

**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**

Ref.: AL DEU 1/2023  
(Please use this reference in your reply)

23 February 2023

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; Special Rapporteur in the field of cultural rights; Special Rapporteur on extrajudicial, summary or arbitrary executions; 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; Special Rapporteur on the rights of indigenous peoples; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and Special Rapporteur on violence against women and girls, its causes and consequences, pursuant to Human Rights Council resolutions 45/10, 46/9, 44/5, 43/14, 51/16, 43/36 and 50/7.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the alleged lack of meaningful participation, through self-elected representatives, of the Ovaherero and Nama peoples in the negotiations leading to the issuance of the "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", as well as the lack of effective reparative measures afforded to them, including an unqualified recognition of the genocide committed against these communities in the former German Southwest Africa colony between 1904 and 1908.**

According to the information received:

*Historical context*

Between 1903 and 1904, several months of confrontations between the German imperial military forces and the Nama and Ovaherero peoples in the former colony of German South West Africa (GSWA), present-day Namibia, resulted in the defeat of the latter. On 2 October 1904, the colonial regime issued an extermination proclamation targeting the Ovaherero peoples. A similar proclamation targeting the Nama peoples was issued on 25 April 1905. The articulated extermination policy focused specifically on the Ovaherero and Nama peoples, not on other communities living in Namibia.

Between 1904 and 1908, German imperial military forces systematically targeted indigenous Ovaherero and Nama peoples, using physical violence, establishing conditions of malnutrition, sickness starvation and thirst. Over 65,000 Ovaherero and 10,000 Nama died at the hands of German authorities, including thousands who died of thirst and starvation after being driven into the desert without food and water. Many Ovaherero and Nama who survived the initial slaughter were sent to concentration camps at Shark Island, Windhoek and Swakopmund and held under inhumane and barbaric conditions, where many more died. An estimated 80 percent of the Ovaherero and 50 percent of the Nama died during this period.

The persecution against the Ovaherero and Nama peoples was latter qualified as the first genocide of the 20th century.

### *The forced labor camps*

During the confrontations, detention camps were established in different parts of the GSWA colony, of which the most prominent were Swakopmund and Lüderitz. These camps also provided forced labor for businesses and for the development of the colonial infrastructure, mainly ports and railroads, as the extermination strategy had resulted in the loss of workers for the German settlers. Indeed, many Ovaherero and Nama were used as slave and/or forced laborers, without compensation, under inhumane and barbaric conditions.

The harsh living conditions in these camps, including lack of food and clothing and heavy labor, led to the death of 7.682 persons, between 30 and 50 percent of the detainees, according to official German accounts. In the Lüderitz camp, approximately 90 percent of the 3.500 prisoners in the Lüderitz camp died.

The human remains of some of the Nama and Ovaherero who died in the concentration camps were sent to German museums and universities for public display or for "medical experimentation" designed to show the superiority of the German race.

Although the end of the war in the GSWA colony was declared on 31 March 1907, the detention camps were only closed on 28 May 1908 for the Ovaherero indigenous. Several Nama indigenous were not officially released until the beginning of the First World War in 1914.

### *The establishment of a racist settler state*

Following the establishment of a racially colonial settler state by the German colonial government, the surviving Ovaherero and Nama faced radical changes in their living conditions, which were characterized by systematic surveillance, discrimination and dispossession. Property of Ovaherero and Nama peoples, including land, cattle and other assets, were expropriated under imperial regulations in 1905 and 1906, without compensation. Possession of land and cattle was prohibited in 1907, resulting not only in the deprivation of their means of economic production, but also in the deprivation of the means for the reproduction of cultural and collective identity. German colonial authorities also

attempted to eradicate the language and culture of the Ovaherero and Nama peoples. Following the withdrawal of freedom of movement, black people over the age of seven were required to wear an identity tag made of sheet metal (Erkennungsmarke) indicating the district where they lived.

Robbed of their rich grazing lands, which provided the economic basis for their existence, and deprived of much of their cultural heritage, many of the Ovaherero and Nama people have been condemned to perpetual and institutionalized poverty for generations.

Gender-based violence was widespread during German colonial rule, particularly against women and girls. Ovaherero and Nama women and girls were subject to rape and physical violence during this period, with the reported knowledge and consent of German colonial authorities. The German colonizers were initially mostly men, which led to an increase of sexual violence and unequal exploitative relationships as well as marriages between German men and Ovaherero and Nama women during the first decades of colonialism, which were reportedly unsanctioned until 1905. Sexual violence against Ovaherero and Nama women was widespread and considered by some as one of the main aspects of the colonial war.

#### *Long-term effects of the genocide in Namibia*

The impact and trauma of the atrocities committed under German occupation lasted long after the overthrow of the GSWA colony by the Union of South African troops during World War I. The Union of South Africa controlled Namibia starting from 1915 and kept several core characteristics of the German colonial system, among them forced labour and the mobility regulations for black people.

