hectares in confined and delineated native areas³, each with a legislative council.

In the North, the area with the most rainfall, live-stock production and crop cultivation are prevalent, while agricultural land in the center regions is mainly used for sheep and livestock raising. Around 47% of Namibia's land mass is used for agricultural purposes, mostly for sheep and livestock, as around 1% of land in Namibia is arable for crops, or around 800,000 hectares. 15% of the land, or around 12.6 million hectares, was assessed by South African surveyors as agriculturally unusable, most of it along the Namib Desert in the west of the country, where diamond and mineral mining take place.

Apartheid South Africa designated agricultural land in Namibia into two categories, commercially viable and communal. Communal land was shared in accordance with customary property rights, while commercial land was available for lease or freehold. Most of the land in the North was classified as communal, while most in the center was designated as commercial, subject to private ownership.

The partition between communal and commercial land also generally followed the geographic boundary of "the Red Line," established by Germany in 1897 as a demarcation between Black Namibians in the north and white German Namibians in the center and south. No account was taken of the fact that many Black Namibians had resided in those areas for generations: their claims were ignored. South West Africa

1 Van Wyk, Jeannie. "The Namibian land conference - a first step towards addressing a burning problem", 1992, University of South Africa, https://journals.co.za/doi/pdf/10.10520/AJA02586568_928

2 Ibid

3 Ibid

under apartheid rule continued this mechanism of segregation.⁴

In all, under South Africa about 44% of usable agricultural land was given to white settlers. As late as 1992, following independence, out of 6,292 farms owned by 4,200 businesses, only 181 in the commercial area were Black-owned. Throughout the 1990s and 2000s, many Black purchasers of freehold land in the commercial areas were able to acquire financing through the Agribank Affirmative Action Loan Scheme. Reports from 2018 suggest that 16% of freehold commercial land, or 6.3 million hectares, was owned by Black Namibians.⁵

Communal lands, designated by the apartheid government for specific tribes (including Namaland and Hereroland) represented around 40% of the total area of Namibia, although they were occupied by 70% of the population.⁶ Both the dispossessions by German settlers and South Africa's brutal apartheid policies ensured that there would be massive inequalities in land ownership. These continue to affect the Nama and Ovaherero significantly to this day, depriving them of economic opportunity and stripping them of the cultural attachments to land that formerly belonged to their families or ancestors. Consequently, leaders in both communities have called for land reform and redistribution, emphasizing that while culture, language, and lives may have been lost forever in the Genocide, land is something that can be regained. However, organizing land reform has grown to become a complex and difficult task.

In 1991, shortly after the adoption of Namibia's Constitution, a Land Conference gathering political leaders, agricultural producers, land rights activists,

and environmental advocates was held in Windhoek to tackle several questions related to land reform. Several conclusions were drawn, but most were deferred by the Namibian government. Consideration of commercial land resulted in recommendations to the government, including the expropriation of land belonging to absentee owners or to businesses holding multiple tracts, and the repurposing of land that had been abandoned toward productive use and possible new ownership.⁷ The question of ancestral rights was also brought up, relating to land dispossessed by both German and South African colonizers. The 1991 Conference concluded that a full delineation of ancestral property rights could not be achieved, due to historic complexities (such as determining who had lived where, and when), they therefore could play no role in land redistribution policy. This meant that because ancestral histories were both complex and not clearly defined, land would not be taken by the government based on claims of ancestral rights or dispossession by colonizers.

In regard to communal land designated to ethnic groups during apartheid, the conclusion was that the status quo would be retained, but ethnic divisions regarding the land would be broken down. That is, members of ethnic communities could live in other areas, as long as the cultures and customs of the designated groups were respected.⁸ The government also extended its involvement in the disposition of communal areas by creating Land Boards to work with traditional authorities to facilitate distribution.⁹ The Conference recommended aid to small scale farmers in purchasing commercial land wherever available. Extending additional protections to disadvantaged groups was also discussed, specifically in

4 Legal Assistance Center. "The infamous "Red Line" Why does Namibia have a veterinary cordon fence?"1992, http://www.lac.org.na/news/probono/ProBono_64-RED_LINE.pdf

5 Kuzeeko Tjitemisa. "Blacks own only 16 percent of farmland", New Era Live, September 14, 2018, <https://neweralive.na/posts/blacks-own-only-16-percent-of-farmland-nsa>

6 Ibid

7 Ibid

8 Ibid

9 Ibid

reference to supporting subsistence farming by the San.

The government, however, insisted that the recommendations of the Conference would be implemented only to the extent that they were consistent with the Constitution, and specifically with its emphasis on the protection of property rights and private ownership in Article 16:

All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

The state or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.

These provisions endorse the titles of current landholders and their heirs, even if they derive from colonization or violent appropriation. The power to expropriate was reserved to the state, but subject only to that proviso, the sanctity of property rights was embedded in the Constitution and cannot be infringed.

In 1995, the Parliament passed the Agricultural Land Reform Act (ALRA), which established a system whereby owners of land, commercial or otherwise, could offer to sell it to the Ministry of Land Reform, which in turn would sell it on to willing buyers. The government, then, could select purchasers based not only on market factors, but also taking demographics

into account. In particular, it was open to the government to steer land for sale to people who descended from long-ago, pre-colonialization owners.

However, land is still disproportionately owned by white Namibians, according to a 2019 study. Of the country's 12,380 commercial farms, around 70 percent are owned by white people.¹⁰ And even though the government has purchased 496 farms and sold them to some 5,000 "previously disadvantaged" Namibians, the evidence demonstrates that beneficiaries of the land redistribution process have also included members of the political and bureaucratic elites, rather than descendants of those who were originally dispossessed.¹¹ Wealthy Namibians, hobby or weekend farmers, or even foreigners have often purchased land that could have been redistributed to Namibians who need it most.

The ALRA system has also been criticized as slow in making any progress toward achieving the land reform goals emerging from the 1991 Land Conference. Inadequate government funding allocated to the Ministry of Land Reform has also contributed to this dysfunction. Yet Prime Minister Saara Kuugongelwa-Amadhila in 2018 emphasized that any system of land distribution must be consistent with the constitutional right to property, and so despite backlash, indicated that the government will not change the current arrangement.¹²

Many of those benefiting from the legislation came from the north of Namibia, areas largely unaffected by colonial dispossession.¹³ And new indigenous landowners often lacked the capital and farming expertise necessary to run successful operations. In several instances, farmers who acquired land under the program were forced to depend on food aid assistance, as they struggled to manage and run properties

10 Melber, H. (2019). "Colonialism, Land, Ethnicity, and Class: Namibia after the Second National Land Conference". *Africa Spectrum*, 54(1), 73-86. <https://doi.org/10.1177/0002039719848506>

11 Ibid.

12 The Namibian. "Willing buyer-willing seller here to stay" (January 2021) <https://www.namibian.com.na/willing-buyer-willing-seller-to-stay/>

13 Interview with Landless People's Movement, January, 2024, Johns Hopkins University

that would be commercially viable only with resources and knowledge that they did not have.¹⁴

A 2008 Supreme Court opinion clarified the government's power to expropriate land under Article 16(2) of the Constitution. The plaintiffs in *Kessl v. The Ministry of Lands and Resettlement* were three German landowners. They all lived in Germany, visited their farms around once or twice a year, and employed Namibian laborers and housed their families on the properties. The government expropriated their land on the grounds that they were absentee owners, something that had been discussed at length in the first Land Conference of 1991. In the High Court, the expropriation was upheld. Kessl and his companions appealed, arguing that the Ministry cannot exercise the power to expropriate under Article 16(2) unless doing so is in the public interest, and that such determination must comply with Article 18, requiring fairness, due process, and compliance with applicable legislation.

The Supreme Court, in a landmark decision, found that the expropriation of the three farms was inconsistent with Articles 16(2) and 18. The judgment in *Kessl* reinforced the constitutional protection of property rights, and in particular the principle that, absent unusual circumstances, land can be transferred only between a willing seller and a willing buyer. For the government to acquire land other than through arm-length purchase, it had to proceed cautiously and demonstrate the existence of unusual circumstances. This meant proper investigation into the maintenance and upkeep of the land, determining whether expropriation can be justified by the public interest, and extending due process of law to the owners.

The Court's decision was met with some backlash, as it essentially upheld the status quo with respect to white absentee landowners. However, the constitutional framework as explained by the Court in *Kessl* continues to be the law of land ownership in Namibia.

In 2018, the government convened a second Land Conference. More attention was given to the problem of ancestral land, as well as to informal settlements in urban areas. Proposals sought to extend land rights and protections to people living in informal urban communities, who number as many as one million, or around 40% of Namibia's population¹⁵. The 2018 Conference also discussed agricultural land distribution and its relation to restorative justice. Proposition 38 urged that Namibia adopt "measures to restore social justice and ensure economic empowerment of the affected communities," considering "the use of reparations from the former colonial powers for such purpose."¹⁶

While land reform can provide social restoration and economic empowerment for affected communities, the devil is in the details. It is difficult to establish policy mechanisms to translate land reform into these broad goals. Negotiating with Germany to include funding for land redistribution would be difficult, in light of the resistance to the concept of reparations.¹⁷ Yet the Second Land Conference stated the priorities of affected communities in land reform in a way not done before. However, out of the 176 resolutions proposed by the 2018 conference, only nine have been enacted into law.¹⁸

Frustration with the status of land distribution provoked political opposition in Namibia. In 2019, Parliament member Bernardus Swartbooi helped

14 Melber, Henning. "Colonialism, Land, Ethnicity and Class"

15 Ibid.

16 Ibid.

17 Gbadamosi, Nosmot. "Namibia Calls for Reparations Talks With Germany" *Foreign Policy*, March 13, 2024, <https://foreignpolicy.com/2024/03/13/namibia-calls-for-reparations-talks-with-germany/>

18 Melber, Henning. "Colonialism, Land, Ethnicity and Class"

create the first political party focused on the mission of land reform, the Landless People's Movement ("LPM"). Currently the party has four members of the National Assembly, including Swartbooi. On its website, the LPM states that it was "formed as a spontaneous government response to elite capture of the land reform programme by bureaucrats at the expense of the landless working class, urban dwellers, peasants, and land dispossessed at a time of increasing calls for genocide reparations."

The party promotes subsidies and zero interest loans to facilitate land acquisition.¹⁹ Subsidies are currently not offered by the Ministry of Land Reform, which operates under the willing buyer-willing seller principle required by the ALRA and Article 16 of the Constitution. The LPM cites the fact that northern Namibians, many whom were not affected or displaced by the colonial rule of Germany or by apartheid South Africa, have been acquiring land through the program as evidence that it is not working.²⁰ The politics of the liberation struggle, in which German-Namibians and South Africans aligned with SWAPO, are also a point of contention.²¹ Many, including representatives of the Damara and San, alongside the Ovaherero, believe that the current land distribution system and policies continue to be essentially unjust.²²

A stark reminder of potential for failure was the violent land reform situation in Zimbabwe, which, like Namibia, suffered from unequal ownership along racial lines. It too was dominated by a minority white

government before independence. Racial division was far more apparent there, as the white minority from 1964 to 1980 conveyed land to white farmers in the commercially valuable highlands.²³ Upon independence, like Namibia, Zimbabwe implemented a willing-buyer willing-seller land reform policy. However, in 1980, the newly installed government forcibly resettled 162,000 indigenous families, mostly on white-owned land, through massive repurchases and buybacks.²⁴ In comparison, the Namibian Land Conference of 2018 estimated that 240,000 families would need to be resettled to achieve egalitarian land reform.²⁵

In Zimbabwe, large tracts of land were abandoned due to violence from rogue armed groups attacking white-owned settlements, encouraged by President Robert Mugabe's government. In the 1990s and 2000s veterans from Zimbabwe's armed struggles led to murderous attacks on white owned properties, taking land by force with little to no resistance of opposition from Zimbabwe's security institutions. Scores of white Zimbabwean landowners were killed or expelled from their homes.

In 2002, the Fast Track Land Reform was adopted, encouraging these invasions, as Zimbabwe stripped its Constitution of property right protections. The forcible dispossession of white landowners without compensation led to sanctions from the European Union and the United States, among others, fueling an economic tailspin, decreased foreign direct invest-

19 Interview with Landless People's Movement, 2024

20 Ibid

21 Ibid

22 Interviews with leaders from the Landless People's Movement, Damara and Ovaherero Communities, Johns Hopkins University, 2024

23 Palmer, Robin. "Land Reform in Zimbabwe, 1980-1990." *African Affairs* 89, no. 355 (1990): 163-81. <http://www.jstor.org/stable/722240>.

24 Ibid

25 Melber, Henning

ment, a drop in agricultural productivity, and spiraling hyperinflation.²⁶

For Namibia, the Zimbabwean solution provided both parallels and warnings. Aggressive land reform policy can address systemic inequality, but without acknowledgement of property rights, buybacks and resettlement can turn into violence and can produce devastating political and economic outcomes. Namibia's Ministry of Land Reform and its courts, through their support of constitutional property rights and the willing-buyer willing-seller system, have managed to avoid the violence and disruption seen in Zimbabwe.

In the discussion of restorative justice for the Genocide of 1904-1908, land will forever remain a contentious yet vital issue. Land grabs by German colonialists deprived the Nama and Ovaherero of untold wealth, and severed connections that generations of their descendants should have enjoyed. Jephtha Nguherimo, founder of the Ovaherero People's Memorial and Reconstruction Foundation, tells the story of how his family has struggled to find their ancestral land after the dispossession during the Genocide. More than a century after the brutal murders of his family, Nguherimo still cannot find the tree under which his grandmother died, after she was forced from her land by the German colonial army. While the legal and political dynamics of any proposed land reform in Namibia remain complex and intricate, it is indisputable that any conversation on restorative justice for the Genocide must address the issue of land.

Mining

The Genocide was driven not just by racist ideologies and territorial ambitions, but also by economic

motives centered on the acquisition of resources, particularly diamonds and land for the German Empire.

The prospect of discovering diamonds in Namibia's Namib Desert spurred German colonial efforts, as the region's proximity to lucrative South African mines led to a conviction that these resources existed.²⁷ This economic incentive added an important dimension to Germany's systematic removal of indigenous populations from their lands.

After years of searching, a Namibian worker named Zacharias Lewala discovered diamonds in the sand dunes in 1908, sparking the Germans to declare the region a "prohibited zone" (Ein Sperrgebiet) to secure control.²⁸ The Genocide had already or killed numerous Ovaherero and Nama, and had displaced communities from their ancestral lands. Any survivors, including women and children, were subjected to horrific conditions in places like Shark Island and Swakopmund concentration camps, where they provided forced labor for the burgeoning diamond mining industry.

Germany also brought in thousands of additional African workers who were forced to supplement the decimated indigenous groups. The value of Namibia's diamond reserves was estimated at billions of dollars even at 1908 prices, giving the German empire control over approximately 30% of the world's diamond supply and propelling its dominance in the global diamond trade.²⁹ Germany extracted over 1,000 kilograms of diamonds from Namibia by 1914.³⁰ The emergence of Namibia as a major diamond supplier intersected with the orchestrated rise of engagement ring culture in the United States, illustrating how global commodity chains connected the profits of

26 Mkodzongi, Grasian, and Peter Lawrence. "The Fast-Track Land Reform and Agrarian Change in Zimbabwe." *Review of African Political Economy* 46, no. 159 (2019): 1–13. doi:10.1080/03056244.2019.1622210.

27 Steven Press, *Blood and Diamonds: Germany's Imperial Ambitions in Africa* (Harvard University Press, 2021).

28 *Ibid.*

29 *Ibid.*

30 *Ibid.*

Germany's actions in Namibia to consumer markets around the world.

In addition to mineral resources, the Genocide facilitated the widespread dispossession of cattle and agricultural lands from the Ovaherero and Nama, constituting a further assault on their cultural traditions and livelihoods. German settlers systematically seized livestock herds and lands through coercion, violence, and legal mechanisms disenfranchising indigenous populations.

These instances of mistreatment raise significant issues under the United Nations Declaration on the Rights of Indigenous Peoples, which recognizes rights to redress for lands, territories, and resources confiscated or occupied without their free, prior, and informed consent (Article 28).³¹ Redress should take the form of restitution or, when not possible, compensation (Article 28(1)). These principles underscore the necessity of addressing the legacies of resource exploitation and land dispossession as part of a comprehensive approach to restorative justice for the Herero and Nama peoples.

The pursuit of economic gains and the acquisition of resources were not merely byproducts of the colonial project but were central drivers of the atrocities inflicted upon these communities. And it has had lasting consequences for the Ovaherero and Nama peoples, contributing to ongoing marginalization and the perpetuation of inequalities. The seizure of land, resources, and wealth through mass violence enabled lasting wealth transfers continues to underpin aspects of Namibian society today. Acknowledging and addressing these intertwined legacies is critical for any meaningful effort towards restorative justice, reconciliation, and reparations in Namibia.

31 UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, A/RES/61/295, 2 October 2007, <https://www.refworld.org/legal/resolution/unga/2007/en/49353> [accessed 2 March 2024]. The UNDRIP was instrumental in acknowledging and safeguarding the rights of indigenous communities globally. With principles regarding land ownership, resource management, and redress for historical injustices, it offers a framework for indigenous rights and their relevance to contemporary issues of justice and restitution.

Religious Groups and Media

Religious Organizations.

Around 90 percent of present day Namibians are Christian, and of those, 50% identify as Lutheran and 20% as Roman Catholic. Many Lutheran churches were established by German missions, such as the German Lutheran Church in Namibia, the Lutheran Church in the Republic of Namibia, the Evangelical Lutheran Church in Namibia, and the Rhenish Mission Society (RMS)¹². During colonial times, many religious organizations allowed the German military to establish outposts or bases in their missions, and some were fully supportive of the slaughter of the Nama and Ovaherero.

In 1904, in a pastoral letter, the RMS reported that native Namibians had “raised the sword” against German colonizers whom “God had placed over them” and that “whoever took the sword would also perish by the sword.”³ The famous Lutheran Christuskirche in Windhoek has a plaque commemorating the German soldiers and settlers who perished during the colonial era, which reads: “In respectful memory of the comrades who have fallen since the creation of the German Protectorate and of the German citizens, women, and children who have given their lives for the Protectorate since this date, dedicated by the Schutztruppe and the population of this country.” During the Genocide both the Finnish Lutheran and the Roman Catholic churches in Namibia took a position of studied neutrality, not opposing the German military. Religious organizations also often forced the

conversion of Nama and Ovaherero from traditional religious practices to Christianity.⁴

In 2017 the Evangelical Church in Germany (EKD) apologized for its role in the Genocide:

“we expressly confess our guilt today towards the entire Namibian people and before God...From the depths of our hearts, we ask the descendants of the victims, and all those whose ancestors suffered from the exercise of German colonial rule, for forgiveness for the wrong done them and the pain they suffered as a consequence.”

The German Lutheran church announced its intention to work with Namibian counterparts to create a German-Namibian Institute for Reconciliation and Development, but the project appears not to have made progress.⁵

The Press and Multimedia Journalism.

The first newspaper to be distributed in Namibia was the Windhuker-Anzeiger, established in 1898. Colonial authorities actively repressed any alternative forms of media, claiming that Africans were “barbaric and excitable” and that “a diversity of opinion and misinformation in the press could mislead or inflame the people and threaten the whole basis of colonial power.”⁶ Windhuker chiefly reported on movements of the imperial forces to a readership consisting mostly of German settlers.

1 U.S Department of State, 2022 Report on International Religious Freedom: Namibia

2 Isaak, Paul John. Opinion - The deafening silence of Namibian churches on genocide, The New Era, 2022

3 Ibid

4 Lewis, Kenneth. The Namibian Holocaust: Genocide Ignored, History Repeated, Yet Reparations Denied, Florida Journal of International Law

5 Dick, Wolfgang. ‘Long overdue’ apology for Namibia, DW, 2017 3

6 Gartley, John Media and Resistance Politics: The Alternative Press in Namibia, 1960-1990 Africa Today 2004 <https://core.ac.uk/download/pdf/145041461.pdf>

Over the course of the liberation struggle, the South West News became one of the region's first multi-racial newspapers, established in 1960 and printed in East London, South Africa and in Windhoek. Namibia is now known for the freedom and robustness of its press (it ranks 24th in the world and first in Africa in press freedom according to the World Press Freedom Index)⁷. Today, journalists are free to operate without intervention from authorities, and there is a diverse array of publications that cover politics and news. National radio and television from the Namibian Broadcasting Corporation are the most popular, and publications like *The Namibian* play active roles as watchdogs over the government. In 2019 *The Namibian* exposed "the fishrot scandal," a scheme of corruption that led to the indictment of two government ministers. The foreign press has also covered Namibian news, specifically the Joint Declaration and efforts to achieve restorative justice for the Genocide. The German publication DW (*Deutsche Welle*) actively followed the negotiation process, and major American publications like *The New York Times* and *The Washington Post* published in-depth features on the subject, including reporting on related litigation in U.S. courts.

7 Long, Jessica. State of World Affairs, U.S. Department of State 2022 <https://na.usembassy.gov/statement-by-charge-daf-faires-jess-long-for-world-press-freedom-day/>

Restorative Justice in Namibia

The concepts of restorative justice, reconciliation, and reparations are interconnected but distinct notions within the broader framework of addressing historical injustices and human rights violations. They are elaborated in various international human rights instruments that provide guidance. 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 establish the right of victims to have access to adequate, effective, and prompt restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (Principles 18-23).¹ Unpacking these terms is crucial for understanding the multifaceted approach required to address the Genocide in Namibia.

Restorative justice is meant to be a survivor- and victim-centered approach focused on repairing harm caused by wrongful acts through cooperative processes involving victims, offenders, and communities.² In cases of historical atrocities, restorative justice mechanisms aim to acknowledge long-term consequences, promote accountability, and

facilitate healing.³ However, restorative justice alone is not sufficient to fully redress the multidimensional impacts of large-scale violations.

Reconciliation is the process of restoring peaceful relations between parties previously engaged in conflict or harm.⁴ In the Namibian context, it requires acknowledging root causes, fostering mutual understanding, and establishing a foundation for coexistence between descendants of victims and perpetrators.⁵ Effective reconciliation often involves truth-telling, apologies, memorialization, and institutional reforms.

Reparations are specific measures designed to provide redress and address ongoing consequences of past violations.⁶ Reparations can include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. For the Ovaherero and Nama genocide, reparations are crucial to address harms such as land dispossession, cultural loss, intergenerational trauma, and economic marginalization.

The concept of reparations draws from diverse legal traditions such as natural law, common law, and

- 1 UN General Assembly, 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 : resolution / adopted by the General Assembly, A/RES/60/147, 21 March 2006, <https://www.refworld.org/legal/resolution/unga/2006/en/12095> [accessed 19 April 2024]. The Basic Principles and Guidelines on the Right to a Remedy and Reparation are a set of international principles adopted by the United Nations in 2005 to address the human rights to remedy and reparation. These principles aim to consolidate existing international legal norms around the rights of victims of gross violations of human rights law and serious violations of international humanitarian law.
- 2 Van Ness, Daniel W., and Karen Heetderks Strong. *Restoring Justice: An Introduction to Restorative Justice*. 5th ed., Anderson, 2014.
- 3 Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence. *Contemporary Perspectives on Transitional Justice Issues*. January 2022. <https://www.ohchr.org/sites/default/files/2023-01/Contemporary-perspectives-SR-Truth-01-2022-User-Friendly.pdf>.
- 4 David Bloomfield, *Reconciliation after Violent Conflict: A Handbook* (International Institute for Democracy and Electoral Assistance, 2003).
- 5 Special Rapporteur, 2022
- 6 Shelton, Dinah. "Righting Wrongs: Reparations in the Articles on State Responsibility." *The American Journal of International Law* 96, no. 4 (2002): 833-56. <https://doi.org/10.2307/3070681>.

international law. Reparations are founded on the equitable principle that those who have benefited from wrongdoing should make restitution to the victims, serving both as an acknowledgment of wrongdoing and an attempt to restore the victims to their prior condition.⁷ Rooted in such legal doctrines as tort law to redress civil wrongs and criminal law for injuries to the public interest, reparations primarily aim to redress harm caused by wrongdoing, emphasizing equity and justice across legal systems.

