ECCHR

Repairing the irreparable?

Tackling the long-term effects of German colonialism in Germany & Namibia

POLICY PAPER

From fall 2015 onwards, the governments of Germany and Namibia have been in negotiations concerning the genocide committed by imperial German forces in what is present-day Namibia. Between 1904–1908, tens of thousands of Ovaherero and Nama were killed—in response to their resistance to colonial violence and land grabs by German settlers. The declared aim of the current negotiations was to establish Germany's role in the genocide and seek reconciliation. Ovaherero and Nama communities, in turn, demanded reparations.

Bilateral talks, in consultation with selected representatives of the descendants of the victims, led to the publication of a "Joint Declaration by the Federal Republic of Germany and the Republic of Namibia" (Joint Declaration) in May 2021. In this declaration, the German government acknowledges the events that "from today's perspective, would be called genocide" and "apologizes and bows before the descendants of the victims." In addition to this acknowledgment, Germany agreed to pay a sum of 1.1 billion euros over a period of 30 years that would be dedicated to aid and development programs.

The Joint Declaration sparked fiercely negative reactions in Namibia. Many Ovaherero and Nama criticized the bilateral format of the negotiations from the start and then continued to demand that they be fully included in the process. A discussion concerning the Joint Declaration in the Namibian National Assembly ended without a resolution in September 2021. Currently, a court case against the Namibian government is in preparation.

The German commentators, in contrast, generally welcomed the Joint Declaration and rejected, in part, the Namibian criticism. Throughout the negotiations, the German government maintained that these proceedings were not of a legal but, rather, of a political or moral nature. In addition, the German government held that international legal standards prohibited them from engaging in negotiations with any partner other than the government of Namibia. On various levels, this approach seems to have hindered the fostering of dialogue—an essential ingredient in addressing such a complex history with the appropriate level of nuance.

A lot could be—and already has been—said about this intergovernmental process.[1] Instead of presenting detailed criticism of the negotiation process, this paper aims to highlight select aspects of the process, which may also provide useful insights for future efforts to address the legacies of racism and colonialism in diverse contexts.

To this end, it will describe the relevance, and also illuminate some of the potentials, of what has been labeled a human rights-based approach to reparations in colonial contexts. The general obligations of states in cases of massive human

rights violations and international crimes will be described, as they are laid out in the international legal framework of reparations and transitional justice (see below 1). As will be shown in the following report, there is a growing consensus amongst the international legal community that reparations and transitional justice standards also must be applied to colonial contexts, a development prompted by the increasing recognition of long-term and structural effects resulting from colonial crimes (see below 2). These standards, however imperfect,[2] provide officially recognized options within the international legal frameworks for ensuring the involvement and agency of survivors and taking into account gendered and other multifaceted perspectives, as well as tackling the structural inequalities resulting from land grabs, large-scale violence and their long-lasting effects. In this sense, these international standards provide a useful lens for a critical assessment of the German-Namibian negotiation process (see below 3–4). Here, what can be learned from the German-Namibian example, to enhance the functionality and legitimacy of future processes, is the relevance of

- the agency and perspectives of the survivors at the core of any process,
- dialogues, which embrace the complexity of the involved communities, instead of creating division,
- taking underrepresented perspectives, in particular of women, into account,
- addressing persisting racialized socio-economic structures, including the continued dispossession of land, resulting from previous colonial dynamics and
- addressing the ignorance within German society surrounding colonialism and its long-term effects, as this continues to be a major hindrance in the reckoning with the colonial past in various contexts.

This paper does not aim to present (international) law—which has its own problematic colonial legacy—as the most effective solution to these particular problems.[3] Yet, it is important to recognize that law establishes rights for Ovaherero and Nama descendants of the survivors in processes dealing with the long-term effects of the colonial violence that still affects them today.

