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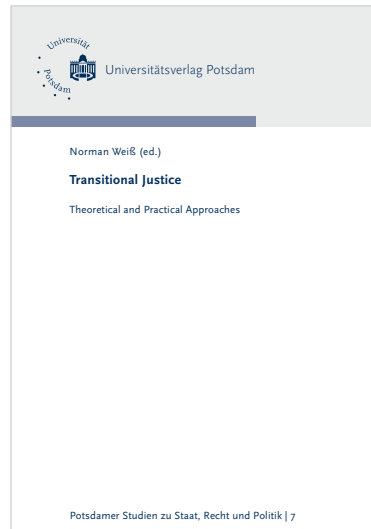
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Transforming Transitional Justice to Address Colonial Crime

The Nama's and Herero's Claim for Justice for Germany's Colonial Genocide in Namibia

Theresa Mair

Abstract While the concept of transitional justice and its range of measures have gained importance on an international level to come to terms with major crimes of the past, colonial crimes and mass violence committed by Western actors have not been addressed by transitional justice so far. In this chapter, the Herero's and Nama's struggle for justice for the genocide on their ancestors by Germany from 1904–1908 and the arising challenges are set in relation to conceptual debates in the field of transitional justice. Building on current debates in the field, suggesting more structural and transformative conceptualizations of transitional justice and an approach 'from below', it is argued that decolonial activism of formerly colonized communities and transitional justice debates can inform each other in a dialogic and fruitful form to formulate suggestions for a process towards post-colonial justice.

1. Introduction

While the concept of transitional justice and its range of measure have gained importance in the endeavor to come to terms with major crimes of the past on an international level, colonial crimes and mass violence committed by Western actors have not been given as much attention in transitional justice so far.¹ In recent years, however, a greater interest has emerged in connecting transitional justice mechanisms and the historical

¹ Balint/Evans/McMillan, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach' (2014) Vol.8 IJTJ 194.

experience of formerly colonized communities. The struggle for justice for the colonial genocide on the Nama and Herero in present-day Namibia by Germany from 1904 to 1908 shows parallels to transitional justice concepts and mechanisms and at the same time—as will be outlined in this chapter in more detail—it challenges its boundaries beyond traditional ideas of transitional justice. Thus an analysis of these processes may allow for the development of forms of transitional justice adequate to account for colonial crimes.

Building on current debates in the field, specifically the suggestion of more structural and transformative conceptualizations of transitional justice and an approach to justice ‘from below’, this chapter will therefore explore in more detail *how the case of the Nama’s and Herero’s push for justice for the colonial genocide may provide insights into a transformative approach to transitional justice, particularly with regards to colonial crimes and their continuities.*

The chapter starts by tracing the happenings in the years of 1904 to 1908 in German South West Africa (GSWA) within the context of the German colonial endeavor. Secondly, the Herero’s and Nama’s demands and struggle for justice for these colonial crimes will be portrayed, including the course of action which has been taken so far and what arguments they base their demands on. In the third part, the connection to transitional justice will be drawn and the applicability of international law and transitional justice discussed, presenting major challenges therein. The fourth section will set the previous analysis in relation to debates in the field of transitional justice and discuss parallels and possible synergies as a contribution to debates surrounding the issue of justice for colonial crimes.

2. German colonization and the genocidal war from 1904–1908

The Herero society formed in the central region of today’s Namibia in the 19th century in relation to the so-called cattle-complex. Local communities professionalized in cattle farming resulting in a social stratification setting the ground for the emergence of the Herero as a society.² They kept intensive trade relations to the cap region, were involved in conflicts with

² Gewalt, ‘Kolonisierung, Völkermord und Wiederkehr: die Herero von Namibia 1890–1923’ in Zimmerer/Zeller (eds.), *Völkermord in Deutsch-Südwestafrika: Der Kolonialkrieg (1904–1908) in Namibia und seine Folgen* (Ch. Links 2003), 105.

neighboring communities and despite going through a process of political centralization, were rather fragmented and loosely connected.³ These divisions were capitalized on by German colonizers to pressure the Herero to sign concessions and protectorate contracts later on.⁴

German influence in the region started with the presence of the Rhenish Missionary Society from 1842 onwards, which established missionary stations around the region.⁵ In 1883, the German tradesman Lüderitz bought land from the Nama for his company and asked the German empire for protection, which was finally granted by the Chancellor of the German Empire Bismarck in order to limit further expansion of the British Empire. Further expansion of German territory followed under the newly founded *Deutsche Kolonialgesellschaft für Südwestafrika* (DKGfSWA, German Colonial Society for Southwest Africa) and the German Empire decided to formally put the region under its rule and administration in 1885. Additionally, the German empire sought to meet the conditions for territorial claims set in Art. 35 of the General Act of the Berlin conference from 1884/85.⁶ Germany and indigenous communities signed various treaties until the 1890s. These contracts put indigenous communities under German protectorate rule, prohibited their leaders to close treaties with other colonial state powers or give them land without Germany's consent, obliged them to protect the lives and property of German citizens and allowed Germans unlimited trade. A treaty with the Herero society was signed under Mahaherero in 1885.⁷ German military troops were sent to GSWA, first, to be in contact with the indigenous communities, although their mandate and autonomy was soon extended to serving as police and to intervene in case of agitation against German rule.⁸

Through the process of colonization and a heavy cattle plague in 1897 the Herero society became existentially dependent on the good-will of the colonial state, including land ownership, access to reservations and

³ Krüger, 'Das Goldene Zeitalter der Viehzüchter. Namibia im 19. Jahrhundert' in Zimmerer/Zeller (note 2), 18.

⁴ Gewalt (note 2), 105

⁵ Krüger (note 3), 21.

⁶ Fabricius, *Aufarbeitung von in Kolonialkriegen begangenen Unrecht. Anwendbarkeit und Anwendung internationaler Regeln des bewaffneten Konflikts und nationalen Militärrechts auf Geschehnisse in europäischen Kolonialgebieten in Afrika* (Duncker & Humblot 2017), 163–165.

⁷ Ibid., 166.

⁸ Ibid., 166–169.

to loans, and work opportunities. Herero chiefs were pressed to sell land. Large parts of land were thus ripped from Herero territory and occupied by German settlers, companies and troops.⁹ Whereas missionaries of the Rhenish Missionary Society attempted to found protected reservations for indigenous communities on inalienable land, a significant number of German settlers, soldiers and administrative officers expressed discontent about reservation policies and demanded permission to occupy land without restriction.¹⁰

The deteriorating social and economic situation of the Herero, the proliferation of German settlement, arising conflicts between Herero and Germans and the unacceptable reservation policy of the colonial administration resulted in an insurrection against colonial rule.¹¹ On January 12th 1904, 5–10,000 Ovaherero attacked the military station Okahanja, as well as German settlements and farms, and killed 120 Germans.¹²

The German state reacted by creating propaganda that promoted revenge and punishment of the Africans.¹³ Influenced by the racist ideologisation of German settlers, who insisted on a final decision in the '*Rassenkampf*' and a 'radical solution to the indigenous question', and fueled by propagandistic speeches of the colonial administration, an atmosphere of hatred and aggression developed among Germans.¹⁴ Also, a war was a welcome opportunity to change the question of land and property according to the German interest.¹⁵

On January 13th, a state of war was proclaimed by Germany, first only in one region, then in whole GSWA and the command of the German troops was transferred to the General Staff in Berlin. In May 1904, Lothar von Trotha was assigned commander-in-chief, replacing former commander Leuthwein's approach of repression and negotiation with a strategy of military intervention and the use of force.¹⁶ When von Trotha arrived in the region, around 35,000 Herero, including women and chil-

⁹ Gewalt (note 2), 110 f.

¹⁰ Ibid., 112.

¹¹ Zimmerer. 'Krieg, KZ und Völkermord in Südwestafrika. Der erste deutsche Genozid' in Zimmerer/Zeller (note 2), 46.

¹² Drechsler, *Südwestafrika unter deutscher Kolonialherrschaft: Der Kampf der Herero und Nama gegen den deutschen Imperialismus* (Akademie Verlag 1966), 150.

¹³ Fischer/Ćupić, *Die Kontinuität des Genozids: Die Europäische Moderne und der Völkermord an den Herero und Nama in Deutsch-Südwestafrika* (Aphorisma 2015), 48.

¹⁴ Ibid., 49.

¹⁵ Ibid., 48.

¹⁶ Fabricius (note 6), 170 f.

dren were assembled in expectation of peace talks at the Waterberg. To the contrary, they were encircled by German soldiers and attacked. The Waterberg became the epicenter of the most crucial and devastating battle of the war.

