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The “reconciliation agreement” – A lost opportunity

Historically, the German colonial crimes in Namibia have been relatively well addressed, but not legally. Since 2015, the German and Namibian governments have negotiated possible reparations for the crimes, especially the genocide of the Ovaherero and Nama. This step held enormous potential for reconciliation and providing a sustainable basis for Germany and Namibia’s future relationship. But this opportunity was lost.

The governments agreed upon strict secrecy for the negotiations, civil society in both countries therefore did not have adequate access to information. From the beginning, representatives of the victims’ descendants and the affected communities criticized that they were not properly involved. That the “reconciliation agreement” will be published as a mere Joint Declaration speaks volumes. The preceding negotiation process furthermore disregarded international participation rights based both in treaties and customary international law. The German government has relied on formal gestures while refusing all legal responsibility for the colonial crimes. Germany wants to initiate “aid programs” in the coming years – but development aid is neither legal recognition between partners on equal footing nor actual reparations.

True and sustainable reconciliation does not work like that. Read ECCHR’s statement on the Joint Declaration between Germany and Namibia [here](#).

Position and summary

- *Nama, Ovaherero and San representatives criticize that they were not able to participate adequately in the negotiations leading up to the agreement between Germany and Namibia (including several Royal Houses and Traditional Authorities, the Nama Genocide Technical Committee, Nama Traditional Leaders Association and Ovaherero Traditional Authority.)*
- *There can never be justice in a truly restorative sense when affected communities like the Nama, Ovaherero, Damara and San do not feel included and are not part of the negotiation process. A simple commitment to inclusion in the agreement cannot outbalance the negotiations’ oversight. This is not only a political question: participation rights are individual and collective human rights under customary international law. They are enshrined in the International Covenant on Civil and Political Rights (ICCPR), and further established in states’ legal obligations as spelled out in the International Convention on the Elimination of Racial Discrimination (ICERD), the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and the UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. These rights include the fundamental right to self-determination, freedom from racial discrimination, and the right to remedy and reparation as further indicated in the Basic Principles and Guidelines on the Right to*



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Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

- *Germany must assume full responsibility for colonial crimes committed in its former colonies. Already before Lothar von Trotha issued extermination orders against the Ovaherero and Nama, people in former German Southwest Africa were dispossessed, killed and raped. The colonial crimes continued after 1908, and other communities, like the Damara and San, were targeted.*
- *Given the joint declaration's wording and lack of the term reparation therein, it avoids comprehensively acknowledging Germany's legal responsibility for its colonial legacy. An apology as noted in the joint declaration and planned to be offered again in person, is to be welcomed but its effect will fundamentally depend on whether affected communities and victims' descendants will perceive it as authentic. This is to be doubted in face of the recent, massive criticism of the agreement. Also, the gesture of an apology will remain purely symbolic if it is not connected to other means of reparations. These are indispensable to atone for colonial crimes and build future stable relationships between equals.*
- *It is important that the declaration's implementation and the envisaged "programs for reconstruction and development" will adequately involve civil society actors and communities especially affected by colonial crimes, including those in the diaspora. Their interests and needs must be principally considered, individual and collective human rights must be respected, and the projects implemented in a gender-sensitive and overall inclusive way. Thereby the following rights must be taken into consideration: the communities' right to participate pursuant to the principle of free, prior and informed consent (FPIC), ICCPR Articles 1 and 25, UNDRIP Articles 3, 18, 19, and the UN Declaration on the Granting of Independence to Colonial Countries and Peoples.*

At the end of the 19th century, German companies, traders, settlers and military troops started dispossessing the local population in the region that is known today as Namibia. A systematic transfer of wealth occurred: the colonizers grabbed natural resources, cattle and land. Gruesome violence was deployed against communities that had lived in the region for centuries, among them the Ovaherero, Nama, Damara and San, rather than recognizing them as equal, sovereign political entities. A formal German colony was established. Both the transfer of wealth and brutality against the local population were "justified" by racist beliefs and the so-called "civilizing mission." The apartheid system was formally legitimized by German colonial law, and an arbitrary and biased administration and justice system. In 1904 and 1905, German General Lothar von Trotha issued extermination orders against the Ovaherero and Nama. An estimated 90,000 people were directly killed or starved to death. Wells were poisoned and refugees were systematically driven back into the desert to starve to death. The Germans built concentration camps, for instance in Lüderitz, where they forced people to work to death, and systematically raped women and girls. The latter also had to scratch the flesh from skulls, sometimes those of family members or friends, so that they could be shipped to Germany for further "scientific" research. Whites "hunted" San as a leisure activity in the following years.



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The wounds remain open

The racist oppression did not stop with the end of German colonialism, but continued during the South African apartheid regime until the 1990s. Even today, most Namibian land belongs to white farmers. A few companies and individuals exploit the natural resources. The colonial transfer of wealth, the genocides and century-long racist oppression have created a legacy of transgenerational social, economic and cultural exclusion. The complex repercussions of German and South African colonialism have not been adequately addressed. The wounds remain open.

In general, processes of historical truth-seeking, legal acknowledgement of the harm done in the past and its repercussions in the present, as well as reconciliation are indispensable to creating restorative justice as a groundwork for a sustainable, peaceful future. With regards to Namibia, such a process would have to comprehensively acknowledge and accept accountability for the colonial crimes committed in Germany's former colony. All of these processes would have to be transparent and inclusive. It would need to be ensured from the beginning that representatives of all affected communities can participate adequately in a manner they feel comfortable with. This would include representatives from the affected communities in the diaspora. Gender-based crimes, sexual violence, rape and forced motherhood would need to be addressed. Only then will true restorative justice, reconciliation and healing be possible.

In this sense, the German and Namibian government's Joint Declaration is – sadly but not surprisingly – a lost opportunity.

The high secrecy of the inter-state negotiations has been a problem since their inception and understandably created mistrust. The reasons for the agreed-upon lack of transparency remain vague. It is also unclear what criteria the two governments used to select representatives of the affected communities to participate in the negotiations. For several years, members and representatives of affected communities, including those living in the diaspora in Botswana and South Africa, have been vocal in demanding adequate participation in the negotiations.

Any type of inter-state negotiation or agreement must respect human rights

Adequate participation is not “only” a political issue – but a question of human rights. Indigenous people's right to adequate participation, and the collective human rights to free, prior and informed consent and to freely choose a group's representatives have become part of customary international law. They are enshrined in the United Declaration on the Rights of Indigenous Peoples (UNDRIP), and are laid out in core human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of Racial Discrimination (ICERD). The human rights established in ICCPR Articles 1 and 25 and ICERD Article 5 are complemented in the fundamental right to self-determination and 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), which guarantees



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effective legal protection and the right to reparations in cases of human rights violations and breaches of international humanitarian law.

States are bound to adhere to human rights and international law in their sovereign actions and in international relations. This applies not only to an agreement's content but also the respective negotiation process. There can never be justice in a truly restorative sense when affected communities like the Nama, Ovaherero, San and other communities are not included in negotiations.

Several UN bodies have criticized the lack of adequate participation from a legal point of view. Already in 2017, the Working Group on the Rights of People of African Descent stated that it was regrettable “the Government of Germany has thus far not consulted seriously with the lawful representatives of the minority and indigenous victims of that genocide to discuss reparations” (HRC/36/60/Add.2, paragraph 53), and that “[t]he Ovaherero and Nama people must be included in the negotiations currently ongoing between the Governments of Germany and Namibia” (HRC/36/60/Add.2, paragraph 61). In a letter dated 2 November 2018, during the last Universal Periodic Review, the United Nations High Commissioner for Human Rights Michelle Bachelet asked the German Minister of Foreign Affairs Heiko Maas to ensure “...that Ovaherero and Nama peoples are included in the negotiations between the Governments of Germany and Namibia following the apology by Germany for the genocide of these people.” Also in May 2018, the Human Rights Council Working Group on the Universal Periodic Review recommended that Germany ensure that the Nama and Ovaherero peoples be specifically included in the ongoing negotiations between the Namibian and German governments (A/HRC/WG.6/30/DEU/2, paragraph 29).