As will be outlined below, there are no legal hurdles to establishing more open and inclusive formats, which would enable the representation of multiple perspectives. To the extent that the law is relevant, those legal instruments which actually aim at enabling a multi-layered exchange should not be ignored, and experiences from other contexts also need to be taken into account.

APPLICABLE INTERNATIONAL LEGAL STANDARDS

The legal basis for the right to remedy and reparations for victims of gross violations of human rights is—acknowledged and enforced by German government agencies in many different regional and historical situations—firmly established in the corpus of international human rights instruments and is widely accepted by the international community.[4] It comprises, inter alia, the rights of victims to remedies, along with reparations, for harm suffered, as well as access to relevant information concerning violations and reparation mechanisms.[5] Reparations comprise restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[6] All of these translate into a wide range of measures, of which only a few have been implemented in the case at hand: rehabilitation, for example, may include medical and psychological care, as well as legal and social services. Satisfaction may involve an official declaration, a judicial decision restoring the dignity, reputation and rights of the victim, or a public apology, including acknowledgement of the facts and acceptance of responsibility, as well as commemoration of and tributes to the victims. Guarantees of non-repetition may involve, on a priority and continued basis, human rights and international humanitarian law education for all sectors of society and training for

1 See, for example: S. Imani and K. Theurer, "Reparationen für Kolonialverbrechen—die ambivalente Rolle des Rechts am Beispiel der Verhandlungen zwischen Deutschland und Namibia," *Z Friedens und Konflforsch* (2022)

2 T.M.W., "On Transitional Justice Entrepreneurs and the Production of Victims," 13(2) *Journal of Human Rights Practice* (2010), 208; Makau W. Mutua, "*Savages, Victims, and Saviors: The Metaphor of Human Rights,*" 42 *Harv. Int'l L.J.* (2001), 201

3 A. Anghie, "Imperialism, Sovereignty and the Making of International Law," (2001), and following research in particular from scholars from the Third World Approaches to International Law (TWAIL).

4 United Nations High Commissioner for Human Rights, "Rule-of-law tools for post-conflict states, Reparations programmes," UN Doc. HR/PUB/08/1 (2008), at 5 f.; United Nations General Assembly. "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 Resolution," UN Doc. A/Res/60/147 (16 December 2005)

5 Human Rights Committee, "General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant," UN Doc. CCPR/C/21/Rev.1/Add. 13 (29 March 2004), at 18

6 Reparations cannot not be equated and shouldn't be confused with "compensation," which is only one of the four elements of reparation, nor should it be equated with the notion of monetary compensation (*Schadensersatz* or *Entschädigung*) in German national law.

law enforcement officials, as well as military and security forces, or mechanisms for preventing and monitoring social conflicts and their resolution.

RELEVANCE FOR COLONIAL CONTEXTS

There is an increasing consensus that international reparation and transitional justice standards also apply to colonial contexts, even if they were only developed after the period of formal colonization.

This development is a result of the increasing recognition that the long-term effects of colonial crimes need to be addressed, as they continue to be visible and relevant to the formerly colonized societies. On the legal side, this development, among other things, is linked to the observation that some of the international crimes committed during colonialism, such as enforced disappearances, are of a continuous nature and, in this sense, may be considered as still ongoing. Finally, also the processes for addressing past human rights violations may themselves affect current human rights obligations. These political processes do not happen outside the legal sphere, but must comply with human rights.

The focus of the international debate in the meantime is on *how* colonial crimes can be addressed within the international legal framework, and how existing standards need to be adopted for contexts involving historical crimes and their long-term effects on the third- or fourth-generation descendants of survivors.

