

Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur in the field of cultural rights and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

Ref.: AL NAM 1/2024

(Please use this reference in your reply)

12 September 2024

Excellency,

We have the honour to address you in our capacities as Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur in the field of cultural rights and Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, pursuant to Human Rights Council resolutions 53/3, 55/5 and 54/8.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the planned extension of the seaport in Lüderitz, Namibia by the Namibian Ports Authority and Hyphen Hydrogen Energy, whose main shareholders are Enertrag, domiciled in Germany, and Nicholas Holdings Limited, domiciled in the United Kingdom of Great Britain and Northern Ireland, that would endanger an important heritage site memorializing the 1904-1908 genocide, without the free, prior and informed consent of the concerned Nama and Ovaherero Peoples.**

Concerns about the involvement of the Ovaherero and Nama Peoples in the efforts to recognize and commemorate the colonial past, as well as the lack of effective reparative measures afforded to them for the genocide committed against these communities in the former German Southwest Africa colony between 1904 and 1908 have been raised by Special Procedures mandate holders in a communication on 23 February 2023 (NAM 1/2023 and GER 1/2023). We thank your Excellency's Government, and the Government of Germany, for their responses sent to this communication, but remain concerned that the claims for recognition and reparation from the Nama and Ovaherero seem to not have been taken into consideration in this project.

According to the information received:

Historical context

The German colonial empire was present in southern Africa from 1884 to 1915. During that period, it developed numerous strategies and systems to subjugate the native population and assert colonial domination.

On 2 October 1904, the colonial regime issued an extermination proclamation targeting the Ovaherero People. A similar proclamation targeting the Nama People was issued on 25 April 1905. Between 1904 and 1908, an estimated over 100,000 people were directly killed, starved or worked to death on railway lines, plantations or in concentration camps. Nama fighters, women and children were deported to Cameroon and Togo; women and girls were

systematically raped. Some human remains of the native peoples were shipped to Germany for scientific research.

The racist system established during German colonialism continued after its end and until the 1990s, through the South African apartheid regime. This regime perpetuated the exclusion of the Nama and Ovaherero Peoples in various dimensions of public life, their land, natural resources and wealth seized during colonial time continued to be transferred to the European descendants, which strengthened the cycle of exclusion and impoverishment.

It is reported that, although some transitional justice and memorialization actions have been taken, the complex repercussions of the German and South African colonialisms on the Nama and Ovaherero Peoples, and in particular the genocidal acts targeting them, have not been adequately acknowledged and addressed. Information about the genocide remains incomplete and not easily accessible to Namibians, including in museums, public spaces and history manuals.

The significance of Shark Island

Shark Island was declared a National Heritage Site in 2019. As such, it is protected under the National Heritage Act (No. 27 of 2004), and the authorities have obligations to protect and conserve this heritage sites from damage and destruction.

Recent forensic studies, conducted with the support of Nama Traditional Leaders Association (NTLA) and the Ovaherero Traditional Authority (OTA), have collected evidence and facts near Lüderitz about the genocide, including on Shark Island, which was one of the most notorious concentration camps of the German colonial empire. The studies highlight the scale of the genocidal acts: some of the detainees of the camp died from the prolonged exposure to the freezing winds that blew in from the Atlantic, while others were worked to death or perished of disease outbreaks due to the unsanitary living conditions. Their bodies were either thrown in the water or buried in unmarked site of graves across the outskirts of Lüderitz.

The studies also highlight the strong heritage value of the site of Shark Island and the need for more efforts to recognize and provide reparation for the gross violations of human rights and intergenerational trauma caused.

Modern infrastructure, including tourist facilities, monuments dedicated to German colonists, roads, and residential development have already been built over Shark Island, permanently covering or removing some of the material traces of the camp's existence and thereby limiting the space for the recognition of its historical significance.

