



Permanent Mission
of the Federal Republic of Germany
to the Office of the United Nations and
to the other International Organizations
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(please quote when answering)

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Note Verbale

The Permanent Mission of the Federal Republic of Germany to the Office of the United Nations and to the other International Organisations in Geneva presents its compliments to the Office of the High Commissioner for Human Rights and has the honour to respond as follows to the Joint Communication of 23 February 2023 from the Special Rapporteur on the promotion of truth, justice, rehabilitation and the 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.

To the
Office of the High Commissioner of Human Rights
Palais Wilson
Geneva

Germany attaches great importance to the United Nations Special Procedures in general and to the mandate of the abovementioned Special Rapporteurs in particular. This has been demonstrated, among other things, by a standing invitation to its mandate-holders to visit Germany. We welcome the recognition of the relevance of the issues addressed by them and the opportunity to engage in dialogue in this connection. The following text is a response to the seven questions posed.

The Permanent Mission of the Federal Republic of Germany to the Office of the United Nations and to the other International Organisations in Geneva avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurance of its highest consideration.

I.

1. Addressing the history of German colonialism in what was German South West Africa between 1884 and 1919, and in particular the crimes committed against the Herero, Nama and others during the colonial war from 1904 to 1908, is of central importance to bilateral relations between the Federal Republic of Germany and the Republic of Namibia. In the war waged by German colonial troops in the colony from 1904 to 1908, atrocities were committed which have to be called genocide. The German Government acknowledges its historical, moral and political responsibility for these crimes.
2. In awareness of these terrible events and Germany's responsibility for them, Germany and Namibia have developed close and amicable relations over decades. Even before the Republic of Namibia gained independence on 21 March 1990, the German Bundestag acknowledged in its resolution of 16 March 1989 the special relations between Germany and Namibia, including the special responsibility of the Federal Republic of Germany for Namibia and its citizens.
3. Shortly after Namibia became independent on 21 March 1990, an initial basis for cooperation which also took into account German-Namibian history was created in the

form of development cooperation between the two countries. Being classified as a higher middle-income country, Namibia has received official development aid from hardly any donor countries since 2009. German development cooperation is an exception. Namibia gets higher per-capita development assistance from Germany than any other country on the continent. The German Government rejects the allegation that it is perpetuating colonial dynamics and dependencies. All projects are tailored to Namibia's development policy priorities through negotiations and agreements with the Namibian Government. The German Government wishes to emphasise that the development cooperation will continue in the future independent of the dialogue on reconciliation with Namibia.

II.

4. On the basis of their strong and cordial relations, Germany and Namibia entered uncharted territory together when they decided in 2014 to enter into a political dialogue with the participation of the particularly affected communities with the aim of addressing the injustice committed in what was then German South West Africa.
5. Both sides are striving in the dialogue process to establish a common understanding with regard to the course of the terrible events in Namibia between 1904 and 1908 and how they should be viewed, to articulate the profound regret of the German Government regarding the atrocities committed against and the suffering inflicted on men, women and children and to prepare a request for forgiveness, as well as to create a framework for lasting reconciliation.
6. The Special Envoys appointed by the two governments, [REDACTED], a former Member of the German Bundestag, and Ambassador [REDACTED], a descendant of the Herero people, met for nine rounds of negotiations between 2015 and 2021. With the participation of the affected communities, they agreed on the text of a political Joint Declaration, which they initialled on 15 May 2021 and pre

III.

7. The German Government welcomes the fact that the chief negotiators were able to initial the draft Joint Declaration in Berlin on 15 May 2021. The Coalition Agreement of 24 November 2021, which reflects the political vision of the three coalition parties of the current German Government, reaffirms that “reconciliation with Namibia remains for us a crucial task arising from our historical and moral responsibility. The reconciliation agreement with Namibia can mark the beginning of a shared process of reckoning with the past”. By initialling the text of the Joint Declaration, the chief negotiators on both sides – in accordance with international custom – documented the negotiated outcome without anticipating its implementation.
8. The Namibian Government presented the initialled draft text to the Namibian National Assembly for debate. Due to the outbreak of the COVID-19 pandemic in Namibia in the summer of 2021, the parliamentary debate on the initialled draft Joint Declaration in Namibia had to be postponed. The German Government noted with respect the intense discussion conducted in the Namibian National Assembly from 12 October to 2 December 2021. It would like to state that both the Namibian Government and the German Government stand by the initialled but yet to be signed draft Joint Declaration.
9. In confidential and constructive follow-up negotiations held in Windhoek in March 2022 and then in Berlin in November 2022, the two sides continued working together to address remaining questions regarding interpretation in an addendum to the draft Joint Declaration. The German Government and the Namibian Government remain engaged in a dialogue on this.
10. Before the last round of talks held in Berlin in November 2022, over 250 Chiefs of the Herero, Nama, Damara and San came together on 27 October 2022 at the invitation of the Namibian Government for a Chiefs Forum. According to the press statement of 3 November 2022 by [REDACTED] Vice-President of the Republic of Namibia, the majority of them were in favour of continuing the dialogue.