Recently, the UN Special Rapporteurs Fabián Salvioli[7] and E. Tendayi Achiume released two reports that dealt explicitly with colonial contexts.[8] These reports discuss the human rights obligations of member states regarding reparations for racial discrimination rooted in slavery and colonialism,[9] along with transitional justice measures for addressing the legacy of gross violations of human rights and international humanitarian law committed in colonial contexts.[10] The second report outlines components and tools developed in the context of transitional justice cases, which may offer lessons and experiences that could be useful in addressing the legacies of these specific kinds of violations. These include some of the most pressing issues characterizing the post-colonial present in the newly independent states, like, for example, the continued dispossession and unequal distribution of land. According to the report, an approach that is informed by transitional justice may serve to "address the deeper causes of colonial violence, through the establishment of its own mechanisms."[11] More concretely, these may include:

- "truth commissions with a holistic mandate to address the colonial past and violations of civil, cultural, economic, political and social rights;
- reparation programmes that remedy the structural inequalities suffered in particular by the victims;
- public apologies that restore the dignity of the victims;
- memorialization and education measures that comprehensively address the patterns, causes and consequences of rights violations;
- guarantees of non-recurrence that change the cultural and institutional standards, structures and processes that perpetuate discrimination, racism and the exclusion of affected populations."[12]

With regard to all of these standards, the report underscores that the across-the-board adoption of "inclusive mechanisms with the strong and active participation of victims empowers affected populations and provides legitimacy and sustainability to efforts to address the legacy of colonialism and, ultimately, to achieve reconciliation."[13]

RELATIONSHIP TO THE INTERTEMPORAL PRINCIPLE AND STATE SOVEREIGNTY

Why have the above-mentioned standards not played a prominent role in the German-Namibian process? One reason, repeatedly put forward by the German government during the course of the negotiations, is that the ongoing process was not legal but, rather, political in nature and that the only legitimate negotiation partner for Germany was the Namibian government.

7 UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence
8 UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance
9 See above, Tendayi Achiume, UN Doc. A/74/321 (21 August 2019)
10 See above Fabián Salvioli," UN Doc. A/76/180 (19 July 2021); See also: Human Rights Council, "Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabián Salvioli," UN Doc A/HRC/45/45 (9 July 2020)
11 Fabián Salvioli, UN Doc. A/76/180, at 4–6
12 Fabián Salvioli, UN Doc. A/76/180, at 6, bullet-points added by the author
13 Ibid

The principle of intertemporality asserts that legal questions must be assessed on the basis of the laws that were in effect during the time in which the previous offenses took place. This has prompted the German authorities to adopt the position that no international standards apply whatsoever to the Ovaherero and Nama genocide, following their assessment that the contemporary conviction of the legal community excluded the in their view 'uncivilized' indigenous peoples also from a minimum proctection of the law.[14] Accordingly, in a case brought by the Ovaherero and Nama to the District Court for the Southern District of New York, the lawyer representing the German government argued that: "History cannot be rewritten, as far as its legal framework is concerned. Legal rules change as time goes by, but the law of the 21st century cannot be introduced back more than 110 years in history."[15] These statements reiterate the very negation of (legal) subjectivity, and hence general protection under the law, which lies at the core of the colonial trauma still affecting the formerly colonized societies to this day. What makes these statements particularly problematic in the present context is the continuity of they negation of legal subjectivity, first as peoples through colonization and then within the colonial settler state through the loss of the legal capacity to own land or cattle, move freely or exercise the own culture. The assessment that the international law of the early 20th century did not provide any protection for the colonized people can be challenged with contemporary sources. For example, even along the contemporary standards of the early 20th century, it is difficult to argue why the Ovaherero and Nama did not qualify as *civilized*.[16] In addition, German national jurisprudence did develop a principle to avoid the reiteration of past injustice via the application of historical laws.[17] One would assume that a case involving massive international crimes and the creation of an authoritarian, openly racist settler state meets the narrow criteria for the application of these principles. However, the authorities refrained from referring to this jurisprudence, and the so-called *Radbruch-formula*[18] applied therein, in this specific case.

As explained above, there is a growing consensus among international human rights lawyers that the principle of intertemporality, which is often referred to in cases involving historical injustice, has only limited relevance for contemporary processes that attempt to come to terms with colonial wrongs.[19] The qualification of the process as a political process cannot do away with the human rights obligations under international law.