The expansion plans for the seaport in Lüderitz

The development project in Lüderitz aims to expand the site of the seaport to double its cargo handling capacity, and should include, once completed, a large-scale hydrogen production facility, using wind-powered turbines to generate hydrogen for export. The project is a joint venture with the Namibian Ports Authority (a State-owned enterprise) and Hyphen Hydrogen Energy,

whose shareholders are the German-based Enertrag and UK-based Nicholas Holdings Limited.

Construction works for phase one of the project are planned to start in early 2025. The work includes reclaiming 15 hectares of land adjacent to the port and an extension of the quay wall by 700m to the west of the harbour, along the eastern coast of Shark Island. The port's structure is likely to pose a heavy physical and visual presence on the Island and would block the sight of the island from the town center.

It is reported that an environmental impact assessment, including archeological study of the surrounding waters to find artifacts, has been conducted. At the time of writing this letter, that environment impact assessment had not yet been made public. No human rights or other human impact assessment has been conducted, that would have analyzed and taken into consideration the historical, memorial and heritage value of the site for Namibians in general and for the peoples concerned in particular.

The National Heritage Council of Namibia has acknowledged that the expansion of the harbour constitutes a concern for Shark Island, including because of the noise pollution, visual integrity and physical damage it would represent to the recently identified mass graves along the coast. The construction work for the harbour extension would have an impact on the underwater seabed along Shark Island, where prisoners were thrown after they died in the concentration camp, disturbing the "burial" places that should be protected under Namibia's Burial Place Ordinance 27 of 1966.

Concerns are expressed by the Nama and Ovaherero communities that the desecration and destruction of the highly significant heritage site would effectively erase the legitimacy of the victimhood of the communities, which is instrumental to ensure adequate reparation measures and their full and effective participation in public life.

Lack of consultation seeking to obtain free, prior and informed consent

In addition to its high heritage value, the land for that expansion, including Shark Islands and its surroundings, is reportedly ancestral lands of the Nama People. Although the Namibian Ports Authority are committed to obtaining the required approval before starting the work, it is reported that the Government of Namibia has adopted a series of policies paving the way for the expansion project.

In that context, concerns were raised about the lack of consultation mechanisms to adequately inform, consult with and seek the prior consent of the Nama and Ovaherero Peoples and to involve them in the decision-making processes about the planned expansion.

On 13 February 2024, the Ovaherero Traditional Authority and Nama Traditional Leaders Association, together with their forensic partners, sent a letter to the Namibian Ports Authority, raising their concerns about the infrastructural development planed on ancestral Nama land, asking for an immediate and permanent moratorium on all constructions works on and

around Shark Island and requesting access to various documents concerning the project.

On 21 June 2024, in absence of a substantive response from the Namibian Ports Authority, a further letter was sent by the legal representatives of the Ovaherero Traditional Authority and Nama Traditional Leaders Association and their partners, reiterating their demands to access relevant documents, for a moratorium and to be included in the decision-making processes.

Without prejudging the accuracy of the above-mentioned allegations, we express grave concerns about the reported process regarding the decision to expand the harbour in Lüderitz, which does not seem to have given sufficient attention to the requests from the concerned Nama and Ovaherero Peoples, in violation of their cultural rights, their right to recognition and to know the truth about the gross human rights violations against them and to fully take part in decision-making processes that affect their land, culture and memory of those violations. 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 measures that may affect them.

We are further deeply concerned about what appears to be a lack of recognition by the authorities and business enterprises involved in the project of the important and painful heritage represented by Shark Island and the need to protect the sensitive site from further damage and destruction, including as a mean 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, to ensure reconciliation and sustainable peace. We would like to recall that it is the duty of States 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.

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 project for the extension of the harbour in Lüderitz, including all measures and steps that have been taken to assess the impact of the project on the heritage site of Shark Island, including the underwater burial site, and on human rights.
3. Please provide details about all measures and steps that have been taken, or that Your Excellency's Government is planning to take, to

guarantee the full participation of the Nama and Ovaherero Peoples in decision-making processes that concern their land and cultural heritage on Shark Island. If such measures have been adopted, please provide details about the type and scope of participation, the representativeness among the Ovaherero and Nama Peoples of the persons or entities involved in the discussions, and how was this participation communicated to the remaining members of the Ovaherero and Nama Peoples. If such measures have not been adopted, please explain why.