In international law, a right to reparations is embedded in the International Covenant on Civil and Political Rights, which requires states to ensure an effective remedy for violations of rights and freedoms within their domestic legal systems (Article 2(3)), and frameworks like the Basic Principles and Guidelines, which provide a comprehensive framework for reparations programs.⁸ These efforts are further supported by the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, which emphasizes the rights of victims to know the truth about violations, to have access to justice, and to receive reparations (Principles 1-4).⁹

The concepts of restorative justice, reconciliation, and reparations are mutually reinforcing in the pursuit of redress. A comprehensive approach integrating all three elements is necessary to address the multifaceted impacts of the Ovaherero and Nama Genocide. Restorative justice can lay the groundwork

for reconciliation, which in turn can create an environment conducive to effective reparations, contributing to the restoration of dignity and trust.

Historical and Current Context of Restorative Justice in Namibia

The pursuit of restorative justice, reconciliation, and reparations for the the Ovaherero and Nama Genocide has been a long and complex journey, spanning more than a century of efforts by affected communities. This history highlights the continued struggles of the Ovaherero and Nama, while also revealing the systemic challenges inherent in addressing historical injustices of such magnitude.

One of the earliest efforts to document and seek redress was the "Blue Book" report, prepared in 1917 by British officials who interviewed witnesses and survivors. This report contributed to the decision at the 1919 Paris Peace Conference to strip Germany of its former colonies, including South West Africa.

Throughout the colonial era and the South African occupation, Namibian leaders and activists continued raising awareness about the Genocide's consequences. Mburumba Kerina, who addressed the UN General Assembly in 1959, helped shape international discourse on the Genocide and the need for legal mechanisms to address such crimes.¹⁰ Alongside anti-apartheid activist Michael Scott,

7 Sidney Haring, German Reparations to the Herero Nation: An Assertion of Herero Nationhood in the Path of Namibian Development, *West Virginia Law Review*, (2002): 393-417.

8 UN General Assembly, International Covenant on Civil and Political Rights, United Nations, Treaty Series, vol. 999, p. 171, 16 December 1966, <https://www.refworld.org/legal/agreements/unga/1966/en/17703> [accessed 9 April 2024].

9 Diane Orentlicher, Report of the independent expert to update the Set of Principles to combat impunity, E/CN.4/2005/102, UN Commission on Human Rights, 18 February 2005, <https://www.refworld.org/reference/themreport/unchr/2005/en/37943> [accessed 19 April 2024]. The Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, adopted by the UN Commission on Human Rights in 2005, define impunity as the inability, in law or practice, to hold perpetrators accountable for human rights violations. Together with the Basic Principles, these updated principles act as authoritative guides reinforcing the internationally recognized rights of victims to access justice, learn the truth about violations, and receive comprehensive reparations – tenets that are highly relevant to the pursuit of restorative justice and reparations for the Genocide targeting the Ovaherero and Nama.

10 Fabian Krautwald, «Namibia's Long History of Anti-Colonial Justice,» *Africa at LSE*, February 9, 2023, <https://blogs.lse.ac.uk/africaatlse/2023/02/09/namibias-long-history-of-anti-colonial-justice/>.

Kerina collaborated with Raphael Lemkin, who then recognized the Namibian case as integral to his understanding of genocide on a global scale.¹¹

In 1985, the UN Special Rapporteur on the Prevention and Punishment of the Crime of Genocide, Benjamin Whitaker, officially recognized the events in Namibia as genocide,¹² providing a stronger legal basis for the struggle for reparations and restorative justice. After independence in 1990, the Namibian government sought to address this legacy. In 2006, the National Assembly passed a resolution initiated by the Ovaherero Paramount Chief and Nama Traditional Leaders Association, outlining conditions for negotiations with Germany, including recognition of the Genocide, an apology, reparations for victims, and the meaningful participation of affected communities.¹³

Namibian civil society organizations, traditional leaders, and advocacy groups have remained steadfast in advocating for restorative justice, reconciliation, and comprehensive reparations.¹⁴

Their efforts have included legal actions, protests, and international advocacy campaigns.

In addition to offering a remedy for the Ovaherero and Nama, restorative justice and reparations serve as pivotal mechanisms in the prevention of further atrocity crimes by systematically addressing the underlying causes of conflict and promoting societal reconciliation.¹⁵ Societies marked by a history of serious violations of international human rights and humanitarian law are at an elevated risk of recurrence if these violations remain unaddressed.¹⁶ Impunity, tolerance, or denial create an atmosphere of distrust and injustice, fostering conditions conducive to continued or resumed violence.

Restorative justice and reparations directly confront these risk factors by acknowledging past wrongs, holding perpetrators accountable, and providing redress to victims. In doing so, they contribute to breaking the cycle of violence and rebuilding trust within communities. Moreover, they address the root grievances and structural inequalities that fuel conflicts, thereby reducing the likelihood of future

11 Ibid.; John Docker, "Are settler-colonies inherently genocidal? Re-reading Lemkin," in *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, ed. by A. Dirk Moses (2008); Schaller, Dominik. "Raphael Lemkin's View of Colonial Rule in Africa: Between Condemnation and Admiration." *Journal of Genocide Research* 7, no. 4 (2005): 534. "While Lemkin's linking of genocide and colonialism may surprise those who think that his neologism was modeled after the Holocaust of European Jewry, an investigation of his intellectual development reveals that the concept is the culmination of a long tradition of European legal and political critique of colonization and empire."

12 Krautwald, 2023

13 Mandates of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; the Special Rapporteur in the field of cultural rights; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on the rights of indigenous peoples; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the Special Rapporteur on violence against women and girls, its causes and consequences, Letter dated 23 February 2023 addressed to the German and Namibian Governments, U.N. Doc. AL DEU 1/2023 (February 23, 2023). Accessed from <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27875>.

14 Krautwald, 2023; Special Rapporteurs, 2023

15 *Framework of Analysis for Atrocity Crimes: A tool for prevention*, United Nations (2014), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.49_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf; Genocide Watch, "Namibia: Germany Acknowledges Its Colonial Genocide," last modified June 23, 2021, https://www.genocidewatch.com/_files/ugd/09ea84_a1ffa50314c14330a16042626a6ca3a9.pdf. The NGO Genocide Watch classifies Namibia as "Stage 10: Denial" given the outcomes of the Joint Declaration and current state of affairs.

16 Arguably both perpetrators and victimized societies are at higher risk – one could argue that the lack of accountability and restorative justice for crimes in Namibia could be linked to recurrence of atrocities in Germany.

troubles. As instruments of transitional justice, mechanisms such as criminal accountability, truth-seeking initiatives, reconciliation efforts, and institutional reforms can help facilitate the healing of community wounds and the establishment of enduring peace.¹⁷

In this way, reconciliation can be conceptualized as a political endeavor, particularly in societies scarred by a history of state violence. In such contexts, reconciliation transcends individual healing and becomes a collective process aimed at rebuilding fractured communities. It is important to recognize that reparations, especially in cases of colonial crimes like genocide and crimes against humanity, cannot reverse the irreversible. As one scholar notes, while reparations are inherently retrospective, restorative justice is a future-facing exercise: “[r]eparations will not bring back the dead. Moreover, to hold present generations responsible for wrongs perpetrated by their ancestors seems like visiting the sins of the fathers upon them... it does not derive from a duty to the dead. Rather, it is based on the forward-looking practice of promising, which is integral to sustaining political community.”¹⁸

Objections to Reparations

Some experts often raise three main objections to establishing a regime of reparations for colonial-era crimes: 1) the actual perpetrators are no longer present to be held accountable, 2) the direct victims

are no longer alive to receive compensation, and 3) the crimes giving rise to the claims were not legally codified at the time they occurred.

However, as other legal and historical scholars argue, these objections are rebuttable in light of established legal principles and the specific context of the Genocide against the Ovaherero and Nama peoples. First, while individual perpetrators may no longer be alive, this is of no relevance to the issue of assigning state responsibility and therefore liability for gross human rights violations.¹⁹ In this case, the Genocide was perpetrated through the German colonial state apparatus, with figures like General Lothar von Trotha meticulously documenting and communicating their actions to authorities in Berlin.

The second objection, that direct victims are no longer alive, discounts the intergenerational impacts and ongoing deprivations stemming from the Genocide. Its ramifications have reverberated across decades, perpetuating cycles of structural violence – poverty, landlessness, cultural erosion, socioeconomic marginalization – and other systemic inequities suffered by affected communities. Some experts argue that these ongoing impacts of a genocide effectively render the descendants of the direct victims as survivors and victims themselves.²⁰

Regarding both of these first two objections, researchers in the *European Scientific Journal* have emphasized:

17 Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, and the Special Adviser to the Secretary-General on the Prevention of Genocide. "Joint study on the contribution of transitional justice to the prevention of gross violations and abuses of human rights and serious violations of international humanitarian law, including genocide, war crimes, ethnic cleansing and crimes against humanity, and their recurrence." Report A/HRC/37/65. Published 06 June 2018. Accessed from https://www.un.org/en/genocideprevention/documents/A_HRC_37_65_AdvanceEditedVersion.pdf.

18 Andrew Schaap, *Political Reconciliation* (1st ed., 2005), 129.

19 Jeremy Sarkin, *Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims Under International Law by the Herero Against Germany for Genocide in Namibia, 1904-1908*. Philadelphia: University of Pennsylvania Press, 2008.

20 Regina Menachery Paulose and Ronald Gordon Rogo, "Addressing Colonial Crimes Through Reparations: The Mau Mau, Herero and Nama," *State Crime Journal* 7, no. 2 (2018): 369–88, <https://doi.org/10.13169/statecrime.7.2.0369>.

*To make such a claim is to discount decades of dispossession—the grand heist of a people’s entire livelihood and way of life. To make such a claim is to assert that the children of those victims of genocide—or those children’s children—somehow elevated themselves beyond the poignant truth that they were once slated for extermination... While true that the direct perpetrators and victims of the 1904-08 genocide are long dead, the beneficiaries and casualties of the extermination still feel acutely the resonance of Imperial Germany’s actions.*²¹

This is why many consider development aid alone, as proposed by Germany, as insufficient: it preserves unequal power dynamics and imposes terms reminiscent of the colonial era (that is, the (former) colonial power gives, and the (former) colony receives).²² Instead, reparations reflect a legal obligation to provide redress tailored to victims' needs, unencumbered by other motives. Challenges around the Joint Declaration exemplify the need for reparations specifically tailored to address the full scope of harms suffered, which have perpetuated systemic inequities, power imbalances, marginalization and dispossession as a living legacy of the Genocide.

The third objection, concerning the legal status of the crimes at the time, highlights the important challenge of intertemporality. Raphael Lemkin, who coined the term "genocide," explicitly considered the German

colonial campaign in South West Africa to qualify.²³ Also, the fact that German forces violated the treaties that they themselves drafted and persuaded the indigenous groups to accept, such as the 1895 protection treaty with Ovaherero leader Samuel Maharero, made the Genocide and the dispossession of land and livestock breaches of international law at the time.²⁴

The International Law Commission has opined that the intertemporal principle does not extend to the Convention on the Prevention and Punishment of the Crime of Genocide.²⁵ This follows from Article I, which makes clear that the Convention is declaratory of existing law. As such, the Convention articulates principles universally recognized and applicable at all times, independent of their codification in a written instrument. This means that genocides were criminal, regardless of when they occurred.

Precedent for this proposition may be found most notably in the International Court of Justice (ICJ) opinion case of "Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections."²⁶ The Court underscored the Convention's broad temporal reach, affirming that the obligation to prosecute genocide pertains to all instances of the crime. The Court too has therefore at least implicitly endorsed the enduring obligation of all states to hold individuals accountable for acts of genocide, underscoring the

21 Sprenger, N., Rodriguez, R. G., & Kamatuka, N. A. (2017). The Ovaherero>Nama Genocide: A case for an apology and reparations. *European Scientific Journal* (June special ed.). ISSN: 1857 - 7881 (Print) e - ISSN 1857- 7431.

22 Bentley, Tom. 2015. *Empires of Remorse: Narrative, Postcolonialism and Apologies for Colonial Atrocity*. Abingdon, Oxon: Routledge Press, 5.

23 Schaller, (2005): 531–538. Lemkin's manuscripts (that some scholars note “publishers were not interested in publishing after his death”) explicitly mentions and devotes a chapter to the massacres of the Ovaherero as a “classical genocide case.”

24 Heinrich Weber and Markus Weber, "Colonialism, genocide and International Relations: the Namibian–German case and struggles for restorative relations," *European Journal of International Relations* 26, no. 1_suppl (2020): 91-115, <https://doi.org/10.1177/1354066120938833>.

25 Report of the International Law Commission on the work of its fifty-third session, 23 April - 1 June and 2 July - 10 August 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No.10, A/56/10. The ILC adopted the Articles on Responsibility of States for Internationally Wrongful Acts.

26 Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996, pp. 595, pp. 615–616, paras. 31–32; pp 617, para. 34.

universal condemnation of such atrocities throughout history.²⁷

In any event, the intertemporal principle permits exceptions. A 2019 report by Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance highlights that exceptions apply when (a) an act began before but continued into a time when international law began consider the act to be internationally wrongful, or (b) the direct ongoing consequences of the act, whenever it occurred, extend into such time.²⁸ This means that economic and racial consequences of colonialism that were felt after they had been recognized as prohibited are not subject to the intertemporal bar.

Reparations are crucial for addressing the Genocide's ongoing effects, which arguably render descendants of systemic extermination, discrimination, and deprivation – e.g., the Ovaherero and Nama communities today – as survivors and victims themselves. As Judge Cançado Trindade of the International Court of Justice underscored, albeit in his dissenting opinion, in *Croatia v. Serbia*, 2015:

[t]here is no restitutio in integrum at all for the fatal direct victims, the memory of whom is to be honoured. As for the surviving victims, reparations, in their distinct forms, can only alleviate their suffering, which defies the passing of time. Yet, such

*reparations are most needed, so as to render living – or surviving atrocities – bearable. This should be constantly kept in mind.*²⁹

While adjudicating historical injustices is undoubtedly complex, the objections do not undermine Germany's obligation to provide meaningful reparations to Namibia's affected communities.

Memory and Reconciliation

Reparations stem from core legal and ethical imperatives to remedy reverberating historical injustice, representing what has been called the "unquestionable right" to restitution, compensation, and guarantees under human rights law.³⁰ Ultimately, reparations must include and go beyond financial compensation in order to fulfill the ethical and legal imperative to address the lasting, systemic harms of unredressed atrocities. For the Ovaherero and Nama, comprehensive reparations are inextricable from the broader pursuit of restorative justice and reconciliation. An integrated approach is therefore necessary for acknowledging the scope of the harms suffered and dismantling persistent colonial patterns from the Genocide.

27 Document A/56/10 (see footnote 28) also mentions the *lex specialis* principle (Articles on Responsibility of States for Internationally Wrongful Acts, Article 55), which deals with situations where specific agreements or decisions may allow for retrospective assumption of responsibility for conduct that was not a breach of international obligation at the time it was committed. In simpler terms, the intertemporal principle generally applies to international obligations, meaning that states are bound by the obligations in force at the time of the conduct. However, there may be exceptions where states agree to compensate for damage caused by conduct that was not considered a breach at the time. These exceptions are rare, and the *lex specialis* principle can provide a framework for dealing with such cases when they arise.

28 United Nations General Assembly, «Contemporary forms of racism, racial discrimination, xenophobia and racial intolerance,» report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Tendayi Achiume, A/74/321, para. 49.

29 Judge Cançado Trindade, "Dissenting Opinion," Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), 2015, accessed April 1, 2024, <https://www.icj-cij.org/sites/default/files/case-related/118/118-20150203-JUD-01-05-EN.pdf>, p. 362.

30 Abuja Proclamation, A declaration of the First Pan-African Conference on Reparations For African Enslavement, Colonization And Neo-Colonization, sponsored by The Organization Of African Unity and its Reparations Commission, 1993, <https://ncobra.org/resources/pdf/TheAbujaProclamation.pdf>.

Truth commissions, public documentation efforts, and reconciliation initiatives have been vital components of restorative justice processes in colonial contexts such as South Africa and Canada, offering official acknowledgment, facilitating dialogue, and informing reparations programs. In 2020, Belgium became the first former colonial power to establish a truth commission to investigate the historic and ongoing injustices resulting from its colonial legacy abroad and consider appropriate reparations.³¹

Memory and memorialization are especially critical components. Neglecting this "memory work" in reparations and restitution risks fueling resentment instead of redress.³² Appropriate memorials honoring victims, removal of those celebrating perpetrators, educational opportunities, monetary restitution, and return of cultural artifacts can be complementary parts of an effective, comprehensive reparative process.³³

31 Destrooper, Tine. "Belgium's 'Truth Commission' on Its Overseas Colonial Legacy: An Expressivist Analysis of Transitional Justice in Consolidated Democracies." *Journal of Human Rights* 22, no. 2 (2023): 158–73. doi:10.1080/14754835.2022.2042220; Van der Speeten, Kato. "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." *Jura Falconis*, 2021.

32 Martha Louise Minow, «Martha Minow on the Law, Memory, and Forgiveness,» interview by David Brown, November 1, 2019, <https://www.lbi.org/news/Martha-Minow-on-the-Law-Memory-and-Forgiveness/>.

33 Sarkin, 2008

Education of the Genocide and Restitution of Human Remains

According to the Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, a General Assembly Resolution adopted in 2005, victims are endowed with the right to “adequate, effective and prompt reparations”.¹ However, only they possess the authority and the right to decide what the words “adequate, effective, and prompt” mean in any given context. Victims, rather than perpetrators, must set the conditions for reparations in cases of historical injustices and human rights violations committed during colonial rule.

The Principles and Guidelines also indicate that “reparation should be proportional to the gravity of the violations and the harm suffered”.² Yet, in cases of genocide, torture, slavery, racism, and pervasive gender-based violence, only victims can determine the proportionality of reparations. The “restitution of identity,” another concept included in the Guidelines, requires consultations with victims on the magnitude of their cultural loss in devising recovery mechanisms.

An effective approach to reparations requires comprehensive education on the violations that gave rise to them, including the nature of the offenses and the identities of the affected parties. The Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence also recommends that states – former colonial powers and former colonies – adopt memorialization measures about the causes and consequences of abuses, and

their impact today.³ The formulation of adequate and effective reparations requires exhaustive knowledge of the crimes committed, the victims involved, and the diverse ways they were affected. Consultation with the descendants of victims is key to avoiding marginalizing the stories of the affected populations and promotes the incorporation of oral histories to reconstruct events frequently overlooked, such as sexual abuse during colonial rule. Misrepresentations of human rights violations perpetuate harm, offend the victims, and prevent fair, sufficient, proportional, and adequate remediation. By contrast, comprehensive documentation of the facts promotes acknowledgment, condemnation, and accountability. Furthermore, the documentation and dissemination of historical violations of human rights law provide a motivation for ensuring non-repetition. Education about the Namibian Genocide is, therefore, a fundamental component of restorative justice because it helps to determine the magnitude of the harm and to recognize the individuals and communities affected.

In Namibia, despite the magnitude of the Genocide, most citizens, especially the youth, are unaware of it. The national education system largely overlooks the events of 1904-08, prioritizing the history of the independence struggle. It covers the Holocaust and the crimes committed by Nazi Germany but omits the account of atrocities that happened within the country itself. Moreover, history lessons are mandatory only up to grade 10 and focus on a more general approach.⁴ Some of the current efforts to preserve memory and to teach about the Genocide are led by

1 UN General Assembly. (March 21, 2006). Basic Principles and Guidelines. Ibid

2 Ibid. 7.

3 Mandates of the Special Rapporteur. AL DEU 1/2023 (February 23, 2023). Ibid.

4 Global Campaign for Peace Education. (Sept 20, 2018). Education about the Holocaust and genocide in Namibia. <https://www.peace-ed-campaign.org/education-about-the-holocaust-and-genocide-in-namibia/>

descendants of the victims. For instance, Laidlaw Peringanda inaugurated the Swakopmund Genocide Museum in the backyard of his house to tell the story of his people. Peringanda raises funds from international donors and foreign visitors and collects Ovaherero traditional artifacts from European collectors. The small Museum is four hours away from Windhoek, but is close to the Concentration Camp Memorial, where Ovaherero and Nama communities gather annually in March to participate in the Swakopmund Reparation Walk.⁵ The Museum and the Memorial constitute evidence of the resolve of the descendants to preserve their story and to honor the victims of the Genocide, albeit without government funds or infrastructure.

At present, Windhoek lacks a National Museum supported by the government and dedicated to the Genocide. However, the Namibian Genocide is well documented in Holocaust museums in other countries. The Montreal Holocaust Museum provides detailed information about “the Herero Genocide” on its website.⁶ Similarly, in 2017, France inaugurated the exhibition “The first genocide of the twentieth century: Herero and Nama in German South West Africa” at the Shoah Memorial in Paris.⁷ Other African countries have implemented measures to improve education on historical atrocities with the objective of healing unaddressed trauma. In October 2023, for example, the Nigerian Ministry of Education and UNESCO developed an education curriculum on genocide and peace that aims to raise awareness of the danger of



SAIS Students stand with Laidlaw Peringanda in front of the Swakopmund Genocide Museum

5 UNESCO. (2024). Swakopmund Concentration Camp Memorial. CIPDH (Center for the Promotion of Human Rights). <https://www.cipdh.gob.ar/memorias-situadas/en/lugar-de-memoria/memorial-del-campo-de-concentracion-de-swakopmund/>

6 Montreal Holocaust Museum. Herero Genocide in Namibia. <https://museeholocauste.ca/en/resources-training/herero-genocide-namibia/>

7 Memorial de la Shoah. (2016).

prejudice and hate speech to build “a more peaceful and inclusive world.”⁸

Education on genocide contributes to disseminating values of tolerance and preventing repetition because it enhances understanding of the human dimensions of historical events. In Namibia, UNESCO can play a crucial role in promoting a holistic approach to education about the Genocide, promoting acknowledgment among the population about their history and incentivizing integration and reconciliation at the same time. Open debate and extensive documentation on the Genocide dignify the victims, enhance the understanding of the descendants, and unify the society. Conversely, silence on the injustices of the colonial past creates divisions and justified anger that impedes the integration of a multicultural nation like Namibia. As Philibert Muzima, a survivor of the genocide in Rwanda, put it, “Forgetting and impunity are keys to recurrence”⁹.

In Germany, educating youth about the Genocide in Namibia is part of its responsibility to acknowledge historical events, and also provides an opportunity to promote accountability in cases of human rights abuses. Germany has been remarkably open about the Holocaust, which is extensively covered in its history lessons, and it has dedicated several museums and memorials to the atrocities of the Third Reich. However, the Namibian Holocaust is absent from German education programs, and no memorials or museums commemorate the victims. Although General Lothar von Trotha issued the orders to exterminate the Ovaherero and the Nama, a street was named for him in Oberhausen in 1933 by the Nazi government. That the street still bears his name today contributes little to demonstrating the regret of German society.

In the garrison cemetery on Columbiadamm in Berlin, there is a marker known as the “Herero Stone” commemorating the Germans who died in the South-west Africa campaign, calling them “heroes,” and a small placard in Neukölln, Berlin, memorializes “the victims of the German colonial rule in Namibia”.¹⁰ However, neither of those monuments mentions the concentration camps, racism, exploitation, or medical experiments on native groups. Germany also left behind markers that still exist in Namibia, commemorating the colonial period and the imperial soldiers who died in the conflict with the Ovaherero and Nama: the Marine Denkmal and the Equestrian Monument. There are no monuments, memorials, or museums in Namibia dedicated by Germans to the thousands of victims of extermination, torture, slavery, gender-based violence, and starvation. Education on the Genocide and the construction of memorials for the victims in both countries would help Germany discharge its moral responsibility and heal the wounds that are part of its harmful colonial legacy in Namibia.