IV.

11. The Namibian Government represents the Namibian people in matters of international law. It is therefore the point of contact for the German Government in all questions relating to bilateral relations, including the negotiations on addressing the colonial past.
12. At the same time, the participation of the individuals and/or groups affected is of vital importance. Above all, a reconciliation process is doomed to fail if the voices of those affected are not heard. From the start of the reconciliation process, it was therefore important to the German Government that the affected communities were represented in the negotiations in an appropriate and effective manner. In this the German and Namibian Governments concurred.
13. However, the right of participation under human rights law concerns the relationship of a state to its citizens (cf. e.g. Art. 25 lit. a ICCPR or the Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169 – which, however, has not been ratified by Namibia). Accordingly – as in this case in Namibia – national constitutional law provides the framework for the form and scope of this important participation, cf. *Marshall et al. v. Canada*, HRC No. 205/1986.
14. To the best of the German Government's knowledge, the traditional communities hold an important place in Namibia's constitutional system. Traditional authorities registered with the Namibian Government in line with Namibia's statutory provisions are responsible for organising their traditional life and representing them at state level.
15. As the holder of national sovereignty, it is the Namibian Government's responsibility to organise the participation of all affected communities in the negotiation process. The motion of ██████████ adopted unanimously by the Namibian National Assembly on 26 October 2006 granted the Namibian Government a mandate to enter into negotiations with Germany. In 2014, the Namibian Prime Minister ██████████ ██████████ declared before the Namibian National Assembly that some of the representatives of the descendants of the genocide victims were seeking direct negotiations with the German Government instead. According to the information available

to the German Government, the Namibian Government subsequently repeatedly invited all representatives of the communities affected to take part in the dialogue. In view of the domestic divisions on this matter, the German Government was always careful to avoid public statements which could be perceived as interference in Namibia's internal affairs.

16. The Namibian Government appointed [REDACTED], himself a descendant of the Herero community, as Special Envoy. He was supported by a Technical Committee, through which representatives of various governmental agencies as well as representatives of the affected communities played an active role in the negotiations. Five representatives of all affected communities were directly involved in the negotiations as delegation members.
17. The talks conducted by the Special Envoys were flanked by extensive consultations with representatives of the descendants of the victim communities outside the dialogue process. From 2015 onwards, the OvaHerero/OvaMbanderu and Nama Council for the Dialogue on the 1904-1908 Genocide (ONCD 1904-1908) with six royal houses and later also the Vaalgrass Traditional Authority, all leaders of the Damara Gaob Council and Hikumine Kapika, leader of the Epupa, among others, participated on a regular basis in the dialogue on reconciliation. In addition, an advisory Chiefs Forum was set up. It was briefed regularly on the progress of the talks by the Vice-President as the Chair of the Special Political Cabinet Committee established by the Namibian Government for the dialogue on reconciliation. The German Government is aware that, parallel to this, the Namibian Government has been consulting with and briefing an alliance of more than two dozen traditional authorities and royal houses.
18. The representatives of two associations, the Ovaherero Traditional Authority (OTA) and the Nama Traditional Leaders Association (NTLA), decided against a direct or indirect participation in the dialogue from the outset. Instead, they brought a class action on 5 January 2017 against the Federal Republic of Germany before the United States District Court for the Southern District of New York. The court dismissed the class action on 6 March 2019. The appeal lodged by the plaintiffs was denied by the United States Court of Appeals for the Second Circuit in its ruling of 24 September 2020, while their petition for a review en banc was denied on 19 November 2020. In a ruling of 7 June 2021, the Supreme Court of the United States denied certiorari.