In Namibia, the socioeconomic impact of the loss of land and assets, the transgenerational trauma of the aftermath of colonialism and genocide, and the racial discrimination, which was intensified by the impending implementation of segregation in 1928, are still pervasive today. The loss of tribal organization, practices, names, and religion has resulted in the loss of cultural identity and belonging and caused irreparable damage. Additionally, the concentration and slave labor camps led to institutional sexual violence and trauma that was never addressed, and which is visible in contemporary Namibia through gender-based violence.

The death toll critically reduced the size of the population of Ovaherero and Nama Peoples, reducing them to voiceless minorities in Namibia with scarce influence in the contemporary political landscape. The Ovaherero and Nama peoples remain a dispossessed and disempowered minority in their own country of Namibia, and many were forced out of or fled Namibia.

#### *The recognition of the genocide*

Internationally, the genocide against the Ovaherero and Nama peoples was acknowledged as genocide in the report on the question of the prevention and

punishment of the crime of genocide prepared by the UN Special Rapporteur on the prevention and punishment of the crime of genocide on 2 July 1985<sup>1</sup>.

The Government of the Federal Republic of Germany refused to use the term genocide for a long time. In 2004, on the centennial of the beginning of the colonial war, a resolution adopted by the German Federal Parliament referred to the events of 1904-1908 as source for a “special responsibility” of the Federal Republic of Germany, referring to the events as a “suppression of the uprisings” about which the parliament expressed its “deep regret and sorrow”.

On 10 July 2015, for the first time, a speaker for the German Foreign Office hinted that the events of 1904–1908 qualified as genocide. Since then, the German Foreign Office and other state representatives have used the term “genocide” to refer to the conduct of the German colonial forces between 1904 and 1908 with a reservation indicating that the events could only be qualified as such according to present-day standards, thus it could not be considered a legal terminology, but rather a historical-political- one.

#### *Ongoing talks between Germany and Namibia*

In October 2006, the Namibian National Assembly passed a resolution confirming a motion submitted by the Paramount Chief of the Ovaherero (following years of consultation with the Paramount Chief of the Nama Traditional Leaders Association), which formulated the conditions and objectives for a negotiation with the German government regarding reparations for the colonial crimes committed between 1904-1908. Essential key points of the motion included: recognition of the genocide, an official apology by the German state, reparations to victims, and tripartite participation in negotiations from both governments and representatives of the affected communities.

However, since 2015, the Governments of Germany and Namibia have embarked in bilateral negotiations on reparations for the colonial crimes committed by the German State in its former colony of South-Western Africa. The bilateral discussions were reportedly carried out in strict confidentiality and without the direct and meaningful participation of the affected communities in the negotiations, including women, which was both a requirement in the Assembly’s resolution and a request of the official leaders of the Ovaherero and Nama peoples. The affected communities were offered a role as technical advisors, without decision-making power, within the interstate bilateral negotiating framework. However, the Ovaherero Traditional Authority (OTA) and the Nama Traditional Leaders Association (NTLA) were not invited to participate in the negotiation process, despite representing the majority of the Ovaherero people and the Nama people in Namibia. The traditional leaders of the Nama and Ovaherero peoples rejected the interstate bilateral framework and demanded tripartite negotiations where affected communities could participate directly and meaningfully through their self-elected representatives. Their position was construed by the Governments as a refusal to participate. Although the official representatives of the OTA and the NTLA did not participate in the

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<sup>1</sup> Symbol E/CN.4/Sub.2/1985/6

negotiations for the aforementioned reasons, some groups within the affected communities accepted the bilateral negotiations and participated in consultations in a government-appointed technical committee. The authorities of some of these groups, however, later pulled out of the process stating that they had not received sufficient information about the negotiations. Due to the strict confidentiality applied to the negotiations, information about the persons involved in the consultations, and the modality of consultation, was unavailable to the affected communities.

In August 2020, in response to a press statement by the President of the Federal Republic of Namibia on the status of the negotiations, representatives of the Ovaherero Traditional Authority (OTA) and the Nama Traditional Leaders Association (NTLA), which include women, made it clear that they will not accept an agreement if they weren't sitting at the table.

### *The Joint Declaration of June 2021*

In June 2021, after six years of negotiations, the German and Namibian Governments issued the “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” (hereafter Joint Declaration),<sup>2</sup> in which 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*”.

The Joint Declaration 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*”, and accepts “*a moral, historical and political obligation to tender an apology for this genocide and subsequently provide the necessary means for reconciliation and reconstruction*”.

Reports indicate that the German Government refrained from assuming legal responsibility for the crimes committed between 1904 and 1908 as it upholds an interpretation of the principle of intertemporality of the law according to which the genocide did not constitute crime at the time of the events, and as such these crimes can only be addressed through political and moral means. This, in turn, entails from the Government of Germany’s perspective a lack of recognition of Germany’s legal obligation to provide reparation to affected communities.