4. Please provide information on the actions and measures taken by the National Heritage Council of Namibia, created by the National Heritage Act, to protect and preserve the site of the concentration camp on Shark Island, including the underwater and mass burial places, especially in the context of the planned expansion of the harbour. Please provide details about the involvement of the National Heritage Council in the impact assessment and decision-making processes of the project, if any, and about its advisory role in raising awareness for the importance and value of the site to relevant authorities. If the National Heritage Council was not involved, please explain why.
5. In view of the recent scientific studies about the nature and importance of the genocidal act on Shark Island and the long term consequences of it, please provide information about any efforts or initiatives Your Excellency's Government intends to take to enhance the protection of and the knowledge about the concentration camp on Shark Island and the genocide against the Nama and Ovaherero Peoples, including through public memorialization, museums and history teaching.
6. Please provide information on any steps that your Excellency's Government has taken, or is considering taking, including policies, legislation and regulations to protect against human rights abuses by business enterprises within its territory and/or jurisdiction, and to ensure that business enterprises conduct effective human rights due diligence to identify, prevent, mitigate and account for how they address their impacts on human rights throughout their activities, as set forth by the UN Guiding Principles on Business and Human Rights (UNGPs).
7. Please explain what additional steps your Excellency's Government has taken to ensure that State owned companies, in this case the Namibian Ports Authority, respect human rights, including requiring human rights due diligence.
8. Please provide information about the measures that your Excellency's government has taken, or is considering to take, to ensure that affected local communities and Indigenous Peoples have access to effective remedies, including adequate reparation, in line with the UNGPs.

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 interim measures be taken to halt the alleged violations of the rights of the Nama and Ovaherero peoples and to prevent their re-occurrence, as well as to prevent further damage to the heritage site on Shark Island.

Please note that a letter regarding the aforementioned allegations will also be sent to Enertrag, Nicholas Holdings Limited, Hyphen Hydrogen Energy, the Namibian Ports Authority, and the home States of those companies (Germany and the United Kingdom of Great Britain and Northern Ireland).

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

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Chair-Rapporteur of the Working Group on the issue of human rights and
transnational corporations and other business enterprises

Alexandra Xanthaki
Special Rapporteur in the field of cultural rights

Bernard Duhaime
Special Rapporteur on the promotion of truth, justice, reparation and guarantees of
non-recurrence

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards.

We wish to draw the attention of your Excellency's Government to its obligations under article 15 of the International Covenant on Economic, Social and Cultural Rights, accessed by Namibia on 28 November 1994, on 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)).

Under this provision, States also have an obligation to respect and protect cultural heritage in all its forms. Cultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations, in order to encourage creativity in all its diversity and to inspire a genuine dialogue between cultures (§50. a). In this connection, we would like to draw your Excellency's Government's attention to the reports of successive Special Rapporteurs in the field of cultural rights relating to the right of access to and enjoyment of cultural heritage (A/HRC/17/38) and to the protection of cultural heritage (A/HRC/31/59 and A/71/317). Concerned communities and relevant individuals should be consulted and invited to actively participate in the whole process of identification, selection, classification, interpretation, preservation/safeguard, stewardship and development of cultural heritage (A/HRC/17/38, §80 c). Cultural heritage and religious sites are also critical resources for safeguarding, questioning and transmitting historical knowledge and narratives of the past, and as such, are resources to ensure the right to education without any discrimination. The Special Rapporteur in the field of cultural rights warns against the fact that "dominant homogenizing narrative blanches out diversity, ignoring the cultural heritage of everyone outside the group in power, simultaneously depriving the majority of the opportunity to understand the complexity of their country" (A/68/296, §31).

The Committee on Economic, Social and Cultural Rights further stressed that States parties should take measures to guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life, which may be strongly communal. The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources (E/C.12/GC/21, §36). Furthermore, States parties must also respect the rights of indigenous peoples to their

culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life (§49 d).