In cases of human rights violations involving the massive loss of lives, culture, and identity, restorative justice implies more than monetary compensation to the survivors or their descendants. The recovery of cultural heritage, including ancestral artifacts and traditional and personal effects of the victims, is a fundamental mechanism. The restitution of traditional objects has been more sluggish, requiring increased activism to change the European perception of indigenous objects as trophies of the colonial period. Principle 22 of the General Assembly Guidelines refers to the search for the bodies of those killed and assistance in their identification and reburial in accordance with the wishes or cultural practices of the communities.¹¹ The recovery of human remains is

8 Global Campaign for Peace Education. (Dec 6, 2023). Nigeria making first steps to introduce a peace education curriculum. <https://www.peace-ed-campaign.org/nigeria-making-first-steps-to-introduce-a-peace-education-curriculum/>

9 Montreal Holocaust Museum. (2024). United Against Genocide: Understand, Question, Prevent. <https://museeholocauste.ca/en/exhibitions/expositions-itinerantes-en/united-against-genocide-travelling-exhibition/>

10 Van Mourik, A. (Sept 18, 2023). A Stroll into Germany’s conflicted postcolonial memory. Justice Info. <https://www.justiceinfo.net/en/121871-stroll-germany-conflicted-postcolonial-memory.html>

11 UN General Assembly, A/RES/60/147. 8.

a sensitive but necessary means of restoring dignity to the victims and closure for the descendants. Germany has already initiated the process of returning Namibian human remains that have been stored in universities, hospitals, and museums for decades. In 2011, 2014, and 2018, Germany returned around 79 sets of remains, including skulls, full skeletons, and bone and skin fragments.¹² However, there are parts of Namibian bodies in Switzerland, Austria, the United States, and South Africa, signaling the existence of an active international trade in human remains in former Southwest Africa.¹³

Education on the Genocide among the international community will raise awareness of the efforts of the Ovaherero and Nama to recover the remains of their ancestors, allowing them to rest in peace in their motherland. It will also encourage bilateral cooperation between European and African countries to return objects culturally significant for the history and identity of indigenous peoples that were taken during colonial rule. Restorative justice in Namibia requires the opportunity for the descendants to provide proper burials for the victims of the Genocide and those who died from the racist medical experiments and in concentration camps, as well as to recover the historical objects that represent their identity.

12 Grieshaber, K. (August 29, 2018). "Germany returns 27 sets of colonial-era remains to Namibians". Associated Press. <https://apnews.com/general-news-4d0d65b1f0f3427cad384180ded754d6>

13 Hillebrecht, W. (November 2019). Archival Evidence of robbed human remains: problems, gaps and reconstructions. National Archives of Namibia. 8. https://www.researchgate.net/publication/340595380_Archival_evidence_of_robbed_human_remains_problems_gaps_and_reconstructions



Photo by Philipp Klausner, Unsplash

The 2021 Joint Declaration between Namibia and Germany

Introduction

The Joint Declaration (JD) by the Federal Republic of Germany and the Republic of Namibia, titled “United in Remembrance of Our Colonial Past, United in Our Will to Reconcile, United in Our Vision of the Future,” marks a significant, yet contested, milestone in addressing the legacy of German colonial rule in Namibia. This Declaration, the result of protracted negotiations, acknowledges the Ovaherero and Nama Genocide committed between 1904 and 1908.¹ It also represents a major development in international relations and restorative justice, perhaps setting a precedent for how former colonial powers will address historical offenses.

The Declaration addresses the atrocities committed by German colonial forces, which resulted in the systematic extermination of tens of thousands of Ovaherero and Nama people.² Germany’s recognition of these crimes is an epochal turning point in the relationship between the two countries. However, the significance of this recognition is perceived by many as weakened by the Joint Declaration’s description of the Genocide only as “events that, from today’s perspective, would be called genocide.”³ Importantly, the JD has not yet been approved by either nation’s legislative bodies, leaving its legal and diplomatic status uncertain. Key issues, far beyond mere terminological differences, are still contentious and may require amendment or even renegotiation. The chal-

lenges extend to deep-seated disagreements over how reconciliation should be implemented and the nature of recompense or apologies. These ongoing differences underscore the reality that while the Declaration is a significant acknowledgment, it is also only the first step in a diplomatic and legal process.

Purpose and Scope of the Draft Joint Declaration

The Joint Declaration has several primary aims.⁴ A cornerstone is Germany’s unequivocal recognition of the atrocities committed against the Ovaherero and Nama as a Genocide, albeit “from today’s perspective.” This formal acceptance, accompanied by an expression of remorse and an official apology, acknowledges the suffering endured by the affected communities.

Regarding its scope, the JD’s most salient portions provide the historical context of the Genocide, Germany’s admission of responsibility, the two countries’ commitment to heal the past and build a new partnership, and specific development initiatives and financial commitments. The historical portion outlines the atrocities committed by Germany during its colonial rule, including war against indigenous peoples, seizure of land, displacement of communities, the setting up of concentration camps where inhumane conditions led to many deaths, enslave-

1 Espitia, M. R. *The First Genocide of the Twentieth Century: Herero and Namaqua 1904-1907*

2 Krautwald, F. (2022). Genocide and the Politics of Memory in the Decolonisation of Namibia. *Journal of Southern African Studies*, 48(5), 805-823.

3 Government of the Federal Republic of Germany and the Government of the Republic of Namibia. *Joint Declaration by the Federal Republic of Germany and the Republic of Namibia. United in Remembrance of Our Colonial Past, United in Our Will to Reconcile, United in Our Vision of the Future*, 2021. https://www.dngev.de/images/stories/Startseite/joint-declaration_2021-05.pdf

4 Ibid.

ment, rape, forced labor, human experimentation, and trafficking of human remains. Further details on how Germany's actions and policies led to the decimation and extermination of large numbers of the Ovaherero, Nama, and other communities reinforce the gravity of these historical events.

A distinguishing feature of the JD is its approach to financial compensation as an element of restorative justice. It includes a €1.1 billion development package for Namibia, to be used to address the enduring socio-economic disparities resulting from the Genocide and colonial exploitation. The specific initiatives and financial pledges are a tangible and important part of the Declaration. Projects financed by the aid package would specifically “target the descendants of victims,”⁵ by supporting reconstruction and development needs in the areas where they live, including water, land reform, agriculture, energy access, and vocational training.⁶ This programming would be organized jointly by the two governments.⁷ Implementation modalities, according to the text, are to include representatives of affected communities⁸ in “a decisive capacity,”⁹ and would be carried out in the regions of Erongo, Hardap, Karas, Khomas, Kunene, Omaheke, and Otjozondjupa: all places where there

are significant concentrations of Ovaherero and Nama people.¹⁰ This work can begin, however, only after the JD has been signed by both governments.¹¹

Overview of Events

Lead-up to Negotiations

In 2006, Namibia's National Assembly passed a resolution recognizing the entitlement of the most affected communities to seek reparations for colonial-era atrocities and positioning the government as an “interested party” rather than the leader in pursuing restorative justice.¹² The secondary role for the Namibian government would be as a facilitator rather than a principal negotiator. This distinction is crucial for understanding the dissatisfaction among affected communities regarding both the JD itself and the negotiation process that led to it. The resolution did not request or mention an apology. It outlined four principles that should serve as “the basis/mandate for any negotiations and final agreements/settlement with the German regime on the genocide of our People.”¹³ The four principles¹⁴ were:

5 Daniel Pelz, “Germany Rejects New Negotiations over Namibia Genocide – DW – 09/02/2022,” dw.com, February 9, 2022.

6 Ibid.

7 Office of the United Nations High Commissioner for Human Rights. Mandates of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; the Special Rapporteur in the field of cultural rights; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on the rights of indigenous peoples; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the Special Rapporteur on violence against women and girls, its causes and consequences. 2023
<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27875>

8 Ibid.

9 Ibid.

10 Ibid.

11 Daniel Pelz, “Germany Rejects New Negotiations over Namibia Genocide – DW – 09/02/2022,” dw.com, February 9, 2022.

12 Miller, M. C. “No Apology Necessary? How Narratives Impact Redress for Colonialism in Namibia and India.” *International Affairs* 99, no. 4 (2023): 1693-1717.

13 Namibia, Parliament. Namibian Parliament Motion on Genocide, 2006. 2006
<https://ogfnamibia.org/namibian-parliament-motion-on-genocide-2006/>

14 Ibid.

1. *That what happened to the Nama and Ovaherero during 1904-1908 was a brutal act of Genocide sanctioned by the German Government of the day;*
2. *That the Nama and Ovaherero people are entitled to demand reparations from the German government;*
3. *That the Namibian government should be an interested party in any discussions between its nationals and the German Government on the issue of reparations;*
4. *That dialogue be convened between, on one hand, the Namibian Government and representatives of the victim communities, and on the other hand the German Government, to try and resolve this matter amicably and thereby strength and solidify the excellent relationship between the two countries, Germany and Namibia.*

Formal Negotiations Begin

The relationship between the Federal Republic of Germany and the Republic of Namibia is deeply rooted in historical and moral responsibilities, as highlighted by unanimously adopted resolutions of the German Bundestag in 1989 and 2004. The 1989 measure marked an initial step towards reconciliation, recognizing the historical events and setting the stage for future dialogue and cooperation. Likewise, the 2004 resolution reaffirmed the commitment to dialogue, emphasizing and acknowledging the “special historical and moral responsibility” stemming from the “campaign of annihilation.”¹⁵

In 2015, formal negotiations began between Namibia and Germany, focusing on addressing the atrocities committed during the colonial era.¹⁶ The process, which lasted from 2015-2021, was characterized by intermittent progress and stalemates, with significant disputes over Germany’s recognition of the events as Genocide and the form and amount of the payment that Germany would agree to make. The negotiations continued, marked by periods of heightened intensity and engagement.

In 2017, Ovaherero Paramount Chief Vekuii Rukoro and other traditional leaders filed a class-action lawsuit, *Rukoro et al. v Germany*, in New York, in an attempt to force the German government to pay damages to the Ovaherero and Nama.¹⁷ They argued that the Genocide was a violation of the law of nations, and that the U.S. courts therefore had jurisdiction to entertain the case pursuant to the Alien Tort Claims Act. Germany moved to dismiss the complaint on the grounds of sovereign immunity, but the plaintiffs argued that immunity had been waived, because some of the proceeds of German exploitation of their ancestors had been invested in the United States, justifying an exception to the jurisdictional bar.¹⁸ Evidence of the connections between the Genocide and New York City included:¹⁹

- skulls and human remains are held in the American Museum of Natural History²⁰
- funds were used to acquire Germany’s consulate and U.N. mission buildings in New York²¹
- the New York Public Library possessed one of few surviving copies of the “Blue Book,” an orig-

15 Federal Republic of Germany, German Bundestag, 17th Electoral term. The historical, political and legal background to the massacre of the Herero and Nama peoples and the situation with regard to the Special Initiative. 2021 http://genocide-namibia.net/wp-content/uploads/2015/01/1710481_Antwort_engl..pdf

16 Kößler, R. “Postcolonial Asymmetry: Coping with the Consequences of Genocide between Namibia and Germany.” In *Postcolonialism Cross-Examined*, 117-134. Routledge, 2019.

17 *Rukoro et al v. Federal Republic of Germany*, 363 F. Supp.3d 436 (S.D.N.Y. 2019), *aff’d*, 976 F.3d 218 (2d Cir. 2020).

18 *Ibid.*

19 *Ibid.*

20 *Ibid.*

21 *Ibid.*

inal and nearly contemporaneous record of the Genocide created in 1918.²²

However, U.S. District Judge Laura Taylor Swain dismissed the case,²³ concluding that the connections between acts in Namibia and property in New York were too tenuous to overcome the presumption of immunity to which foreign governments are entitled in U.S. courts.²⁴ The plaintiffs appealed to the United States Court of Appeals for the Second Circuit, but the appeal was rejected in September of 2020. The Appeals Court determined that while part of the District Court’s analysis was “erroneous,”²⁵ the plaintiffs’ allegations were nevertheless insufficient to trace the proceeds from assets expropriated more than a century ago to present-day property owned by Germany in New York.²⁶ The appellate court was sympathetic to the plaintiffs – concluding its opinion by saying that “The terrible wrongs elucidated in Plaintiffs’ complaint must be addressed through a vehicle other than the U.S. court system” – but it affirmed the dismissal of the case because Germany was entitled to sovereign immunity.

Although the case did not result in a trial or verdict in United States courts, *Rukoro et al. v Germany* strengthened efforts to pursue a negotiated solution by bringing the Genocide back into the limelight, and according to many observers, provided a positive incentive for Germany to come to the bargaining table.

Negotiation and Finalization of the Draft Declaration

The landscape of negotiations changed significantly with the advent of a new German government in 2021. Demonstrating a departure from its predecessors,

this administration was open to acknowledging the colonial-era Genocide, along with a newfound willingness to engage more constructively.

The Namibian government invited various organizations representing the affected communities, including the Ovaherero Traditional Authority, the the Ovaherero Concert for Dialogue, and Nama Traditional Leaders Association, to participate as technical advisers to the negotiators. Two of the three indigenous groups declined the invitation, due to disagreements over the committee’s composition and level of its engagement.²⁷

The key issues under negotiation included the acknowledgment of the Genocide, contrition from the German government, and compensation for the affected communities. Germany exhibited a readiness to confront its history, agreeing without significant resistance to acknowledge past events and extend an apology. Germany’s stance on the term “reparations” was a focal point of contention during the negotiation process. Germany refused to use the term outright, insisting on alternative language, provoking significant debate and disagreement.²⁸

The German side suggested “Reconstruction and Development Aid,” framing the compensation not as an obligation but as a voluntary commitment.²⁹ The amount of the payment was discussed, with references made to the reparations of \$3 billion given by Germany to those directly impacted by the Holocaust. The timeline for funding was agreed to reflect the long-term relationship between Namibia and Germany and to allow for future developments.

22 Ibid.

23 Ibid.

24 Ibid.

25 *Rukoro et al v. Federal Republic of Germany*, 976 F.3d 218 (2d Cir. 2020).

26 Ibid.

27 Kaapama, Phaniel. “SAIS International Human Rights Law Clinic Fieldnotes.” By the 2024 class of Johns Hopkins SAIS International Human Rights Law Clinic. January 2024.

28 Ibid.

29 Ibid.

However, the inclusion of Paragraph 20 of the Joint Declaration presented a key sticking point in the eyes of the affected communities. Germany insisted on a provision stating that “both Governments share the understanding that these amounts mentioned above settle all financial aspects of the issues relating to the past addressed in this Joint Declaration.”³⁰ In other words, from the German perspective questions of monetary compensation would not be revisited: this agreement was to put an end to those discussions. This position was a serious challenge for the Namibian negotiating team,³¹ who wondered why Germany was bringing something so fundamental to the table so late in the game.³²

Nonetheless, in May 2021, the governments concluded negotiations on the Joint Declaration.³³ Germany pledged to distribute a €1.1 billion package to the Namibian government over 30 years for development programming.³⁴ The JD reflected Germany’s position that the compensation was not “reparations”: a word never used in the Declaration. Then-Federal Foreign Minister Heiko Maas of Germany announced that the agreement was “exclusively one on a voluntary

basis,”³⁵ with “no legal grounds on the basis of which this payment is being made or promised,”³⁶ meaning that it was “not comparable to the reparations issue as such.”³⁷

In announcing the JD, the Chief Namibian negotiator, Zedekia Ngavirue, maintained that the government had achieved its objectives of “acknowledgment of genocide, apology and payment of reparations.”³⁸ Ngavirue conceded that the Namibian side “would have liked to have had more” money, but said that €1.1 billion amount was most “affordable - financially, politically”³⁹ to the German side. The Namibian government claimed unique standing as the only entity capable of engaging with Germany as a sovereign equal.⁴⁰ It emphasized that it had presented a unified national stance, on behalf of “one Namibia,” rejecting demands that certain ethnic groups should have had their own seats at the table. The government’s view was that had it had invited representatives of the Nama and Ovaherero to engage as integral and vocal parts of the technical infrastructure for the negotiators throughout the process, and that by doing

30 Government of the Federal Republic of Germany and the Government of the Republic of Namibia. Joint Declaration by the Federal Republic of Germany and the Republic of Namibia. United in Remembrance of Our Colonial Past, United in Our Will to Reconcile, United in Our Vision of the Future, 2021. https://www.dngev.de/images/stories/Startseite/joint-declaration_2021-05.pdf

31 Kaapama, Phaniel. “SAIS International Human Rights Law Clinic Fieldnotes.” By the 2024 class of Johns Hopkins SAIS International Human Rights Law Clinic. January 2024.

32 Ibid.

33 Federal Republic of Germany, The Permanent Mission of the Federal Republic of Germany to the Office of the United Nations. Note No.: 159/2023. 2021 <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=37548>

34 Melber, H. “Germany and Reparations: The Reconciliation Agreement with Namibia.” *The Round Table* 111, no. 4 (2022): 475-488.

35 Talmon, Stefan. “Reconciliation without Reparation? The German-Namibian Joint Declaration on ‘Our Colonial Past.’” *German Practice in International Law*. 2023.

36 Ibid.

37 Ibid.

38 Rebecca Staudenmaier and Adrian Kriesch, “Namibia Expects German Reconciliation Deal to Go Ahead – DW – 06/04/2021,” *dw.com*, June 4, 2021, <https://www.dw.com/en/namibias-chief-negotiator-says-he-expects-deal-with-germany-to-be-signed/a-57773718>.

39 Ibid.

40 Talmon, Stefan. “Reconciliation without Reparation? The German-Namibian Joint Declaration on ‘Our Colonial Past.’” *German Practice in International Law*. 2023.

so it had acquitted itself of any responsibility to give special status to the Ovaherero and the Nama.⁴¹

One month after the conclusion of negotiations, the National Assembly opened debates on the document, although they were soon suspended due to a Covid-19 outbreak in summer 2021.⁴² Discussions resumed in September 2021⁴³ and continued for several months, although Parliament never voted on the Joint Declaration.⁴⁴ Follow-up conversations were held in Windhoek in March 2022 and in Berlin in November 2022, to “address remaining questions regarding interpretation in an addendum to the draft Joint Declaration.”⁴⁵ Yet those questions had still not been resolved, or even publicly disclosed, as of the first months of 2024.⁴⁶ Nor has the text of any “addendum” been announced.

Before the November 2022 follow-up negotiations, 250 Chiefs of the Ovaherero, Nama, Damara, and San convened with then-Namibian Vice President Nangolo Mbumba (then the point-person in the government’s negotiation strategy, and now the country’s president) to discuss the JD.⁴⁷ His office reported that a majority of those present at the forum were in favor of continuing dialogues on the agreement, provid-

ing confirmation, in the government’s view, that the Declaration was at least in principle acceptable to the affected communities.⁴⁸

In that same year, however, the German government announced that it viewed negotiations on the Joint Declaration as “finalized,”⁴⁹ even as “talks about specific modalities of its implementation are continuing.”⁵⁰ Germany has not altered its position that it will negotiate only with the Namibian government on “equal footing,”⁵¹ and not with the Ovaherero and Nama communities directly. In late 2022, the German government indicated that it had no plans to submit the JD to a vote in the Bundestag, because under German law it did not require ratification.⁵²

As of May 2024, the draft Joint Declaration still has not been signed by either government. There continues to be strong opposition to the agreement from Nama and Ovaherero communities, which “demanded a direct participation in the negotiations, as well as reparations.”⁵³ Further, some argue that the aid package pledged by the German government is insufficient. This dissent raises questions about the

41 Ibid.

42 Cai Nebe and Sakeus Iikela, “Namibia Debates German Genocide Deal – DW – 09/21/2021,” dw.com, September 21, 2021, <https://www.dw.com/en/namibia-debates-german-genocide-deal/a-59243358>.

43 Ibid.

44 Federal Republic of Germany, The Permanent Mission of the Federal Republic of Germany to the Office of the United Nations. Note No.: 159/2023. 2021, <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=37548>

45 Ibid.

46 Ibid.

47 Ibid.

48 Ibid.

49 Daniel Pelz, “Germany Rejects New Negotiations over Namibia Genocide – DW – 09/02/2022,” dw.com, February 9, 2022, <https://www.dw.com/en/germany-rejects-new-negotiations-over-namibia-genocide/a-63002889>.

50 Ibid.

51 Talmon, Stefan. “Reconciliation without Reparation? The German-Namibian Joint Declaration on ‘Our Colonial Past.’” *German Practice in International Law*. 2023. GPIL, 2023

52 Daniel Pelz, “Germany Rejects New Negotiations over Namibia Genocide – DW – 09/02/2022,” dw.com, February 9, 2022.

53 Kate Connolly, “UN Representatives Criticise Germany over Reparations for Colonial Crimes in Namibia,” *The Guardian*, April 28, 2023, <https://www.theguardian.com/global-development/2023/apr/28/un-representatives-criticise-germany-over-reparations-for-colonial-crimes-in-namibia>.

Declaration's prospects for implementation, as well as its long-term implications.

Analysis of the Joint Declaration

While the Declaration importantly acknowledges Germany's moral responsibility and contains an official expression of apology, the affected communities in Namibia claim that it has several shortcomings, including:

- the hedging of the recognition of the atrocities as "genocide" under the legal definition in the UN Convention;
- their exclusion from decision-making, particularly regarding the negotiation of the JD itself;
- what they see as the disproportion between the amounts pledged for development assistance and the immense crimes of 1904-08; and
- the lack of specific recognition of the gender-based violence and exploitation experienced by women and girls during the Genocide, especially in concentration camps.

Acknowledgment of the Genocide:

The systematic annihilation of tens of thousands of Ovaherero and Nama, including through deliberate starvation and forced labor, unequivocally constitutes Genocide within the standards set by the 1948 Convention, whenever it occurred. The German argument that the Convention was not in effect at the time is what we characterize elsewhere in the report as an artful dodge. Unequivocally recognizing the Genocide as such, without qualification, is important for upholding international law, acknowledging the full gravity of the crimes, and providing a foundation for restorative justice.

The Apology and Its Acceptance:

Germany apologized for the Genocide and accepted "moral, historical and political" responsibility. It is notable that the word "legal" is absent. And the Namibian government's acceptance of the apology on behalf of the affected communities is not seen as legitimate by many in those communities themselves, who insist that an apology is owed directly to them.⁵⁴ Moreover, the apology to "the descendants of the victims" is considered by some as not acknowledging the harm suffered by the affected communities as a whole, including in particular the women and children who were murdered and abused. The Joint Declaration has also been criticized for effectively excluding members of Nama and Ovaherero diasporas in Botswana, Angola, and South Africa, which exist today as a direct result of the forced displacement during the Genocide.

Development Assistance:

The proposed reconstruction and development support program has been criticized as inadequate and disproportionate to the scale and impact of the Genocide on the Ovaherero and the Nama, and for the absence of the word "reparations."

Moreover, the development projects outlined in the JD are seen by some as not clearly aligned with the needs of the affected communities. Ovaherero and Nama people argue that clearer commitments are needed for the restoration of ancestral lands and the repatriation of artifacts and human remains. They argue that cash grants are not optimal in the long term, because they do not address the root causes of marginalization and dispossession, or the socioeconomic inequities that will persist even after the aid ends.⁵⁵

54 Nguherimo, Jephtha. "SAIS International Human Rights Law Clinic Fieldnotes." By the 2024 class of Johns Hopkins SAIS International Human Rights Law Clinic. January 2024.

55 Hishoono, Naita. "SAIS International Human Rights Law Clinic Fieldnotes." By the 2024 class of Johns Hopkins SAIS International Human Rights Law Clinic. January 2024.