Germany must accept its responsibility

In general, Germany must assume full responsibility – also legally – for the colonial crimes committed in its former colonies. The Joint Declaration between the Namibian and German government fails to do so. The genocide of the Ovaherero and Nama following the 1904 extermination orders by Lothar von Trotha needs to be legally recognized as such. Furthermore, the crime of colonialism in itself – the racist violence, installation of an apartheid regime and racist colonial laws, systematic transfer of wealth, forced labor and sexual violence committed by German troops, companies, traders and settlers – must be acknowledged as a grave violation of the basic principles of international law, and as crimes against humanity or war crimes. Reparations according to the CARICOM principles needs to be offered with the aim of tackling the legacy of structural racism, trauma and transgenerational social, economic and cultural exclusion.

In order to address German colonialism in Namibia, a truth commission could be established. It could be chaired by leading decolonial scholars and experts on gender-based crimes. Members of Namibian civil society and self-elected representatives of affected communities must be able to participate. The testimony could become a living memorial in remembrance to the past, and a resilient departure point for the future.



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With regards to the Joint Declaration, as mentioned above, the state-centered approach does not live up to the standards established under present-day international law. It is a false and outdated conception of international law that negotiations regarding colonial injustice can only be conducted on an inter-state or inter-governmental level. On the contrary, international law requires states to actively seek the participation of representatives of affected communities and their free, prior and informed consent. The questions of genocide, reparations and legal responsibility do belong together and need to be addressed as such. So far, states have ignored the applicable international standards and best practices of responding to gross human rights violations, in particular, the rights and role played by victim communities.

Legally addressing colonialism also concerns the present

As much as this process is about addressing past crimes and injustices, it is also related to the human rights of people living today. The issue being framed as a “merely political” question falls short of states’ obligations to condemn grave breaches of international law, and may in itself violate the rights and dignity of the still-affected communities. This means that in contexts related to grave human rights violations or violent contexts *in the past*, the negation of a legal claim *in the present* may itself amount to an additional violation of the victims’ dignity and an infringement of the individual and collective rights of the historically affected communities.

It is laudable that the Joint Declaration includes Germany’s apology. The same can be said for the planned personal apology of the German Federal President for the genocide of Ovaherero and Nama, as well as reconciliation and commemorative initiatives. Germany wants to fund these and education and research initiatives with 50 million out of the promised 1,1 billion euros. Whether this apology will be accepted as authentic by the descendants of the victims will depend on many details and remains to be seen. Given that the Royal Houses and Traditional Authorities, the Nama Genocide Technical Committee, Nama Traditional Leaders Association, Ovaherero Traditional Authority and others have strongly criticized the negotiations process as well as the to-be-expected content of the agreement already in May 2021, the reconciliation effect of such an apology remains doubtful.

In reading the Joint Declaration drafted by the Namibian and German government, it becomes apparent that the fears of the Ovaherero, Nama, San and the Namibian parliamentary opposition were well-founded. Worries that Germany will unilaterally dictate the apology’s conditions have become real in the declaration’s text: in the paragraph after the apology, it says that the “Namibian government and people accept Germany’s apology.” However, the Ovaherero, Nama, San and opposition representatives are a significant part of the population and remain excluded here. How can such an acceptance be issued with such certainty?

We generally welcome that the German government plans to support development aid programs in land reform and land acquisition, land development, agriculture, rural infrastructure and natural resources, energy and water supply, as well as education with 1,05 billion out of a total of 1.1 billion euros over 30 years. Yet, civil society actors, especially the descendants of those who fled the colonial crimes in the diaspora, fear that these projects will not necessarily benefit the most marginalized because of their lacking participation. There is a deeply-rooted mistrust in affected communities and civil society towards the Namibian



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government and administration due to corruption and nepotism. Furthermore, the question remains under which conditions these kinds of projects can be seen and accepted as a part of reparations for colonial crimes. Development aid has nothing to do with restoring justice – it happens top-down and not in a relationship of equal partners. All of these concerns clearly show the toxic effect of non-inclusive negotiations about the responsibility for a colonial past that is deeply marked by genocide and colonial crimes.