19. The German Government noted the decision of the OTA and the NTLA to turn down the Namibian Government's invitation to take part in the reconciliation process. It regrets that its representatives have rejected repeated invitations from the Namibian Government to participate in the talks.
20. However, the abovementioned human rights instruments neither grant a right to participation in a certain form nor a veto right for individual representatives of the affected communities. Despite the rejection of the initialled Joint Declaration by the OTA and the NTLA, it was possible to take the positions of the affected communities into account in an effective manner in the talks held over the course of six years. In this vein, at the conclusion of the Chiefs Forum convened on 27 October 2022, Vice-President H.E. ██████████ stated on 3 November 2022 that there was a majority in favour of continuing the negotiations.
21. In the view of the German Government, there is therefore no reason to assume that the participation of the affected communities, as it was designed on the part of the Namibian Government, fell short of the requirements of the relevant human rights standards. Furthermore, the initialled Joint Declaration provides for the participation of the affected communities in the implementation of the programmes for reconstruction and development, as well as for reconciliation, remembrance, research and education.

V.

22. The initialled Joint Declaration reflects the shared understanding of the two sides of the events between 1904 and 1908 on the territory of what is now Namibia and concludes, with reference to the preamble of the Genocide Convention of 1948, that the abominable atrocities committed during periods of the colonial war culminated in events that, from today's perspective, would be called genocide. On this basis, it states Germany's moral, historical and political obligation to tender an apology for this genocide and subsequently provide financial means for reconciliation and reconstruction programmes. It envisages a formal apology from Germany and the acceptance of this apology by the Namibian side.
23. Under international law, the concept of reparation flows from the breach of an international obligation. However, today's outlawing and prohibition of genocide under

international law did not exist in the years 1904 to 1908. The Convention on the prevention and punishment of the crime of genocide of 9 December 1948, which entered into force for the founding signatories in 1951, and for Germany in 1955, does not apply retroactively. The Federal Government is aware of voices that argue in favour of a retroactive application of the Convention. International Law as it stands, however, provides for no such conclusion. According to Art. 28 of the Vienna Convention on the Law of Treaties of 23 May 1969, which reflects customary international law, a treaty does not apply retroactively unless a different intention appears from the treaty or is otherwise established. The Convention on the prevention and punishment of the crime of genocide does not contain any such provision. Furthermore, in the view of the Federal Government, the human rights instruments concluded under the auspices of the United Nations do not codify customary core principles existent before 1945. There is no evidence of a respective general state practice accepted as law before 1945.

24. It is with complete justification that the international community recognised the lack of legal rules to protect individuals against the state power to which they are subject as intolerable and drew the necessary conclusions for the future by concluding diverse human rights and international criminal law instruments. The German Government regards the ban on genocide and human rights as key pillars of international law, and has been advocating the development of relevant systems of protection since the end of the Second World War. This also springs from the recognition of our moral responsibility. However, the current regime of human rights protection is not a suitable instrument for addressing by legal means events which occurred long before its establishment.
25. As in the case in question there can be no legal responsibility under international law because the relevant legal instruments sanctioning these crimes came into existence at a later point in time, reconciliation must be sought by other means. Therefore, the German Government has, together with the Namibian Government, taken the path of political bilateral negotiations with the participation of the affected communities. The German Government would like to stress that this does not diminish the sincerity of its regret nor the seriousness of its efforts to bring about reconciliation, but rather underlines them.

VI.

26. With a view to healing the wounds of the past and to creating a lasting partnership for the future, the initialled Joint Declaration provides for a separate and unique reconstruction and development support programme in the Erongo, Hardap, ||Kharas, Khomas, Kunene, Omaheke and Otjozondjupa regions, which are mainly populated by Herero and Nama. Representatives of these communities will play a prominent part in this process. The projects are to include the following areas in which they are disadvantaged to this day: land reform, especially 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.
27. In order 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 and 1908, for future generations, the two sides want to find appropriate ways of memory and remembrance, support research and education, cultural and linguistic issues and encourage meetings of and exchange between all generations, in particular the youth. To this end, a separate legal structure, i.e. a joint trust or fund, is to be developed and put in place to select and finance projects which aim to improve reconciliation.
28. In the initialled Joint Declaration, the German Government undertakes to make available a total of 1.1 billion euro for the reconstruction and development support programme and the projects for reconciliation, remembrance, research and education. Some 50 million euro of this will be dedicated to the establishment of a programme for reconciliation, remembrance, research and education. This sum is to be allocated over a period of 30 years. The initialled Joint Declaration envisages the establishment of a Binational Commission to serve as a political framework for the consolidation of the special relationship between Germany and Namibia. Furthermore, in the Joint Declaration the Government of the Federal Republic of Germany renews its commitment to continue bilateral development cooperation at an adequate level within the framework of the United Nations 2030 Agenda for Sustainable Development.
29. The German Government considers the objection that the envisaged measures in the form of development cooperation are not a suitable means of fostering durable rec-