The Joint Declaration is without question a significant step in addressing a horrific period of colonial history. Germany's willingness to acknowledge and address its colonial past, particularly regarding Namibia, is notable. Germany has taken more substantial steps than any other former colonial power, and Namibia has demonstrated a deep commitment to engage in finding a future-looking resolution. The level of moral and political responsibility assumed, albeit not a full confession to past crimes, sets an important example that other former colonizers will likely face pressure to follow.

However, the Joint Declaration is not the end of the road for Germany and Namibia. The next steps will be crucial in determining the success of this agreement. Further negotiations will almost certainly be needed to iron out the details of implementation. This could take the form of an annex or protocol to the existing Joint Declaration, a revision based on the agreed

text, or even an entirely new agreement. Although the Germans had previously rejected the idea of a completely new agreement, recent statements, such as President Frank-Walter Steinmeier's eulogy at the funeral of former President Geingob, suggest that this option may now be on the table.⁵⁶

Regardless of the specific form that future negotiations take, it is clear that both Germany and Namibia will need to continue engaging in open, honest dialogue to ensure that reconciliation and development efforts meaningfully benefit those most harmed by the legacy of colonialism.

As President Steinmeier expressed, "Reconciliation is not about closing the past; it is about taking responsibility for our past – and it is a commitment to a better future together."⁵⁷ The international community will be watching closely to see how this process unfolds and whether it can serve as a model for other colonial powers seeking to address their own histories.



The class at the Namibian University of Science and Technology, with the Paramount Chief of the Ovaherero, Dr. Mujinde Katijua, and two members of his team, Nandiasora Mazeingo and Festus Muundjua

56 Steinmeier, Frank-Walter. "Funeral of H.E. Dr. Hage G. Geingob, President of the Republic of Namibia." Speech, Windhoek, Namibia, February 24, 2024. Bundespräsident. Accessed April 30, 2024. <https://www.bundespraesident.de/Shared-Docs/Reden/EN/Frank-Walter-Steinmeier/Reden/2024/240224-funeral-Hage-Geingob-Namibia.html>.

57 Ibid.

Challenges and Responses to the Joint Declaration

In the wake of the German and Namibian governments announcement of the Joint Declaration in 2021, many groups in Namibia, particularly among the Nama and Ovaherero, vocally opposed both the agreement and the process by which it was reached. Reactions to the JD also came from within Germany and from the international community. Perhaps the most significant challenge, however, is the lawsuit filed by Bernardus Swartbooi, a member of the National Assembly, along with the Ovaherero Traditional Authority, the Nama Traditional Leaders Association, and the Landless People's Movement, against officials of the Namibian government, alleging that the JD is illegal under Namibian domestic law, and is inconsistent with international law as well.

Ovaherero Traditional Authority and Civil Society

Within the OTA, two separate factions recognize different Paramount Chiefs, Mutjinde Katjiua and Hoze Riruako. Both, however, have called for the government to work more closely with the affected communities in reaching an agreement with Germany, and have criticized the Namibian authorities for having failed to do so. Riruako concedes that substantial government involvement in the JD was inevitable and that Ovaherero representatives must work with the government, but that they must be more deeply engaged in the ongoing process. Katjiua has been more critical, accusing the government of having failed to fulfill its affirmative obligation to the Ovaherero by excluding them from significant inclusion in the negotiations. His view, in line with the 2006 resolution of the National Assembly, is that the discus-

sions over any agreement should be directly between Germany and affected community representatives, with the Namibian government playing the role of facilitator.

Katjiua and many of his followers have also criticized the JD for failing to address what they see as a critical issue: the ability to return to traditional lands and to access sacred sites. This faction of the OTA has also maintained that it is imperative to use the word “reparations” in ongoing conversations, since genocide is a legal concept with reparations as what they claim is a broadly accepted remedy.

Ovaherero civil society organizations have also reacted to the JD. The OvaHerero People's Memorial and Reconstruction Foundation has called for the agreement to be revisited to give a more substantial role to the affected communities, including Nama and Ovaherero living outside of Namibia. The Foundation takes the position that full restorative justice must include a full and unambiguous apology, reparations for the loss of land and property, restoration of artifacts and human remains, funding for Ovaherero in other countries to return if they so choose, and economic assistance for members of affected communities seeking to recover their land. It also espouses the importance of including the affected groups in negotiations, and to dedicate compensation from Germany to support those groups, which would decide how to use them.¹

The Ovaherero Genocide Foundation has also criticized the JD, saying that the process was structurally flawed, and that renegotiation would be insufficient: the process must restart with the affected communities able to negotiate in their own name. Like many in

1 “7 Principles of Restorative Justice,” OvaHerero People's Memorial and Reconstruction Foundation, n.d. <https://opmrf.org/restorative-justice/>

the OTA, the Foundation argues that reparations must take the place of development aid, as the payment of reparations is internationally recognized as the proper atonement for genocide.²

Nama Traditional Leaders Association

The position of the NTLA is essentially in line with that of the Ovaherero organizations. They argue that it is not sufficient for Nama leadership to negotiate with the Namibian government, and then to have the government talk with Germany: the Nama insist on having their own seat at the negotiating table. They demand that to move forward with restorative justice and reparations, Germany must offer in-person apologies to Nama leaders and elders, marking the respect that the NTLA feels has been lacking thus far. In-country interviews reflect that while the NTLA considers financial compensation to be important, the most critical objective is justice more broadly, which they do not believe the current JD accomplishes. Their emphasis on reparations goes beyond money: it includes the need to address land taken from the Nama and the cultural losses to brethren who live outside of Namibia as a result of the Genocide. Finally, the NTLA agrees with the views of others that it is critical for the JD to refer to the events of 1904-1908 as Genocide, without qualifiers. Like the OTA, the NTLA views Germany as under a legal obligation, not merely a moral one, to make amends.

Damara Leadership

The primary objection posed to the JD by Damara leaders is their exclusion, along with the San, as recognized victims of the Genocide, even absent the express extermination orders issued by the German forces against the Ovaherero and Nama. Damara communities too were displaced to Botswana and

South Africa, and they became disconnected from their heritage and language. Many died.

In-country interviewees recounted that, according to oral tradition and written records, Damara and San were also taken to Shark Island and other concentration camps, making them victims of the 1904-08 Genocide, not “collateral damage.” This view is supported by the fact that San and Damara skulls are among the human remains returned to Namibia in recent times. Yet, despite serious reservations about the JD, some Damara leaders have remained actively involved in the negotiating process. Like the Nama and Ovaherero representatives, Damara leadership too call for person-to-person reconciliation, with apologies not just to the Nama and Ovaherero, but also to San and Damara elders. They emphasize that a sincere apology and full reconciliation must take place before moving forward with negotiations on reparations, which should be directed toward helping all affected communities, including the Damara and the San. Although they have opposed the Namibian government in the creation of the JD, they have not joined the lawsuit initiated by the Ovaherero and Nama leadership, which do not recognize the Damara and San as victims of the Genocide.

Bernardus Swartbooi v. Speaker of the National Assembly, et al.

On January 18, 2023, a lawsuit was filed against the government in the High Court of Namibia by Patrick Kauta, a lawyer representing Bernardus Swartbooi, a Member of Parliament, as well as the OTA, the NTLA, and various other organizations. In the lawsuit’s “founding affidavit,” Swartbooi argues that the JD violates the Namibian Constitution and the 2006 Motion on Genocide Against Namibian People. Swartbooi is the leader of the Landless People’s Movement, an opposition party that advocates land reform and restorative justice.

2 Nandi Mazeingo, “Mazeingo paints Germany’s decision as ‘racist,’” Ovaherero Genocide Foundation, September 6, 2022. <https://ogfnamibia.org/wp-content/uploads/2023/05/OGF-dismisses-the-Namibia-German-joint-agreement-and-its-format-as-‘racist.pdf>

In a speech before the National Assembly during debate on the agreement, Swartbooi claimed that the negotiations were intended to benefit the German and Namibian governments, rather than to seek justice. He stated that the JD is inconsistent with United Nations instruments, including the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of Racial Discrimination (CERD), and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).³

The plaintiffs allege an illegal lack of transparency in the negotiations, specifically stemming from the Executive's appointment of a special envoy to conduct them. This, they say, amounts to a violation of the constitutional framework on the separation of powers.⁴

In their constitutional argument, the plaintiffs contend that the lack of parliamentary debate in the process of concluding the JD violated Article 63(2)(e), which reserves to the National Assembly the obligation "to agree to ... the ratification of international agreements." Since there was no opportunity for consideration of the JD, the National Assembly could not fulfil its duty under Article 63(2)(i) to "remain vigilant and vigorous for the purposes of ensuring that the scourges of apartheid, tribalism, and colonialism do not again manifest... and to protect and assist disadvantaged citizens of Namibia who have historically been the victims of these pathologies."⁵

The plaintiffs also make the political argument that in failing to mention reparations and instead emphasizing the "special relationship" between Germany and Namibia, the JD has prioritized the interests of the governments and German-speaking Namibians over those of the affected communities. They insist

that Germany sincerely and personally apologize to the leadership and elders of the Nama, Ovaherero, Damara, and San, before the conversation about financial compensation can begin.⁶

This lawsuit, which is currently pending, will likely end in the Supreme Court, which will rule definitively on the consistency of the JD – both process and product – with international and domestic law. The suit is being watched carefully by many in the international community, who see it as a trailblazing exercise that may well animate future restorative justice approaches.

The Namibian Government

The Namibian government has responded to criticisms of the JD by emphasizing the steps that it took to include the Traditional Authorities throughout the process of negotiation, providing opportunities for representatives of the affected communities to participate. Some members of those groups accepted the invitation and acted as advisers to the negotiating team.

The government insists that any discussions with Germany must be between two sovereign states, rather than one state and ethnic groups within the other. It is also of critical importance to the Namibian government, especially in light of the country's history, to stress all citizens are first and foremost Namibians. The late President Geingob frequently pointed out that the victory of nationalism over tribalism has played a pivotal role in Namibia's success since independence.

The government sees the JD, and in particular Germany's pledge of development aid, as an important

3 Bernardus Swartbooi, "Contribution to the National Assembly Debate On the Joint Declaration on the 1904-1905 Genocide between Germany and Namibia," Parliament of Namibia, September 29, 2021. <https://www.parliament.na/wp-content/uploads/2021/09/Genocide-Swaartbooi.pdf>

4 Bernardus Swartbooi, Swartbooi et al v The Speaker of the National Assembly et al, Founding Affidavit, January 18, 2023.

5 Ibid.

6 Ibid.

acknowledgement of the Genocide, and maintains that although the JD indicates that those funds should be “dedicated to the reconstruction and development support program for the benefit of the descendants of the particularly affected communities,” the government, and not the communities themselves, should determine precisely how and where the money is to be used. The bottom line for the government is that the funds are pledged by Germany to Namibia, not to the Nama and Ovaherero communities alone, and that decisions in Windhoek on how to apply it will be made in a manner consistent with the commitment to “One Namibia.”

The Namibian government also views the position of the NTLA and OTA as unrealistic and divisive. This includes the insistence on the word “reparations,” to which Germany will not agree, as well as the demand for compensation in amounts that, in the eyes of the government, are not within the realm of realistic possibility.

The German Government and Opposition

Germany too has maintained that any agreement to be negotiated with Namibia must be a bilateral state-to-state undertaking. Thus, it is up to the Namibian government to decide whom to include on its negotiating team, and those individuals would be at the table as representatives of Namibia, not of any segment of it. In light of criticisms of the JD, the German government has confirmed its willingness to revisit some of its provisions but has so far declined to restart the process from scratch.

The Alternative für Deutschland (AfD), a far-right political party in Germany, has been harshly critical of the very concept of the JD. Indeed, in 2019, the AfD claimed that the German government’s narrative has failed to reflect what it described as “profitable achievements” of colonialism.⁷ The party dismiss-

es calls for reparations, contending that development aid demonstrates that Germany has already addressed its responsibility to its former colonies. And specifically with respect to the case of Namibia, the AfD simply denies that there was a “systematic or deliberate genocide,” instead conceding only that there may have been “disproportionate hardships and cruelties” imposed upon the Nama and Ovaherero between 1904 and 1908.⁸

Given the signs that support for the AfD is growing in Germany, and that the mainstream parties may soon need to discuss compromises with it, there is substantial concern in Namibia that should the AfD gain greater power, it would abandon the program of restorative justice entirely. The situation is being watched carefully, and nervously, in Windhoek.

UN Special Rapporteurs

In early 2023, seven UN Special Rapporteurs (on the promotion of truth, justice, reparation and guarantees of non-recurrence; in the field of cultural rights; on extrajudicial, summary or arbitrary executions; on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; on the rights of indigenous peoples; on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; and on violence against women and girls, its causes and consequences) issued a communication to the German and Namibian governments expressing concern over the JD. They pointed specifically to the lack of Nama and Ovaherero representation in the negotiations, and the qualification attached to the word “genocide.” They also criticized the characterization of the financial pledge as development aid rather than reparations, the lack of a commitment to memorialize the Genocide in Germany, and the failure to specifically recognize the

7 “Die deutsche Kolonialzeit kulturpolitisch differenziert aufarbeiten,” Deutscher Bundestag, December 11, 2019. <https://dserver.bundestag.de/btd/19/157/1915784.pdf>

8 Ibid.

role of gender-based violence. The Special Rapporteurs also expressed the view that human rights treaties concluded since 1945, including the Genocide Convention in particular, reflect customary law that predated their adoption.⁹

The two governments were invited to respond, and both did so in May and June 2023. Germany attempted to reassure the Special Rapporteurs that the two parties to the JD were continuing to work together to address outstanding issues. It noted that the majority of over 250 chiefs of the Nama, Ovaherero, Damara, and San, meeting in November 2022, supported continuing the process. The German government reiterated its stance that while the participation of affected groups is extremely important, it is the responsibility of the Namibian side to facilitate their inclusion

in what must remain country-to-country negotiations. Germany's response observed that NTLA and OTA representatives had declined invitations from the Namibian government to participate and argued that the efforts of its Namibian counterparts met the requirements of the human rights instruments cited by the Special Rapporteurs. Finally, Germany made the legal argument that the 1948 Genocide Convention does not apply retroactively, and therefore creates no legal obligation relating to reparations for anything that happened in colonial times.¹⁰

The Namibian government also responded to the Special Rapporteurs. It reported that it had invited many individuals from the Nama and Ovaherero Traditional Authorities to join the Technical Committee as representatives of the affected communities,



SAIS Group meeting at the Parliament of Namibia with the Speaker of the National Assembly, Hon. Prof. Peter Hitjitevi Katjavivi, and Assistant to the Speaker, Mr. Shaandre Finnies

9 “Mandates of the Special Rapporteur...” Office of the United Nations High Commissioner for Human Rights, February 23, 2023. <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27875#:~:text=The%20Joint%20Declaration%20recognizes%20%22Germany%27s,accepts%20%22a%20moral%2C%20historical%20and>

10 Permanent Mission of the Federal Republic of Germany to the Office of the UN and to other International Organizations in Geneva, “Note Verbale,” Government of Germany, June 1, 2023. <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=37548>

but most of them chose to decline. The Namibian response reiterated a willingness to continue to engage with any traditional leaders who desire to participate in the process. It pointed out the specific provisions in the JD referring to gender-based violence, and described efforts already taken in Namibia to memorialize the Genocide.¹¹

The European Center for Constitutional and Human Rights

The European Center for Constitutional and Human Rights issued a statement in the wake of the JD, concluding that the insufficient representation of the Nama, Ovaherero, Damara, and San in the negotiations precluded effective restorative justice. It said that the lack of direct participation of impacted groups was contrary to the ICCPR, CERD, and UNDRIP, as well as the UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.⁹ The statement criticized the lack of the use of the term “reparations” in the JD and noted that any apology must be viewed as genuine by affected communities. The ECCHR also called for the use of funds provided as part of the JD for the benefit of all members of the affected communities, including Nama and Ovaherero living outside of Namibia.¹²

11 Office of the Deputy Prime Minister and Minister of International Relations and Cooperation, “Joint Communication from Special Procedures,” Government of Namibia, May 30, 2023.

12 Sarah Imani, Karina Theurer, and Wolfgang Kaleck, “The ‘reconciliation agreement’--A lost opportunity,” European Center for Constitutional and Human Rights, June 2021. https://www.ecchr.eu/fileadmin/Hintergrundberichte/ECCHR_GER_NAM_Statement.pdf



Photo by Grant Durr, Unsplash

The Agreement Seen Through an International Law Lens

Because the Joint Declaration is a bilateral agreement between two countries and concerns a grave violation of human rights principles, international law is a critical lens through which this issue must be examined. To accomplish such an examination, there are important questions that must be answered regarding the applicability of the law, intertemporality, and the role of international and regional institutions in the current legal regime.

Addressing the first two of these, three specific queries emerge regarding the Namibian case: whether what occurred in Namibia was a genocide; if so, whether genocide (under the legal definition) was a crime under international law at the time; and, therefore, whether what occurred in Namibia was illegal. These questions can be answered through consideration and analysis of the sources of international law, both treaty and customary. The analysis begins with the most relevant treaty, the Genocide Convention, then reviews German treaty obligations, and concludes with a consideration of customary international law as it stood at the time.

The Genocide Convention (1948) and the International Court of Justice (ICJ)

The most obviously relevant document to the Namibian case is the Genocide Convention, opened for signature in 1948 following the Holocaust, and entering into force in 1951.¹ To reiterate its key elements: states are legally obligated to refrain from committing genocide as well as to criminalize it in their domestic legal systems.² Both Germany and Namibia are parties to the Convention, with Germany acceding in 1954 and Namibia in 1994.³

The Genocide Convention defines genocide as:

*any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.*⁴

Some representatives of the affected communities have expressed a desire to institute a complaint against Germany in the ICJ, the judicial arm of the United Nations, over the crimes committed during the Genocide. The ICJ has two roles: it rules on legal disputes submitted to it by states in accordance with

1 United Nations. "Convention on the Prevention and Punishment of the Crime of Genocide." United Nations, December 9, 1948. https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf; For more information on the Convention, see Chapter One: Background)

2 Ibid.

3 "United Nations Treaty Collection." treaties.un.org, n.d. https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en.

4 "Convention on the Prevention and Punishment of the Crime of Genocide."

its governing Statute, and it provides advisory opinions on legal questions put to it by authorized UN organs and agencies.⁵ The Court has jurisdiction over contentious cases involving: a) “the interpretation of a treaty; b) any question of international law; c) the existence of any fact which, if established would constitute a breach of an international obligation; and d) the nature or extent of the reparation to be made for the breach of an international obligation.”⁶ The Court’s jurisdiction in contentious cases requires the consent, express or implied, of the respondent state.⁷

Not every dispute can be submitted to the ICJ.⁸ As the Genocide Convention was not in effect at the time of the events in Namibia, its compromissory clause cannot be used to establish jurisdiction,⁹ and so to overcome the jurisdictional bar Germany would have to consent, which it can safely be assumed it would not do.

The Question of Intertemporal Law and the Genocide Convention

A major point of concern in the Joint Declaration remains the use of the term “genocide.” Rather than referring to the events of 1904-1908 simply as “genocide” without qualification, the German government instead opted to describe the attempted extermination of the Ovaherero and Nama as “events that, from

today’s perspective, would be called genocide.”¹⁰ This raises significant questions regarding legal responsibility under the current international framework. One could logically infer that Germany’s insistence on this language was an effort to avoid acceptance of legal (as opposed, perhaps, to moral) liability for the Genocide.

However, the Vienna Convention on the Law of Treaties, which came into effect in 1969 but is generally understood as codifying existing customary international law, provides that treaty law is generally non-retroactive:

*Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.*¹¹

The Genocide Convention does not contain any provision that would invite retroactive interpretation. The International Court of Justice confirmed, in a 2015 decision, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, that the provisions of the Convention did not impose obligations on states prior to the dates of their respective ratifications.¹² Therefore, the genocide document would not apply to those who perpetrated

5 “How the Court Works.” How the Court Works | INTERNATIONAL COURT OF JUSTICE. Accessed April 21, 2024. <https://www.icj-cij.org/how-the-court-works>.

6 “Research Guides: International Court of Justice: The International Court of Justice (ICJ) Overview,” The International Court of Justice (ICJ) Overview - International Court of Justice - Research Guides at Columbia Law School, accessed April 22, 2024, <https://guides.law.columbia.edu/c.php?g=1221809&p=9252453>.

7 “Basis of the Court’s Jurisdiction.” Basis of the Court’s jurisdiction | INTERNATIONAL COURT OF JUSTICE. Accessed April 22, 2024. <https://www.icj-cij.org/basis-of-jurisdiction>.

8 The International Court of Justice’s Balancing Act - Carnegie Endowment for International Peace, accessed April 22, 2024, <https://carnegieendowment.org/2024/01/26/international-court-of-justice-s-balancing-act-pub-91490>.

9 “Basis of the Court’s Jurisdiction,” Basis of the Court’s jurisdiction | INTERNATIONAL COURT OF JUSTICE, accessed April 22, 2024, <https://www.icj-cij.org/basis-of-jurisdiction>.

10 “Joint Declaration by the Federal Republic of Germany and the Republic of Namibia,” 2021, <https://www.parliament.na/wp-content/uploads/2021/09/Joint-Declaration-Documents-Genocide-rt.pdf>

11 “Vienna Convention on the Law of Treaties.” opened for signature May 23, 1969, United Nations Treaty Series no. 1155 (1980): 331-362. https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

12 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*)

the atrocities, notwithstanding the fact that none of the individual actors are currently alive to stand trial in any event. Of course, the word “genocide” was not coined until the end of World War II by Raphael Lemkin, a Polish lawyer who invented the term to describe the Nazis’ attempted extermination of such groups as Jews and Roma.¹³

This then raises the question of whether what took place in Namibia in 1904 legally constituted genocide. To make this determination, one can look to the plain text of international legal instruments, public acknowledgment of other genocides that took place before the ratification of the 1948 Convention, and later analysis of the events.

United Nations General Assembly Resolution 96(1), adopted in December 1946—two years before the Genocide Convention was approved—begins with the words, “Genocide is a denial of the right of existence of entire human groups,” “affirms that genocide is a crime under international law which the civilized world condemns,” and acknowledges that “many instances of such crimes of genocide *have occurred* when racial, religious, political and other groups have been destroyed, entirely or in part.”¹⁴ The text as written makes clear that the international community considered genocide to be a crime under international law even before the adoption of the Convention. Given these facts, the non-retroactive nature of the Genocide Convention itself may not matter: since the German colonial government attempted the physical extermination of the Nama and Ovaherero communities, it thus committed genocide. Resolution 96(1) also directed UN member states, “to enact the necessary

legislation for the prevention and punishment of this crime,” acknowledging the existence of pre-existing crimes of that character, and providing the means through which individuals may be held to account for committing it.¹⁵

The Convention itself acknowledged the fact that genocides took place before its adoption. Its preamble, for example, recognizes that “at all periods of history genocide *has* inflicted great losses on humanity.” Therefore, although the ICJ has recognized that the Convention itself is not retroactive, that does not mean that there were no earlier instances of genocide. And the German government itself has stated that “the Convention on the Prevention and Punishment of the Crime of Genocide...points to the historical dimension of the term of genocide... For this reason, in a historical-political public debate, the definition of the Genocide Convention can serve as a standard for a non-legal assessment of a historical event as genocide.”¹⁶

Public statements by states and international institutions regarding other events of the early 20th century also indicate that the international community understands that the crime of genocide existed before the 1948 Convention. For example, the Holocaust is universally considered to have been a genocide, although obviously it antedated the Convention. In 2007, the UN General Assembly even adopted a resolution via consensus stating that denying the Holocaust is “tantamount to approval of genocide in all its forms.”¹⁷ The ICJ acknowledged that “[t]he Roman persecution of the Christians, the Turkish massacres of Armenians, the extermination of millions of Jews

13 “United Nations Office on Genocide Prevention and the Responsibility to Protect.” United Nations, 2024. <https://www.un.org/en/genocideprevention/genocide.shtml>.