Yet, by relying on the doctrine of intertemporality – the declaration states that the killing of the Ovaherero and Nama 1904-08 is only a genocide “from today’s perspective” – the German state reproduces the colonial power structures of hegemonic subordination and the racist exclusion of non-European nations and political entities – the core element of colonialism and colonial injustice. Based on this doctrine and the respective argumentation, it follows that today’s international law does not apply to protect the then colonized: they were not part of the so-called civilized nations, that means that legally no genocide was committed, the colonial power did not act unlawfully and thus no reparations are due. The argument’s structure shows how colonial power patterns survive. On the one hand, some acts are hors law, while Germany uses a legal argument based on the doctrine of intertemporality to reject responsibility.

Semantic struggle

And while we welcome the use of the term “genocide” for the killings of thousands of Ovaherero and Nama between 1904-08 by the German colonizers, an ambivalent feeling remains. It is unfortunate that even after the year-long (semantic) struggle for the correct terms, only a weakened form is used: the German Foreign Office uses the term “genocide from today’s perspective,” and repeats in the Joint Declaration that Germany only bears moral responsibility and therefore only has a purely moral, historical and political obligation to apologize for the genocide. The declaration also stresses that any kind of payment derives only from this normatively weak responsibility.

Furthermore, by using terms like “gesture of recognition” (*Geste der Anerkennung*) and “healing the wounds,” and insisting on not using the word “reparations” in any sense whatsoever, the German government shows it has the very same intent and strategy as was behind its initial refusal to call it genocide. This is how Germany still aims to shape the narrative of reconciliation in terms of morality instead of the law and legal obligation. It frames the whole discussion in terms of comity. Law has nothing to do with it, this is the clear message the German government has wanted to portray from the start through the end of the negotiations. Hence, the notion of “gesture of recognition” intends to avoid a recognition of legal responsibility that goes beyond a mere gesture. The same holds true for the notion of “healing the wounds” that has found its way back into the text of the accord, even though it was previously rejected by the Namibian government. Hence what we have is a mere shift of an initial refusal to call it genocide to a refusal to apply the legal term “reparations.”

With regards to the Basic Principles on Remedy and Reparation, we welcome that Germany understood that a process of reconciliation can only start respecting and involving the interests of the “descendants of the particularly affected communities,” and that within the Namibian context, the land question must be tackled. However, some reservations remain: with a view of



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the principle of free, prior and informed consent – how can such questions and decisions on payments “to settle all financial aspects of the issues relating to the past” be resolved on a merely inter-state level yet again?

Despite these laudable aspects, this very problematic stance, is clearly reflected in the Joint Declaration. Decolonial scholars have repetitively pointed to the fact that “development aid” is embedded in asymmetrical power relations between the Global North and the Global South. This has the effect of reinforcing the relationship between “saviors” and “supplicants,” where the former act pursuant to a *noblesse oblige*, while the latter remain trapped in a passive receiving and accepting role. Development aid can never mean decolonization. Rather, it perpetuates and reinforces an economic and political system that relies on colonial hierarchies of submission. Reparations, on the contrary, would imply that the Global North owes the Global south – not just a gesture.

What shows from the choice of title and format of the accord between Namibia and Germany regarding “their” colonial past (e.g. “united in remembrance of our colonial past”) up to the decision to plan programs of reconstruction and development support, the “semantic struggle” was decided in favor of the German government’s take on its responsibility, a responsibility that is normatively very thin, almost void in its recognition of accountability and reckoning with its colonial legacy and guilt.

Redress also means legal responsibility

All of this is hard to comprehend since already in 2017, the Working Group on Peoples of African Descent visited Germany, and in its report to the Human Rights Council, clearly identified the slaughter, enslavement and forced displacement of the Nama and Ovaherero peoples as genocide (A/HRC/36/60/Add.2, paragraph 61):

The suffering of the Ovaherero and Nama peoples at the hands of the German authorities, also known as the “first genocide of the twentieth century”, has left an indelible mark on the souls of both victims and perpetrators. The colonial past of Germany, the genocide of the Ovaherero and Nama peoples and the sterilization, incarceration and murder of people of African descent under the Nazi regime in Germany are not addressed in the national narrative (A/HRC/36/60/Add.2, paragraph 7).

and recommended that:

Germany should recall its role in the history of colonization, enslavement, exploitation and genocide of Africans, and should make reparations to address the continued impact of those acts. (...) The Working Group emphasizes that the history of racism in Europe should also be understood through an analysis of the events preceding the Second World War, taking into account the correct sequence of historical events (A/HRC/36/60/Add.2, paragraph 61).