The argument regarding the legitimacy of negotiation partners does not stand up to closer scrutiny either: according to this narrative, the democratically elected Namibian government, since independence, followed a strong policy of "one people—one nation" and, therefore, placed strong emphasis on selecting themselves the members of the negotiation team. In this context, any exercise of influence to enter into negotiations with other representatives of Namibian communities would have amounted to a violation of the sovereignty of the Republic of Namibia. In addition, as the German Special Envoy responsible for the negotiations, Ruprecht Polenz, put it, "there is no generally elected or accepted representation of all Ovaherero and Nama, but numerous different groups. What comes on top is rivalries within these communities."[20] What this narrative shows is that Germany, throughout the negotiation process, treated the involvement of the Ovaherero and Nama as if this amounted to establishing bilateral relations with

14 See only: Research Service of the German Parliament: "Ausarbeitung. Der Aufstand der Volksgruppen der Herero und Nama in Deutsch-Südwestafrika (1904–1908) Völkerrechtliche Implikationen und haftungsrechtliche Konsequenzen," WD 2 - 3000 - 112/16, 27, (September 2016), at 16 (in German), available at: www.bundestag.de/resource/blob/478060/28786b58a9c7ae7c6ef358b19ee9f1f0/wd-2-112-16-pdf-data.pdf "Das Deutsche Reich hat durch die Niederschlagung der Herero und Nama am Waterberg grundsätzlich nicht gegen Völkervertragsrecht verstoßen. […] Im Hinblick auf das Völkergewohnheitsrecht lässt sich feststellen, dass Individuen demgegenüber schon zu Beginn des 20. Jahrhunderts einen rudimentären Schutz genossen, der sich aus den Geboten der Menschlichkeit und Zivilisation herleiten ließ. Die Rechtsüberzeugung der damaligen Völkerrechtsgemeinschaft schloss allerdings die in ihren Augen „unzivilisierten", indigenen Völker auch von diesen Mindeststandards aus."

15 U.S. District Court of the Southern District of New York, *Rukoro et al. v. Federal Republic of Germany*, Case 1:17-cv-00062-LTS, Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss, (13 March 2018), at 7

16 Anachronismen als Risiko und Chance: Der Fall Rukoro et al. gegen Deutschland," Kritische Justiz 52, 92-117 (2019)

17 For example, the "Mauerschützen-Rechtsprechung": Bundesgerichtshof, Urteil v. 3.11.1992, 5 StR 370/92; ders. v. 20.3.1995, 5 StR 111/94; see also: Horst Dreier, "Gustav Radbruch und die Mauerschützen," *Juristenzeitung 52* (1997) H. 9, 421

18 The original wording, as coined by Germany's former Minister of Justice and Philosopher Gustav Radbruch in Gustav Radbruch, *"Gesetzliches Unrecht und übergesetzliches Recht," Süddeutsche Juristen-Zeitung* 1 (1946) H. 5, 105, at *107* "[…] wo Gerechtigkeit nicht einmal erstrebt wird, wo die Gleichheit, die den Kern der Gerechtigkeit ausmacht, bei der Setzung positiven Rechts bewußt verleugnet wurde, da ist das Gesetz nicht etwa nur ‚unrichtiges' Recht, vielmehr entbehrt es überhaupt der Rechtsnatur."

19 United Nations General Assembly, "Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Tendayi Achiume, prepared pursuant to General Assembly resolution 73/262," UN Doc. A/74/321 (21 August 2019), at 49

a non-governmental entity in Namibia. However, insofar as processes for addressing colonial crimes involve present-day governmental action—and, as such, need to comply with the human rights obligations the sovereign states are bound to[21]—states need to ensure the involvement of the survivors, in accordance with their international human rights obligations. The challenge that arises here is not so much related to sovereignty but, rather, concerns whose responsibility it is to ensure that international human rights standards are complied with. The Federal Republic of Germany seems to consider the involvement of the affected groups exclusively as Namibia's responsibility. This deviates from the above-quoted approach taken by the Special Rapporteur, who held, given the complexity of the task, that the responsibility for the process lies with both states and, in particular, with the former colonizing power.[22] It was up to both the governments of Germany and Namibia to develop a framework, within which the perspectives of the descendants of the survivors would have a forum that is satisfactory to them.