14 United Nations General Assembly. “The Crime of Genocide.” Fifty-Fifth Session. 1946. A/RES/96(1). <https://documents.un.org/doc/resolution/gen/nr0/033/47/pdf/nr003347.pdf?token=ENhBOOwUdMyCDB41wW&fe=true> (emphasis added).

15 Ibid.

16 Talmon, Stefan. “The Genocide in Namibia: Genocide in a Historical-Political or in a Legal Sense?” GPIL - German Practice in International Law, September 23, 2017. <https://gpil.jura.uni-bonn.de/2017/09/genocide-namibia-genocide-historical-political-legal-sense/>

17 United Nations Department of Public Information. “General Assembly adopts resolution condemning any denial of holocaust.” 2007. <https://press.un.org/en/2007/ga10569.doc.htm>.

and Poles by the Nazis are outstanding examples of the crime of genocide.”¹⁸ Even the German government itself has accepted that the perpetration of genocides occurred prior to its explicit denunciation in 1948. According to Kenneth F. McCallion and Robert Murtfeld,

*Germany has also conceded the retroactive application of this Convention to events occurring prior to its enactment, since, for example, it entered into a comprehensive settlement agreement with victims of the Nazi Holocaust. The same applies for Germany’s official condemnation of Turkey for the genocide of the Armenian people during the period of the Ottoman Empire.*¹⁹

Based on the legal definition provided in the 1948 Convention, therefore, the actions of the German troops in Namibia between 1904 and 1908 can be definitively described as Genocide. The orders by General von Trotha, were clear and unequivocal: “Within the German borders, every male Herero, armed or unarmed [...] will be shot to death. I will no longer take in women or children but will drive them back to their people or have them fired at.”²⁰

According to the Convention, the crime of genocide has two elements that must be proven: the act of killing or causing harm to members of a particular ethnic group, and the intent “to destroy” that group thereby, “in whole or in part.”²¹ Von Trotha’s

orders, especially in light of subsequent actions by German colonial forces under his command, amply satisfy both of these elements. Von Trotha openly announced that his intention was to eliminate all Ovaherero and Nama people based on their membership in the two groups. And, in addition to the attempted physical elimination of the Ovaherero and Nama peoples, the German actions in carrying out those orders illustrate an effort not only to kill them, but also to destroy all vestiges of their presence in the territory.

As explained by the International Work Group for Indigenous Affairs:

*The genocide against the Herero and Nama had several phases. The first of these involved massacres of both combatants and non-combatants. The second phase consisted of the establishment of a cordon in the Omaheke region and hunting down and dispatching Herero refugees from the Battle of Omahakari. The third phase was the implementation of a scorched-earth policy aimed at destroying the livelihoods of the Herero and Nama; not only destroying homes, corrals, and sacred sites, but also capturing or destroying Herero and Nama cattle, goats and sheep and burning their crops.*²²

This systematic attempt to eliminate both peoples’ lives, cultures, and livelihoods easily satisfies the definition of genocide under the Convention.²³ Further, a

18 International Court of Justice. “Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.” May 28, 1951. <https://www.icj-cij.org/sites/default/files/case-related/12/11767.pdf>.

19 McCallion, Kenneth F., and Robert Murtfeld. “Germany’s Responsibility under International Law to Compensate the Ovaherero and Nama Peoples of Namibia for the 1904-1908 Genocide.” *Harvard International Law Journal*, n.d. <https://journals.law.harvard.edu/ilj/wp-content/uploads/sites/84/Murtfeld-McCallion-Reparations-2.pdf>.

20 Goda, Norman. “Crimes against Humanity and the Development of International Law.” *The National WWII Museum | New Orleans*, September 15, 2021. <https://www.nationalww2museum.org/war/articles/crimes-against-humanity-international-law>.

21 International Court of Justice. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, n.d. <https://www.icj-cij.org/case/118>.

22 The International Work Group for Indigenous Affairs. “Reconciliation between Germany and Namibia: Towards Reparation of the First Genocide of the 20th Century - IWGIA - International Work Group for Indigenous Affairs.” <https://www.iwgia.org/en/news/4538-reconciliation-between-germany-and-namibia-towards-reparation-of-the-first-genocide-of-the-20th-century.html#:~:text=The%20genocide%20against%20the%20Herero>.

23 The Genocide Convention, Art. II

report by UN Special Rapporteur Benjamin Whitaker in 1985, definitively concluded that the Namibian case and the crimes committed against the Ovaherero and Nama were genocide as a matter of law, removing any doubt as to the applicability of the term.²⁴

This analysis of the Genocide Convention alongside the German government's assertion that the classification of a past act as genocide is merely a "non-legal assessment of a historical event," suggests that the Convention is not the source of law applicable in this case.²⁵ Other sources must be considered to answer the question whether the Germans' actions in Namibia were legal at the time. Notably, however, the ICJ has recognized that the Convention "embodies principles that are part of general customary international law."²⁶ That means that all states must adhere to the "principle that genocide is a crime prohibited under international law" irrespective of the Convention, and to accept that "the prohibition of genocide is a peremptory norm of international law (or *jus cogens*) and consequently, no derogation from it is allowed."²⁷

The Hague Conventions (1899 and 1907)

The Hague Conventions of 1899 and 1907, the latter of which was signed and ratified by the German government at the very time the Genocide was being carried out in South West Africa, set out the rules governing the treatment of combatants and non-combatants during conflict. These Conventions, created in response to the increased brutality of war during the 19th century, are relevant for this analysis of the

events of 1904-1908. However, an earlier international conference convened in Berlin served as the blueprint for the Hague Conventions and demonstrates that the international community was thinking about grave violations of humanitarian law long before the German massacres of the Ovaherero and Nama in Namibia.

The Brussels Declaration of 1874, which had enormous influence on the Hague Conventions, was utilized in 1899 as a template for discussion.²⁸ The Brussels Conference, which culminated in the Declaration, set out norms for "the treatment of prisoners of war, the laws of belligerent occupation, and the treatment of civilians" among other items that would later be codified in the Hague Conventions.²⁹ The document outlined the proper conduct of soldiers regarding "military authority over hostile territory," elaborated on the identification of "belligerents combatants and non-combatants," established limits on "means of injuring the enemy," and regulated sieges and bombardments, spies, prisoners of war, the sick and wounded, taxes, *parlementaires* (persons "authorized by one of the belligerents to enter into communication with the other, and who advance bearing a white flag"), capitulations, and armistices.³⁰ Though the Brussels Conference laid the foundation for the Hague Conventions a few decades later, the document created at the Conference was never ratified, as the participating countries did not want to commit to any norms that would limit their ability to defend themselves or to wage war.³¹

24 United Nations Human Rights Commission SubCommission on Prevention of Discrimination and Protection of Minorities Excerpts from the UN Report on Genocide 1985 Paragraph 24 and the Armenian Genocide, n.d. <https://genocideeducation.org/wp-content/uploads/2014/08/UN-Report-on-Genocide-excerpts.pdf>.

25 Ibid.

26 United Nations. "United Nations Office on Genocide Prevention and the Responsibility to Protect." United Nations. <https://www.un.org/en/genocideprevention/genocide.shtml>.

27 "United Nations Office on Genocide Prevention and the Responsibility to Protect."

28 Dowdeswell, "The Brussels Peace Conference of 1874 and the Modern Laws of Belligerent Qualification," 814

29 Ibid, 806

30 Ibid.

31 Ibid.

The Hague Conventions of 1899 and 1907 were unlike any that had preceded them, as they resulted in seventeen treaties and three declarations rather than one single agreement.³² The reach of the treaties is extensive. The agreements included the necessary conditions for the opening of hostilities (*jus ad bellum*), the laws of war on land (*jus in bello*), the identification of belligerents, the rights of prisoners of war and the sick and wounded, lawful weaponry, authority over captured territory, etc), and the rights of neutral powers both on land and at sea, among other things.³³ Particularly notable is the enshrinement of the rights of prisoners of war into law, with 16 articles outlining their permissible treatment.³⁴ In general terms, the Hague Convention of 1907 stated that ‘the right of belligerents to adopt means of injuring the enemy is not unlimited,’ and sought to limit any weaponry determined to cause ‘unnecessary suffering.’³⁵

Among the multiple treaties signed at the two Hague Conventions, several provisions emerge as particularly relevant to the Namibia case. And Kenneth Lewis succinctly demonstrated that Germany violated the Hague Conventions:

*At a minimum, Germany, as a signatory to the 1899 Hague Convention, acknowledged and agreed that it should and would not use prisoners of war as slaves, starve prisoners of war, or confine prisoners of war absent an indispensable measure of safety. Consequently, by raping, starving, torturing, and enslaving the Herero and Nama people, Germany violated international law.*³⁶

While the content of the Hague Conventions explicitly prohibited the German atrocities in Namibia, other considerations make the definitive determination that the Genocide was a breach of treaty obligations more complicated. Of course, the Ovaherero and Nama peoples were not signatories to the Hague Conventions.³⁷ Yet under Article II of the “Laws and Customs of War on Land,” the contents of the treaty were said to be “only binding on the Contracting Powers, in case of war between two or more of them,” and “these provisions shall cease to be binding from the time when, in a war between Contracting Powers, a non-Contracting Power joins one of the belligerents.”

Treaty provisions to this or similar effect had been seen in other international humanitarian law instruments even prior to the Hague Conventions. The 1868 Declaration of St. Petersburg, one of the first treaties limiting the means of warfare, banned a particular kind of exploding bullet. But the document contained the clarification that the prohibition was restricted to conflicts between the signatories. The language “in time of war between civilized nations” and “in case of war among themselves,” throughout the Declaration ensured that, while the usage of these weapons was forbidden against “civilized” -- i.e., European -- countries, their deployment was not banned in colonial wars. The document further provided that its rules were “compulsory only upon the Contracting or Acceding Parties thereto in case of war between two or more of themselves; it is not applicable to non-Contracting Parties, or Parties who shall not have acceded to it.” This limitation, according to Robert Kolb and Momchil Milanov, was particularly desired by the British, who were heavily engaged in some-

32 Yale Law School Library, “The Laws of War”

33 Ibid.

34 Tileubergenov et al., “Political and Legal Defining the Regulations of War in the Hague Convention of 1907”; Hutchinson Unabridged, “Hague Convention, 1907.”; Yale Law School, “Laws and Customs of War on Land (Hague IV); October 18, 1907”

35 Carmola, “The Concept of Proportionality,” 99

36 Lewis, Kenneth. “The Namibian Holocaust: Genocide Ignored, History Repeated yet Reparations Denied.” Florida Journal of International Law 29, no. 0. <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1621&context=fjil>.

37 Ibid.

times violent colonization throughout the nineteenth century.³⁸

Even so, it is important to note that the applicability of legal texts governing conduct in wartime (*jus in bello*) may depend upon how the events of 1904-08 are framed by the viewer. In discussions in Namibia, some members of the affected communities refer to the events solely as Genocide, while others we spoke with place them in the context of a war of liberation in which the indigenous people were engaged in resistance against the German regime. Thus, provisions of the Hague Conventions concerning wartime acts are relevant only if one views the historic context as war, as opposed to an uprising against colonial occupation.

Nevertheless, while the Hague Conventions included the stipulations that they were binding only on their signatories, other provisions implied that their contents were declaratory of customary international law at the time and could therefore be said to be applicable to non-signatories as well. The so-called “Martens Clause,” in the preamble, for example, states:

*Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.*³⁹

Not only does this imply the extension of the Hague Convention protections to civilians wherever they might be, it also recognizes that this obligation is grounded in the “laws of humanity and the requirement of the public conscience.” This supports the view that the acts committed by Germany in Namibia were illegal under the law of nations applicable at the time. That the Hague Conventions articulated the law of armed conflict in the early 20th century was reiterated by the Nuremberg International Military Tribunal in 1946, which described that the Conventions as “declaratory of the laws and customs of war.”⁴⁰ As the International Red Cross put it, the Hague Conventions were “considered as embodying rules of customary international law. As such they were also binding on states which were not formally parties to them.”⁴¹

Furthermore, the Martens Clause’s preambular references to “laws of humanity” and “requirements of the public conscience,” imply the existence of a general principle barring crimes against humanity. And if such a concept was generally accepted at the time, it can reasonably be inferred that mass murder of indigenous groups by a colonial power would constitute a violation of the “laws of humanity” that most certainly would disturb “the public conscience.” But whether the Martens language may be read as this significant depends upon the legal force of treaty preambles.

The Vienna Convention on the Law of Treaties, at Article 31, suggests a lack of consensus. Nonetheless, Article 31 of that Convention suggests that treaty interpretation may rely on the preamble for a holistic textual analysis, since prefatory words often provide information on the treaty’s object and purpose.⁴² In the present case, even if it lacks binding force per se, the Hague Convention’s preamble lays

38 Kolb and Milanov, “The 1868 St Petersburg Declaration on Explosive Projectiles: A Reappraisal,” 520-1

39 The Avalon Project. “Laws of War : Laws and Customs of War on Land (Hague II); July 29, 1899,” 2019. https://avalon.law.yale.edu/19th_century/hague02.asp.

40 International Committee of the Red Cross. “Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.,” 2022. <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-ii-1899>.

41 BIPP Human Rights Unit, “Genocide Convention,” International Committee of the Red Cross, “Convention (II).”

42 “Vienna Convention on the Law of Treaties.”

out general principles of law that prohibited parties from committing crimes against humanity. Thus, the German colonial government, as a fully participating party, was bound by these principles in the preamble just as much as if they had appeared in the enumerated articles of the Convention.

The Berlin Conference of 1884-1885

The Berlin Conference, from 1884 to 1885, was the notorious conclave at which Western leaders carved up African territory to further their colonial ambitions (initiating the “Scramble for Africa”). However, along with dividing territory among the attendees, including Germany, the Conference also produced a legal agreement, the “General Act.” In it, the signatories committed to certain principles and rules to guide their colonization, and set out shared understandings on such matters as the status of major African rivers, banning the overland slave trade, and declaring the neutrality of the Congo basin.⁴³ Obviously, no African nation or representative was present at the Conference, and there was no discussion of the sovereignty of African peoples by the delegates. Nevertheless, the “General Act” contained stipulations that the German government violated during the Genocide.⁴⁴

Particularly relevant is Article 6: “All the Powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the

preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being.”⁴⁵ There can be no doubt that the murders of tens of thousands of Ovaherero and Nama by their German colonizers violated this binding commitment. The attempted elimination of the two communities, as well as their internment in camps and the destruction and theft of their land and livelihoods, were all manifestly inconsistent with a promise “to care for ... their moral and material well-being.” That the protection of indigenous populations was to be understood as codified into international law is further shown by the words closing the eighth session of the Conference:

*Gentlemen, after having surrounded freedom of commerce and navigation in the centre of Africa with guarantees, and after having shown your solicitude for the moral and material welfare of the populations which inhabit it, you are about to introduce rules into positive international law which are destined to remove all causes of disagreement and strife from international relations.*⁴⁶

The architects of the Berlin Conference intended to create binding international law: international law that was violated by the Germans in Namibia.

The Treaty of Protection between the Ovaherero and Germany

43 Shepperson, George. “The Centennial of the West African Conference of Berlin, 1884-1885.” *Phylon* (1960-) 46, no. 1 (1985): 37. <https://doi.org/10.2307/274944>; Matthew, Craven. “Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade.” *London Review of International Law* 3, no. 1 (2015): 31-59.

44 Gathara, Patrick. “Berlin 1884: Remembering the Conference That Divided Africa.” www.aljazeera.com, November 15, 2019. <https://www.aljazeera.com/opinions/2019/11/15/berlin-1884-remembering-the-conference-that-divided-africa>.

45 “General Act of the Conference at Berlin of the Plenipotentiaries of Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Italy, the Netherlands, Portugal, Russia, Spain, Sweden and Norway, Turkey and the United States Dealing with Africa (General Act of the Berlin Conference) - ‘the World and Japan’ Database,” n.d. <https://worldjpn.net/documents/texts/pw/18850226.T1E.html>.

46 Anderson, Rachel. “Redressing Colonial Genocide under International Law: The Hereros’ Cause of Action against Germany.” *California Law Review* 93, no. 4 (2005): 1155-89. https://www.jstor.org/stable/pdf/3481468.pdf?refreqid=fastly-default%3Ac8b6746b1b244f34647a50903d5534e8&ab_segments=&origin=&initiator=&acceptTC=1.

Aside from its binding multilateral treaties that created the obligations for the humane treatment of colonized populations and the limitation of brutality in conflict, Germany was also bound by a bilateral treaty signed with the Ovaherero. Although the intent of the Germans to adhere to its terms even as they signed it is questionable, an agreement, said to be based on mutual respect and protection, was in fact concluded between two sovereign political entities, and was later violated by the Germans.⁴⁷

The treaty between Germany and Paramount Chief Maherero was signed on October 21, 1885, two decades prior to the Genocide. On their part, the Ovaherero promised, among other things, “to guarantee the safety of life and possessions of Germans and their equals in their territories, to guarantee German citizens and their equals unlimited right to travel, to live, to trade, and to work in their territories.... (and) to contribute to the maintenance of peace in the Protectorate.” The Germans, in return, undertook “to guarantee protection to Paramount Chief Maherero and his people...to see to it that white residents of Hereroland respect the laws, customs and usages of the Natives, and pay the hitherto customary taxes, and do nothing in violation of German criminal law.... [and] respect the treaties concluded between the Herero Tribes and other nations or their citizens prior to this treaty.”⁴⁸

This agreement was a source of international law that created binding obligations for the parties. And it was yet another undertaking that the Germans violated when they determined to eliminate the Ovaherero. In signing a treaty with the Ovaherero, Germany acknowledged their legal personality, and at least

implicitly accepted that both parties were subjects of both conventional and customary international law.⁴⁹

Customary International Law

To apply it to the Namibian case, the sources and understanding of customary international law during the time of the Genocide must be considered, specifically regarding humanitarian law and the rights of indigenous peoples. While modern international law lacks explicit recognition of the rights of formerly colonized populations—especially in light of the non-retroactivity of human rights conventions—some of the earliest jurists acknowledged that indigenous peoples had legal rights. For example, Francisco de Vitoria, a Spanish theorist whom some scholars consider one of the fathers of international law, posited that indigenous peoples possessed international legal personality in equal measure with their colonizers.⁵⁰ While this study does not address the legal status of colonization itself, the philosophical origins of the notion of indigenous groups’ international legal personality has significance for arguments put forth by the affected communities of Namibia. Surely Germany did not treat the Nama and Ovaherero peoples as if they were international legal persons when they dispossessed them of land throughout the colonial period, let alone when they began murdering them in 1904.

Customary international law around the turn of the century was drawn from two sources: natural law and states’ opinions. Natural law, which “combined law, ethics, and morality,” determined that “all rules of

47 Miller, Robert J., and Olivia Stitz. “The International Law of Colonialism in East Africa: Germany, England, and the Doctrine of Discovery.” *Duke Journal of Comparative and International Law* 32 (2021): 1–59. <https://doi.org/10.2139/ssrn.3798893>.

48 Rivera, Amy M. “Did the German Actions in the Herero Rebellion of 1904–1908 Constitute Genocide??” U.S. Army Command and General Staff College, 2012. <https://apps.dtic.mil/sti/tr/pdf/ADA563131.pdf>.

49 Columbia River Inter-Tribal Fish Commission. “Treaty: Promises between Governments,” n.d. <https://critfc.org/member-tribes-overview/treaty-q-a/>.

50 G.C. Marks, “Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Cases,” *Australian Year Book of International Law*, no. 13 (1990-1991): 1-52.

the law of nations [were] legally binding.”⁵¹ Although invocation of natural law declined with the rise of positivism, it remained a factor in determining the content of customary international law at the time of the Genocide. Natural law is the source on which “jus cogens” norms are based: norms that “constitute(s) the ‘ethically minimum’ content of international law” and from which no derogation is permitted.⁵²

The other source, states’ opinions, is explained by the writings of several legal theorists of the time, such as John Austin, a 19th century British legal philosopher, who argued that international law is, “imposed upon nations or sovereigns by opinions current amongst nations.”⁵³ Thomas Baty, another English writer, proposed a similar theory, that the basis and legitimacy of international law was found in the opinions of nations.⁵⁴ These two sources of customary law are important in interpreting the legality of the Germans’ actions and of the Genocide itself. And both of them are consistent with the definition of customary international law set out in Article 36(1)(b) of the Statute of the ICJ, and the Court’s landmark decision in *The North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*.⁵⁵

As has been shown, several of the relevant treaties may not be of unquestionable legal relevance, whether because they were not ratified (the Brussels Convention) or because of the textual limitation of their protection to signatories (the Hague Conventions). However, utilizing the natural law and states’ opinions approaches to customary international law,

all them can be interpreted to be declaratory of the law at the time and thus applicable to all, including the Germans in Namibia. The Martens Clause of the 1899 Hague Convention, for example, contains the notion that all belligerents are protected under the “laws of humanity and the requirement of the public conscience.”⁵⁶ These two concepts fit neatly into both understandings of customary international law. The words “laws of humanity” imply universal applicability, regardless of membership in the Convention. And the “requirement of the public conscience” suggests that the values included in the Convention were reflective of the collective views of the states involved. As such, consideration of the Hague Conventions through the lens of 19th century customary international law refutes the argument that it did not apply to conflicts with non-signatory parties, like the Overherero and the Nama.

The Brussels Declaration is indicative of customary international law by similar logic. Fedor F. Martens, the Russian jurist and diplomat who drafted the Declaration, explained the intent of states in accepting it: “to enter into no new obligations, no new commitments of any kind with regard to general principles.” He thus in effect recognized the document as merely reflecting already existing principles by which war was governed, or customary law reflected in states’ opinions. The basis of the Declaration in natural law was also illustrated by Martens, who described the Conference as “in a sense the natural development of a thought, which has long been recognized as just.”⁵⁷ The Brussels Declaration too is therefore properly seen to be declarative of customary international

51 Zhang, Yue. “Customary International Law and the Rule against Taking Cultural Property as Spoils of War.” *Chinese Journal of International Law* 17, no. 4 (December 1, 2018): 943–89. <https://doi.org/10.1093/chinesejil/jmy030>.

52 Ohlin, Jens David. “In Praise of Jus Cogens’ Conceptual Incoherence.” *McGill Law Journal*, 2018. <https://lawjournal.mcgill.ca/article/in-praise-of-jus-cogens-conceptual-incoherence/>.

53 Zhang

54 Ibid

55 (1969) ICJ Rep 3.

56 Ticehurst, Rupert. “The Martens Clause and the Laws of Armed Conflict - ICRC.” *International Review of the Red Cross*, April 30, 1997. <https://www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm>.

57 Zhang

law, and thus applicable to the Namibian case despite its lack of ratification.

Another document largely recognized as reflecting customary international law at the time, although not signed by Germany, was the Lieber Code, created by a Prussian professor to guide the conduct of soldiers during the American Civil War. The document Lieber drafted consisted of 157 articles that, while also establishing specific rules regarding prisoners of war, freed slaves, noncombatants and permissible tactics, also proposed general ideas regarding the requirements of humanity, the treatment of the enemy, and the conduct of troops.⁵⁸ For example, in Article 16, Lieber wrote that, “Military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge....in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.”⁵⁹ The specific rules that the Code established also contain principles with long-lasting implications, such as the codification of the idea of non-combatant immunity. Article 23 provides, “Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.”⁶⁰ Such concepts were to become key aspects of contemporary international humanitarian law, with its roots found in the Hague Conventions.