The many Herero who could break through and flee were driven into the desert of Omaheke at gunpoint. Most of them died in the desert of dehydration, but still the battle was “to be continued as long as there was any possibility of a revival of the Herero’s power of resistance.”¹⁷ On October 2nd 1904 the notorious extermination order by von Trotha was proclaimed, ordering all Herero to leave GSWA and German troops to kill: “Any Herero found within the German borders with or without a gun, with or without cattle, will be shot at. I no longer shelter women and children. They must either return to their people or will be shot at. This is my message to the Herero nation.”¹⁸ Soon after, the Nama, who had sided with the Germans until then, joined the resistance against colonial rule under the command of Hendrik Witbooi and faced the same fate as the Herero.¹⁹

As advised by the German Chancellor Bülow, who was concerned about Christian and humanistic principles, the proclamation was revoked on November 29th 1904 by Wilhelm II, after the genocidal phase had already ended.²⁰ The services of the Rhenish Missionary Society were made use of and concentration camps were built to host the ‘rest of the Herero’ in order to make them surrender.²¹ The state of war was officially renounced on March 31st 1907, but fighting with Nama Chiefs²² and war captivity only ended in 1908.²³

Based on estimations, some 65,000 Herero and 10,000 Nama—about 80% and 50% of their populations respectively—had perished.²⁴ Amongst other tactics, the genocide was carried out through starvation and by the poisoning of Herero wells. About one-third died on the jour-

¹⁷ Ibid., 172.

¹⁸ See Bundesarchiv Berlin Lichterfelde, R 1001, Nr. 2089, Bl. 100 ff. cited in: Behnen (ed.), *Quellen zur deutschen Außenpolitik im Zeitalter der Imperialismus 1890–1911* (Wissenschaftliche Buchgesellschaft 1977), 291 ff.

¹⁹ Hillebrecht, ‘Die Nama und der Krieg im Süden’ in Zimmerer/Zeller (note 2), 121.

²⁰ Zimmerer, *Krieg KZ und Völkermord* (note 11), 50, 53.

²¹ Fabricius (note 6), 173.

²² Kaulich, *Die Geschichte der ehemaligen Kolonie Deutsch-Südwestafrika (1884–1914) Eine Gesamtdarstellung* (Peter Lang 2001), 258, 263.

²³ Zimmerer, *Krieg KZ und Völkermord* (note 11), 58.

²⁴ Fabricius (note 6), 174.

ney to concentration camps and many died due to typhus, smallpox, and other diseases in the camps. They were subjected to forced labor, beaten and whipped by their captors. Women were raped or made concubines and many men were hung.²⁵

With the closure of concentration camps, all surviving Herero were subjected to tight measures of control and surveillance to prevent any form of autonomous political organization and they were distributed as “labourers without rights”²⁶ to meet the need for work force in the colony in railway construction, farming and mining.²⁷ A decree adopted in 1905 paved the way for the expropriation of all property and assets, even reservations and cattle and a subsequent distribution thereof among German settlers and businesses. Consequently, the Herero were not only deprived of their material livelihood, but also a base to practice their traditions and customs, which were closely tied to cattle farming.²⁸ About 25% of the indigenous population were also deported to other regions of GSWA or other protectorates, such as Cameroon.²⁹

German colonial rule ended with Germany’s defeat in World War I and the entry of the South African army in 1915.³⁰

3. The Herero’s and Nama’s struggle for justice

The genocidal war against the indigenous population of Namibia by the German Empire was decisive in putting direct domination in the central and southern region of present-day Namibia into practice.³¹ The long-term effects of the genocide, to which Herero³² representatives refer,

²⁵ The Combat Genocide Association/Zimmerer/Neuberger, *Herero and Nama Genocide* <http://combatgenocide.org/?page_id=153> accessed July 27th 2018.

²⁶ Gewalt (note 2), 117.

²⁷ Eicker, *Der Deutsch–Herero–Krieg und das Völkerrecht: Die völkerrechtliche Haftung der Bundesrepublik Deutschland für das Vorgehen des Deutschen Reiches gegen die Herero in Deutsch–Südwestafrika im Jahre 1904 und ihre Durchsetzung vor einem nationalen Gericht* (Peter Lang 2009), 77.

²⁸ *Ibid.*, 77 f.

²⁹ Schildknecht, *Bismarck, Südwestafrika und die Kongokonferenz: Die völkerrechtlichen Grundlagen der effektiven Okkupation und ihre Nebenpflichten am Beispiel des Erwerbs der ersten deutschen Kolonie* (LIT 2000), 267.

³⁰ Gewalt (note 2), 118.

³¹ Zimmerer, *Deutsche Herrschaft über Afrikaner. Staatlicher Machtanspruch und Wirklichkeit im kolonialen Namibia* (LIT Münster 2001), 13.

³² Representatives of the Herero community were the first ones to demand redress for the genocide and other colonial crimes by Germany. The Nama joined their de-

concern the social, political and economic structure, due to wholesale expropriation of indigenous communities from their land. This created not only the conditions for settlement of European farmers in nearly the entire region, but also affected the way history was constructed in the area, particularly with regards to the collective identity of many Herero and Nama groups.³³ The struggle for justice by the communities of victims' descendants have focused on the acknowledgement and an apology for the German genocide from 1904–1908, reparations for the loss and harm it created and the implementation of a commemoration culture to prevent similar atrocities in the future.

In 1923, the funeral of former Paramount Chief Samuel Maharero marked the effective creation of a unified Herero society that was tied to the history of war with Germany. Additionally, it sparked the creation of an annual commemoration important for re-telling Otjitiro Otjindjandja (meaning 'many people died in one place') among the communities.³⁴ The idea of seeking reparations from Germany was reportedly raised the first time by some Herero political elites soon after World War II, but since they were engaged in the struggle for Namibia's independence from South Africa, the endeavor lacked resources and interest at that time.³⁵ The first attempts to officially press for reparations were made shortly after independence in 1990, when the important Herero figure Riruako asked the Namibian president to deliver a letter to Germany demanding compensation for the eradication of 80% of the Herero—without success.³⁶

At a state visit of German chancellor Helmut Kohl in 1995, a demonstration was held in Windhuk, in which more than 200 descendants of the victims participated and a petition was handed over.³⁷ Three years later, further petitions were delivered to German president Roman Herzog, one

mands, as well as the San and Damara more recently. Due to limited clarity and literature, a detailed account of the genealogy of involved communities cannot be given.

³³ Kößler/Melber, 'Völkermord und Gedenken: Der Genozid an den Herero und Nama in Deutsch-Südwestafrika 1904–1908' in Fritz Bauer Institut/Wojak/Meinl (eds.), *Völkermord und Kriegsverbrechen in der ersten Hälfte des 20. Jahrhunderts: Jahrbuch 2004 zur Geschichte und Wirkung des Holocaust* (Campus 2004), 236.

³⁴ Morgan, 'Remembering Against the Nation-State: Herero's Pursuit of Restorative Justice' (2012) 21(1) *Time & Society* 21, 22, 24. Most Namibians simply refer to the happenings by the years of its duration: 1904–1907.

³⁵ *Ibid.*, 24.

³⁶ Eicker (note 27), 82.

³⁷ Delius, *100 Jahre Völkermord an Herero und Nama. Menschenrechtsreport Nr. 32 der Gesellschaft für bedrohte Völker* (GfbV 2004), 17.

demanding financial compensation, another demanding a formal apology and the acknowledgement of the principle of reparation.³⁸

The German president responded by expressing acknowledgement of the wrongdoing of German troops and Germany's moral responsibility. At the same time, he excluded a formal apology and compensation and avoided the term 'genocide'. Since the relevant international law created in 1948 was not applicable at that time, and Germany was already paying development aid to Namibia, the Herero's request was to be considered void.³⁹ This notion was contested publicly at a visit of Riruako. He raised the argument that the Herero did not benefit from Germany's development aid and highlighted the unequal distribution of land in Namibia. Also, a comparison between the fate of the Herero and the Shoa was drawn, demanding an equal handling of victims.⁴⁰ Namibian foreign minister Theo-Ben Gurirab supported that argument in 2001 when he denounced Germany's unwillingness to apologize for the genocide in Namibia as being motivated by racism.⁴¹

In 1998, the Herero filed a first legal complaint for the payment of compensation at the International Court of Justice (ICJ) in the Hague. It was refused based on Art. 34 of the ICJ statute, which limits access to the court to states.⁴² Further legal actions followed. In September 2001 the Herero People's Reparation Corporation (HPRC) submitted a legal claim at the High Court of the District of Columbia in the USA, suing the companies *Deutsche Bank eG*, Terex corporation and *Deutsche Afrika-Linien* for 2 billion US Dollars of compensation. In a separate trial, Germany was sued for the same amount of compensation at the US Federal Court in Washington. Both of the accused were incriminated of genocide, crimes against humanity, expropriation, forced labor, slavery, destruction of culture and sexual abuse during colonial rule.⁴³ While mostly ignored, it should be highlighted that the statement of claim was not limited to

³⁸ Eicker (note 27), 82 f.

³⁹ Ibid., 83.

⁴⁰ Ibid., 84.

⁴¹ Ibid., 84.

⁴² Ibid., 83 f.

⁴³ Böhleke-Itzen, *Kolonialschuld und Entschädigung: Der Deutsche Völkermordan den Herero 1904–1907* (Perspektiven Südliches Afrika 2, Brandes & Apsel 2004), 26 f. Both legal actions were based on the *Alien Tort Claims Act*, a law introduced in 1789 enabling the prosecution of foreign companies, institutions and persons in case of damage or harm through the violation of international law or a treaty signed by the USA.

the crimes of 1904, but also included corporal abuse by German settlers and authorities after the war had ended, pointing to the broader context of violence and crime under colonialism.⁴⁴ In January 2017, another legal complaint was filed with the United States District Court for the Southern District of New York under the Alien Tort Statute. The case⁴⁵ was dismissed in March 2019.⁴⁶

At the UN World Racism Conference in Durban in September 2001, the Herero raised their claims and were supported by a German human rights organization, the *Gesellschaft für bedrohte Völker*, for the first time.⁴⁷ Cooperations with German and international activist and NGOs were expanded over the years to come, culminating in recent transnational conferences in Berlin in 2016 and Hamburg in 2018.⁴⁸

Nevertheless, the line of argument of Germany did not change until 2004. A turning point was the visit of a commemoration event on the occasion of the centenary of the battle of Waterberg by the German minister of development Heidemarie Wieczorek-Zeul. In her speech, she asked for forgiveness and spoke of a German war of annihilation against the Herero, which would nowadays be called genocide. Reparations were still ruled out, but help regarding the land reform planned by the Namibian government was announced.⁴⁹

The German Ministry for Foreign Affairs asserts that about 1 billion euro have been invested in bilateral development cooperation with Namibia since 1990, the highest payment per capita in Africa.⁵⁰ A parliamentary resolution from 1989 set the foundation for this distinguished and historically motivated form of cooperation.⁵¹ From 2007 until 2015

⁴⁴ Ibid., 29.

⁴⁵ <https://www.dw.com/en/pressure-grows-on-germany-in-legal-battle-over-colonial-era-genocide/a-42267279>, accessed July 20th 2018.

⁴⁶ <https://www.reuters.com/article/us-namibia-genocide-germany/lawsuit-against-germany-over-namibian-genocide-is-dismissed-in-new-york-idUSKCN1QN2SQ>, accessed July 20th 2018.

⁴⁷ Eicker (note 27), 84.

⁴⁸ PR http://genocide-namibia.net/wp-content/uploads/2016/10/161011_Presse-release.pdf; <https://colonial-amnesia-quovadishh.eu/>, accessed July 20th 2018.

⁴⁹ Morgan (note 34) 29 ff.

⁵⁰ Ministry of Foreign Affairs [Auswärtiges Amt] 'Beziehungen zu Deutschland' (June 2018) <<https://www.auswaertiges-amt.de/de/aussenpolitik/laender/namibia-node/-/208320>>, accessed July 24th 2018.

⁵¹ Deutscher Bundestag, *Beschlußempfehlung und Bericht Drucksache 11/3934 Die besondere Verantwortung der Bundesrepublik Deutschland für Namibia und alle seine Bürger* <http://www.namibia-botschaft.de/images/stories/Namibia/bilateral/Bundestag/11_4205.pdf>, accessed July 20th 2018.

Germany also offered another 36 Million euro within a ‘special initiative of reconciliation’ intended to fund measures of communal development in the living areas of Herero, Nama, Damara and San, the communities which suffered most under colonial rule. An evaluation of the program is still outstanding.⁵² The Herero surrounding Riruako refused the offer and insisted on reparation payments instead.⁵³

The state of Namibia seemingly tried to soften Herero demands in the interest of national reconciliation.⁵⁴ When Namibia gained independence in 1990 the new state promoted nation-building and declared a national policy of reconciliation. Thus, the emphasis on a particular group’s past did not accord with the government’s priorities. “Reconciliation effectively meant adopting a Namibian identity and ‘moving forward’ rather than debating the historical responsibility of various groups”⁵⁵, what Sabine Höhn calls “collective amnesia”.⁵⁶ Also, many Herero perceived that the SWAPO (South West African People’s Organization) government directed land redistribution, development projects and service provision improvements almost exclusively to the Northern region of the ruling party’s constituency. “Where the Namibian government saw Herero claims as a challenge to the nation-state, some Herero saw their marginalization by their own government to benefit the German state.”⁵⁷

In October 2006, however, the Namibian parliament unanimously adopted a resolution requested by Riruako guaranteeing the Herero Namibian support in their pursuit of reparations from Germany. Since 2014, negotiations about an appropriate name for Otjitiro Otjindjandja,

⁵² Bundesregierung [Federal government of Germany], *Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Niema Movassat, Wolfgang Gehrcke, Christine Buchholz, weiterer Abgeordneter und der Fraktion DIE LINKE.—Drucksache 18/8859—Sachstand der Verhandlungen zum Versöhnungsprozess mit Namibia und zur Aufarbeitung des Völkermordes an den Herero und Nama* (Berlin July 6th 2016) <http://dip21.bundestag.de/dip21/btd/18/091/1809152.pdf>, accessed July 20th 2018.

⁵³ Eicker (note 27), 86f.

⁵⁴ Sarkin, *Colonial genocide and reparations claims in the 21st century: the socio-legal context of claims under international law by the Herero against Germany for genocide in Namibia, 1904–1908*, (Praeger Security International 2008), 55 f.

⁵⁵ Morgan (note 34), 25.

⁵⁶ Höhn ‘International Justice and Reconciliation in Namibia: The ICC Submission and Public Memory’ (2010) 109: 436 African Affairs, 471, 484–487.

⁵⁷ Morgan (note 34), 28.

an apology, and a process of reconciliation are ongoing between representatives of Namibia and Germany.⁵⁸ There have been no results to date.⁵⁹

Nonetheless, celebrations and commemoration events, such as Herero day in Okahandja and Heroes' Day in Gibeon, have been established. The events carry a message of reconciliation, both between various groups in Namibia and between the descendants of the survivors of genocide and the German state—but also demand a clear recognition of the happenings and the sincere determination to seek whatever redress is possible for past atrocities and injustice.⁶⁰

Efforts by the Herero to raise awareness and build up political pressure have attracted national and international press and resonated broadly over the last decade, for example in a number of museums and exhibitions including information about the war of annihilation. The political pressure created is considered to have urged the German government representative Wieczorek-Zeul to formally apologize in 2004.⁶¹ Motifs iteratively invoked by Herero are systematic racism and colonization, which formed the base for their impoverishment, and serve as a basis for their demands for land, reparations, truth and reconciliation.⁶² The declaration of the first transnational congress on the Ovaherero and Nama genocides in October 2016 in Berlin adds the demand that “the Ovaherero and Nama communities [are] to be directly involved in negotiating a comprehensive solution, including recognition of the genocide, a sincere and appropriate

⁵⁸ Bundesregierung, *Sachstand der Verhandlungen* (note 51); Christiane Habermatz and Jan-Philipp Schlüter, ‘Deutschland verhandelt über Entschädigung der Herero’ *Deutschlandfunk* (February 16th 2018) <<https://bit.ly/2LB9W31>> accessed July 27th 2018.

⁵⁹ Krüger, ‘Delegation aus Namibia macht Druck auf Bundesregierung’ *Spiegel* (June 5th 2018) <<http://www.spiegel.de/politik/ausland/namibia-deutschland-soll-verantwortung-fuer-herero-voelkermord-uebernehmen-a-1201421.html>> accessed July 20th 2018.

⁶⁰ Kößler, ‘“A Luta Continua”: Strategische Orientierung und Erinnerungspolitik am Beispiel des “Heroes Day” der Witbooi in Gibeon’ in *Zimmerer/Zeller* (note 2), 180–191.