Recalling that the Sustainable Development Goals are a voluntary process enshrined in human rights that remain obligations under international law, the Special Rapporteur underlines that no violation of human rights, including cultural rights, may be justified in the name of development or sustainable development. (A/77/290, §95). In her report to the General Assembly, the Special Rapporteur in the field of cultural rights highlighted that in many cases, “development” policies and strategies reflecting dominant cultural viewpoints or those of the most powerful sectors of society, with historic ties to colonialism and domination, are designed and implemented to the detriment of the most vulnerable in a manner that impedes the future sustainable development and survival of these persons and communities and probably, in the longer term, of humanity. She stressed that people and peoples must be the primary beneficiaries of sustainable development processes and recommended that States, international organizations and other stakeholders ensure that sustainable development processes (a) Are culturally sensitive and appropriate, contextualised to specific cultural environments and seek to fully align themselves with the aspirations, customs, traditions, systems and world views of the individuals and groups most likely to be affected; (b) Fully respect and integrate the participation rights and the right of affected people and communities to free, prior and informed consent; (c) Are self-determined and community led; (d) Are preceded by human rights impact assessments to avoid any negative impacts on human rights, including impact assessments on cultural rights; any impact assessment failing to address living heritage or the cultural significance of affected natural resources, or conducted without the free, prior and informed consent, consultation and active participation of the persons and communities affected directly or indirectly, should be rejected as insufficient and incomplete; (e) Recognize that indigenous peoples must give their free, prior and informed consent before any project that affects them is implemented (A/77/290, §97-98).

We also wish to draw the attention of your Excellency's Government to its obligations under article 2 of the Covenant on Civil and Political Rights, acceded to by Namibia in 1994, 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 (§10, 11, 12 and 15). we would like to refer to the right of victims of human rights violations to receive full reparation for the harm suffered.

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”.¹

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”.² In his report on “Transitional justice measures and the legacy of human rights violations in colonial contexts” (A/HRC/76/180), 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”.

With regards to the reported insufficient memorialization of the genocide of Ovaherero and Nama peoples in Namibia, 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).

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, acceded to by Namibia in 1982, and 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

¹ A/76/180, paras. 94 and 95

² A/69/518, para. 7

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”.

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 United Nations Declaration on the Rights of Indigenous Peoples (General Assembly Resolution 61/295, 13 September 2007) 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 like to highlight the UN Guiding Principles on Business and Human Rights, which were unanimously endorsed by the Human Rights Council in its resolution (A/HRC/RES/17/31) in 2011. These Guiding Principles are grounded in recognition of:

- a) “States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- b) “The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and
- c) “The need for rights and obligations to be matched to appropriate and effective remedies when breached.”

The Guiding Principles clarify that under international human rights law, “States must protect against human rights violations committed in their territory and / or their jurisdiction by third parties, including business enterprises” (guiding principle 1). This requires States to “state clearly that all companies domiciled within their territory and / or jurisdiction are expected to respect human rights in all their activities” (guiding principle 2).

All States have a duty under the international human rights legal framework to protect against human rights abuse by third parties. Guiding principle 1 clarifies the State duty “to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.” This obligation requires that a State takes appropriate steps to “prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.” In addition, this requires, inter alia, that a State should “enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights...” (guiding principle 3).

The guiding principle 4 requests States to take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by

the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

The Guiding Principles also require States to ensure that victims have access to effective remedy in instances where adverse human rights impacts linked to business activities do occur.

Principle 18 underlines the essential role of civil society and human rights defenders in helping to identify potential adverse business-related human rights impacts. The Commentary to principle 26 underlines how States, in order to ensure access to remedy, should make sure that the legitimate activities of human rights defenders are not obstructed. Moreover, Principle 26 stipulates that “States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”

States may be considered to have breached their international human law obligations where they fail to take appropriate steps to prevent, investigate and redress human rights violations committed by private actors. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures.