

Germany Has to Grant Reparations for Colonial Crimes

Karina Theurer

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On 24 April 2023, several United Nations Special Rapporteurs started publishing their joint communication with the German government ([AL DEU 1/2023](#)) and the Namibian government ([AL NAM 1/2023](#)), on violations of international law during their interstate negotiations on reparations for colonial crimes and by their final agreement, their [Joint Declaration](#). They clearly state that both governments have violated participation rights and that reparations are to be granted in accordance with international law. The legal intervention of the Special Rapporteurs is timely as both governments continue to negotiate [details of execution](#) although a [court case is pending](#) (Case-Number: HC-MD-CIV-MOT-REV-2023/00023), there are severe doubts about the [lawfulness of the negotiations](#) and politically the Joint Declaration [adds fuel to the fire](#) rather than contributing to reconciliation. With regard to transnational norm-generating processes, their legal assessment contributes to the establishment of minimum legal standards in processes of reparations for colonial crimes worldwide and the decolonization of international law. Civil societies and legal scholars now need to demand that basic principles of transitional justice, rule of law and international law are to be respected, meaning that the negotiations on reparations are to start anew.

Why Timely? Execution of the Agreement Despite Legal Insecurities and a Pending Court Case?

When confronted with the unlawfulness of the Joint Declaration and the process leading up to it, representatives of the German government emphasize that the text is not mutually legally binding but merely a [political expression](#) of intent and that it contains only voluntary political commitments. Article 20 of the text sparks doubts about that interpretation, and also the new government's coalition agreement, valid for the time between 2021 and 2025, still speaks of a [reconciliation agreement](#). Another attempt to duck away might be imminent: In August 2022, the German government affirmed that the signature of the Joint Declaration was constituent [for its entry into force](#) and [for the release of funds](#), probably hoping that the latter might put enough pressure on the SWAPO-led Namibian executive to quickly proceed to sign. In Namibia though, the [strong social protests](#), the pending [court case](#) in front of the Namibian High Court and the [upcoming elections in 2024](#) have led some members of SWAPO led-government to oppose the signature and execution of the Joint Declaration in its current form. In November 2022, representatives of the Namibian executive traveled to Berlin to negotiate an [addendum](#) to the existing Joint Declaration. Will the German government now push for execution and release the funds despite the lack of signature and the pending court case in a desperate attempt to put an end to the matter before the elections in Namibia in 2024?

The Special Rapporteurs Letters to the Governments and Their Subsequent Communication

In addition to the domestic litigation led by Patrick Kauta, representatives of Ovaherero and Nama, together with their lawyers, contacted the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabián Salvioli, in 2022. They provided him with factual information on the alleged violations of rights and referred to the Special Rapporteurs [report](#) on Transitional justice measures and addressing the legacy of gross violations of human rights and international humanitarian law committed in colonial contexts and to the [report](#) on human rights obligations of Member States in relation to reparations for racial discrimination rooted in slavery and colonialism published by the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance. Based on this, several UN Special Rapporteurs decided to conduct their own historical and legal research on the subject.

On 23 February 2023, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, [Fabián Salvioli](#), the Special Rapporteur in the field of cultural rights, [Alexandra Xanthaki](#), the Special Rapporteur on extrajudicial, summary or arbitrary executions, [Morris Tidball-Binz](#), the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, [Balakrishnan Rajagopal](#), the Special Rapporteur on the rights of indigenous peoples, [Francisco Cali Tzay](#), the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, [K.P. Ashwini](#), and the Special Rapporteur on violence against women and girls, its causes and consequences, [Reem Alsalem](#), jointly wrote one letter to the German government ([AL DEU 1/2023](#)) and one letter to the Namibian government ([AL NAM 1/2023](#)), in which they expressed their grave concerns regarding the violation of international law. Both governments had 60 days to respond, during which the communication stayed confidential. On April 12, the German government [asked](#) for an extension of the deadline until May 8, 2023, arguing that answering the legal questions required the cooperation of several ministries and that this would take longer. The Namibian government did not respond at all.

The Legal Obligation to Actively Seek the Effective Participation of Affected Communities (Including Those in the Diaspora)

One of the main legal issues the Special Rapporteurs [raise](#) is the lack of effective participation of Ovaherero and Nama during the German-Namibian interstate negotiations between 2015 and 2021 leading to the Joint Declaration initialed in May 2021. They state that their direct and meaningful participation through self-elected representatives was not a matter of political discretion of the two governments, but is guaranteed by international law and enshrined for instance in Articles 11 and 18 of the [United Nations Declaration of Indigenous People](#). They also [make it clear](#) that the invitation to an advisory technical committee that does not allow for direct participation cannot be construed as a refusal to participate by the affected communities.

All of these points have been raised by the German and Namibian governments in an attempt to divert public attention from their legal accountability and to [argue](#) that the whole process belongs to the political sphere of foreign policy and thus entails broad political discretion. The change of names from reconciliation agreement to Joint Declaration and political declaration is just one more example. Furthermore, the German executive seeks to delegate its own legal obligation to ensure active participation in terms of international law to the Namibian executive. It [asserts](#) that nation-states are the primary actors in the international order and that the German government is bound to negotiate with the Namibian executive as the sole legitimate representative of all Namibians. And it [argues](#) that they trust that the Namibian executive has ensured that those participation rights were respected that they formally acknowledge and aim to implement. The Special Rapporteurs [clarify](#) that this reasoning is incorrect and that both governments have a legal obligation to respect, protect and fulfill participation rights.