conciliation to be unjustified. This objection is based on the consideration that development cooperation evades the assumption of due responsibilities.¹ It is claimed that development programmes do not target victims specifically and their aim is to satisfy basic and urgent needs, to which beneficiaries have a right as citizens, not necessarily as victims². However, the initialled Joint Declaration states clearly that the reconstruction and development support programme is a response to Germany's historical, moral and political responsibility for the genocide and that bilateral development cooperation with Namibia will be continued independent of this at an adequate level. The reconstruction and development support programme envisaged in the initialled Joint Declaration is therefore deliberately targeted at the current settlement areas of the affected communities and at spheres in which they are disadvantaged to this day.

VII.

30. Nor does the initialled Joint Declaration ignore the gender aspects of the genocide. It mentions the violence against women and children and points out the abuse and rape which women and children were subjected to. The suffering, the inhumane treatment and the pain which tens of thousands of men, women and children experienced during the colonial war in the territory of today's Namibia at the hands of Germany must not be forgotten.
31. Today, the German Government is pursuing a feminist foreign policy. It is committed to ensuring that women and marginalised groups have equal access to resources – from financial, labour and natural resources to immaterial resources such as education and networks. It will also strive for a gender-sensitive and/or gender-transformative implementation of the programmes named in the initialled Joint Declaration.

VIII.

32. The genocide left deep scars in the collective memory of the affected communities. Independent of the foundation for reconciliation to be established after the signing of the Joint Declaration, to which the German Government attaches great importance as a means of strengthening the culture of remembrance and reviving an

¹ A/76/180, Ziff. 98.

² A/69/518, Ziff. 41.

inclusive dialogue within society on reconciliation, Germany is willing to shoulder its colonial responsibility and has for many years been supporting efforts to preserve cultural memory in Namibia and to investigate the historical facts through a large number of projects. For example, from 2001 until 2011, the German Government funded, among others, a Namibian project to research and document anti-colonial resistance and the then Federal Foreign Minister, Joschka Fischer, handed over a microfilm to the National Archives of Namibia in Windhoek on 29 October 2003 containing the files of the former Imperial Colonial Office.

33. Just like its predecessor, the current German Government made addressing German colonial history one of the goals in its coalition agreement of 24 November 2021. The German Government supports provenance research and digitisation, the expansion of museum cooperation and the return of collections from colonial contexts. It wants to move on from colonial continuities and commission independent scientific studies to address the legacy of colonialism and develop a concept for a place of learning and remembrance addressing colonialism. Cultural policy is to contribute to a common future between Europe and Africa through a special programme entitled “Global South”.
34. In the past few years, human remains and cultural artefacts from collections in Germany have been repatriated on many occasions, primarily to Namibia, among others. On 29 August 2011, on 4 and 5 March 2014 as well as on 30 September 2018, human remains were handed over to representatives of the victim communities particularly affected and returned to Namibia. The Federal Government, federal states and municipal umbrella organisations agreed in the joint “Framework Principles for dealing with collections from colonial contexts” of 2019 to repatriate human remains from collections from colonial contexts.
35. The repatriation of cultural property has also been made possible. In the case of collections from colonial contexts, the competences of the respective institutions must be respected, as they are usually the owners or in possession of collection holdings. The Federal Government will continue to work to ensure that repatriations to Namibia are made possible.
36. In 2019, for instance, the whip and family bible of Namibia’s national hero Captain [REDACTED] were returned to Namibia. On 31 May 2022, 23 artefacts from the Ethnological Museum in Berlin of the Prussian Cultural Heritage Foundation were

given to the National Museum of Namibia in Windhoek as a permanent loan. According to a decision of the Foundation Council of the Prussian Cultural Heritage Foundation, they are to remain in Windhoek by means of a contractual agreement with the Namibian side.