PROBLEMS AND PITFALLS

The German-Namibian process has been the first of its kind to address the long-term effects of a colonial genocide through negotiations between the former colonizing power and the formerly colonized, now-independent state. While generally commendable, several problems and pitfalls became visible during this process, which can also be linked to experiences within other transitional justice proceedings.

Survivor- and victim-centered approach

The participation and agency of the survivors is meanwhile recognized as a source of knowledge, insight and legitimacy for transitional justice processes.[23] Processes which actively take this insight into account have been described as following a survivor- or victim-centered approach.[24]

Several aspects of the negotiation process deserve closer scrutiny in this regard: the described bilateral format of the negotiations allowed certain members of the community to be involved in the ongoing process, but only on the condition that they accept the status of having no direct representation in the negotiations between the states. The intention behind this format was to provide the opportunity for an exchange with the Ovaherero and Nama, while remaining within the bilateral framework. However, this generated divisions between those Ovaherero and Nama who decided to accept these prerequisites and those who insisted upon a different format. Creating hierarchies between different groups of victims is a very powerful means of undermining processes which depend on community acceptance. Also, for the Ovaherero and Nama, this setup fortified existing tensions between the different groups. Instead of addressing this problem, tensions were furthered by the language adopted by the German Foreign Office, referring to some groups, as "others [who] refuse to join in."[25]

Beyond the format of the negotiations, no other official forum, in which perspectives of the Ovaherero and Nama could be expressed and heard, ever existed, was offered or seems to have been envisaged in the Joint Declaration. Of the possible measures available to address grave and systematic abuses, thus far, only few have been implemented in the case at hand. It is well known that truth-telling from the perspective of the survivors, as well as commemoration, can have a reparative and healing effect. They can also contribute toward (re)establishing the agency of survivors that was lost as a result of the international crimes.

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20 Translated by the author, original: Ruprecht Polenz, "Auf dem Weg zu einer Aussöhung mit Namibia—Kolumne," *Mission Lifeline* (6 June 2021), available at: mission-lifeline.de/auf-dem-weg-zu-einer-aussohnung-mit-namibia/ „[…] Es gibt keine allgemein gewählte oder von allen Herero und Nama anerkannte Vertretung, sondern zahlreiche unterschiedliche Gruppierungen. Hinzu kommen auch Rivalitäten innerhalb dieser Communities."

21 See only: United Nations High Commissioner for Human Rights, "Rule-of-law tools for post-conflict states, Reparations programmes," UN Doc. HR/PUB/08/1 (2008), at 5: "Before the proclamation of internationally protected human rights, the prevailing view in international law was that wrongs committed by a State against its own nationals were essentially a domestic matter and that wrongs committed by a State against nationals of another State could give rise to claims only by that other State as asserting its own rights. […] With the adoption of the Universal Declaration of Human Rights and the International Covenants on Human Rights, it was recognized that human rights were no longer a matter of exclusively domestic jurisdiction and that consistent patterns of gross violations of human rights warranted international involvement. Furthermore, international human rights law progressively recognized the right of victims of human rights violations to pursue their claims for redress and reparation before national justice mechanisms and, if need be, before international forums."