⁶¹ Anderson, ‘Redressing Colonial Genocide under International Law: The Hereros’ Cause of Action against Germany’ (2005) 93(4) *California Law Review*, 1155, 1185 f.

⁶² Gross, ‘Why The Herero Of Namibia Are Suing Germany For Reparations’ (National Public Radio May 6th 2018) <<https://www.npr.org/sections/goatsandsoda/2018/05/06/606379299/why-the-herero-of-namibia-are-suing-germany-for-reparations?t=1532012650598>> accessed July 20th 2018.

apology, as well as just reparations to the Ovaherero and Nama communities who continue to suffer the adverse effects of the genocide.”⁶³

4. Major challenges to the pursuit of (transitional) justice

Transitional justice has not yet been discussed in connection with the colonial genocide on the Nama and Herero in academic and political discourse. In the context of Namibia, it rather is an issue of debate as an option concerning the more recent events during the struggle for independence. After independence, SWAPO, the leading party in the struggle, introduced an unconditional general amnesty, avoiding accountability for past human rights violations. South Africa’s acclaimed transitional justice body, the Truth and Reconciliation Commission, even asked for hearings in Namibia. The offer was rejected,⁶⁴ but South Africa’s courage to address its brutal past impressed and inspired Herero activists to adapt the concept. Mbakumua Hengari of the Ovaherero Genocide Foundation explains: ‘South Africa took a very bold step by creating a Truth Commission where people would come vent out and point fingers and, through that process, find a mechanism of trying to level out things.’ In Namibia, this effort must come from within the Herero community.

The fact that transitional justice is being considered regarding Namibia’s more recent history as well as the experience of its neighboring country could be built up upon. However, the Herero and Nama have also encountered a number of challenges, which are relevant for the applicability of transitional justice. Three major obstacles will be illustrated in more detail: the lack of acknowledgement of the events as a genocide and

⁶³ 1. Transnational Non-governmental Congress on the Ovaherero and Nama Genocide ‘RESTORATIVE JUSTICE AFTER GENOCIDE Joint Resolution of the Delegates to the I. Transnational Congress on the Ovaherero and Nama Genocides Berlin, October 14–16, 2016’ http://genocide-namibia.net/wp-content/uploads/2016/12/2016-12-01_CongressResolution.pdf, accessed July 20th 2018.

⁶⁴ For a detailed account of the debate concerning justice for human rights violations by SWAPO in the course of the struggle for Namibia’s independence see Conway, ‘Truth and Reconciliation: The Road Not Taken in Namibia’ 5(1) *The Online Journal of Peace and Conflict Resolution* <http://www.trinstitute.org/ojpcr/5_1_conway.htm>, accessed July 20th 2018 or Hunter ‘“Wenn zu viel Wahrheit entzweit, wie viel Wahrheit ist wohl genug?” Umgang mit der jüngsten Vergangenheit in Namibia’ in Schmidt/Pickel/Pickel (eds.), *Amnesie, Amnestie oder Aufarbeitung? Zum Umgang mit autoritären Vergangenheiten und Menschenrechtsverletzungen* (VS Verlag für Sozialwissenschaften 2009).

Germany's reluctance to participate in a justice process, the inapplicability of international law and the exclusivity of genocide in international memory politics.

4.1 *Germany's trouble recognizing colonial genocide*

While the collective memory and trauma among descendants of the victims lives on and has become an issue of concern for the majority of Namibian society, a century after the genocide, there is widespread amnesia or indifference in Germany, with little effort to address the injustice.⁶⁵ Still, there is no consensus concerning the question of whether the atrocities committed by German troops on indigenous people in Namibia at the beginning of the 20th century are to be considered a genocide or not. Representatives of the communities assert that it was indeed a genocide, in reference to article 11 of the UN Security Council Resolution 1325 (2000).⁶⁶

The first evidence in favor of the argument was published by German scientists in the late 1960s. The claim was then supported by various academic monographs in the 1990s, so that '[o]n the basis of these contributions as well as widely established contemporary definitions, we can describe the historical events that took place at the beginning of the twentieth century in eastern, central and southern parts of the German colonial territory called South-West Africa with confidence, as being tantamount to genocide.'⁶⁷ The UN-commissioned Whitaker Report further substantiated this conclusion by describing events in GSWA between 1904 and 1908 as the first genocide of the 21st century.⁶⁸

Germany's position regarding the classification as a genocide remains unclear. On one hand, the German diplomat Martin Schäfer emphasized the government's position in 2015 as "The war of annihilation in Namibia

⁶⁵ Melber, 'The Genocide in "German South-West Africa" and the Politics of Commemoration. How (Not) to Come to Terms with the Past' in Perraudin/Zimmerer (eds.), *German Colonialism and National Identity* (Routledge 2011), 252.

⁶⁶ Congress on the Ovaherero and Nama Genocide (note 62), 2.

⁶⁷ Melber (note 65), 252.

⁶⁸ Drafted by the special rapporteur Ben Whitaker for the United Nations Subcommission on Prevention of Discrimination and Protection of Minorities the document was adopted as *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide* (Document E/CN.4/Sub.2/1985/6, 2 July 1985).

from 1904 to 1908 was a war crime and a genocide.”⁶⁹ Further, then-President of the *Bundestag* Norbert Lammert confirmed in a newspaper: “Measured by current standards, the abatement of the Herero uprising was genocide.”⁷⁰ In September 2015, at the first reading of the parliamentary motion by the party *Die Linke* (leftist party) ‘Reconciliation with Namibia—Remembrance and apology for the genocide in the former colony German-Southwest Africa’ speakers of all parties in the German parliament applied the term ‘genocide’.

On the other hand, no resolution has been passed by the *Bundestag* which acknowledges the genocide as such officially and the German government appears to continue to avoid the phrase.⁷¹ Instead, German government representatives invoke the “special historical and moral responsibility” due to their entangled colonial past, which finds expression in the scope of development aid being paid to Namibia.⁷²

Reparations, and a form of apology which could legitimate an entitlement, are excluded based on the arguments that development aid to Namibia makes reparations obsolete, that too much time had passed and that international law did not protect the civilian population at that time of the war.⁷³ Most especially the latter argument has been highlighted repeatedly and explained in detail in an elaboration by the German parliament’s scientific service.⁷⁴

In 2014, a political process of dialogue was initiated, aiming at formulating a common declaration about the atrocities, finding a dignified form of commemoration and remembrance, as well as to overcome the

⁶⁹ Schäfer, ‘Regierungspressekonferenz vom 10. Juli’ (July 10th 2015) <www.bundesregierung.de/Content/DE/Mitschrift/Pressekonferenzen/2015/07/2015-07-10-regpk.html> accessed July 20th 2018.

⁷⁰ Lammert in ‘Bundestagspräsident Lammert nennt Massaker an Herero Völkermord’ *Die Zeit* (July 8th 2015) <<https://www.zeit.de/politik/deutschland/2015-07/herero-nama-voelkermord-deutschland-norbert-lammert-joachim-gauck-kolonialzeit>> accessed July 18th 2018.

⁷¹ Bundesregierung (note 52).

⁷² Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung (Federal Ministry of Economic Cooperation and Development) <http://www.bmz.de/de/laender_regionen/subsahara/namibia/index.jsp> accessed July 18th 2018.

⁷³ Anderson (note 61), 1185.

⁷⁴ Wissenschaftlicher Dienst Deutscher Bundestag, *Der Aufstand der Volksgruppen der Herero und Nama in Deutsch-Südwestafrika (1904–1908). Völkerrechtliche Implikationen und haftungsrechtliche Konsequenzen*, (September 27th 2016) <<https://www.bundestag.de/blob/478060/28786b58a9c7ac7c6ef358b19ee9f1f0/wd-2-112-16-pdf-data.pdf>> accessed July 18th 2018.

noticeable effects of colonial rule in Namibia.⁷⁵ The German government announced the plan to conclude the talks by the end of 2016, then postponed the completion to the last federal parliamentary elections in September 2017 and until today, no official conclusion has been published.⁷⁶ In an agreement by representatives of both governments, Nama and Herero victims organizations should not be involved in the negotiations directly. Namibia, thereby, also acts against the Namibian parliamentary resolution which granted them the right to participate in such talks. Germany considers a judgment concerning their involvement an illegitimate interference with internal affairs of Namibia.⁷⁷

As a recent survey by the Windhoek-based think tank Institute for Public Policy Research shows, however, Namibia's attitude is currently shifting. The Namibian public and population is getting anxious to see results and the Namibian government is losing patience. Two thirds of Namibians support the demand for reparations and slightly more than half want traditional representatives of the Herero and Nama to be involved in the negotiation. A major point of critique, not only by Herero and Nama leaders but also by German oppositional politicians and NGOs, is that the negotiations are taking place behind closed doors and are not transparent. The Namibian government also appears to take a closer position to the Herero's and Nama's claims, such as when the attorney general unexpectedly announced he was investigating a compensation claim against Germany.⁷⁸

It should be noted that the German government invested in cultural and academic exchange to foster reconciliation, and that the development and testing of educational methods about the genocide on the Nama and Herero was funded in 2016 and 2017 after academics and activists had raised serious concerns.⁷⁹ Additionally, the German government confirmed—after having been pressured by civil society organizations for many years—that they are in dialogue with the Namibian embassy and

⁷⁵ Bundesregierung (note 52), 1.

⁷⁶ Kynast, 'Völkermord an Herero—In Namibia wächst die Wut auf Deutschland' *ZDF* (January 14th 2018) <<https://www.zdf.de/nachrichten/heute/voelkermord-an-herero-wut-auf-deutschland-waechst-100.html>> accessed July 27th 2018.

⁷⁷ Bundesregierung (note 52), 5 f.

⁷⁸ Deutsche Welle (May 9th 2018) 'Namibians losing patience over German slowness to act on genocide claims' <https://www.dw.com/en/namibians-losing-patience-over-german-slowness-to-act-on-genocide-claims/a-43715135> accessed July 27th 2018.

⁷⁹ Bundesregierung (note 52), 13.

German museums and collections in order to organize further repatriation of human remains to Namibia.⁸⁰

Reckoning with its colonial past proves to be a long-term process of small steps for Germany, which is shaped by political structures and power relations in and between both countries. In March 2018, the party Die Linke issued a parliamentary motion including the acknowledgement of the genocide according to the respective UN convention and an official apology by Germany. The motion called for the inclusion of Herero representatives in the reconciliation dialogue, a plan to tackle the structural consequences of colonial rule and violence and a need to address the issue of public remembrance culture and education in Germany.⁸¹ It remains to be seen if Germany will finally acknowledge the genocide and thereby take a pivotal step which can pave the way for future activities to handle its colonial past.⁸²

4.2 *Applicability of international law*

It is without question that, from today's perspective, the atrocities and actions of annihilation which took place in colonial military conflicts constitute injustices. In international law they would be classified as war crimes, specifically genocide and crimes against humanity.⁸³

Germany, among other European states, opposes this notion recalling the legal principle excluding retroactive effects and arguing that the crimes committed during colonial times can only be considered based on contemporaneous international legislation.⁸⁴ Indeed, the legal principle *tempus regit actum* regulating intertemporality in law assures exactly this, laid down for instance in Art. 28 of the Vienna Convention on the Law of

⁸⁰ Ibid., 14.

⁸¹ Deutscher Bundestag, *Antrag Versöhnung mit Namibia—Entschuldigung und Verantwortung für den Völkermord in der ehemaligen Kolonie Deutsch-Südwestafrika* (Berlin March 16th 2018) <http://dipbt.bundestag.de/dip21/btd/19/012/1901256.pdf> accessed July 16th 2018.

⁸² Dokumentations- und Informationssystem für Parlamentarische Vorgänge (DIP), 'Basisinformationen über den Vorgang' <<http://dipbt.bundestag.de/extrakt/ba/WP/19/2333/233389.html>> accessed July 22nd 2018. A continuously updated overview of all parliamentary actions concerning the relation to Namibia including English translations is offered by the Namibian embassy: <http://www.namibia-botschaft.de/parlamentarische-initiativen.html> accessed July 22nd 2018.

⁸³ Fabricius (note 6), 35, 37.

⁸⁴ Ibid., 35.

Treaties from 1969. The *Institut de droits international* reaffirmed in 1975 “[...] the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules of the law that are contemporaneous with it.”⁸⁵ Therefore, for a legal evaluation of the actions by German troops in GSWA, solely the law at that time is relevant and decisive.⁸⁶

At the beginning of the 20th century, genocide was not yet codified in law. Only in 1948 did the Convention on the Prevention and Punishment of the Crime of Genocide enable criminal prosecution. Even if the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity from November 1968 excludes the temporal limitation of war crimes such as genocide⁸⁷, the problem of intertemporality explained above remains.

Another obstacle to the application of international law is the lack of an individual or community-based entitlement to reparations. A theoretical claim for reparations according to Art. 3 of the Hague Convention of 1907 only takes states, as subjects of international law, into account.⁸⁸ Anthony Anghie, professor of international law and proponent of the Third World Approach to International Law (TWAAIL) criticizes this exclusivity. International law was systematically formed by a “complicity of positivism and colonialism” with a focus on sovereign territorial states according to the colonial interests of European colonial powers, in order to enable conquest and “oppression of the non-European world.”⁸⁹ Even if this notion is debatable, it is a fact that in the 19th century, the definition of subjects of international law was eurocentric and limited. States outside of Europe had to apply and justify their willingness and capability to become part of the alliance of ‘civilized states’.⁹⁰ International humanitarian conventions, both the Geneva and the Hague laws, were thus not applicable in colonial wars between European states and indigenous communities, because they were no parties to any treaties. Indigenous communities were not considered (potential) subjects of international law.

⁸⁵ Institut de droit international ‘The Intertemporal Problem in Public International Law’ (Eleventh Commission, Rapporteur Max Sorensen 1975), at point 1.

⁸⁶ Fabricius (note 6), 39.

⁸⁷ Böhlke-Itzen (note 43), 15 f.

⁸⁸ Ibid., 20.

⁸⁹ Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004), 15.

⁹⁰ Fabricius (note 6), 334.

Consequently, colonial wars were not considered international conflicts either⁹¹ and international rules regulating military conflict and war were not applied to colonial wars, neither treaty-based nor customary law.⁹² After the establishment of formal colonial rule in 1885, German national law was to be applied in GSWA. German law included some protection from arbitrary violence by European soldiers in the colony, but regulations did not apply to times of conflict.⁹³

As Fabricius concludes her thorough legal analysis of the happenings in GSWA from 1904–1908, the conditions for the crimes of genocide and crimes against humanity are theoretically fulfilled, but at that time they were crimes of moral nature only, not from a legal perspective.⁹⁴ In his evaluation of the chances of success of the legal appeal by the Herero in 2001, Eicker reaches the same conclusion. Besides the immunity clause and the political question doctrine, which excludes political questions from being treated by federal courts, taking effect in the USA, the violations of international law, which were presented in the statement of case by the Herero, do not meet the legal prerequisites for a legal claim.⁹⁵ The legal actions by the Herero might have been and may continue to be unsuccessful on a material level, but it should be noted that they did in fact have an enormous political effect.⁹⁶

Even if most scholars appear to agree on the perspective presented above, opposing views deserve mentioning. Rachel Anderson argues that the actions committed by the German colonial administration violated customary and treaty law and that the Berlin West Africa Convention and the Anti-Slavery Convention conferred third-party beneficiary rights of protection to the Herero Nation and its people, because Germany referred to them as a nation in documents.⁹⁷

⁹¹ *Ibid.*, 335

⁹² Fabricius (note 6), 336. It was only in the mid 20th century that humanitarian law was also recognized to be applied in domestic conflicts and that customary humanitarian legal standards would have to be considered in colonial wars also.

⁹³ *Ibid.*, 339.

⁹⁴ *Ibid.*, 343.

⁹⁵ Eicker (note 27), 478.

⁹⁶ *Ibid.*, 503.

⁹⁷ Anderson bases her argument on the notion that the third-party beneficiary doctrine recognized in international law in the 1969 Vienna Convention on the Law of Treaties (Art. 34) and that the Herero community did fulfill the requirements of population, territory and government to be defined as a state at the end of the nineteenth century and Germany addressed them as such in treaties and other documents. Poisoning wells, killing women and children, and killing and wounding prisoners of war would have been illegal under the laws of war at that time. The

Implementing an approach of transitional justice, which is based on international law, seems to be impossible from a legal perspective. Additionally, introducing a base for seeking redress for colonial crimes does not appear to be a priority by the international community. In 2000, the United Nations Subcommission on the Advancement and Protection of Human Rights adopted a resolution named ‘Mass and flagrant violations of human rights which constitute crimes against humanity and which took place during the colonial period, wars of conquest and slavery’ which concludes that these crimes “should no longer benefit from impunity”.⁹⁸ However, the final statement of the following World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban in 2001, while acknowledging the suffering caused by genocide, no longer mentioned colonial wars or colonialism and their effects were referred to in a general terms only.⁹⁹ In that regard, Eicker argues that regarding the legal restriction as the sole basis for Germany to deny reparations would be naive.¹⁰⁰

4.3 *Exclusivity of victimhood on international level*

The German genocide against the Herero has gained considerable academic and public prominence in the last two decades. At the same time, other atrocities such as the equally brutal suppression of the Mau-Mau movement in Kenya in 1952–7 or the so-called Maji-Maji War in current Tanzania, where the German policy resulted in the death of hundreds of thousands Africans, do not receive the same amount of attention.¹⁰¹ As

war thus also violated treaty law prohibiting the annihilation of African peoples in reference to clauses in the Berlin West African Convention and the 1890 Anti-Slavery Convention that obliged colonial powers to protect indigenous Africans. See Anderson (note 60), 1178–1188.

⁹⁸ UN Doc. E/CN.4/SUB.2/DEC/2000/114, Sub-Commission on Human rights decision 2000/114 ‘Mass and flagrant violations of human rights which constitute crimes against humanity and which took place during the colonial period, wars of conquest and slavery’, August 18th 2000.

⁹⁹ World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance Declaration, September (2001) <<http://www.un.org/WCAR/durban.pdf>> accessed July 27th 2018.

¹⁰⁰ Eicker (note 27), 496.

¹⁰¹ Schaller, ‘The Struggle for Genocidal Exclusivity. The Perception of the Murder of the Namibian Herero (1904–8) in the Age of a New International Morality’ in Perraudin/Zimmerer (eds.), *German Colonialism and National Identity* (Routledge 2011), 267.

Schaller analyzes, this fact is due to the selectiveness of an ‘international morality’, which developed after the Cold War and sought to recognize, apologize and possibly pay restitution for past injustice¹⁰² resonating in the emergence of the field of transitional justice.

The selectiveness expresses itself through a competition between different victim groups, struggling for international recognition and inclusion into global collective memory.¹⁰³ The success of the Holocaust restitution movement in this endeavor has inspired other victim groups.¹⁰⁴ The Herero’s remarkable achievement to attract so much attention as a victim group of a ‘pre-modern’ genocide can be, at least partly, attributed to having applied a strategy of comparison to the victims of National Socialism, especially Jews and forced laborers and highlighting the relevance of the genocide in Namibia as a precursor for the Holocaust.¹⁰⁵

Numerous scholars have analyzed how the Namibian genocide has contributed to the establishment of a new pattern of extermination. The inherent racism of settler colonialism and change of discourse in publications, military practice and doctrines increased the acceptance of mass violence and killings and linked the ideas of ‘decisive battles’ and a ‘final solution’.¹⁰⁶ Polemic and simplistic constructions of causality should, however, be dealt with care from an academic perspective.¹⁰⁷

Many victims of the Nazi regime have been compensated by Germany by measures of ‘*Wiedergutmachung*’ (lit. ‘making good again’). In reference, the victims of colonial genocide would morally also deserve to be compensated on the ground of equal treatment. Taking into account that Nuremberg laws which were applied in the trials following the Nazi

¹⁰² Ibid., 267.

¹⁰³ Ibid., 267 f.

¹⁰⁴ Despite the ongoing Turkish government’s denial, the mass murder of Anatolian Armenians has been successfully recognized by a number of international bodies, including the German Bundestag. Pro-Armeinan activists have applied a strategy of highlighting similarities to the Holocaust, a strategy which was highly successful.

¹⁰⁵ Schaller (note 101) 270 f.

¹⁰⁶ Melber (note 65), 258. See also Kößler/Melber, ‘Völkermord und Gedenken: Der Genozid an den Herero und Nama in Deutsch-Südwestafrika 1904–1908’ in Fritz Bauer Institut/Wojak/Meinl (eds.), *Völkermord und Kreisverbrechen in der ersten Hälfte des 20. Jahrhunderts: Jahrbuch 2004 zur Geschichte und Wirkung des Holocaust* (Campus 2004) 37–75. Zimmerer, ‘Rassenkrieg und Völkermord: Der Kolonialkrieg in Deutsch-Südwestafrika und die Globalgeschichte des Genozids’ in Melber (ed.), *Genozid und Gedenken* (Brandes & Apsel Verlag 2005), 23–48 or Fischer (note 13), 93–103.

¹⁰⁷ Schaller (note 101), 273.

regime seem to have created genuine law, as well as the diverse forms of *Wiedergutmachung*, the relevance of the difference of applicability of international law fades from a moral standpoint. The accusation of a racist differentiation appears difficult to be refuted on that ground.¹⁰⁸ Upholding the unique status of the Holocaust the German government explained, that the term *Wiedergutmachung* specifically designated compensation for victims of the Holocaust and other injustice of the NS regime. Reparations, on the other hand, described the settlement between states, typically after acts of combat, based on international law.¹⁰⁹

In Namibia, the Herero's claim for reparation for genocide has led to political controversies and dispute among different ethnic groups. The SWAPO lead government, dominated by representatives of the Ovambo, refused to support their demands in the first place in order to not neglect other groups which were also affected by German colonial rule.¹¹⁰ Herero groups have long ignored expressions of concern about their monopolization of victim status and the resulting promotion of tribalism.¹¹¹ Melber explains that "[t]he exclusivity of genocide results in the danger that through the acknowledgement of the Herero genocide, other colonial atrocities might be neglected or forgotten."¹¹² The Nama and the San were also subject to genocidal acts under German colonial rule in Namibia. After the Herero's defeat in 1904 German troops resorted to mass killings, deportations, incarceration in concentration camps and enslavement of Nama civilians in order to suppress their resistance. The nomadic San were regularly hunted by German troops and coerced into settling down in permanent villages until the end of Germany's rule in 1915, a clear case of cultural genocide.¹¹³ Herero associations, however, have sought to unite with other communities affected by the German genocide in recent years, which may have contributed to the growing importance of justice and reparations for the majority of the Namibian population.

Germany's acknowledgement of the Turkish genocide against Armenians sparked another debate in public concerning the differentiated

¹⁰⁸ Eicker (note 27), 495 f.

¹⁰⁹ Bundesregierung (note 51), 10.

¹¹⁰ Schaller (note 101), 273 f.

¹¹¹ The phenomenon of 'competition among victims' resulting in the claim of a monopoly victim status is certainly not limited to this case. The dominant association of the Holocaust with an exclusively Jewish victimization process, for instance, have led to a long denied recognition of other victim groups such as Rom*nja and Sint*ezza or homosexuals. Melber (note 65), 257, 260.

¹¹² Schaller (note 101), 275.

¹¹³ Ibid., 274. Melber (note 65), 252.

treatment of victims of genocide and fueled accusations of racism.¹¹⁴ The selectiveness of granting the status of victimhood of genocide enacted on a national and international level, thus, does not only severely impede the pursuit of justice and reconciliation, but also appears to be the result of political processes and struggles.

5. Transformative transitional justice as a framework

As has been elaborated, Nama and Herero groups and activists have appealed to transitional justice concepts and mechanisms, such as (international) courts to seek redress in the form of reparations, demanding acknowledgement and an official apology. Further, they have also referred to other instances of transitional justice such as the Nuremberg trials and specific transitional justice instruments like truth commissions. However, the particular context of colonial injustice as illustrated in this case, its complex local and global causes and long-term effects, the inapplicability of international law due to the principle of intertemporality and its focus on states, and the seeming reluctance of involved states and the international community to seriously deal with the issue reveal some obstacles to implementing transitional justice in its 'original' form. Taking a perspective of more transformative transitional justice informed by a movement from below could offer a base for overcoming such limitations.

Transitional justice is a 'global project' and constitutes a dominant international framework for conceptualizing and seeking redress for systematic violations of human rights, such as genocide, other mass atrocities and widespread oppression.¹¹⁵ It emerged as a field in the late 1980s as a reaction to the practical challenges human rights activists were facing in Latin American countries following authoritarian rule in 'transition to democracy'. The idea of accountability for past abuse was adopted on an international level and translated into legal-institutional reforms and responses, such as prosecution, truth-telling, restitution and reform of

¹¹⁴ Muinjange, Vorsitzende der Ovaherero Genocide Foundation, gegenüber der Zeitung "Die Welt" vom 8. Juni 2016 ("Der Völkermord an den Armeniern fand nur sieben Jahre nach dem an den Herero statt, hier sprechen die Deutschen plötzlich wie selbstverständlich von Völkermord [...] Was ist der Unterschied? Die Herero sind schwarz, die Deutschen glauben, dass sie Schwarze nicht ernst nehmen müssen. Das ist für mich die einzige Schlussfolgerung.", www.welt.de/156078534).

¹¹⁵ Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29(2) *Third World Quarterly*, 275.

abusive institutions.¹¹⁶ The field of transitional justice is, however, also a contested one and subject to continuous debate and development. Critique on the concept includes its legalistic approach neglecting political dimensions,¹¹⁷ treating symptoms rather than the causes and its lack of achievements and impact.¹¹⁸

As an answer, transitional justice practitioners and scholars propose a radical reform of the politics, locus and priorities of transitional justice towards a more transformative nature. Transformative justice, as defined by Gready and Robins, thereby describes a “transformative change that emphasizes local agency and resources, the prioritization of process rather than pre-conceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both local and global levels”.¹¹⁹ It entails a shift in focus from the legal to the social and political, from the state and institutions to communities and everyday realities, based on a bottom-up understanding of analysis and needs. Lambourne outlines a transformative approach to transitional justice which entails four key elements: accountability or legal justice; truth and healing (psychological justice); socioeconomic justice; and political justice.¹²⁰ As a result, the tools of transformations could comprise a broad range of policies and activities that can impact the social, political and economic situation of several stakeholders, and are not restricted to, but may include, courts and truth commissions.¹²¹

Within a transformative framework, and informed by research findings, transition is not viewed as an interim process from linking one regime to another, but as a long-term, sustainable process of transformation embedded in society.¹²² Also, Girelli proposes to open the definition of transition for the application of transitional justice “as (political) processes, and long-term ones, which not only seek justice but also acknowledge and plant the seeds for addressing root causes of conflicts and abuses,

¹¹⁶ Arthur, ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’ (2009) *Human Rights Quarterly* 31(2), 321.

¹¹⁷ McCargo, ‘Transitional Justice and its Discontents’ (2015) 26(2) *Journal of Democracy*, 5.

¹¹⁸ Gready/Robins, ‘From Transitional to Transformative Justice: A New Agenda for Practice’ (2014) 8:3 *IJTJ* 339, 340.

¹¹⁹ *Ibid.*, 340.

¹²⁰ Lambourne, ‘Transformative Justice, Reconciliation and Peace Building’ in Buckley-Zistel/Koloma Beck/Braun/Mieth (eds.), *Transitional Justice Theories* (Routledge 2017), 24.

¹²¹ Gready/Robins (note 118), 340.

¹²² Lambourne (note 120), 19.

and where spaces are carved for traditionally marginalised subjects to express their grievances. Transitions should consequently be approached as a forum for debate, critique, redefinition."¹²³ Goals of transitional justice are therefore not limited to establishing democratic state structures anymore. Scholars have highlighted the benefits of using the conceptual tools of transitional justice to describe and shape redress politics in established democracies, especially regarding settler colonial states.¹²⁴

In recent times, an increased activism of indigenous groups has been witnessed in transitional justice scenarios, with the effect of pushing classical boundaries of the discipline.¹²⁵ Even if the Nama and Herero have not referred to transitional justice explicitly they nevertheless have integrated and appealed to key elements of transitional justice, such as reconciliation, overcoming impunity, truth-finding and how to come to terms with the past in general, as well as to measures typical of transitional justice such as apologies, reparations and appealing to international law at judiciary bodies. Similarly to the origins of transitional justice, activists are challenging the boundaries of the understanding of justice and how justice can be achieved through strategies that suit postcolonial analysis of colonial genocide and challenges they encounter in their pursuit of justice. Thereby they appear to address similar issues as have been pointed out by the conceptualization of transformative transitional justice from below.

5.1 *Justice from below*

Debates about 'transitional justice from below' have sought to set the focus on transitional justice 'on the ground' in the communities or organizations which have been affected by violent conflict directly. Experience shows that, as soon as 'the wheels of institutionalized international justice begin to turn' the voices of those most affected are not always heard or given adequate weight.¹²⁶ Examples of communities in Northern Ireland, Sri Lanka and Colombia demonstrate that the absence of viable international justice mechanisms has resulted in the creative energy for transition com-

¹²³ Girelli, *Understanding Transitional Justice. A Struggle for Peace, Reconciliation, and Rebuilding* (Philosophy, Public Policy, and Transnational Law, Palgrave 2017), 299.

¹²⁴ Winter, 'Towards a Unified Theory of Transitional Justice' *IJTJ* 7(2) (2013), 224.

¹²⁵ Henry, 'From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies' (2015) 9 *IJTJ* 214; Girelli (note 123) ch 3.

¹²⁶ McEvoy/McGregor, *Transitional Justice from Below: Grassroots Activism and Struggle for Change* (Hart 2008), 3.

ing from below. In such settings, it is often victim groups, community and civil society actors, including NGOs, that act as “engines for change”.¹²⁷

In his critique on the imperialist tendencies in international law and human rights discourse Rajagopal advocates the need for movements ‘from below’ to be ‘written back into’ struggles for human rights and social justice.¹²⁸ The development of effective methods of dealing with the past have been and still are not only marked by the deliberation of legal institutions or landmark cases but by the individuals and groups involved in social and political struggles. As Nyamu-Musembi illustrates “rights are shaped through actual struggles informed by people’s own understandings of what they are justly entitled to” and therefore promotes an “actor-oriented perspective”¹²⁹ on justice. Such an approach acknowledges the reality of power differences and therefore points to the need to look beyond formal legal principles. Rather, an otherwise legalistic discourse of rights is used in a transformative manner challenging power inequalities in society.¹³⁰

Herero and Nama communities’ and activists’ actions and demands clearly resonate with that framework and understanding of rights. Similarly to cases in other countries in transition, no adequate international or national bodies have been created which could be appealed to and addressing other institutional bodies like national courts in the USA has not been successful from a legal perspective. Nevertheless, the communities continue to organize themselves in creative ways, such as by building up networks between communities and civil society actors in Namibia, Germany and beyond, and formulating a common understanding of the events and context in Namibia in 1904–1908, as well as common demands.¹³¹ Taking into account the specific context that many Herero and Nama were deported or had to flee at that time and that, as a result, a lot of community members are living in diaspora, they demand self-representation within talks towards reconciliation with the German government. Namibia cannot represent their community members without Namibian nationality.¹³² Thereby they also challenge the dichotomy inherent to

¹²⁷ Ibid., 3.

¹²⁸ Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2003).

¹²⁹ Nyamu-Musembi, ‘Towards an Actor Informed Perspective on Human Rights’, IDS Working Paper 169 (Institute of Development Studies 2002), 1.

¹³⁰ Ibid., 2.

¹³¹ Congress on the Ovaherero and Nama Genocide (note 62).

¹³² Ibid., 3.

common understandings and practice of (transitional) justice between victims and perpetrators by introducing the community of descendants as an actor. Girelli suggests a corresponding broadening of the concept of subjects to transitional justice, to include “also those—individuals or groups—who underwent economic, historical and cultural violence (such as indigenous communities) [...] in the context of or consequently to wars.”¹³³

In this way, justice from below and direct participation is used both as a practical strategy by Nama and Herero communities and as a demand directed at the involved states and the international community. In accordance with An-Na'im, they thereby also imply a demand to decolonize the understanding of the meaning of justice, as to be informed by the community, that “if it does not make sense to [...] the community, it is not justice”.¹³⁴ Documenting such forms of resistance can be viewed as a new task of transitional justice. Resistance can serve as a very promising basis for political reconciliation, because it shows possibilities for agency, solidarity and innovation.¹³⁵ Fostering participation and making resistance visible also acknowledges agency and can transform victimhood in an emancipatory way.¹³⁶

5.2 *Combining restorative and retributive approaches*

Throughout the latest statements by Nama and Ovaherero is the request for a ‘dialogue’ between community representatives, Namibia and Germany, within a process of restorative justice.¹³⁷ At the same time, various legal actions have been taken by Herero associations, the latest in 2017, suing Germany for reparations for its colonial crimes. Activist and community organizations thereby appeal to both, retributive and restorative conceptions of justice. Lambourne’s theory of transformative transitional

¹³³ Girelli (note 123), 295.

¹³⁴ An-Na'im, ‘Editorial Note: From the Neocolonial “Transitional” to Indigenous Formations of Justice’ (2013) 7 IJTJ 199.

¹³⁵ Gready/Robins, *From Transitional to Transformative Justice: A new agenda for practice Briefing Note TF-J* (University of York 2014) <<http://www.simonrobins.com/Transformative%20Justice%20Briefing%20Paper.pdf>> accessed July 27th 2018, 4.

¹³⁶ *Ibid.*, 4f.