37. In the sphere of cultural preservation, the German Government is, for example, currently funding the renovation by the Samuel Maharero Heritage Foundation of a cemetery in Okahandja where several celebrated Herero leaders are buried. It is also supporting a project to preserve the oral traditions of the Nama, Damara and Baster societies. Original testimonies by Namibians who experienced first-hand the German colonial era are being digitised so that these voices can be heard by future generations.
38. With regard to the upkeep of the graves of members of the German colonial forces, the German Government wants to make it clear that the Volksbund Deutsche Kriegsgräberfürsorge e.V., which cares for German war grave sites abroad with the support of the German Government, does not manage any war grave sites in Namibia. Grave sites for members of the former German colonial troops in Namibia are maintained by a local initiative with a similar name but without funding from Germany. The German Government provides the local initiative with a tied grant via the Volksbund exclusively for tending to the graves of the world war dead in the cemeteries.
39. At present, the Federal Foreign Office is financing a programme entitled “German Colonial Rule. Scholarship Programme for Cooperative Research”, which is coordinated by the German Academic Exchange Service. It enables nine young academics from Burundi, Cameroon, Namibia, Rwanda, Tanzania and the Philippines to research the role of the Foreign Office and other German authorities during the colonial era. One of the express goals of the scholarship programme is to hear perspectives from countries where there were once German colonies and to find a way of dealing with the past which is based on partnership and focused on the future. Furthermore, the Federal Foreign Office is funding the anthology “Das Auswärtige Amt und die Kolonien. Geschichte, Erinnerung, Erbe” (The Foreign Office and the Colonies. History, Remembrance, Legacy), which is edited by [REDACTED] (Munich), [REDACTED] (Stuttgart), [REDACTED] (Berlin) and [REDACTED] (Yaoundé / Cameroon).

IX.

40. Despite the strong and cordial relations with Namibia and the many contacts between German and Namibian civil societies, it took a long time before the German public became aware of the genocide committed in Namibia between 1904 and 1908.
41. The German Government is therefore keen to also strengthen and expand the culture of remembrance in Germany with regard to German colonial rule and to see a critical examination of this era. It welcomes initiatives to this end at municipal level, including within the framework of town twinning arrangements, as well as at federal state level. The Federal Agency for Civic Education, which has provided information on the German colonial era in what was then German South West Africa in several background papers, also plays an important role.
42. Addressing our colonial history as part of Germany's culture of remembrance is a task for the whole of society, including the cultural and academic communities. Examples include the exhibition "German Colonialism. Fragments Past and Present", which was held at the Deutsches Historisches Museum (German Historical Museum) in 2016, the play "Hereroland" by [REDACTED] and [REDACTED] premiered at the Thalia-Theater in Hamburg in January 2020 and the opera "Chief Hijangua" by the Namibian composer [REDACTED], a Herero, and the German director [REDACTED] [REDACTED] which had its premiere in Windhoek in September 2022 and will be performed in Berlin and Munich in autumn 2023. The film "Der vermessene Mensch" (Measures of Men) by [REDACTED], which had its premiere in Berlin on 22 February 2023 and was also shown in Namibia in early March 2023, including in the settlement areas of the Ovaherero, with the support of the German Government, deals with the genocide in Namibia and has re-ignited the public debate in Germany. The German Government welcomes and supports the open and frank discussion of these issues.

X.

43. The German Government recognises with profound respect that, under the guidance of the Namibian Government's Special Envoy, [REDACTED], and the German

Government's Special Envoy, [REDACTED], and with the participation of the affected communities, it has been possible after six years and in nine rounds of negotiations to find a common language for the genocide of tens of thousands of women, men and children and to preserve its memory for future generations.

44. The German Government regards the Joint Declaration as a basis for a comprehensive and inclusive process of reconciliation and reconstruction with Namibia across our societies. It comprises an appropriate culture of remembrance and a new level of political, economic and cultural partnership, for which the German Government has earmarked funding as outlined in the initialled Joint Declaration.
45. It is the firm intention of the German Government to continue working to ensure that this dialogue on reconciliation – which is being conducted by both sides sincerely, comprehensively and in a spirit of mutual trust, is far advanced and also looks to the future – can be brought to a successful conclusion despite all the difficulties. It could serve as a model for addressing colonial injustice.

Geneva, 01 June 2023