22 Fabián Salvioli, UN Doc. A/76/180, at 19

23 " […] the most successful transitional justice experiences owe a large part of their success to the quantity and quality of public and victim consultation carried out", Report of the Secretary-General, "The rule of law and transitional justice in conflict and post-conflict societies," UN Doc S/2004/616 (23 August 2004), at 16; United Nations General Assembly, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on the participation of victims in transitional justice measures," UN Doc. A/HRC/34/62 (27 December 2016), at 24–26

24 E. Tendayi Achiume, UN Doc. A/74/321, at 59

25 Federal Foreign Office, "Addressing Germany and Namibia's past and looking to the future—Article," as published and updated by 1 July 2019 at: www.auswaertiges-amt.de/en/aussenpolitik/regionaleschwerpunkte/afrika/-/1991702

The commemoration of and storytelling about the genocide is omnipresent in the praise poems and other forms of present-day Ovaherero and Nama culture—and so is the consciousness of the transgenerational trauma and poverty linked to the loss of the land. However, what the Namibian people have to say about this trauma, not to mention their demands, has not yet received any forum outside of the context of Ovaherero and Nama minority culture, select research and civil society projects.

After the events of 1904–1908 and during the remaining decades of the 20th century, no efforts were taken to uphold the rights to truth, to justice and to reparations during the lifetimes of direct survivors, their children or grandchildren. Until today, there is no official investigation into or account of the events between 1904–1908 beyond the short negotiated historical summary provided in the Joint Declaration. Nor has there been a process established that systematically considers the accounts of the affected communities. Available resources are limited to the results of historical research and (usually German-language) documents in archives.

From the perspective of the Ovaherero and Nama, the negotiations thus offered the first ever, and very limited, official window for agency regarding this highly sensitive matter. The intensity with which they demanded their involvement—"Nothing about us without us"—cannot come as a surprise.

Restrictions in terminology

The terminology used by the German representatives throughout the negotiations added to the tensions with representatives of the Ovaherero and Nama. Supposedly to avoid establishing an international precedent, Germany was eager to avoid the term "reparations" and also only used the term "genocide" with reservations. These reservations were linked to an understanding of reparations within German public discourse, which largely equates the notion of reparations with (monetary) compensation or the national legal concepts of *Entschädigung* or *Schadensersatz*. As outlined above, the human rights-based approach to reparations refers to a much broader and more fluid framework for addressing large-scale abuses than the concept of compensation.

Statements (primarily made by states and international lawyers) which claim that these traumatic events do not qualify as international wrongs according to the standards of the time, and that, therefore, the descendants should not be considered as victims, have been perceived—particularly by descendants, researchers and activists—as re-traumatizing and as a reassertion of colonial power relations through the very processes which aim to address this injustice.[26] The same is true with regard the refusal to consider the descendants of the survivors as victims, which was accompanied by the denial of any individual rights of members of the affected communities resulting from the colonial genocide. These restrictions in terminology fostered an atmosphere of distrust, which is a well-known trap in transitional justice processes. As the former UN Special Rapporteur on Reparations, Pablo de Greiff, aptly put it:

"In some cases […] it is argued that the benefits 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 [or] the acts that are the subject of redress are declared to be "unjust" but such a declaration is also said to have no legal consequences […]

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 (an apology depends on such recognition, everything else being an excuse or an expression of regret) reparation programmes that fail to acknowledge responsibility do not provide reparation […].[27]

Ruling out the terminology of reparations, the states missed an opportunity to shape and further develop this framework. A positive stance on reparations could have openly addressed questions concerning the reasonable scope and content of the existing framework for cases involving historical crimes and their long-term effects, as well as trauma passed down over generations. International law leaves a lot of room for interpretation that could have filled these ideas with life.

Overlooked perspectives

The German-Namibian process actively addressed the implications of German colonialism for the first time, but the applied formats cannot be described as inclusive. One problem resulting from this concerns overlooked perspectives. These include the perspectives of other affected groups (a), the perspectives of women and the multiplicity of perspectives which could have become visible by applying a gender-sensitive approach (b), but also the question of how to decolonize German society (c).