The declaration further states that Germany “*apologizes and bows before the descendants of the victims*” and “*asks for forgiveness for the sins of their forefathers*”. It also indicates that “*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*”.

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<sup>2</sup> [www.dngev.de/images/stories/Startseite/joint-declaration\\_2021-05.pdf](http://www.dngev.de/images/stories/Startseite/joint-declaration_2021-05.pdf)

In this regard, the Joint Declaration does not afford reparation measures to victims, rather it establishes that a 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*” and that “*representatives of these communities will participate in this process in a decisive capacity*”. Under this programme, 1.1 billion euros will be provided by Germany for “*support programs for reconstruction and development*” in the regions of Erongo, Hardap, Kharas, Khomas, Kunene, Omaheke and Otjozondjupa over the next 30 years.

Furthermore, the Joint Declaration does not recognize the gendered violence that women and girls specifically experienced in the form of sexual violence and exploitation.

Clause 10 of the Joint Declaration stipulates that no further demands based on colonial crimes will be made in the future.

#### *Status of the Joint Declaration*

To date, the declaration has not been signed at Namibia’s National Assembly. In September 2021, the Namibian Defense Minister tabled a motion in the National Assembly for debate of the Joint Declaration and sought a vote in favour of its ratification. Parliamentary approval is necessary in Namibia for several reasons, partly due to the resolution passed on the subject in October 2006. For ten weeks, members of Parliament debated the motion. In December 2021, after the Namibian Executive promised further engagements with their German counterpart, the Speaker of the National Assembly noted the debates without taking a vote. However, the German Foreign Office stated in August 2022 that they considered the Joint Declaration as being conclusive. In November 2022, a Namibian delegation reportedly traveled to Berlin to negotiate an Addendum to the Joint Declaration and to agree on the concrete terms of its implementation

#### *Opposition and legal challenges to the Joint Declaration*

The announcement of the declaration triggered opposition in the Namibian National Assembly and protests from affected communities, including the Nama Traditional Leaders Association (NTLA) and the Ovaherero Traditional Authority (OTA), and the general civilian population in Namibia.

Affected communities, including women, have called for the establishment of new negotiations in which they can participate directly. They have argued that former settlers have not only a moral and political duty, but also a legal duty to engage directly with the affected communities in seeking appropriate remedies. They also stressed that a people-centered solution would be essential in the struggle to eliminate discrimination and trauma, if conducted in a fair and responsible manner. Affected communities have also noted that a gender perspective, including a recognition of the gender-based crimes and sexualized violence committed against the Ovaherero and Nama and the inclusion of non-

male perspectives in the present's day negotiations, should be central to discussions. The type and quantity of reparations is also seriously disputed in Namibia. Ovaherero and Nama organizations insist on receiving reparation for the harm suffered rather than generic development aid and consider the proposed sum insufficient. In this regard, they expect remedies to include an unqualified recognition of the crime of genocide and reparations for this crime, the return of looted human remains, the recognition of the decimation of cultures, and the adoption of historical enquiries concerning the loss of lives, livelihood and culture.

In January 2023, legal representatives of the Landless Peoples Movement, the Ovaherero Traditional Authority, and ten different Nama Traditional authorities, comprising the Nama Traditional Leaders Association, filed an application to the High Court in Namibia to have the legality of the Joint Declaration reviewed and to seek judicial review of the Speakers' decision to note the debate on the Joint Declaration (case number: HC-MD-CIV-MOT-REV-2023/00023). The application argues that the Namibian government didn't have the authority to agree to clause 20 of the Joint Declaration without prior legal review and approval by the Namibian Parliament, and that the Speaker's decision to "note" the debate violated procedural laws and was *ultra vires*. It further argues that the negotiations leading to the Joint Declaration entailed a violation of the right to participation of affected communities in a substantive manner and through self-elected representatives, particularly in view of the exclusion of the Ovaherero Traditional Authority (OTA) and the Nama Traditional Leaders Association (NTLA). In addition, the application argues that the current interpretation of the principle of intertemporality by the German and Namibian governments is a reproduction of the racist distinction between civilized and non-civilized nations and is thus itself racist. In this connection, it further notes that according to articles 63(2)(i) and 40(I) of the Namibian National Assembly on the duty to counter colonial patterns and legacies, the Cabinet, Attorney General, and Namibian Executive must oppose such content in any agreement.