Lastly, the Special Rapporteurs [make](#) an important clarification regarding the moment, when the governments are to seek the active participation by the affected communities, including those in the diaspora: They affirm that the participation rights apply not only during negotiations but already before, when transitional justice mechanisms are designed, and later when the agreed measures are implemented.

Legal Recognition, Reparations and Reconciliation

The Special Rapporteurs [urge](#) the German government to assume legal responsibility for the colonial crimes committed during colonial rule and to grant reparations. They underscore that the Joint Declaration initialed in 2021 does not contain effective reparative measures and does not provide the necessary means to achieve reconciliation. They [affirm](#) that according to international standards, reparation should aim at comprehensively addressing the multiple consequences and effects of the harm suffered, including as a result of killings, starvation, torture, gendered violence, forced labor or loss of property, and should entail measures in the areas of restitution, compensation, rehabilitation and satisfaction. In 2021 already, Fabián Salvioli [said](#) that any negotiation on reparations for colonial crimes had to take into account lessons learned from transitional justice processes over the last 40 years. In addition to the lack of direct and meaningful participation of the affected communities, the Special Rapporteurs criticize the strict secrecy agreed upon between the two states regarding their negotiations. They [emphasize](#) that this kind of top-down approach is incapable of providing a sustainable basis for a peaceful future as experiences from other transitional justice processes show. Furthermore, they [criticize](#) the substitution of reparations by development aid. They confirm that the provision of development aid to address the legacy of colonialism risks perpetuating, rather than rectifying, colonial dynamics.

Reproduction of Colonial Racism and the Decolonization of the Doctrine of Intertemporal Law

The Special Rapporteurs also [raise](#) the reproduction of colonial racism by the current interpretation of the [doctrine of intertemporal law](#) by the German government according to which the laws at the time did not protect the Ovaherero and Nama

from being killed in large numbers. They [reiterate](#) that this interpretation of the doctrine of intertemporal law is an obstacle to reparations and that the German government should refrain from interpreting it in that way. Already in 2021, the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance, then Tendayi Achiume, affirmed in her [report](#) on human rights obligations of Member States in relation to reparations for racial discrimination rooted in slavery and colonialism that the pursuit and achievement of reparations for slavery and colonialism required a genuine decolonization of the doctrines of international law that remain barriers to reparations. She explicitly referred to the principle of intertemporal law.

The doctrine of intertemporal law is clearly one of the doctrines of international law that need to be (re-)interpreted in a decolonial manner. One of the [main legal arguments](#) of the legal intervention that includes the domestic litigation before the Namibian High Court is that the German government has to refrain from reproducing colonial racism and Eurocentrism when it determines which laws were in force at the end of the 19th and the dawn of the 20th century. Until today, the German Foreign Office and the Scientific Service of the German Bundestag retrospectively assume that a handful of the most racist European scholars whose works have become hegemonic during the course of the violent imposition of European ideas and values during the beginning of the 20th century for some decades already had been hegemonic on a universal scope at the end of the 19th century. In its [legal assessment](#), the Scientific Service of the German Bundestag for instance does not quote a single non-European legal scholar at the time, does not question whether it should take into account state practice of “non-European”-representatives and tends to omit or downplay differing legal views amongst European scholars. At the end of the 19th century, European international law might not have become universal yet but might have been only one legal order amongst others in a polycentric legal structure. That would require [thorough research](#) into possible “other” legal orders in the southern part of Africa at the end of the 19th century when determining the laws that were in force at the time. Legal scholars such as [Matthias Goldmann](#) or [Martti Koskenniemi](#) show that the racist distinction between “civilized” and “uncivilized” nations the German government relies on – and the legal consequences tied to it (being bare of any legal protection accorded to human beings) – were [controversial](#) even amongst European scholars at the time. Lastly, this racist distinction rightly disappeared very quickly from international law again when the right to self-determination became hegemonic – and might perhaps not be relied on when applying the doctrine of intertemporal law because of its second element. This second element requires that the existence of a right should be based not only on the law in effect at the time, but also on the international law as applied to the [continued existence](#) of that right.

Negotiations Between Germany and Namibia Need to Start Anew

As shown above, the Special Rapporteurs clearly state that international legal norms have been violated during the German-Namibian interstate negotiations leading to the Joint Declaration and that the Joint Declaration itself is incapable of providing

a stable basis for reconciliation. The two governments should assume their legal responsibility, refrain from signing and further implementing the Joint Declaration and start new negotiations – this time in accordance with minimum legal standards. With regard to transnational norm-generating processes on reparations for colonialism and slavery, their joint communication with the two governments contributes to establishing minimum legal standards that hopefully soon will be applied, respected and fulfilled in other contexts as well.

Disclaimer: The author was one of the legal representatives of the affected communities (Ovaherero and Nama) who contacted and provided historical facts and legal opinion to the offices of the United Nations Special Rapporteurs. The views expressed in this article are her own.