The Lieber Code, although designed for domestic use, was intended to apply to international conflict as well. In a letter to a government representative, Lieber said, “I desire to write a little book on the Law

and Usages of War, affecting the Combatants -- some 200 pages, but nothing of the sort having ever been written, so far as I know.”⁶¹ True to his intentions, the Code had enormous implications for international law. The Code itself was endorsed in many countries and inspired the creation of similar documents. According to Jenny Gesley, “The Prussian army translated and endorsed the Lieber Code as a guideline for its soldiers in the Franco-Prussian War of 1870. The Netherlands published a similar manual in 1871, as did France (1877), Switzerland (1878), Serbia (1879), Spain (1882), Portugal (1890), Italy (1896), and the United Kingdom (1884).”⁶² The Lieber Code is also credited as the first codification of the laws of war, and it inspired the many others that would soon follow. It is said to have been a template for the Hague and Geneva Conventions, as it was the first document to establish the rights of combatants and non-combatants and to clarify appropriate means of conduct during warfare.⁶³

The widespread acceptance of the Lieber Code by states, as well as its contents of rules “strictly guided by the principles of justice, honor, and humanity,” as provided in Article 4, once again illustrate their reflection of customary international law under both states’ opinions and natural law.⁶⁴ In the Namibian case, the German violations of the Code are undeniable, particularly since the precursor to Germany, Prussia, published and distributed copies of the Lieber Code to its soldiers during its continental wars in Europe. In the Genocide, the Germans regularly violated the rights of non-combatants and prisoners of war as well as the concept of military necessity.

58 Gesley, “The ‘Lieber Code’”

59 Yale Law Library, “General Orders 100”

60 Ibid

61 Baxter, “The First Modern Codification,” 177

62 Gesley, “The ‘Lieber Code’”

63 Ibid; Baxter, *Human Rights in War*, 5; May, *War Crimes and Just War*, 76; Murnion, “A Postmodern View,” 28; Baxter, “The First Modern Codification,” 171

64 “Avalon Project - General Orders No. 100 : The Lieber Code,” 2019. https://avalon.law.yale.edu/19th_century/lieber.asp.

Statements by the German government itself throughout the Genocide illustrate and acknowledge its illegality in customary international law. They show that the Germans were fully aware that their actions violated collective values and customs and would be looked upon negatively by the international community. When it was issued, von Trotha's order to eliminate the Ovaherero people evoked debate within Germany, and even horror among some Germans. Of particular note is the report of the Chief of the Army General Staff to the Imperial Chancellor, informing him that von Trotha's "plans to wipe out the entire nation or to drive them out of the country are meeting with our approval." Yet the report of what was being done to the Ovaherero led the Imperial Chancellor to appeal to Kaiser Wilhelm to put an end to the killings. He considered that the Genocide was "contradictory to all Christian and human principles," and was "demeaning to [Germany's] standing among the civilized nations of the world." This sentiment was eventually echoed by the Kaiser, who rescinded von Trotha's order.⁶⁵

That the Genocide was against "all Christian and human principles," constituted recognition that it was against natural, and thus customary, law. In terms of states' opinions, in admitting that Germany's treatment of the Ovaherero and Nama would "diminish [its] standing" in the international community, the Chancellor recognized that such actions were considered to be unacceptable in the opinions of other states, and hence violative of customary international law at the time.

The Legal Question of Reparations

The Genocide Convention does not provide for any form of redress for victims or survivors,: it requires

only that states affirmatively prevent genocide and punish those responsible for it once it has been determined that it occurred.⁶⁶ Other legal instruments discussed in the preceding sections also lack such restorative provisions, and thus, entitlement to reparations for victims of such grave human rights abuses remains an open question under international law.

The Permanent Court of International Justice, the precursor to the International Court of Justice, was the first international legal tribunal to enter judgment on the question of reparations. The *Chorzow Factory Case* in 1927 established that international law requires that reparations be paid to states that were victims of violations of international law:

*The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is 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.*⁶⁷

Of course, the standard announced by the Court in this case reflected the law of state-to-state obligations rather than debts owed to individual victims or collectives whose human rights were abused. However, as negotiations over the Joint Declaration continue and litigation works through the courts of Namibia, the *Chorzow* principle of reparations could be part of a foundation for the Namibian government, on behalf of the affected communities, to claim reparations from Germany rather than the development aid promised in the agreement as it stands today. The principle is simple: a party violating the legal rights of another party must provide the means for restoring

65 Berat, Lynn. "Genocide: The Namibian Case against Germany." *Pace International Law Review* 5, no. 1 (n.d.). <https://doi.org/10.58948/2331-3536.1119>.

66 "Convention on the Prevention and Punishment of the Crime of Genocide."

67 Felix E. Torres. 2021. "Revisiting the Chorzów Factory Standard of Reparation - Its Relevance in Contemporary International Law and Practice." *Nordic Journal of International Law* 90:190-227. *Factory At Chorzów (Ger. v. Pol.)*, (1928) PCIJ Series A No. 17.

the victim to the status quo ante, and if that cannot be done, to compensate through a monetary payment.

In domestic courts, judgments may be applied retroactively, when doing so is “consistent with the concept of the eighteenth and nineteenth centuries that judges are discoverers rather than makers of law.”⁶⁸ The Supreme Court of the United States has addressed the question of retroactivity on a case by case basis, after “[weighing] the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.”⁶⁹ If an international court were to adopt a similar approach, it could assess the history and current status of the affected communities in Namibia and possibly apply the logic of *Chorzow Factory*.

Domestic courts in some European nations have awarded redress for wrongs committed during colonial occupation. In the United Kingdom, a 2012 decision of the High Court of Justice held that a claim by victims of the Mau Mau massacre in Kenya could go forward even 50 years later.⁷⁰ Thereafter, the British government agreed to pay £19.9 million to claimants who had suffered abuse during the incident.⁷¹ This at least shows that a former European colonial power can be motivated by litigation to provide compensation to victims of grave violations of human rights.

International Institutions

International organizations have contributed significantly to the legal environment in which the Namibian case is situated today.

The African Union

The African Union (AU) is made up of the 55 countries on the African continent. It came into existence in 2002 as the successor to the Organization of African Unity (OAU).⁷² The AU functions in a similar manner to the United Nations, but on a continental level. It has created departments focused on different priorities, as well as principal decision-making organs, including ones dedicated to judicial matters and human rights violations.⁷³

During the existence of the OAU, the African Charter on Human and Peoples’ Rights was opened for signature, and it remains the primary human rights treaty for the AU.⁷⁴ Adopted in 1981, the Charter lays out the rights of all Africans, and establishes the African Commission on Human and Peoples’ Rights (ACHPR), tasked with promoting and protecting human rights in the 54 AU member states that are parties to the Charter.⁷⁵ The Commission is quasi-judicial, in that it can investigate and adjudicate complaints against states parties regarding claimed treaty violations, provide recommendations regarding member states’

68 John Bernard Corr. 1983. “Retroactivity: A Study in Supreme Court Doctrine as Applied.” *North Carolina Law Review* 61:745-797.

69 *Ibid.*

70 *Ndiku Mutua et al. v. the Foreign and Commonwealth Office*. International Humanitarian Law Databases. October 5, 2012. <https://ihl-databases.icrc.org/en/national-practice/ndiku-mutua-et-al-v-foreign-and-commonwealth-office-5-october-2012>.

71 Alex Wessely. 2017. “The Mau Mau case – five years on.” Leigh Day. <https://www.leighday.co.uk/news/blog/2017-blogs/the-mau-mau-case-five-years-on/#:~:text=The%20Mau%20Mau%20case%20represented,and%20suffering%20they%20had%20endured>.

72 “About the African Union.” About the African Union | African Union, February 10, 2022. <https://au.int/en/overview>.

73 “About the African Union.” About the African Union | African Union, February 10, 2022. <https://au.int/en/overview>.

74 Rep. A Guide to the African Charter on Human and Peoples’ Rights. Amnesty International, October 19, 2006. <https://www.amnesty.org/en/documents/ior63/005/2006/en/>.

75 “African Human Rights System.” International Justice Resource Center, December 10, 2021. <https://ijrcenter.org/regional/african/#:~:text=The%20special%20mechanisms%20mandates%20extend,States%20parties%20to%20the%20Charter>.

human rights practices, and issue binding interpretations of the Charter.⁷⁶

The African Charter does not explicitly make mention of a right to reparations, but Article 21(2) requires that states' parties provide the right to recovery of property and/or compensation in cases of dispossession.⁷⁷ On the subject of reparations from former colonial powers, the Commission adopted a 2022 Resolution on Africa's Reparations Agenda and the Human Rights of Africans in the Diaspora and People of African Descent Worldwide,⁷⁸ which calls on the AU to:

establish a committee to consult, seek the truth, and conceptualize reparations from Africa's perspective, describe the harm occasioned by the tragedies of the past, establish a case for reparations (or Africa's claim), and pursue justice for the trade and trafficking in enslaved Africans, colonialism and colonial crimes, and racial segregation and contribute to non-recurrence and reconciliation of the past.

This resolution has directly affected reparation discussions, particularly during the International Conference on Building a United Front to Advance the Cause of Justice and Reparations to Africans, held in Accra, Ghana, in November of 2023. The AU, along with CARICOM member states, called for the establishment of a global reparations fund to provide resources for campaigns, and for formal apologies from European nations that had colonized the

regions. They employed the principles enshrined in the African Charter, such as the right of colonized or oppressed people to free themselves from domination, and the right of dispossessed people to recover their lost property.⁷⁹

The Accra Proclamation on Reparations was issued following the Conference.⁸⁰ Article 2 seeks the establishment of a Global Reparations Fund, to be based in Africa and to operate as an autonomous entity to advance the campaign. The Fund would be supported by multilateral institutions and agencies aligned with the reparatory justice agenda. It also asks the AU to coordinate with CARICOM and other regional organizations in analyzing two questions: "how international law interacts with or supports the quest for reparations, including the potential for exploring litigation options in regional and international court systems," and "whether acts of enslavement, colonialism and apartheid against Africans, [constituted] grave violations of human rights at the time they were committed."⁸¹ Article 8 proposes a legal reference group to provide "legal advice on the question of reparations, including best practice on the law, practice and litigation of the reparations agenda."⁸²

While the Proclamation does not go into detail about what reparations are to be claimed, from whom, for what, or how they are to be measured, the commitment to explore "litigation options" and to collaborate with the United Nations in determining legal avenues to address human rights violations furthers the inter-

76 Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981, <https://www.refworld.org/legal/agreements/oau/1981/en/17306>, Art. 45, 49.

77 Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981, <https://www.refworld.org/legal/agreements/oau/1981/en/17306>

78 The African Commission on Human and People's Rights Res. 543, Resolution on Africa's Reparations Agenda and The Human Rights of Africans In the Diaspora and People of African Descent Worldwide , 73rd Sess., Oct. 21-Nov. 9, 2022, ACHPR/Res.543 (LXXIII) 2022, (2022).

79 Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981, <https://www.refworld.org/legal/agreements/oau/1981/en/17306>, Art. 20(2, 3), 21(2), 22(2).

80 "Accra Proclamation on Reparations." 14-17 November, 2023. International Conference On Building a United Front to Advance The Cause of Justice and Reparations to Africans. <https://au.int/en/decisions/accra-proclamation-reparations>.

81 Ibid., Art. 6.

82 Ibid., Art. 8.

national dialogue.⁸³ The language in the Proclamation suggests that member states of the AU are to serve as the primary actors utilizing the framework, but this does not exclude the possibility that the Proclamation could be employed by governments to negotiate reparations on behalf of themselves or particularly affected communities.⁸⁴

The African Union's judicial organ, the African Court on Human and Peoples' Rights, is open only to states that are members of the Union.⁸⁵ It is therefore not an option for the pursuit of restorative justice for the Ovaherero and Nama people, or for that matter the Namibian government, against Germany.

The African Union Commission on International Law (AUCIL) undertakes activities relating to the codification and development of international law on the African continent and assists in the revision of existing treaties, the drafting of new treaties and framework agreements, and dissemination of information on international law and peaceful resolution of conflicts.⁸⁶ This Commission has the potential to develop Third World Approach to International Law ("TWAIL") arguments for reparations and promotion of the Accra Proclamation agenda.

TWAIL is a controversial academic movement that examines the limitations of international law precluding legal redress for historical injustices such as genocide and colonialism.⁸⁷ TWAIL argues that state

responsibility for colonial era abuses has escaped adjudication because Western nations as the main actors in the development of international law have created rules to serve their own interests.⁸⁸ It claims that they designed treaties and norms to exclude states that were under colonial rule from legal redress, reinforcing the unequal balance of power between Western states and the global south.⁸⁹ One of these means, in the view of TWAIL, is the principle of intertemporality. TWAIL adherents contend that international law must be reformed to permit the broader participation of the global south, including entertaining the right to redress for colonialism and other abuses that continue to victimize developing nations.⁹⁰ It is important to note that TWAIL is a controversial position that is by no means universally accepted.

The United Nations Contributions to the Global Restorative Justice Conversation

The United Nations and its agencies are integral in the establishment and enforcement of international law, and in particular, international human rights law and the right to restorative justice efforts. The main policy-making organ of the UN is the General Assembly (UNGA), made up of the 193 member states of the United Nations with each having an equal vote on resolutions, and such matters as appointing the Secretary-General and non-permanent members of

83 Gentleman, Amelia. "African and Caribbean Nations Agree Move to Seek Reparations for Slavery." *The Guardian*, November 17, 2023. <https://www.theguardian.com/world/2023/nov/17/african-and-caribbean-nations-agree-move-to-see-reparations-for-slavery>.

84 "Accra Proclamation on Reparations." 14-17 November, 2023. International Conference On Building a United Front to Advance The Cause of Justice and Reparations to Africans. <https://au.int/en/decisions/accra-proclamation-reparations>.

85 African Union, Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008, <https://www.refworld.org/legal/constinstr/au/2008/en/64042>.

86 About AUCIL | African Union. Accessed April 21, 2024. <https://au.int/en/auCIL/about>.

87 Van der Speeten, Kato. "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." *Jura Falconis*, 2021, 39.

88 *Ibid*, 40.

89 *Ibid*.

90 *Ibid*, 75.

the Security Council and approving the UN budget.⁹¹ As previously mentioned, one of the landmark resolutions adopted by the UNGA relating to restorative justice as Resolution 60/147, 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, the first attempt to codify a right to reparations in international law.⁹² The Resolution sets out states' obligations to respect and implement international human rights and humanitarian law, what crimes constitute gross violations of those principles, the statutes of limitation for international crimes, the identification and treatment of victims, including their rights of access to justice, and the right to a remedy, including reparations where appropriate.⁹³

The UNGA also established the Permanent Forum on People of African Descent in August of 2021 by Resolution 75/314, providing a mandate to coordinate with existing mechanisms such as the Working Group, to provide expert advice and recommendations to the UNHRC.⁹⁴ Its functions include:

to monitor and review progress on the effective implementation of the programme of activities of the International Decade for People of African Descent, to request the preparation and dissemination of information by the United Nations system on issues relating to people of African descent, to raise awareness and promote integration and coordination of activities of agencies, funds, and programmes relating to

*people of African descent within the United Nations system, and to offer advice and recommendations on matters concerning the protection, promotion and respect of all human rights of people of African descent.*⁹⁵

The Ovaherero and Nama Genocide is particularly relevant to the Permanent Forum, which could serve to disseminate information and increase awareness about the Genocide and its legacy. Visibility efforts worldwide would support the affected communities in their struggle for justice, by applying increased pressure on both the German and Namibian governments to guarantee their meaningful participation in future negotiations.

The UN Declaration on the Rights of Indigenous Peoples is the principal human rights mechanism in which reparations are discussed regarding wrongs committed against indigenous communities. Adopted in 2007, UNDRIP spells out the fundamental rights of indigenous peoples and establishes a framework for applying human rights standards as they apply to their specific situations.⁹⁶ Seven articles prohibit the kinds of acts committed during the Ovaherero and Nama Genocide or recognize the right to reparations for such acts. These articles are as follows:

Article 8

a. States shall provide effective mechanisms for prevention of, and redress for:

b. Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

91 "United Nations, Main Body, Main Organs, General Assembly." United Nations. Accessed April 20, 2024. <https://www.un.org/en/ga/>.

92 Theo van Boven, Introductory Note 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" (Dec.16, 2005).

93 G.A. Res 60/147, U.N. Doc. A/RES/60/147, (March, 2006)

94 G.A. Res. 75/314, U.N. Doc. A/RES/75/314, (Aug. 2, 2021)

95 Mandate | OHCHR. Accessed April 21, 2024. <https://www.ohchr.org/en/special-procedures/wg-african-descent/mandate>.

96 "Indigenous Peoples." U.S. Agency for International Development, March 17, 2023. <https://www.usaid.gov/indigenous-peoples-0#:~:text=Adopted%20in%202007%2C%20the%20UNDRIP,specific%20situation%20of%20indigenous%20peoples>.

c. Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights.

Article 10

a. Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

a. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

a. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 20

a. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 28

a. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occu-

ried, used or damaged without their free, prior and informed consent.

b. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 40

a. Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with states or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Ultimately, although UNDRIP is not a treaty, it articulates the standards for governments in their treatment of indigenous communities, and provides a framework which indigenous groups, such as the Ovaherero and Nama people, can use to frame restorative justice.

Regarding cultural, intellectual, religious, and spiritual property taken from indigenous groups without their consent, the United Nations Educational, Scientific and Cultural Organization (UNESCO) established a convention and a committee to serve as mechanisms for the restoration of such property. The UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, as designed to combat the illegal trade of culturally significant items. The Convention urges states' parties to adopt measures to "prohibit and prevent the import, export, and transfer of cultural property," and offers guidance on what comes within that term.⁹⁷ While the Convention has motivated significant progress in addressing the illicit trafficking of cultural property, in accor-

⁹⁷ "About 1970 Convention." UNESCO.org. Accessed April 21, 2024. <https://www.unesco.org/en/fight-illicit-trafficking/about?hub=416>.

dance with Article 28 of the Vienna Convention on the Law of Treaties, it is not retroactive, and one state party can invoke it against another only after the Convention has entered into force for both. When the Convention cannot be deployed, UNESCO encourages states to negotiate a mutually acceptable agreement of their own.⁹⁸

In 1978 UNESCO established an Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP) as a permanent intergovernmental body open to states whether or not they are parties to the 1970 Convention.⁹⁹ The ICPRCP deals with cases of lost or stolen cultural property of fundamental importance, when a state requests its return and international conventions do not apply.¹⁰⁰ The Committee is made up of representatives of 22 member states, elected for staggered four-year terms by the General Conference of UNESCO.¹⁰¹ A state does not have to be party to the 1970 Convention to submit a request to the Committee, but both parties in the dispute over the cultural property must agree to appoint the Committee as a facilitator in resolving it.¹⁰² In the case of Namibia, museums in Germany and other western nations still hold looted cultural artifacts from colonial times, as well as the remains of Ovaheroo and Nama people that were used for medical experimentation. Repatriation efforts have begun and must continue.

The Office of the High Commissioner for Human Rights (OHCHR) houses a number of programs aimed at furthering restorative and transitional justice efforts worldwide, in terms of human rights violations generally, and specifically for people of African descent. The OHCHR serves as the secretariat of the United Nations Human Rights Council (UNHRC), the principal UN intergovernmental body responsible for monitoring compliance with human rights treaties. A number of its programs make explicit mention of the right to reparation including reports by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, and declarations adopted by the Permanent Forum on People of African Descent.

The UNHRC is composed of representatives of 47 member states that are directly elected by the General Assembly with each member serving a three-year term renewable once.¹⁰³ The Council provides states with a multilateral forum to address human rights violations, responds to human rights emergencies, and makes recommendations for implementation of human rights mechanisms. The Council also has a procedure whereby any individual, group of individuals, or non-governmental organization may submit a complaint against any of the 193 UN member states.¹⁰⁴ The goal of the UNHRC is to bring about cooperation on the part of states found to have violated their obligations, or to suggest measures to redress human rights abuses.¹⁰⁵

98 UNESCO Subsidiary Committee of the Meeting of States Parties to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 7th Sees., C70/19/7.SC/10.REV. (Paris, 2019).

99 “Return & Restitution’ Intergovernmental Committee.” UNESCO.org. Accessed April 21, 2024. <https://www.unesco.org/en/fight-illicit-trafficking/return-and-restitution?hub=416>.

100 Ibid.

101 Ibid.

102 “Return & Restitution’ Intergovernmental Committee.” UNESCO.org. Accessed April 21, 2024. <https://www.unesco.org/en/fight-illicit-trafficking/return-and-restitution?hub=416>.

103 Welcome to the Human Rights Council | OHCHR. Accessed April 21, 2024. <https://www.ohchr.org/en/hr-bodies/hrc/about-council>.

104 Human Rights Council Complaint procedure | OHCHR. Accessed April 21, 2024. <https://www.ohchr.org/en/hr-bodies/hrc/complaint-procedure/hrc-complaint-procedure-index>.

105 Ibid.

In September 2011, the UNHRC adopted Resolution 18/7 which created the position of Special Rapporteur on truth, justice, and reparation, whose purpose is “to guarantee truth, justice, reparation, memory and guarantees of non-recurrence.”¹⁰⁶ The Special Rapporteur submits annual thematic reports on the mandate, most of which discuss the right to reparations. These reports aim to promote accountability where human rights have been violated, to secure the memory of past violations, to make recommendations on how to provide remedies for victims through reforming national, institutional, and legal frameworks while promoting the rule of international human rights law, and to prevent future violations.

The most recent report, released in October of 2023 by the Special Rapporteur, Fabián Salvioli, was entitled “International Legal Standards Underpinning the Pillars of Transitional Justice.” It analyzes the foundations of the five pillars: truth, justice, reparation, memorialization, and guarantees of non-recurrence. The Report provides a framework for discussions globally, including in the case of the Ovaherero and Nama Genocide, and is a prime example of how Special Rapporteurs may publicly name and shame violators of international human rights law on the international stage.¹⁰⁷

This, together with, the joint report of several Special Rapporteurs in response to the JD constitute is a prime example of how occupants of those positions of Special Rapporteurs may shed light on human rights issues, and publicly call violators to account.

In addition to the Special Rapporteur, the UNHRC established the Working Group of Experts on People of African Descent, to provide a mechanism to study and address the problems of racial discrimination faced by people of African heritage living in the Dias-

pora.¹⁰⁸ By holding bi-annual sessions and carrying out country visits to observe the realities of discrimination today, the Working Group tries to ensure that these issues receive maximum visibility.¹⁰⁹

The Working Group could provide a space for the lasting impacts of the Ovaherero and Nama Genocide to be talked about more widely. If it were to look into the legacy of the Genocide and bear witness to the discrimination and lack of visibility for descendants and members of the affected communities, it could be an avenue to promote understanding of their grievances and needs.

106 Special rapporteur on truth, justice and reparation | OHCHR. Accessed April 21, 2024. <https://www.ohchr.org/en/special-procedures/sr-truth-justice-reparation-and-non-recurrence>.

107 See Chapter 5 for more information on this report

108 Mandate | OHCHR. Accessed April 21, 2024. <https://www.ohchr.org/en/special-procedures/wg-african-descent/mandate>.

109 Ibid.



Photo by Joshua Kettle, Unsplash

Learning from the Past and Present on Collecting Moral Debts

Introduction on Current Global Reparations Discussions

The global discourse on restorative justice has been shaped by historical abuses and calls for accountability from survivors and the international community. Previous restorative justice movements, such as those for the Holocaust, can provide a framework on how to achieve reconciliation and restitution. However, contemporary movements for reparations exemplified by those within the Caribbean Community (CARICOM), underscore the difficulties survivors encounter and the limits of international law when pursuing justice after significant time has passed and multiple actors beyond the state are involved. Examining historical and modern movements for restorative justice sheds light on how to navigate complex legal and political landscapes, while fostering dialogue on accountability to build a more just and equitable future.