#### *Insufficient memorialization about the genocide*

The genocide against the Ovaherero and Nama peoples is scarcely memorialized in Germany. The colonial past has not played a prominent role in the German public discourse for a long time. Few public resources or memorials are dedicated to Germany's colonial past, including the genocide against the Ovaherero and Nama. The only public accessible memorial for the genocide against the Ovaherero and Nama in Germany is located in the city of Bremen adjacent to a former colonial monument that was erected in 1932. It should be noted that it was not a governmental initiative, but local civic initiatives that pushed for turning this colonial memorial into an anti-colonial memorial. In 1996 the Mayor of Bremen and the President of Namibia jointly unveiled for the first time a plaque saying "In Memory of the victims of the German colonial rule in Namibia, 1904-1914". In 2009 an adjacent memorial dedicated to the victims of the genocide against the Ovaherero and Nama was sculptured, which currently includes an information plaque that refers explicitly to the German genocide in Namibia.

Germany's Federal Agency for Civic Education (Bundeszentrale für politische Bildung) has published in its book programme numerous books related to the holocaust and Nazi atrocities and has as well more recently published a book entitled "Aiding and abetting genocide: Germany's role in the annihilation of the Armenians".<sup>3</sup> Regrettably, it has not dedicated a book to the genocide in Namibia in its publication programme to date. Some scientific articles and the agency's web content have covered the colonial crimes and the genocide in Namibia. While there are first signs of a more inclusive memorialization of the crimes of Germany's colonial past, many schoolbooks still in use give scant attention to the crimes committed during Germany's colonial past or to the genocide in Namibia.

On the other hand, sites erected to commemorate the colonizers continue to be maintained while the historical context remains uncommented or unexplained. The German War Graves Commission, partially funded by the German Foreign Office, maintains graves in Namibia of exclusively German soldiers who died abroad during the German colonization of Namibia from 1884-1915, but leaves out the history of the Ovaherero and Nama victims. In Germany, the grave of Lothar von Trotha, who gave the extermination order against the Ovaherero and Nama, is located at the Poppelsdorfer Friedhof in Bonn. While his name was recently removed from a sign listing the cemetery's graves of honour, the cemetery's site does not include a historical context about his role in the genocide.

We express grave concern at the alleged failure of the Governments of Germany and Namibia, as parties to the negotiations, to ensure the right of Ovaherero and Nama Peoples, including women, to meaningful participation, through self-elected representatives, in the discussions on the recognition and redress of the 1904-1908 genocide, which led to the issuance of the "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". We wish to recall that the legal status of the Ovaherero and Nama peoples and their representatives as indigenous peoples under international and national law is different and separate from that of the Namibian Government itself, and thus requires a place of its own in the negotiations. Since the subject matter of the current negotiations between Germany and Namibia directly relates to and affects the right of the Ovaherero and Nama peoples and the determination of the remedies that would provide adequate justice for the harm suffered, no valid negotiations can be conducted and no just settlement can be reached without them. The meaningful participation of Ovaherero and Nama Peoples is an essential part of the much-needed reconciliation process and cannot be confined to external consultations; it must entail their direct engagement as interested and necessary parties in all aspects of the negotiations that concern them, and ensure the full and equal participation of women from affected communities. In this regard, we recall that international law requires the States to obtain the free, prior, and informed consent of the Indigenous Peoples concerned through their own representatives before adopting and implementing legislative or administrative measures that may affect them. It also

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<sup>3</sup> See Jürgen Gottschlich, *Beihilfe zum Völkermord: Deutschlands Rolle bei der Vernichtung der Armenier*, Bonn: Bundeszentrale für politische Bildung, 2005, available for order at: <https://www.bpb.de/shop/buecher/schriftenreihe/203527/beihilfe-zum-voelkermord/>



stipulates that mechanisms that aim to redress colonial crimes have to be developed in conjunction with them. The right to meaningful participation in all decisions that have an impact on their cultural life is also guaranteed under international law.<sup>4</sup>

We express further concern that in acknowledging and apologizing for the past violence, the Joint Declaration only includes a “qualified” recognition of the genocide committed against the Ovaherero and Nama peoples “from today’s perspective”, thus attempting to remove legal consequences for those acts under current national and international law. In addition, the recognition for the harm inflicted to these communities found in the Joint Declaration encompasses the assumption of moral liability but fails to recognize legal responsibility. We are concerned that this is reportedly based on a contested application of the principle of intertemporality to this case, according to which the legal questions about the crimes must be assessed pursuant to the laws in effect at the time of the events. The application of this principle to crimes committed during the colonization of Namibia means, however, that those acts are assessed not in line with today's legal standards but rather in accordance with the racist and discriminatory laws imposed by the colonial power of the time, thus perpetuating unacceptable colonial patterns and legacies.