Moreover, Pablo de Greiff, the former UN Special Rapporteur on truth, justice, reparations and guarantees of non-repetition, has pointed out what states’ unwillingness to use the term



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“reparations” and understanding that redress means legal responsibility and accountability implies for the healing of societies to whom injustice was done:

Reparation programs 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 (an apology depends on such recognition, everything else being an excuse or an expression of regret) reparation programs that fail to acknowledge responsibility do not provide reparation and are more akin to mechanisms for the distribution of indemnification benefits.

Experience confirms that victims, quite correctly, do not see the transfers performed through such programs as reparations, and therefore continue to struggle to have that right satisfied (No. 62-63.)

Hence, there can never be justice in a truly restorative sense when affected communities like the Ovaherero, Nama or San are not part of the negotiation process. They must be involved in implementing the accord. Moreover, it is they who decide if they are included and heard in an adequate manner. Hence it is insufficient to only write this in the text of a declaration. Expectations are running high now that Germany keeps its promise, which is only that, to include all affected communities in the future. Reparations are indispensable for addressing colonial harm and injustices in the past and present, and building future relationships between equals. This exact point is reflected in present-day international legal standards and summarized in the United Nations 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). From these Basic Principles, it is clear that victims of human rights violations have the right to reparations, which is one element of a broader system designed to address such gross violations of human rights.

Will Germany engage in a processes of true reconciliation?

While compensation is one modus of realizing the right to reparations, others such as restitution, rehabilitation, satisfaction and guarantees of non-repetition need to be understood in conjunction. The Basic Principles of Remedy and Reparation provide for the following measures *inter alia*:

- Verifying the facts and issuing a full and public disclosure of the truth,
- Searching for the disappeared and the bodies of those killed,
- Officially declaring or issuing a judicial decision restoring the dignity, reputation and rights of the victim and those closely connected to them,
- Issuing a public apology, including acknowledging the facts, accepting responsibility, and commemorating and paying tribute to the victims.
- And above all, assisting in the bodies’ recovery, identification and reburial in accordance with the victims’ expressed or presumed wishes or the families’ and communities’ cultural practices.



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Given that there are many restitution claims by descendants of the victims of colonial crimes to repatriate human remains/ancestors to their homeland, it would have been a strong statement to have mentioned this measure of reconciliation and reparation in the Joint Declaration. One has to understand the cultural and symbolic value ancestors' homecoming has to the affected communities and individuals' right to cultural and spiritual identity. Hence, again, this lacuna in the accord is a missed chance.

Again, the Joint Declaration's terms do not mirror the complex system of truth, justice, reparations and the guarantee of non-recurrence. It leaves the impression that Germany did not even try that hard. We hope that Germany redeems itself by tackling the challenges that come in the application of the complex and sensitive system of redress, reconciliation and restorative justice in order to live up to the expectations it has created in the public eye of Namibia and Germany.

With specific regards to the Joint Declaration as a "reconciliation agreement" in order to at least compensate the lack of participation throughout the negotiation process, the only way the parties can implement the previewed development measures/programs is in a victim-centered, gender-sensitive and overall inclusive way in accordance with human rights, specifically the affected communities' right to participate in public decision-making pursuant to the principle of free, prior and informed consent and ICCPR Articles 1 and 25, UNDRIP Articles 3, 18 and 19, and the UN Declaration on the Granting of Independence to Colonial Countries and Peoples. The FPIC principle reveals an eagerness to address some of the worst aspects of colonial legacies by requiring that states actively involve indigenous peoples in decision-making processes, rather than imposing decisions upon them. The German state must answer to that during the accord's implementation. It must make good on its promises to at least understand the concept of an accord for what it is: a legal obligation entered in good faith.

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