26 For more, see: S. Imani and K. Theurer, "Reparationen für Kolonialverbrechen—die ambivalente Rolle des Rechts am Beispiel der Verhandlungen zwischen Deutschland und Namibia," *Z Friedens und Konflforsch* (2022)

27 United Nations General Assembly, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence," UN Doc A/69/518 (14 August 2014) at 62–63

A—Further affected groups

The Namibian genocide was rightly labeled the Ovaherero and Nama genocide, as these were the groups targeted explicitly in the extermination orders of the German military.

However, the populations of Ovaherero and Nama living in the diaspora in Botswana, South Africa or the USA were not represented in the negotiations. Nor were the Ovaherero and Nama the only Black people living in the area where the genocide occurred. The Namibian Damara lived in the same region. Many of them were killed during the genocide, either because of their involuntary involvement in the war or because the German colonizers had difficulties distinguishing the two groups.[28] In a similar manner, the Namibian San were subjected to intense colonial violence, in the form of racist "bushmen-hunts," which, although mostly occurring several years after the Ovaherero and Nama genocide, still took place under German colonial rule. The intention behind, along with the scope of, this violence against the San has been described as genocidal.[29]

B—Gender-based/sexual violence

With Esther Muinjangue, Ida Hoffmann and, more recently, Sima Luipert, several of the most visible civil society actors pushing for an acknowledgment of the Ovaherero and Nama genocide since the 1990s have been women. However, this was not reflected in the format of the negotiations. The authors are not aware of any Ovaherero or Nama women, who were members of the technical committees advising the negotiations or their implementation.

It is generally acknowledged that reparation processes cannot be complete without a gender-sensitive approach.[30] According to a recent UN statement, "processes of truth-seeking, justice, comprehensive reparation, guarantees of non-repetition and memorialization would be incomplete" without a gender-sensitive perspective.[31] However, the adoption of a gender-sensitive approach or a historical assessment that considers specific gendered aspects of German colonial rule was not visible within the formats of the negotiations.

Sexual violence against Ovaherero and Nama women was widespread and considered by some contemporary commentators as one of the major reasons for the colonial war.[32] In the concentration camps and related contexts of forced labor, women faced different treatment, along with different types of tasks demanded of them, by the colonial administration.[33] The German colonizers and soldiers were initially mostly men, which led to an increase in sexual violence and coercive relationships, as well as marriages between German men and Ovaherero and Nama women during the first decades of colonialism. The so-called "mixed marriages" (*Mischehen*) were considered problematic by the colonial administration, which led to the establishment of programs that brought German women to the colony of German South West Africa. With the adoption of an order forbidding these marriages in 1905, the women in these marriages faced double discrimination for being linked to both the colonizers and the colonized.[34] This remains a problem inherited by many Ovaherero and Nama alive today who have German ancestry, but whose special relationship to Germany, in contrast to their German-speaking Namibian relatives, has not been recognized to this day. Germany recognizes a special relationship with German-speaking Namibians, because of the language, but not with the Black direct descendants of German colonizers who do not speak the German language.

C—German society: Dealing with ignorance

Tackling the indifference and ignorance within German society regarding the colonial past is a topic of major importance. As pointed out by E. Tendayi Achiume, the lack of awareness on all levels regarding the persistent legacies of colonialism are a major hindrance to reparations.[35] Yet, the German perspective on these colonial legacies was not explicitly addressed in the Joint Declaration.

There are many possible approaches to dealing with this ignorance within German society. Possibilities range from provenance and historical research to repatriation and restitution. They also include political education, in the form of general public education, along with school

28 L. Garises, "*The Damara and the Genocide—A Call for Recognition and Restitution,*" (14 September 2022), available at: www.rosalux.co.za/our-work/the-damara-and-the-genocide

29 R J Gordon, "Hiding in Full View: The ''Forgotten'' Bushman Genocides of Namibia," *Genocide Studies and Prevention* 4:1 (April 2009), 29

30 Fabián Salvioli, UN Doc. A/75/174, at 93; E. Tendayi Achiume, UN Doc. A/74/321, at 57

31 United Nations General Assembly, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence," UN Doc. A/75/174 (17 July 2020) at 93