While all UN human rights treaties were only codified after 1945, we want to underscore that they enshrined core international law standards of a customary nature that predate their adoption and ratification. It should be noted that German legal doctrine itself has successfully relied on arguments of natural justice to deal with the difficulty that many crimes committed during the Nazi period were legalized by discriminatory and inhumane laws or were at the time when they were committed not explicitly prohibited in Germany’s positive law. After German unification similar arguments were relied on, to hold commanders and border guards responsible for the killing of refugees at the internal boarder between the former Democratic Republic of Germany and the Federal Republic of Germany responsible for their crimes.<sup>5</sup> In light of this, it would be difficult to argue that due to the fact that there was not yet a specific international law norm codified or ratified by Germany at the time when the crimes against the Ovaherero and Nama were committed, such conduct could be considered legal and that the genocide and the crimes against humanity committed during Germany’s colonial rule would not raise any legal obligations in relation to remedies, including in respect to reparation for the harm suffered.

We would like to note that the nature, scope and intent of the crimes committed, which are rightly characterized as genocide – and therefore a crime against humanity – are of a severity which cannot be construed under any legal or historical interpretation as being subject to temporal limitations or prescription and, as such, relieving the perpetrator from legal liability and the duty to provide redress to the affected communities who continue to suffer today the severe material harm and intergenerational trauma of the crimes inflicted upon them. In addition, the systematic colonial dispossession of property, land, housing, cattle and means of livelihood, as well as the enslavement and internment of Ovaherero and Nama in detention camps

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<sup>4</sup> United Nations Declaration on the Rights of Indigenous Peoples, art. 11 and 18. International Covenant on Economic, Social and Cultural Rights, art.15.

<sup>5</sup> Jurisprudence of German courts have relied on arguments initially presented by Gustav Radbruch, in his famous article on *Gesetzliches Unrecht und übergesetzliches Recht*, published in *Süddeutsche Juristen-Zeitung* (1946), pp. 105-108.

resulted in systematic and widespread violations of their civil, political, economic, social and cultural rights.

We are further concerned that, in line with your Excellency Government's alleged position that victims' claims for compensation are null and void, the Joint Declaration does not afford reparation measures to victims, but rather establishes "reconstruction and development support programmes" as a form of collective development aid for the harm inflicted to Ovaherero and Nama peoples. We regret to note that this proposed response, which falls within the development aid category, is inconsistent with the scope of the harm inflicted to victims, fails to provide effective reparation to affected communities or take into consideration the consequences of gendered violence committed against Ovaherero and Nama women and girls, and is incompatible with international standards on reparation of gross human rights violations.

On the contrary, to be effective and compliant with international standards reparation or benefits afforded to victims should aim at comprehensively addressing the multiple consequences and effects of the harm suffered, including as a result of killings, starvation, torture, gendered violence, enslavement, forced labor, and loss of property, means of livelihood and community life, and should entail measures in the areas of restitution, compensation, rehabilitation and satisfaction. This is particularly important for Ovaherero and Nama peoples who have stated that access to ancestral lands is considered essential for the process of "healing wounds". Effective reparation should also include measures to establish the facts and learn the truth about the circumstances surrounding the 1904-1908 genocide, including the identity of the victims and perpetrators, the events that led to these violations, the gendered violence experiences by women and girls, and their impact on the affected populations and their descendants. Processes of historical truth-seeking are indispensable to create restorative justice and collective healing.

Furthermore, we express concern that development aid projects that do not encompass legal accountability or aim at repairing the harm done and improve the specific conditions in which victims find themselves are not adequate substitutes for measures of reparation. Moreover, the provision of development aid to address the legacy of colonialism risks perpetuating, rather than rectifying, colonial dynamics and perceptions where the former colonial power sets the conditions for the provision of assistance to the former colony.

We wish to underline that the question at hand is not a demand for assistance but rather, and clearly so, a demand for accountability and reparation for the harm inflicted. This has important ramifications as only full reparation that includes acknowledgement, apology, restitution, compensation, rehabilitation and guarantees of non-recurrence (including the reform of continuous forms of exclusion and discrimination), can effectively remedy past wounds. This fundamental distinction cannot be overlooked or dismissed as in it lies the key to achieving the healing and reconciliation that has evaded both parties for so long.

Finally, we express concern at the reported insufficient memorialization in Germany about the colonial past and particularly about the genocide against the Ovaherero and Nama peoples, including the sexual violence experienced by women

and girls. We would like to recall in this regard the duty of States, both former colonizing powers and former colonies, to memorialize the gross human rights violations committed in colonial contexts. Comprehensive memorialization measures should be adopted, in full consultation with the victims, to inform the general public about the violations suffered by the Ovaherero and Nama peoples during the colonial period, and to preserve the memory of those tragic events for current and future generations.<sup>6</sup>