Examining Germany's Obligations to the Ovaherero and Nama through Holocaust Reparations

Legal complexities, political challenges, as well as passage of time and generational shifts pose challenges for reparations negotiations and are especially pertinent in the case of the Nama and Herero Genocide. At the outset of these conversations, arduous questions arise concerning the best way is to address atrocities to provide justice, and how a price can

be put on war crimes, genocide, and crimes against humanity. Restorative justice measures are critical not only to address and atone for previous atrocities, but to ensure that crimes do not recur. Germany's previous negotiations may serve as guidelines for current discourse. Following the Holocaust, various groups and nations negotiated with West Germany for reparations, although the outcomes of these claims varied. The success of the Jewish movement for restorative justice is attributed to the establishment of Israel, the global communication and distribution networks for Jewish communities, incorporation of survivors into negotiations, and Germany's willingness to entertain their proposals.¹ The following analysis is focused on the Claims Conference, which produced a wide range of reparation and restitution for Jewish victims and is viewed as a framework for restorative justice movements.

Germany's history of reparations negotiations reflects the difficulties of addressing historical atrocities and injustices, as well as the ongoing efforts to reckon with the legacy of war and genocide. Some scholars argue that the Genocide of the Nama and Ovaherero "served as a training exercise—perhaps unconsciously—for the Holocaust."² Others question that characterization but still acknowledge the commonalities between the Kaiserreich's colonialism and the Third Reich: "both used genocide as a means to achieve political and social objectives."³ Either way, however, the negotiations following the Holocaust have assist-

1 Woolford, Andrew, and Stefan Wolejszo. "Collecting on Moral Debts: Reparations for the Holocaust and Pořajmos." *Law & Society Review* 40, no. 4 (2006): 871–901. <http://www.jstor.org/stable/4623350>.

2 Sarkin, Jeremy. *Germany's Genocide of the Herero: Kaiser Wilhelm II, His General, His Settlers, His Soldiers*. NED-New edition. Boydell & Brewer, 2011. <http://www.jstor.org/stable/10.7722/j.ctt81sgv>, 235.

3 Bachmann, Klaus, Author. *Genocidal empires: German colonialism in Africa and the Third Reich*. [Berlin ; New York: Peter Lang, 2018] Pdf. <https://www.loc.gov/item/2021758733/>, 14-15.



They Tried To Burry Us by Isabel Katjavivi. Installation and photo via M.Bassy taken during the Ovizire.Somgu exhibition in 2018

ed in constructing a “master frame” for use in resolving subsequent claims.⁴

Politicians and activists called for the right of Jewish people to bring claims against Germany following World War II, despite not having a state at the time, expanding the boundaries of international law to have Germany return all sequestered property, pay individual restitution, and make collective compensations for material damages.⁵ It was not until the Federal Republic of Germany was established in 1949 that the State of Israel was first offered \$2,380,000 of German products, and the Shilumin Agreement in

1952 opened a negotiation process by which Germany would pay reparations both to Israel and to individual survivors.

The Conference on Jewish Material Claims Against Germany (the Claims Conference) was established in October 1951, consisting of 23 world Jewish organizations. It still exists today. The main goals of the Claims Conference were first to procure funds for Jewish victims of the Holocaust to aid in the rebuilding of institutions and communities, and second to provide a means for individual victims to pursue restitution.⁶ Its objectives go beyond financial considerations,

4 Howard-Hassmann, Rhoda E., and Anthony P. Lombardo. “Framing Reparations Claims: Differences between the African and Jewish Social Movements for Reparations.” *African Studies Review* 50, no. 1 (2007): 27–48. <http://www.jstor.org/stable/20065339>. pg 31.

5 Silvers, Dean. “The Future of International Law as Seen through the Jewish Material Claims Conference against Germany.” *Jewish Social Studies* 42, no. 3/4 (1980): 215–28. <http://www.jstor.org/stable/4467091>.

6 Ibid.

however, as its mission also encompasses, for example, recognizing, acknowledging, and preserving victims' stories.⁷ In 1952, after negotiations with the Claims Conference, Israel and the Federal Republic of Germany signed the Luxembourg Agreement. Its Protocol Number 1 codified West Germany's obligation to institute indemnification laws to provide restitution for property seized by the Nazis, and Protocol Number 2 set out Germany's main financial obligations to the Conference.⁸

The initial negotiations produced the Protocols over six months. In the early phases of the discussions, West Germany was obdurate and East Germany did not participate. While the Occupying Powers (the U.S., the U.K., and France) were originally resistant to recognizing indemnification or restitution claims, Jewish groups worked with U.S. military and political authorities for the return of property to survivors and heirs in the American zone.⁹ Within the Claims Conference negotiations various groups were represented, reflecting different nationalities and religious backgrounds. Reconciling the different experiences of Jewish and non-Jewish victims in Eastern Europe proved challenging. Deliberations between the groups, governments, and international organizations reached a settlement that created two categories for survivors of slave labor and forced labor.¹⁰ Ultimate-

ly this agreement was made possible by a shared commitment to initiate remedies for affected communities. The Claims Conference process operated over the next half century, and continues today, caring for survivors and preserving their memories.¹¹

Various factors contributed to the success of the Claims Conference, including West Germany's economic prosperity after the War and moral responsibility, but the ongoing negotiations, collective bargaining, and the collaborative work of organizations drove reparation outcomes for survivors. To distribute reparations to Jewish victims, the conference processed over 280,000 claims in various languages, and "Pro-actively researched 150 Holocaust-related archives scattered in 29 countries around the world to document claims."¹² As of 2024, Germany has paid over \$90 billion to Jewish victims of Nazi persecution through German Federal Indemnification Laws (*Bundesentschädigungsgesetz*) created at the instance of the Claims Conference.¹³ By identifying and contacting potential survivors, developing media campaigns to advertise the claims process, and collaborating with survivors and Jewish organizations, the Conference was able to successfully negotiate compensation for Jewish victims, including the return of Jewish-owned properties. However, many victims were excluded from compensation programs

7 Taylor, Gideon, Greg Schneider, and Saul Kagan. "The Claims Conference And The Historic Jewish Efforts For Holocaust-Related Compensation And Restitution". In *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, (Leiden, The Netherlands: Brill | Nijhoff, 2009) doi: <https://doi.org/10.1163/ej.9789004174498.i-576.29>

8 Silvers, Dean. "The Future of International Law as Seen through the Jewish Material Claims Conference against Germany."

9 Henry, Marilyn. "Fifty Years of Holocaust Compensation." *The American Jewish Year Book* 102 (2002): 3-84. <http://www.jstor.org/stable/23604537>; Silvers, Dean. "The Future of International Law as Seen through the Jewish Material Claims Conference against Germany."

10 Taylor, Gideon, Greg Schneider, and Saul Kagan. "The Claims Conference And The Historic Jewish Efforts For Holocaust-Related Compensation And Restitution."

11 Claims Conference, "Holocaust Survivors Will Continue to Receive Additional One-Time Payments from the German Government until 2027 as a Result of Claims Conference Negotiations," Claims Conference, June 15, 2023, <https://www.claimscon.org/2023/06/holocaust-survivors-will-continue-to-receive-additional-one-time-payments-from-the-german-government-until-2027-as-a-result-of-claims-conference-negotiations/>.

12 Taylor, Gideon, Greg Schneider, and Saul Kagan. "The Claims Conference And The Historic Jewish Efforts For Holocaust-Related Compensation And Restitution" 110.

13 Claims Conference, "Holocaust Survivors Will Continue to Receive Additional One-Time Payments from the German Government until 2027 as a Result of Claims Conference Negotiations."

or only received minimal payments, and while the restitution of properties in West Germany is viewed as fairly successful, it was not in Central and Eastern Europe.¹⁴ Roma and Sinti groups also referenced the Jewish reparations process in negotiations with West Germany, but outcomes were not as extensive as those reached with the Claims Conference.

Germany's willingness to engage in continuous negotiations facilitated additional international agreements regarding compensation and restitution for victims of the Holocaust. They include the Hardship Fund, bilateral agreements with the Austrian Government, multilateral agreements with industry and government, and settlements of class-action lawsuits.¹⁵ After the reunification of Germany, laws were enacted criminalizing Holocaust denial, education curricula on the Holocaust were made mandatory, and concentration camps were converted to memorial sites.¹⁶ Negotiations over how to teach the Holocaust included German and Polish educators, as well as historians to create broadly acceptable accounts encompassing various perspectives.¹⁷

The distribution of restitution funds from the Claims Conference was one of the most challenging aspects of the pursuit of restorative justice. Eligibility factors for German government pensions were thoroughly deliberated. The threshold finally agreed was six months of imprisonment in concentration camps, meaning those who endured shorter stays were not able to receive the pensions.¹⁸ The Claims Confer-

ence compensated victims by creating distribution networks and provided essential services for survivors, such as housing assistance, healthcare, and welfare programs. Bilateral negotiations and the inclusion of civil society organizations generated not only restitution and reparations, but also the commemoration of the Holocaust through education and memorials.

The negotiations in the Claims Conference after the Holocaust aimed to address the need for justice in light of the immense suffering of survivors. They also set crucial standards for future reparation negotiations. Allowing group representation claims was groundbreaking, as it created opportunities for individuals beyond interactions solely between states. The Claims Conference created a restitution process that included "rallying, unifying and building consensus within survivors' communities" that was essential in strengthening bargaining power and developing distribution networks.¹⁹ Keeping survivors at the center of the process and providing a platform for them not only ensured accountability, but contributed to the healing process by allowing victims to be heard, acknowledged, and compensated. Key elements for a fair, transparent, and effective process must include such extensive outreach for eligible survivors, maintaining communication with victims on the status of their applications, ensuring genuine participation, having an appeals process, striving to maintain fairness, utilizing the latest technology,

14 Henry, Marilyn. "Fifty Years of Holocaust Compensation." *The American Jewish Year Book* 102 (2002): 3–84. <http://www.jstor.org/stable/23604537>.

15 Taylor, Gideon, Greg Schneider, and Saul Kagan. "The Claims Conference And The Historic Jewish Efforts For Holocaust-Related Compensation And Restitution."

16 Vitale, Monica, and Rebecca Clothey. 2019. "Holocaust Education in Germany: Ensuring Relevance and Meaning in an Increasingly Diverse Community." *FIRE: Forum for International Research in Education* 5 (1): 44–62. <https://doi.org/10.32865/fire201951139>.

17 Torpey, John. "'Making Whole What Has Been Smashed': Reflections on Reparations." *The Journal of Modern History* 73, no. 2 (2001): 333–58. <https://doi.org/10.1086/321028>.

18 Taylor, Gideon, Greg Schneider, and Saul Kagan. "The Claims Conference And The Historic Jewish Efforts For Holocaust-Related Compensation And Restitution."

19 Ferstman, Carla, and Mariana Goetz. "Introduction." In *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, (Leiden, The Netherlands: Brill | Nijhoff, 2020) doi: https://doi.org/10.1163/9789004377196_002, 6-7.

and finally, emphasizing the moral responsibility of participants at every level.²⁰

The Claims Conference and reparations movement following the Holocaust have been critical in inspiring survivors of genocide and in establishing methods for seeking restorative justice. However, in several respects the Holocaust experience may be distinguishable from other situations, and therefore may not be a useful model to be followed. These particulars include: “1) the unique unity and strength of Jewish organizations; 2) the participation of Israel, a state, in negotiations, with the United States working behind-the-scenes; 3) the tremendous moral claims made by the Jewish people; 4) the guilt consciousness of a great part of the world toward the Jewish people; 5) the willingness of Germany to negotiate.”²¹ Historical, political, legal frameworks, and cultural factors shape each restitution process, making it difficult to apply a single approach or method without due regard to context.

Several movements have, however, drawn inspiration from the efforts to seek restorative justice in the aftermath of the Holocaust. The Claims Conference and the negotiations with Germany were viewed as especially pertinent by the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events.²² In the 1990s the Organization of African Unity initiat-

ed discussions on reparations for Africa based on historical injustices, colonization, and the slave trade by exploring the procedures of the Holocaust negotiations.²³ And a group of Ovaherero representatives inspired by the Claims Conference filed a lawsuit against Germany in New York, under the U.S. Alien Tort Statute, in the 1990s.²⁴ While this case was not successful, it was pivotal in paving the way for the discussions that led to the Joint Declaration between Namibia and Germany.

In 2006, Paramount Chief Kuaima Riruako of the Ovaherero submitted a motion passed by the Namibian National Assembly inviting negotiations with Germany for reparations. According to the resolution, the talks would be between “the Namibian Government and representatives of the victim communities, and on the other hand the German Government.”²⁵ But that is not what happened in the discussions that led to the JD.

In 2023 the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, together with other Special Rapporteurs on related subject, released a report pointing out the lack of meaningful representation of the Ovaherero and Nama, and alleging that the reparative measures included in the Declaration were insufficient.²⁶ In contrast to negotiations following the Holocaust that incorporated various survivors and organizations, the

20 Taylor, Gideon, Greg Schneider, and Saul Kagan. “The Claims Conference And The Historic Jewish Efforts For Holocaust-Related Compensation And Restitution.”

21 Silvers, Dean. “The Future of International Law as Seen through the Jewish Material Claims Conference against Germany,” 223.

22 Torpey, John. “‘Making Whole What Has Been Smashed’: Reflections on Reparations.” *The Journal of Modern History* 73, no. 2 (2001): 333–58. <https://doi.org/10.1086/321028>.

23 Howard-Hassmann, Rhoda E., and Anthony P. Lombardo. “Framing Reparations Claims: Differences between the African and Jewish Social Movements for Reparations.” *African Studies Review* 50, no. 1 (2007): 27–48. <http://www.jstor.org/stable/20065339>.

24 Gross, Daniel . 2018. “Why the Herero of Namibia Are Suing Germany for Reparations.” NPR. May 6, 2018. <https://www.npr.org/sections/goatsandsoda/2018/05/06/606379299/why-the-herero-of-namibia-are-suing-germany-for-reparations>.

25 Ovaherero Genocide Foundation. 2021. “Namibian Parliament Motion on Genocide, 2006.” Ovaherero Genocide Foundation. June 1, 2021. <https://ogfnamibia.org/namibian-parliament-motion-on-genocide-2006/>, para 2.

26 Salvioli, Fabian, Alexandra Xanthaki, Balakrishnan Rajagopal, Jose Francisco Cali Tzay, K.P. Ashwini, and Reem Alsalem. 2023. “Mandates of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence.” <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27875>.

report pointed out that the JD discussions were bilateral and confidential between the two governments. While members of the affected communities served on Technical Committees advising the negotiators, they were not seated at the table to talk to the German representatives directly. And the Ovaherero Traditional Authority and the Nama Traditional Leaders Association had no role to play at all.²⁷

Furthermore, Article 20 of the JD states that Germany and Namibia “share the understanding that these amounts mentioned above settle all financial aspects of the issues relating to the past addressed in this Joint Declaration.”²⁸ Recently Germany marked 70 years of restorative justice and compensation for Holocaust survivors and funding for Holocaust education.²⁹ This prompts the question whether Germany has a moral duty to continue to address the grievances of the Ovaherero and Nama communities, as it has done with Holocaust victims.

The Claims Conference negotiations contributed significantly to “the procedural evolution of mass claims processes, by identifying special beneficiary categories with both individualized and collective awards schemes.”³⁰ The investments of time, resources, and human capital in the Claims Conference were pivotal in including as many survivors and their heirs as possible to provide reconciliation, restitution, and reparations. While there are clear political, legal, cultural, and timeline differences between the cases of the Ovaherero and Nama Genocide and the Holo-

caust, lessons from the latter can surely be instructive. The passing of time does not erase the devastating atrocities experienced by the Ovaherero and Nama, and the apartheid policies that exacerbated inequalities experienced by the two groups.

The German word for restitution, used in agreements with Holocaust survivors, is “Wiedergutmachung,” or “making whole.” However, the Claims Conference has refrained from adopting this term, emphasizing that the payments, regardless of their size, can serve only as symbolic gestures in the effort to redress the suffering of victims.³¹ This dynamic underscores the intersection of morality and financial compensation within the Claims Conference, and the challenge of reconciling the two. The same dilemma arises in the context of negotiations over restorative justice for the Ovaherero and Nama Genocide, where similar legal questions are in play, but where outcomes show significant discrepancies with earlier programs of restorative justice.

CARICOM: Current Global Restorative Justice Conversation

The restorative justice movement is not an isolated conversation driven only by the Ovaherero and Nama. The Caribbean Community has also united to this larger conversation advocating for colonial reparations and other forms of restorative justice.³² Caribbean States organized the Caribbean Community and

27 Salvioli, Fabian, Alexandra Xanthaki, Balakrishnan Rajagopal, Jose Francisco Cali Tzay, K.P. Ashwini, and Reem Alsalem. 2023. “Mandates of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence.”

28 Federal Republic of Germany and The Republic of Namibia. 2021. “JOINT DECLARATION by the FEDERAL REPUBLIC OF GERMANY and the REPUBLIC of NAMIBIA, 6.

29 “Germany Marks 70 Years of Compensating Holocaust Survivors with Payment for Home Care.” 2022. NBC News. 2022. <https://www.nbcnews.com/news/world/nazi-germany-holocaust-survivors-compensation-payment-home-care-rc-na47862>.

30 Ferstman, Carla, and Mariana Goetz. “Introduction”. In *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, 6-7.

31 Taylor, Gideon, Greg Schneider, and Saul Kagan. “The Claims Conference And The Historic Jewish Efforts For Holocaust-Related Compensation And Restitution”.

32 Mosquera-Rosero, Claudia. “Statement of Claudia Mosquera Rosero.” OHCHR, May 30, 2023, <https://www.ohchr.org/en/events/sessions/2023/second-session-permanent-forum-people-african-descent>



Healing Waters Haiti is a painting by Synthia SAINT JAMES which was uploaded on November 1st, 2012.

Common Market (CARICOM) to address the economic inequalities and underdevelopment that still plague the region as a consequence of historical injustices.

The Ovaherero and Nama have played a key role in this conversation as Germany has formally apologized for the Ovaherero and Nama Genocide.³³ Concurrently, support is building among African and Caribbean

nations to further explore international and historical reparations claims. The transatlantic slave trade in the Caribbean was another enormous historical crime whose effects continue to reverberate in modern-day society. Today, significant recognition from the African and Caribbean nations has advanced the reparations and reparatory movement.

33 Fisher, Max. "The Long Road Ahead for Colonial Reparations." *The New York Times*, August 27, 2022. <https://www.nytimes.com/2022/08/27/world/americas/colonial-reparations.html>.

This has generated various discussions and raised awareness about the situation globally. CARICOM's reparations campaign was initiated in 2001 when Caribbean States raised such claims at the UN World Conference on Racism, and African and Asian States issued declarations supporting the movement.³⁴ In June 2023, the second session of the Permanent Forum on People of African Descent examined steps to address these issues. The idea of engaging in a reparations conversation and responding to mass human rights violations was addressed by Dr. Barryl Biekman, founder of the African Union African Diaspora Sixth Region Facilitators Working Group-Europe. Dr. Biekman targeted the complex situation of the role of international law in accessing remedies, and made a call to assemble expert committees in cooperation including CARICOM.³⁵ In addition, Claudia Mosquera Rosero, director of Igualdad Racial, Diferencia Cultural, Conflictos Ambientales y Racismos en las Américas Negras introduced an ethno-racial approach which seeks to promote the notion that there is no single way of addressing historical reparations.³⁶

The history of the trans-Atlantic slave trade and colonialism has encouraged the affected nations to seek reparations from former colonizers, and consequently, they have begun joint initiatives between AU and CARICOM. Before the movement began, the African

and Caribbean countries recognized their vibrant relationship as members of the African Diaspora community, and formed organizations like the Citizens and Diaspora Directorate and the Caribbean Pan African Network.³⁷

The Ovaherero and Nama, and CARICOM have pushed the reparations movement into a central global conversation that has also engaged academia. Mtiangai Sirleaf, Professor of Law at the University of Maryland, has explored the limitations of transnational law, showing how it is insufficient to redress these human rights violations.³⁸ Jo-Anne Wemmers, Professor at the School of Criminology of the Université de Montreal, has discussed the notion of distributive justice in the context of reconciliation, suggesting that equity, equality, and need are essential values to ensure fairness for the affected communities.³⁹ Professor Antony Anghie, of the University of Utah, has written about the relationship between international law and colonialism, concluding that today's differences among former colonial nations and Global South must be addressed by new doctrines and institutions.⁴⁰ According to Prof. Anghie, the concept of sovereignty and the jurisprudence under which international law has developed do not resolve the challenges former colony states still face today.⁴¹

The Ovaherero and Nama and the Caribbean community are eager to be part of the pursuit of global

34 Buser, Andreas, "Colonial Injustices and the Law of State Responsibility: The CARICOM Claim for Reparations." KFG Working Paper Series, no.4, Berlin Potsdam Research Group, 2016. SSRN-id3050647.pdf

35 Biekman, Barryl A. "Statement of Dr. Barryl A. Biekman." OHCHR, May 30, 2023, <https://www.ohchr.org/en/events/sessions/2023/second-session-permanent-forum-people-african-descent>

36 Mosquera-Rosero, Claudia. "Statement of Claudia Mosquera Rosero." OHCHR, May 30, 2023, <https://www.ohchr.org/en/events/sessions/2023/second-session-permanent-forum-people-african-descent>

37 "Strengthening the AU-Caribbean Diaspora Relationship: CIDO holds tripartite meeting with CARICOM and the Canadian Pan-African Network (CPAN)." Union Africaine, December 05, 2015, <https://au.int/fr/node/19489>

38 Sirleaf, Mtiangai V. S., "Making Room for the Distributive in Transitional Justice." SSRN, (2013): <https://ssrn.com/abstract=2293965>

39 Wemmers, Jo-Anne. "Reparation, Decolonization, and International Law: The Healing Role of Reparation." Harvard International Law Journal, 2014. <https://journals.law.harvard.edu/ilj/wp-content/uploads/sites/84/Wemmers-Reparations.pdf>

40 Anghie, Antony. "The Evolution of International Law: Colonial and Postcolonial Realities." Third World Quarterly 27, no. 5 (2006): 739–53. <http://www.jstor.org/stable/4017775>.

41 Ibid.

justice. Among former colonial powers, only Germany and the United Kingdom have accepted their historical wrongs; however, even they have insisted on self-designed solutions to make up for them.

CARICOM's reparations campaign has targeted European nations that held colonies in the Caribbean hundreds of years ago to lay out a case for reparatory justice for indigenous peoples and African descendants who experienced slavery, slave trading, and racial apartheid.⁴² CARICOM's efforts have been endorsed by 15 nations, and have demonstrated how colonial actions contributed to poverty, underdevelopment, marginalization, social exclusion, economic disparities, and instability.⁴³ These claims have, however, been strongly opposed by Western and European Union states, resulting in a lack of positive response. In 2013, CARICOM mobilized its "Ten Point Plan for Reparatory Justice," which set out its demands. Some of these, and the responses from European governments, are as follows:

- Sincere apology: an essential element if there is to be healing. European governments have not fully apologized for their historical atrocities. Aside from Germany, only the UK has published a statement of regret, but it has not acknowledged responsibility for crimes. No other European country has responded at all.⁴⁴
- Indigenous people development programs: mass killings and land appropriation reduced indigenous populations (e.g., the Garifuna and Kalinago in Caribbean islands⁴⁵), and many of their descendants remain traumatized, landless, and marginalized. The University of the West Indies offers an Indigenous People Scholarship as a means of rehabilitation. But such efforts, however valiant, do not address all of the needs of the affected communities, and a development plan proposed by CARICOM would introduce additional means of healing and integration.
- Cultural institutions: European governments regularly invest in cultural establishments in their own countries, such as museums and research centers to inform their citizens.⁴⁶ However, Caribbean states lack the opportunity to reach all of their populations through such means, and thereby to educate their citizens about the crimes against humanity that victimized their ancestors. Therefore, CARICOM has included investment in the development of community institutions as part of the remedies for historical mistreatment, which European governments are requested to finance.
- Health Crisis: CARICOM member states face the highest incidence of chronic diseases, such as hypertension and type two diabetes, as a result of malnutrition, physical and emotional brutality, and stress among populations descended from victims of colonial-era crimes. European governments have provided financial support to address climate change, but they have so far not participated in tackling the health challenges affected communities face.⁴⁷

42 "Caricom Ten Point Plan for Reparatory Justice." OHCHR. Accessed April 27, 2024. https://adsdatabase.ohchr.org/IssueLibrary/CARICOM_Ten-Point%20Plan%20for%20Reparatory%20Justice.pdf

43 Demory, Catarina. "Slavery Tribunal? Africa and Caribbean Unite on Reparations | Reuters." Reuters, April 4, 2024. <https://www.reuters.com/world/slavery-tribunal-africa-caribbean-unite-reparations-2024-04-04/>.

