

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 GBR 10/2024
(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 acknowledge the responses received from the Governments of Namibia and of Germany 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 planned on ancestral Nama land, asking for an immediate and permanent moratorium on all construction 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 what appears to be a lack of human rights due diligence from the UK based Nicholas Holdings Limited investing in Namibian Ports Authority and Hyphen Hydrogen Energy, in particular regarding the rights to access to and enjoyment of heritage, the right to take part in decision-making processes that have an impact on one's cultural life, the equal right to access effective judicial remedy, the right to truth about gross human rights violations, the preservation of evidence and memory about those violations, guarantees of protection against discrimination and the free, prior and informed consent of Indigenous Peoples on matters that concern their land and cultural resources.

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 on any steps taken by Your Excellency's Government to set out clearly the expectation that all business enterprises domiciled in its territory and/ or jurisdiction respect human rights throughout their operations.
3. Please provide information on the steps taken by Your Excellency's Government to make sure that financial entities respect human rights in line with the UN Guiding Principles on Business and Human Rights, by requiring them to conduct human rights due diligence throughout its value chain.
4. Please indicate where financial institutions contribute to adverse impacts, how Your Excellency's Government provides for appropriate remediation that accords with the responsibility for the harm.

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 the Namibian Government, Enertrag, Nicholas Holdings Limited, Hyphen Hydrogen Energy, the Namibian Port 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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transnational corporations and other business enterprises

Alexandra Xanthaki
Special Rapporteur in the field of cultural rights

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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 the United Kingdom of Great Britain and Northern Ireland on 20 August 1976, 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 the United Kingdom of Great Britain and Northern Ireland on 20 August 1976, 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, ratified by the United Kingdom of Great Britain and Northern Ireland on 7 March 1969, 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

¹ A/76/180, paras. 94 and 95

² A/69/518, para. 7

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”.

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 also like to highlight the UN Guiding Principles on Business and Human Rights, which were unanimously endorsed in 2011 by the Human Rights Council in its resolution (A/HRC/RES/17/31) after years of consultations with governments, civil society and the business community. The Guiding Principles were established as the authoritative global standard for all states and companies to prevent and address the negative impacts of business on human rights. The Guidelines are based on the recognition that:

- a. "The existing obligations of States to respect, protect and fulfil human rights and fundamental freedoms;
- b. The role of business enterprises as specialised bodies or companies performing specialised functions, which must comply with all applicable laws and respect human rights;
- c. The need for appropriate and effective remedies for rights and obligations when they are violated.

The Guiding Principle 1 reiterates the State's duty to "protect against human rights abuses by business enterprises on its territory and/or under its jurisdiction". The guiding principle 2 provides that States should make clear that all companies domiciled on their territory and/or under their jurisdiction are expected to respect human rights in all their activities. In addition, the guiding principle 3 reiterates that States must take appropriate measures to "prevent, investigate, punish and remedy such abuses through effective policies, laws, regulations and adjudication". In addition, it requires, among other things, that a State "provide effective guidance to business enterprises on how to respect human rights throughout their operations".

Principles 11 to 24 and principles 29 to 31 provide guidance to business enterprises on how to meet their responsibility to respect human rights and to provide for remedies when they have cause or contributed to adverse impacts. Moreover, the commentary of principle 11 states that “business enterprises should not undermine States ‘abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes’”. The commentary of guiding principle 13 notes that business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties. [...] Business enterprise’s “activities” are understood to include both actions and omissions; and its “business relationships” are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services”.

Furthermore, according to guiding principle 26, States should take appropriate measures to ensure the effectiveness of domestic judicial mechanisms when dealing with business-related human rights abuses, including by considering how to limit legal, practical and other obstacles that may lead to denial of access to remedy.