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information about the measures adopted by the States parties to the negotiations leading to the Joint Declaration to guarantee the rights of the Ovaherero and Nama peoples, including women and girls, to participate meaningfully and through self-elected representatives in the discussions related to the recognition and reparation of the 1904-1908 genocide. If such measures have not been adopted, please explain why.
3. Please provide information about the measures adopted by your Excellency's Government to provide access to remedy, within your jurisdiction, to victims belonging to the Ovaherero and Nama peoples for the violations endured, including women victims of sexual violence and their descendants. If such measures have not been adopted, please explain why.
4. Please indicate if any measures are planned or have been adopted by your Excellency's Government to provide effective reparation to victims, including restitution of confiscated land, compensation, psychosocial and physical rehabilitation, and satisfaction. If such measures have not been adopted, please explain why.
5. Please indicate if any measures have been adopted within your jurisdiction to establish the truth about the facts and circumstances surrounding these violations, including sexual violence committed against women and girls. If such measures have not been adopted, please explain why.
6. Please indicate if any memorialization measures or processes have been adopted by your Excellency's Government to inform the general public

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<sup>6</sup> A/76/180, para. 110.

within your jurisdiction, and where relevant abroad, about the violations suffered by the Ovaherero and Nama peoples during the colonial period, including gender-based violence committed against women and girls, and to preserve the memory of those tragic events for current and future generations. If such measures have not been adopted, please explain why.

7. Please provide information on the current status of discussions with Namibia on the recognition and the reparation of the 1904-1908 genocide.

We would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary measures are taken to ensure justice, truth, reparation and guarantees of non-recurrence of past human rights violations, as guaranteed by various international human rights instruments.

Please note that a letter regarding the aforementioned allegations will also be sent to the Government of the Republic of Namibia.

Please accept, Excellency, the assurances of our highest consideration.

Fabian Salvioli  
Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

Alexandra Xanthaki  
Special Rapporteur in the field of cultural rights

Morris Tidball-Binz  
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Balakrishnan Rajagopal  
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Reem Alsalem  
Special Rapporteur on violence against women and girls, its causes and consequences

## **Annex**

### **Reference to international human rights law**

In connection with above alleged facts and concerns, and without prejudging the accuracy of these allegations, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards.

We would like to refer to article 2 of the Covenant on Civil and Political Rights, ratified by Germany in 1973, which establishes that States must undertake measures to ensure that persons whose rights or freedoms are violated shall have an effective remedy. In addition, 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 equal access to an effective judicial remedy and receive adequate, effective and prompt reparation for the harm suffered, and to have access to relevant information on reparation mechanisms (paragraphs 10, 11, 12 and 15).

In its General Comment No. 31, the Human Rights Committee established that States need to respect and ensure the Covenant rights to all persons who may be within their territory and to all persons that are subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party (paragraph 10). Furthermore, States have an obligation to investigate and punish serious human rights violations, including summary or arbitrary killings, torture and other cruel, inhuman or degrading treatment, and enforced disappearances (paragraph 18). Failure to investigate and prosecute such violations is in itself a breach of the norms of human rights treaties. Impunity for such violations can be an important element contributing to the recurrence of violations. In addition, in its recent general recommendation no. 39 (2022) on the rights of Indigenous women and girls, the Committee on the Elimination of Discrimination against Women stressed the obligation for States to address the effects of colonialism.

In connection to the duty to prevent impunity for gross human rights violations and to ensure victim's access to an effective remedy regardless of the time in which those violations took place, we would like to recall that the imprescriptibility of crimes against humanity is a norm of *jus cogens*, i.e. a peremptory norm of international law that does not admit of any contrary provision. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, of 26 November 1968, establishes the imprescriptibility of crimes against humanity committed both in wartime and in peacetime, whenever they were committed. According to this instrument, States must adopt the necessary legislative or other measures so that the statute of limitations for criminal action or punishment, established by law or otherwise, does not apply to those crimes, and in the event of that they exist, be abolished. In addition, the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity of February 2005 establishes that States should adopt and enforce safeguards against any abuse of restrictive rules, such as those pertaining to prescription, that fosters or contributes to impunity (principle 22) for human rights violations. It further prescribes that prescription in criminal cases shall

not run for periods where no effective remedy is available. Moreover, the rule of prescription (or status of limitations) shall not apply to crimes that are imprescriptible under international law. Even when such principle is applicable, it shall not be effective for victims seeking reparations for their injuries (principle 23). Similarly, 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 determine that “statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law” (principle 6).

With regards to the failure of the Joint Declaration, conjointly drafted by your Excellency’s Government and the Government of Namibia, to afford full and effective reparation to the Ovaherero and Nama peoples for the harm inflicted during colonial ruling, particularly during the 1904-1908 genocide, and the legacy of those violations in present times, we would like to refer to the right of victims of human rights violations to receive full reparation for the harm suffered. The Updated Set of Principles (articles 31-34) recall the duty of States to make reparation to victims. Similarly, 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 receive adequate, effective and prompt reparation for the harm suffered. Reparation should be proportional to the gravity of the violations and the harm suffered. Victims should be provided with full and effective reparation, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (paragraphs 10, 11, 15, and 18). In addition, 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 (UN Doc. A/Res/60/147) guarantees effective legal protection and the right to reparations in cases of human rights violations and breaches of international humanitarian law.

We would like to recall that, as noted by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, “unlike the traditional transitional justice processes that focus on recent human rights violations, addressing rights violations that occurred in colonial times poses challenges due to the length of time that has passed (..) in general, processes of historical truth-seeking and the legal recognition of the harm done in the past and its repercussions in the present are indispensable to the establishment of restorative justice as a basis for a peaceful and sustainable future”.<sup>7</sup>

It is important to stress in this regard that serious human rights violations can be shattering for victims and have long-lasting effects impacting many persons and generations. As noted by the former Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence in his report on reparations (A/69/518) “the failure to implement measures that can mitigate the legacies of the violations, in addition to being a breach of a legal obligation, has severe consequences for both individuals and collectivities”.<sup>8</sup>

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<sup>7</sup> A/76/180, paras. 94 and 95

<sup>8</sup> A/69/518, para. 7

With regards to the Joint Declaration's offer of development aid *in lieu of* the full reparation owed to Ovaherero and Nama peoples for the serious harm inflicted on them, we would like to bring to your Excellency's Government attention that in his report on reparations, the former Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence noted with concern that sometimes benefits to victims are given not as a way of satisfying the legal obligations of the State and the rights of the victims but as an expression of "solidarity" with them while clarifying that such acts have "no legal consequences". He noted in this regard, that "reparation programmes that fail to acknowledge responsibility in effect attempt to do the impossible. Just as an apology is ineffective unless it involves an acknowledgment of responsibility for wrongdoing [...] reparation programmes that fail to acknowledge responsibility do not provide reparation."<sup>9</sup>

As established by the current Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, to properly address the legacy of serious human rights violations committed in colonial context, States that were colonizing powers must consider mechanisms to redress the harm caused to victims and affected communities. Such reparations, whether individual or collective, should aim to be comprehensive and include the following: (a) Satisfaction, including restoration of the victims' dignity, recognition of the harm caused and the responsibilities involved, the dissemination of information in this regard, and the issuance of public; (b) Restitution of lands and natural resources, through mechanisms for the return of usurped lands, and/or the granting of other lands agreed upon with the affected persons and communities, including through land reform mechanisms that make possible to overcome inequality in access to lands and natural resources; and the restitution of cultural heritage and archaeological remains; (c) Compensation, including sums of financial compensation that are considered adequate and commensurate with the harm suffered by the victims, and to which they have agreed; (d) Physical and psychosocial rehabilitation and access to essential rights, infrastructure and services that ensure a dignified life, including housing, health, education and access to water and sanitation".<sup>10</sup>

The Special Rapporteur further noted that to address the legacy of human rights violations in colonial contexts, "reparations should not and cannot be dressed up as humanitarian aid, assistance or development cooperation, evading the assumption of due responsibilities".<sup>11</sup> Development aid projects that do not acknowledge accountability and do not aim to improve the specific conditions in which victims find themselves are not adequate substitutes for measures of reparation.<sup>12</sup>

In addition, we would like to recall your Excellency's Government that article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, ratified by Germany in 1969, reiterates that States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate

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<sup>9</sup> A/69/518, para. 7

<sup>10</sup> A/76/180, para 107.

<sup>11</sup> A/76/180, para. 98.

<sup>12</sup> A/76/180, para. 108.

reparation or satisfaction for any damage suffered as a result of such discrimination. Committee on the Elimination of Racial Discrimination, in its general recommendation no. 34 (paras. 27–28 and 58) states that the effective protection of individuals from forms of racial discrimination requires access to justice, the pursuit of accountability, reparations, guarantees of non-recurrence, and the elimination of impunity.

In the Durban Declaration and Program of Action 2001 Member States of the United Nations reaffirm “as a pressing requirement of justice that victims of human rights violations resulting from racism, racial discrimination, xenophobia and related intolerance, especially in the light of their vulnerable situation socially, culturally and economically, should be assured of having access to justice, including legal assistance where appropriate, and effective and appropriate protection and remedies, including the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination, as enshrined in numerous international and regional human rights instruments, in particular the Universal Declaration of Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.” This Declaration further urges States to “take all necessary measures to address, as a matter of urgency, the pressing requirement for justice for the victims of racism, racial discrimination, xenophobia and related intolerance and to ensure that victims have full access to information, support, effective protection and national, administrative and judicial remedies, including the right to seek just and adequate reparation or satisfaction for damage, as well as legal assistance, where required.”

We would also like to refer to the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance addresses the human rights obligations of Member States in relation to reparations for racial discrimination rooted in slavery and colonialism (A/74/321). In her report, the Special Rapporteur has warned States “that many contemporary manifestations of racial discrimination must be understood as a continuation of insufficiently remediated historical forms and structures of racial injustice and inequality.” She further recommended that States should “adopt a structural and comprehensive approach to reparations” and “reform existing laws where necessary to make them fit for the purposes of undoing the legacies of historical racial discrimination and injustice, including by looking to indigenous and other value and legal systems to inform the process”.