44 Keane, Daniel. "Caribbean Countries to Seek \$33 Trillion in Slavery Reparations." The Standard, September 12, 2023. <https://www.standard.co.uk/news/world/caribbean-countries-seek-trillion-slavery-reparations-b1106585.html>.

45 Cooke, Ernesto. "British Carried out Genocide on Garifuna & Kalinago Nation - SVG PM." St Vincent Times, March 21, 2023. https://www.stvincenttimes.com/british-carried-out-genocide-on-garifuna-kalinago-nation-pm/#google_vignette.

46 "Caricom Ten Point Plan for Reparatory Justice." OHCHR. Accessed April 27, 2024. https://adsdatabase.ohchr.org/IssueLibrary/CARICOM_Ten-Point%20Plan%20for%20Reparatory%20Justice.pdf

47 "Water and Wastewater Management." European Investment Bank, 2021. <https://www.eib.org/en/projects/topics/energy-natural-resources/water-and-waste-water-management/index.htm>.

- **Technology Transfer:** during colonial times, European States extracted maximum value from the region by producing and exporting raw materials. Today, European governments have supported the development of a digital economy in the region that aligns with a modernization agenda, such as by investing in high-speed internet, mobile networks, and cloud computing.⁴⁸ However, CARICOM requests assistance in improving access of younger generations to science and technology to give them access to development that was previously denied.
- **Debt cancellation:** The impacts of colonialism continue to be reflected in the region, where widespread poverty and unpreparedness for development have driven a cycle of increasing public debt. Today nine Caribbean countries have higher than 70 percent debt-to-GDP ratios.⁴⁹ CARICOM's plan calls for debt cancellation. Without directly accepting that this constitutes a form of reparations, the UK partnership proposes to strengthen institutional capacity to design and implement sound macroeconomic policies to promote growth and reduce poverty.⁵⁰

Former colonial powers have shown an interest in increasing direct foreign investment, such as the UK-Caribbean infrastructure partnership.⁵¹ While these measures are helpful, they are generally not

deemed a sufficient response to CARICOM's request for reparations. The CARICOM campaign seeks to determine remedies for historical injustices more broadly and to be heard in the process of decision-making.

Sir Hilary Beckles, Vice-Chancellor of the University of West Indies and Chairman of the Caribbean Community Reparations Commission has amplified CARICOM's active steps in seeking reparations by reaching out to multiple activist groups globally and to the African Union, "calling for a common political front for the reparations movement."⁵² The AU has declared solidarity with CARICOM in these efforts.⁵³

The Ovaherero and Nama and CARICOM agree that there is no uniform approach on how to address historical injustices adequately since their situations differ in many respects. However, the campaign for reparations has gained wide support, as a path to reconciliation. According to both communities, the goals of restorative justice require more than financial compensation. They include promoting the equitable distribution of economic productivity, the equal social value of all people, and cooperation in addressing needs. These are objectives that money alone cannot achieve. What is needed must include such steps as formal apologies, repatriation of artifacts and remains, and cultural and social awareness to build knowledge and understanding.⁵⁴

48 "Digital Economy." European Investment Bank, 2022. <https://www.eib.org/en/projects/topics/innovation-digital-and-human-capital/digital-economy/index.htm>

49 "UK-Caribbean Region Development Partnership Summary, July 2023." Government of United Kingdom, 2023. <https://www.gov.uk/government/publications/uk-caribbean-region-development-partnership-summary/uk-caribbean-region-development-partnership-summary-july-2023#regional-context>.

50 Ibid.

51 Garic, Hermina. "Challenges Facing Reparations Requests by Caribbean Countries ." Utica University Center of Public Affairs and Election Research, March 21, 2020. <https://www.ucpublicaffairs.com/home/2019/3/31/caribbean-countries-press-european-governments-for-slavery-reparations-by-hermina-garic>.

52 Beckles, Hilary. "From Local Moments to Global Movement: Reparation Mechanisms and a Development Framework." United Nations, March 25, 2024. <https://www.un.org/en/local-moments-global-movement-reparation-mechanisms-and-development-framework>.

53 Ibid.

54 "Caricom Ten Point Plan for Reparatory Justice." OHCHR. Accessed April 27, 2024. https://adsdatabase.ohchr.org/IssueLibrary/CARICOM_Ten-Point%20Plan%20for%20Reparatory%20Justice.pdf

The Ovaherero and Nama seek a fair and dignified conversation where they are part of decision-making regarding restorative justice. Their campaign has made a significant contribution to the restorative justice conversation, and they now stand shoulder-to-shoulder with CARICOM and others as colleagues in a truly global movement.



Photo by Aylin Azucena Duarte

Conclusion

The following paragraphs represent the class's conclusions. Those marked "observations" are our overall takeaways: what we believe to statements that are solidly grounded in international law, and/or well-supported by the factual evidence.

Given what we believe to be the importance of the Joint Declaration, not as the final stage in achieving restorative justice but as a way station in an iterative process, our "recommendations" are focused entirely on next steps that Germany, the Namibian government, and the affected communities might consider as they continue their efforts to arrive at a conclusion that all of them can accept as legitimate and satisfactory.

Observations

1. Under international law binding at the time, the events of 1904-08 were without question Genocide and were without question illegal. This conclusion is supported by both conventional and customary law principles. That said, however, there appear to be no obvious ways to obtain redress through legal instruments or institutions existing in 2024. In particular, international law does not provide a general right to reparations on the part of affected communities. Nonetheless, research into possible avenues of achieving restorative justice – in domestic as well as international forums – should certainly continue, and all opportunities should be thoroughly explored.
2. While the International Court of Justice has made clear that the Genocide Convention of 1948 did not have retroactive application as a legally-binding treaty, the very issue of whether non-retroactivity is itself inconsistent with international law needs to be explored further, with implications for the Ovaherero-Nama Genocide as well as other outrages committed by colonial powers against indigenous peoples.
3. One of the most striking features of the Ovaherero-Nama Genocide is how little about it is known outside Namibia. Although the number of victims may have been smaller than those of the Armenian Genocide during World War I, not to mention the Holocaust of the 1940s, the systematic, deliberate, and merciless efforts to eradicate entire populations certainly deserves more attention than it has received around the world. We hope that our study and this report will be a small contribution to the needed worldwide understanding of what happened in Namibia during the first decade of the last century. And we encourage others to undertake further research into what happened, and how restorative justice may be pursued.
4. Additional research into historical records should also be directed to an understanding of the plight of the Damara and the San, during the Genocide and in the years following it. There is certainly evidence that the systematic abuse of those peoples, albeit perhaps without explicit orders like those to exterminate the Ovaherero and Nama, entitles them as well to claim status as "affected communities."
5. To accomplish the goal of expanding global awareness of what was truly the first genocide of the twentieth century, the involvement of international government and non-government organizations would be most desirable. The United Nations, through such agencies as UNESCO and others, could be instrumental in making sure that this happens.
6. The Joint Declaration by the two governments, published in 2021, appears to have been reached in a manner inconsistent with the U.N. Declaration on the Rights of Indigenous Peoples, which

provides at Art. 18 that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.” Even if it is true that the affected communities were invited to participate in the Technical Committee, the members of that group were not chosen by the communities themselves, “in accordance with their own procedures.”

Recommendations

We proceed from the assumption that the Joint Declaration of 2021 is in need of an overhaul. Both parties appear willing to accept that the document negotiated between the governments of Namibia and Germany was not a final draft: it was a constructive first step, but not by any means a conclusive disposition of the issues that both governments have pledged to address.

We therefore respectfully, and with diffidence, offer the following recommendations to the authorities of both Germany and Namibia, and to the affected communities.

To the Government of Germany:

1. The 2021 draft refers to the attempted extermination of the Ovaherero and Nama people as “events that, from today’s perspective, would be called genocide.” There is no reason for that circumlocution, which is perceived as deeply offensive by the affected communities in Namibia. Nations around the world, including Germany, have applied the unmodified term “genocide” to other systematic mass killings that antedated the United Nations Convention of 1948, and the German Bundestag has itself used the word to describe Turkish atrocities against Armenians only 10 years after the mass killings in Namibia. And of course the Holocaust in Europe, perpetrated by the German Third Reich, was a genocide. What happened between 1904 and 1908 in German South West Africa was also a Genocide directed at the Ovaherero and Nama peoples, and should be described as such, without qualifiers.
2. There has been considerable resistance among the affected communities to the characterization of Germany’s monetary commitment in the 2021 Joint Declaration as a “reconstruction and development support programme.” We understand the German resistance to the use of the word “reparations.” We also understand the reluctance of the Namibian government to enshrining a potentially divisive categorization of Namibian citizens by ethnicity. But the Joint Declaration calls for collaboration with the affected communities in the identification of projects to be undertaken with the grant funds, and we encourage both sides to ensure that they are used where they are most needed, and are not subject to political pressures coming from any direction.
3. It seems clear that the German Government must be prepared to put more money on the table. We suggest that time and effort be spent attempting to find ways for enhanced German support to be of the greatest benefit to the descendants of the Ovaherero, the Nama, the Damara, and the San. This could take the form of specific and localized infrastructure support (including education, health care, and transportation), facilitating the acquisition of land, and other means of ensuring that the payments are dedicated to – and are seen as – real restorative justice, rather than simply generic development aid. But we suggest that more focus be directed at benefiting those whose forebears’ suffering as a result of the Genocide included even more than the horrific loss of lives: the destruction of culture, language, and traditions, as well as expulsion from their historic lands and sacred sites.
4. Those responsible for the education of German youth should ensure that the Ovaherero-Nama Genocide is part of school curricula in Germany.

Public acknowledgment of it, including memorials and plaques in places on German soil where Namibians were imprisoned, or where medical experimentation was done, would promote the goal of remembrance. And care should be taken to remove positive public recognition of German perpetrators. Current programs promote the return of human remains and artifacts that were looted from Namibia, and the support of the government in expediting those efforts would be beneficial. The goal here would not be to engender a sense of personal guilt on the part of people born a century after these events. But what occurred in Namibia is every bit as much a part of German history as the Holocaust, and should be treated accordingly.

To the Government of Namibia:

1. It is apparent that the Joint Declaration as agreed in 2021 is not acceptable to the vast majority of Ovaherero and Nama Namibians. One of their principal objections, as is widely known, is that they did not have what they consider to be the appropriate level of representation at the negotiating table. While we understand the Government's (and Germany's) argument that the discussions must be between representatives of two states, it does seem clear that more – indeed, much more – must be done to upgrade the engagement of the affected communities in negotiations if they are ever to accept the outcome as legitimate. The Traditional Authorities established pursuant to Namibian law could be a useful partner to propose precise ways in which ethnic groups should be represented.
2. We believe that the best way to address concerns about the Government's negotiating position would be to accept a suggestion from the Chiefs Assembly, and convene, as soon as possible, a high-level meeting of all stakeholders within the country. Such a meeting would give opportunities for the expression of views of all ethnic groups wishing to be heard: not only the directly affected Ovaherero and Nama, but the Damara and San, as well as other minority communities, as well as Namibians of Ovambo and of German heritage. The goal of the meeting should be the development of a common position to be presented at the next round of discussions with Germany, and a choreography addressing who will present it, and how and by whom responses will be evaluated.
3. In calling for such a meeting, and in any ongoing diplomatic efforts, the Government should be mindful that there are members of the affected communities who are not Namibian citizens. There are significant Ovaherero populations, and smaller but not negligible Nama ones, in Botswana, South Africa, and Angola, as well as further afield. Their inability to participate in talks with Germany stands in the way of comprehensive representation of the communities, which needs to be addressed.
4. One of the subjects for an all-parties meeting to address would be the utility of establishing a Truth and Reconciliation Commission, comprising objective adjudicators and open to all stakeholders. Such institutions have worked well in other places. One has recently been initiated by Belgium with respect to its former African colonies, and the Republic of Liberia has just announced an attempt to use such a commission to promote healing from its devastating 14-year civil war. The Commission could be tasked with determining not only what happened in the early 20th century, but also its continuing impact on contemporary Namibia.
5. The Government has attempted to make it possible for descendants of communities that were stripped of their land during the colonial era to get it back, by purchasing it from Government intermediaries when current owners are prepared to sell. But such a program, well intentioned as it is, does not help potential buyers who simply do not have the resources to participate in an auction. Attention should be paid to finding ways to use grant funds to equip descendants of

people who were dispossessed of their land with the means of getting it back.

6. While it is understandable that the Government does not wish to encourage internal divisions along ethnic lines, it cannot ignore the fact that the Genocide did not affect all communities that make up modern Namibia equally. There would be no concession to tribalism were the Government to acknowledge the historical record demonstrating that the Ovaherero, the Nama, the Damara, and the San suffered disproportionately from the Genocide, and that their descendants still bear those scars. The Genocide should be commemorated in that light. For example, the Government should lend its support to the Genocide Museum in Swakopmund and should consider the creation of additional memorials elsewhere in the country (including upgrading the Genocide-related contents of the National Museum in Windhoek). It should use its resources to identify and to preserve sites that memorialize the victims (specifically, at the sites of concentration camps). And there is no reason for there to be monuments in Namibia to the German soldiers who carried out the massacres of indigenous peoples (German support for the removal of such symbols would be a visible contribution toward reconciliation).
2. We encourage the Ovaherero and Nama representatives to continue their vigilant and solution-focused engagement as we recall that negotiations toward a new or amended joint declaration would be the beginning, and not the end, of the process. Surely their voices must be heard in the meeting of all stakeholders that we believe would best provide a way forward from the current impasse. Decisions will need to be made concerning where, when, and how grant funds will be spent: the communities must be involved in those discussions. They should be vocal and public in their advocacy for specific uses of grant funds, engaging their own cohorts in determining what is best, and then promoting those ideas to both German and Namibian interlocutors. And when, as inevitably will happen, in some instances their specific goals are not achieved, they should stay involved, committed to the notion that restorative justice requires the collaboration of its recipients as well as its providers.

To the Affected Communities:

1. We start from the assumption that the shared goal of all Namibians is an agreement that is fair, consistent with international law, and appropriate both in Germany's acceptance of responsibility for the Genocide and in its commitment to restorative justice. That said, if there is to be an outcome that the affected communities can embrace, they must engage with the Government in finding a way of achieving it. We urge them to work together with the governments of both countries toward finding ways to participate in the negotiations with Germany that can be accepted by all of the parties to those discussions.



Photo by Aylin Azucena Duarte

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Chapter 2

History

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JOINT DECLARATION BY THE FEDERAL REPUBLIC OF GERMANY AND THE REPUBLIC OF NAMIBIA

**“UNITED IN REMEMBRANCE OF OUR COLONIAL PAST, UNITED IN OUR WILL
TO RECONCILE, UNITED IN OUR VISION OF THE FUTURE.”**

Introduction

The Government of the Federal Republic of Germany and the Government of the Republic of Namibia, as democratically elected by the people of Germany and Namibia respectively,

- *Responding* to the Resolution of the National Assembly of the Republic of Namibia of 2006 and the Resolutions of the German Bundestag of 1989 and 2004,
- *Mindful* of the deep wounds inflicted on particular communities and other peoples of Namibia by the atrocities perpetrated during German colonial rule between 1904 and 1908, which echo down and through time and are still felt by Namibians today,
- *Recognizing* the need for development in order to address the lasting economic, social and psychological hardship of the communities most affected,
- *Underlining* the special nature of German–Namibian relations as stressed by Resolutions of the German Bundestag in 1989 and 2004 confirming a special historical and moral responsibility towards Namibia,
- *Recalling* the Motion of the National Assembly of the Republic of Namibia of 2006 calling for an amicable solution to the outstanding questions of the past,
- *Considering* the previous efforts by the German and Namibian Governments, as well as by churches and civil society to address the injustice of the past and strive for reconciliation,
- *Mindful* of the strong and cordial relations between their countries since the independence of the Republic of Namibia that include a very close network of contacts between citizens from all walks of life in both countries,
- *Recalling* the support for Namibia’s independence, in particular the implementation of United Nations Security Council Resolution 435 (1978) from the two states in Germany in the long Namibian struggle for independence, and from the united Germany to the development of Namibia thereafter,
- *Acknowledging* that the two Governments have enjoyed strong and cordial relations since the independence of the Republic of Namibia and wish to improve upon this relationship further,
- *Affirming* their firm resolve to maintain and strengthen their excellent bilateral relations and the need to urgently redress a dark past in order to build a better future,

Jointly declare the following:

I.

1. In 1904, Germany waged a war, which annihilated large parts of indigenous communities that were residing in what is now Namibia. The German forces adopted and implemented policies to exterminate clearly identified communities. These measures also affected other communities of what today is Namibia.
2. In this context, Lieutenant General Lothar von Trotha issued an Order on 2nd October 1904 which led to the death and suffering of thousands of Ovaherero, including women and children. This Order was rescinded by the German Government on 8th December 1904, but by then, many thousands of Ovaherero had been killed and perished.
3. Notwithstanding the revocation of the first Order by Germany, Lieutenant General von Trotha issued a second Order on 22nd April 1905. This was directed against the Nama and also threatened them with a similar fate to that of the Ovaherero unless they surrendered. These threats were later carried out, resulting in the further substantial annihilation of the Nama communities.
4. In 1905, German authorities created concentration camps, notably at Swakopmund, Shark Island and Windhoek (Alte Feste), in which the internees were enslaved and forced to work under inhumane conditions, resulting in the death of thousands of people from hunger, disease and forced labour. Some of the Nama fighters and their families were banished to Togo and Cameroon.
5. The severity of the conditions and the bleakness of life prospects in these camps were such that many internees were doomed to die. By the time these camps were finally closed in 1908, thousands of people had died from hunger, disease and exhaustion from forced labour.
6. In the aftermath of the war, large swathes of territory, constituting ancestral land historically inhabited by and belonging to indigenous communities, were seized and occupied by the German State. These actions led to the expulsion and displacement of indigenous communities from their ancestral lands. In some cases, communities were forced out of what today is Namibia itself and have remained uprooted to this day.
7. Furthermore, human remains of members of indigenous communities were removed unlawfully and shipped to Germany for pseudo-scientific racial purity and eugenic 'research' without respect for human dignity, cultural and religious beliefs and practices. The shipments also included cultural artifacts of these communities.
8. Overall, tens of thousands of men, women and children were subjected to the orders and associated German policies. They were shot, hanged, burned, starved, experimented on, enslaved, worked to death, abused, raped and dispossessed, not only of their land, property and livestock, but also of their rights and dignity.
9. As a consequence, a substantial number of Ovaherero and Nama communities were exterminated through the actions of the German State. A large number of the Damara and San communities were also exterminated.

II.

10. Both Governments affirm that the Preamble to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1948) “recognises that at all periods of history genocide has inflicted great losses on humanity”. The German Government acknowledges that the abominable atrocities committed during periods of the colonial war culminated in events that, from today’s perspective, would be called genocide.

III.

11. On the basis of this acknowledgement, the German Government recognizes Germany’s moral responsibility for the colonization of Namibia and for the historic developments that led to the genocidal conditions between 1904 and 1908, as described above, with its gross human rights violations and human sufferings thereof. On the same basis, Germany accepts a moral, historical and political obligation to tender an apology for this genocide and subsequently provide the necessary means for reconciliation and reconstruction.
12. The German Government further acknowledges the grave guilt incurred by individuals in positions of military and political responsibility at the material time and Germany’s superordinate responsibility for their actions, particularly with regard to Ovaherero and Nama communities.
13. Germany apologizes and bows before the descendants of the victims. Today, more than 100 years later, Germany asks for forgiveness for the sins of their forefathers. It is not possible to undo what has been done. But the suffering, inhumanity and pain inflicted on the tens of thousands of innocent men, women and children by Germany during the war in what is today Namibia must not be forgotten. It must serve as a warning against racism and genocide.

IV.

14. The Namibian Government and people accept Germany’s apology and believe that it paves the way to a lasting mutual understanding and the consolidation of a special relationship between the two nations as affirmed by the two Bundestag Resolutions of 1989 and 2004, respectively. This shall close the painful chapter of the past and mark a new dawn in the relationship between our two countries and peoples. This relationship will be characterized by a much more thorough and meaningful process of reconciliation and reconstruction, an appropriate culture of remembrance, as well as a new level of political, economic and cultural partnership.

The Namibian Government deeply appreciates its friendly relationship with Germany, which also extends to numerous partnerships and initiatives launched from all walks of life.

V.

15. In view of the acknowledgment provided in Chapter II, and pursuant to the apology in Chapter III of this Declaration, the two Governments jointly decided to embark upon measures to heal the wounds of the past and create a lasting partnership for the future. Both Governments further decided on the need for a forward looking special relationship framework that gives meaning to the letter and spirit of this Declaration and the resolutions unanimously adopted by the Bundestag and Namibian National Assembly.

16. A separate and unique reconstruction and development support programme will be set up by both Governments to assist the development of descendants of the particularly affected communities, in line with their identified needs. Representatives of these communities will participate in this process in a decisive capacity. Under this programme, projects will be implemented in the following regions: Erongo, Hardap, //Kharas, Khomas, Kunene, Omaheke, and Otjozondjupa. The projects will include the following sectors: Land Reform, in particular Land Acquisition, within the framework of the Namibian Constitution, and Land Development, Agriculture, Rural Livelihoods and Natural Resources, Rural Infrastructure, Energy and Water Supply, Technical and Vocational Education and Training.
17. Both Governments decide to promote and support reconciliation between the people of Namibia and Germany through preserving the memory of the colonial era, in particular the period between 1904 to 1908, for future generations by, inter alia, finding appropriate ways of memory and remembrance, supporting research and education, cultural and linguistic issues, as well as by encouraging meetings of and exchange between all generations, in particular the youth. Both Governments further decide to jointly develop and put into place a separate legal structure, i.e. a joint trust or fund in order to select and fund projects which aim to improve reconciliation.
18. The Government of the Federal Republic of Germany will make available the amount of 1100 (one thousand one hundred) Million Euros, as a grant to implement the envisaged projects within the framework of the above-mentioned programmes. Germany commits herself to allocate this amount over a period of 30 years. Of this, the amount of 1050 (one thousand fifty) Million Euros will be dedicated to the reconstruction and development support programme for the benefit of the descendants of the particularly affected communities. 50 (fifty) Million Euros will be dedicated to the projects on reconciliation, remembrance, research and education.
19. The governing and implementation structures for both programmes will operate on the basis of the principles of equal partnership, joint decision taking, good governance and transparency as well as affected community participation. Provision will be made for monitoring of implementation, including audits and periodic comprehensive impact assessment at agreed intervals.
20. Both Governments share the understanding that these amounts mentioned above settle all financial aspects of the issues relating to the past addressed in this Joint Declaration.
21. Both Governments decide on the establishment of a Bi-National Commission, as a forward looking and lasting political framework for the consolidation of this special relationship between Germany and Namibia.
22. The Government of the Federal Republic of Germany renews her commitment to continue the bilateral development cooperation at an adequate level within the framework of the UN Agenda 2030 for Sustainable Development to contribute to the development of Namibia, as a whole and to the benefit of all Namibians.



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