32 See for example: Missionary Joh. Neitz, "Die Herero betreffend, Reise zu Samuel Herero, 8.11.1907," *Archiv der Vereinigten Evangelischen Mission Wuppertal*: A/k 5, zitiert in H Gründer: "*Geschichte der deutschen Kolonien*," (2018), at 130

33 C.W. Erichsen, "The angel of death has descended violently among them—Concentration camps and prisoners-of-war in Namibia, 1904–08," *African Studies Centre Research Report* 79 (2005), at 56 ff. and 142 f.

34 See S. Luipert, "A personal account of the genocide against the Nama," in: ECCHR and Akademie der Künste (eds.), "*Colonial Repercussions: Namibia—115 years after the genocide of the Ovaherero and Nama"* (2019) at 46–47, available at: www.ecchr.eu/fileadmin/Publikationen/ECCHR_NAMIBIA_DS.pdf

35 Tendayi Achiume, UN Doc. A/74/321, at 60

textbooks—German colonialism is still not a mandatory subject in many curricula[36]—and fostering cultural exchange and mutual understanding.

For example, the memorial landscapes in the German capital still render the history of colonialism largely invisible. The Federal Concept for Memorial Sites (*Gedenkstättenkonzeption des Bundes*) is still oriented exclusively toward the historical contexts and geographical sites associated with the National Socialist regime and the dictatorship in the German Democratic Republic. The coalition agreement of the current federal government, while affirming the commitment to address German "*colonial heritage,*" only envisages the drafting of a concept for a "learning and commemoration site regarding colonialism" (*Lern- und Erinnerungsort Kolonialismus*) for the next electoral period. It is unclear if concrete steps will follow from this, let alone what form they will take.

At the same time, existing sites commemorating the colonizers often continue to be maintained, without the appropriate commentary or explanation.[37] The German War Graves Commission (*Volksbund Deutsche Kriegsgräberfürsorge e.V.*), funded in part by the German Foreign Office, maintains the graves of German soldiers in Namibia who died abroad during the German colonization of Namibia from 1884–1915, while leaving the history of the Ovaherero and Nama who lost their lives largely invisible in Namibia.[38] Here, much still remains to be done.

WHAT MAY FOLLOW

In this paper, multiple divisions which characterize the German-Namibian post-colonial present have been outlined. Breaking down these divisions and entering into a multi-level exchange must be a priority within any future processes that aim to come to terms with the colonial past. The involvement and agency of the descendants of the survivors must also be considered a prerequisite for any future efforts—both in terms of functionality and legitimacy. Available forums need to be redesigned in a manner that prevents discrimination and is open to perspectives of the affected communities in all their heterogeneity. The outcomes of these forums should not be predetermined. It is the responsibility of the civil societies and both states to make sure that such spaces exist. Such processes may take time, but less time when compared to the mitigation of conflicts resulting from ignorance or exclusion. Finally, the process of addressing the colonial past needs to go in both directions and also involve German society, with the aim of tackling ignorance, as well as the recent colonial apologetic tendencies within German society, and fostering empathy and understanding.

36 S. Vogel, "Kolonialismus im Schulbuch. Was Schüler*innen heutzutage über den Kolonialismus lernen," *Rosa Luxemburg Stiftung-Nachricht* (20 August 2020), available at: www.rosalux.de/news/id/42834#_ftn4

37 For example, see: M. Bechhaus-Gerst, "Koloniale Spuren im städtischen Raum," *APuZ* 69. Jg., 40–42/2019 (30. September 2019) 40, at 42–44

38 See the online search module on the website of the Volksbund Deutsche Kriegsgräberfürsorge e.V., (in German); See also: L. Förster, "*Postkoloniale Erinnerungslandschaften. Wie Deutsche und Herero in Namibia des Kriegs von 1904 gedenken*," (2010) at 104

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