We would also like to recall the report on violence against indigenous women and girls of the Special Rapporteur on violence against women and girls, its causes and consequences, in which she also recommended States to respect “due diligence obligation to prevent, investigate and punish perpetrators for indigenous women and girls who are victims of gender-based violence” and to address the “ample impunity that prevails” (A/HRC/50/26). The Special Rapporteur acknowledged the importance of “moral and non-monetary reparation,” especially for indigenous women and girls who are “generally excluded from reparation programmes”.

In addition, we would like to recall that a key objective of the United Nations Declaration on the Rights of Indigenous Peoples (General Assembly Resolution 61/295, 13 September 2007) is to ensure redress for the historical injustices and the dispossession of the lands of indigenous peoples. The responsibility to provide reparation and redress for indigenous peoples is underscored throughout the



Declaration in numerous provisions. Specifically, redress is required for any action aimed at depriving indigenous peoples of their integrity as distinct peoples (art. 8, para. 2 (a)); any action with the aim or effect of dispossessing them of their lands, territories or resources (art. 8, para. 2 b)); any form of forced assimilation or integration (art. 8, para. 2 (d)); for the taking of their cultural, intellectual, religious or spiritual property (art. 11); depriving them of their means of subsistence (art. 20, para. 2); as well as for the development, utilization or exploitation of their mineral, water or other resources without their free, prior and informed consent (art. 32).

The clearest manifestation that redress is still needed for indigenous peoples around the world is their continued lack of access to and security over their traditional lands. In this regard, article 28 of UNDRIP states that “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, occupied, used or damaged without their free, prior and informed consent” and that this 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”. In addition, UNDRIP affirms that 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 (art. 10).

With regard to the allegations that affected communities did not effectively participate in the negotiations leading to the issuance of the Joint Declaration, we would like to recall that in May 2018, the Human Rights Council's Working Group on the Universal Periodic Review (UPR) recommended with respect to the German State, that the Nama and Ovaherero communities be included in the ongoing negotiations on the recognition of the events of 1904-1908. In this report on “Transitional justice measures and the legacy of human rights violations in colonial contexts” (A/HRC/76/180), which addresses among other issues the insufficient participation of Ovaherero and Nama Peoples in negotiations leading to the preparation of the Joint Declaration, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence stressed that “transitional justice approaches to addressing the colonial past cannot and should not render invisible the victims and communities, who should occupy a central and privileged role”. He further recommended that “the design, implementation and evaluation of transitional justice mechanisms adopted in these (post-colonial) contexts must be carried out with the effective participation of the victims and affected communities and in permanent consultation with them”.

In addition, we would like to recall that the participation rights of indigenous communities such as the human right to free, prior and informed consent, and the fundamental right to self-determination are part of customary international law. The UNDRIP contains some of these rights in more detail. Art. 11 of the UNDRIP stipulates that mechanisms that aim to redress colonial crimes have to be developed in conjunction with indigenous peoples. Art. 18 UNDRIP states 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”.

We would also like to recall articles 11, 12 and 15 of the International Covenant on Economic, Social and Cultural Rights, ratified by Germany on 17 December 1973, covering the rights to an adequate standard of living, including adequate food, clothing and housing, the right to the highest attainable standard of physical and mental health and as well the right of everyone to take part in cultural life. In its general comment 21, the Committee on Economic, Social and Cultural Rights established that this right included the right to take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on one's way of life and on one's cultural rights (para. 49(e)), as well as the right to claim and receive compensation if their rights have been violated (para. 54(a)).

With regards to the reported insufficient memorialization of Germany's colonial past, particularly about the genocide of Ovaherero and Nama peoples, we would like to recall that principle 3 of the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, of February 2005, establishes the duty of States to preserve memory about those violations and their responsibility in the transmission of such history. It underscores that "people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights [...] and to facilitate knowledge of those violations". Such measures shall aim at "preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments". Interpretation of past events that have the effect of denying or misrepresenting violations are incompatible with the aforementioned obligations of the State.

In addition, we would like to refer to the inalienable right of victims and society as a whole to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes, as established in the Updated Set of Principles (principle 2). Full and effective exercise of the right to truth provides a vital safeguard against the recurrence of violations (principle 5).

The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, has established that former colonizing powers and former colonies "should adopt memorialization measures that comprehensively address the patterns, the causes and the consequences of rights violations committed during colonization and their impact today, in order to preserve the memory of these events and their dissemination to present and future generations". They should also "establish mechanisms for investigation and truth-seeking within their areas of competence and jurisdiction in order to shed light on colonial violence and on the oppression, racism, discrimination and exclusion that affect those peoples today."<sup>13</sup>

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<sup>13</sup> A/76/180, paragraphs 110 and 103.