¹³⁷ Cf. Cunneen, ‘Restorative justice and the politics of decolonization’ in Weitekamp E G M/Kerner H (eds.), *Restorative Justice: Theoretical Foundations* (Willan 2003), 32–49.

justice, likewise, proposes a syncretic approach integrating retributive and restorative justice.¹³⁸ Such an approach seeks to avoid compromise whilst also acknowledging that the process is inevitably messy and aims to enable a transformation of social, economic and political structures in addition to legal justice mechanisms to deal with the enormity of pain and destruction caused by violence and conflict.¹³⁹ It appears that the integrated strategy applied in the search for justice for the Herero and Nama genocides is an expression of precisely these needs. Additionally, integrating restorative justice to the transitional justice practice can create opportunities to pursue justice despite the non-applicability of international law. As has been illustrated, most scholars agree that a claim for reparations for colonial crimes by Germany cannot be substantiated on the basis of international law. Negotiations in a restorative justice setting, however are an option.

It should also be considered that establishing a right to redress through reparations for the Herero and Nama would set a precedent for dealing with colonial genocide, likely more so if taking place in a retributive setting which is generally more accepted in the international sphere of justice. The proposed trialog as a restorative justice setting could decrease the pressure and risk for Germany in that regard, but at the same time pave the way for case specific negotiations in other cases of colonial injustice.

5.3 The entanglement of the legal and political

Judicial procedures suing states for reparations do, as this case shows, not only serve the purpose of a financial claim. Most of all, communities hope for a document of official recognition of the injustice they were subjected to and an acknowledgment of their loss and trauma as well as an official apology as an expression of respect for the victims. Suing for that recognition is rather a desperate act vis-à-vis the political failure to open the way to make amends.¹⁴⁰ The legal action against companies and Germany by the HPRC in New York in 2001 did not only have a legal purpose. It was also aimed at gaining international attention and creating awareness about the issue, in order to build up political pressure.¹⁴¹

¹³⁸ Lambourne (note 120), 20–39.

¹³⁹ Ibid., 19–20.

¹⁴⁰ Böhlke-Itzen (note 43), 24f.

¹⁴¹ Eicker (note 27), 492.

As has been explained, the international law which can be applied in the case of the genocide was created in and is informed by the historic setting of that time. Racism and a politically motivated conception of subjects of international law, that served the colonial and imperial interests of European states led to the fact that humanitarian and war law was not applied at that time. The German government even asserted the racist conception of international law at the time of the genocide as a legitimation to exclude reparations.¹⁴² Legal actions by Herero representatives thus also point to the fact that international law and law in general is always a result of a political process and setting, even if or rather because they fail.

This also becomes evident by the comparison between how the Herero and Nama genocide and the Holocaust were dealt with. Considering that new laws were created so that perpetrators of the Nazi regime could be prosecuted in a legal form in the Nuremberg trials while the German state repeatedly refers to the inapplicability of international law to disclaim demands for reparations by Herero and Nama, the political nature and flexibility of law and its application become clear. This fact also explains why Herero representatives continue accusing the German government of racism.¹⁴³

The argument that “law, emerging from political processes of negotiation and deliberation, is itself always political” is also supported by Girelli who points to the risk of not dealing with this fact openly in the practice of transitional justice.¹⁴⁴ The legal and the political should rather be handled in their entanglement.

5.4 Addressing structural effects

With regards to addressing indigenous harm, Balint, Evans and McMillan advocate that including structural justice will enhance the ability of transitional justice to recognize and address colonial injustice and its structural continuities or effects.¹⁴⁵ Transitional justice mechanisms usually deal with periods of exceptional violence and institutionalized crime with state forces being the main perpetrator. They thus usually follow a conception of violence as violation of physical integrity. Systemic violence, as

¹⁴² Wissenschaftlicher Dienst Deutscher Bundestag (note 74), 16.

¹⁴³ Eicker (note 27), 496.

¹⁴⁴ Girelli (note 123), 296 f.

¹⁴⁵ Balint/Evans/McMillan (note 1) 194.

a less visible form of violence inherent in the social, political and economic system, and often root causes of conflicts, have not received the attention in the field that they deserve.¹⁴⁶ Indigenous communities often experience these different kinds of violence, and the relations between them, which continue in the form of a politico-economic context of historic and ongoing dispossession and of contemporary deprivation and poverty.¹⁴⁷ A meaningful transition might thus be conceived as a primarily economic endeavor, entailing redistributive policies, socio-economic rights and structural reforms of the political and administrative to achieve social and economic justice. As Girelli finds “the dominant paradigm of transitional justice often appears to fall short of offering meaningful avenues for rectifying ongoing injustices centered on land dispossession and self-determination that impact some 350 million indigenous peoples residing in 70 states around the world.”¹⁴⁸

Not only reparations, but also the current distribution of land marked by a concentration of farming land in the hands of businesses owned by *white* descendants of European settlers has been an issue repeatedly raised by Herero and Nama communities. While the Namibian government has initiated some land reform, for which Germany has announced its support, the Herero and Nama are not satisfied by the results.¹⁴⁹ The Herero and Nama see their economic situation as a direct result of the genocide in 1904–1908 and German colonial rule, which marked the starting point of total forceful expropriation. They have never been compensated for their “forced labour or for the complete loss of their land, livestock and properties”.¹⁵⁰ Reconciliation for colonial genocide is regarded as intrinsically intertwined with economic aspects, even more so due to the context of colonialism. As has been explained, activities of tradesmen and economic interests played a vital role in the German colonization of Namibia and were interwoven with political interests.¹⁵¹ In the current negotiations, however, Germany refuses to recognize land distribution as a means of compensation for the consequences of the genocide.¹⁵²

¹⁴⁶ Girelli (note 123), 257.

¹⁴⁷ *Ibid.*, 258.

¹⁴⁸ Girelli (note 123), 261.

¹⁴⁹ Melber, ‘No land in sight’ *Development and Cooperation* (June 9th 2017) <<https://www.dandc.eu/en/article/despite-independence-1990-land-ownership-remains-unfairly-distributed-namibia>> accessed July 28th 2018.

¹⁵⁰ 2016 Declaration, 2. Also Melber (note 149).

¹⁵¹ Fischer, 37–45.

¹⁵² Melber (note 149).

The notion that transitional justice should also offer redress for long-standing socio-economic violations, or to outline developmental and economic policies, is also contested in academic debates. Exceeding the 'natural mandate' of transitional justice would risk creating unrealistic expectations and these concerns should rather be left to other disciplines such as development.¹⁵³ Such an argumentation is contested by the Herero's and Nama's refusal of development aid. Germany's argument that the extraordinarily large amount of development aid paid to Namibia would serve the purpose of undoing the economic harm resulting from colonialism (and thereby equal reparations)¹⁵⁴, does not meet the demands of the communities of Nama and Herero. They demand economic restitution as reparations, not development aid, since reparations also provide an official recognition of the past and the connection of the past to the present.¹⁵⁵

Additionally, this argument points to another structural continuity of the relation between Germany and its former colony. The vision of Namibia and its people, as well as Africa in general, in Germany is still mostly shaped by a patronizing attitude, informed by racist colonial imaginations of the other as 'uncivilized' and needy of help.¹⁵⁶ Racism as a legitimizing structure of colonization and genocide, as well as a continuous societal power structure is also addressed by Herero and Nama. Racism is explicitly evoked as a problem regarding the differentiated treatment of victims of genocide who are and are not of African descent, emphasizing the need of political education about racism in German society. It is a central theme in the communities' networking activities. Nama and Herero associations mostly cooperate with local German organizations addressing issues of racism, especially against people of African descent, such as the Initiative of Black People in Germany (Initiative Schwarze Menschen in Deutschland Bund e.V.).

A limited legalistic focus on civil and political rights, and on individuals, can be particularly problematic for indigenous people when it detracts attention from broader structures of discrimination that led to and resulted from the conflict.¹⁵⁷

Further, the power relations and dependencies which also resulted from colonialism are an issue of discussion. Namibia, for quite a long time, has refused to support the Nama and Herero's claim for reparations,

¹⁵³ Girelli (note 123), 273.

¹⁵⁴ Eicker (note 27), 498; Böhlke-Itzen (note 43), 99 f.

¹⁵⁵ Sarkin (note 53), 429 f.

¹⁵⁶ Böhlke-Itzen (note 43), 125.

¹⁵⁷ Girelli (note 123), 259.

presumably also due to a fear of losing Germany's financial support in the form of development cooperation on which they are, to some extent, dependent. In contrast to reparations, development aid from Germany is mostly tied to conditions such as a liberal market policy and 'good governance'.¹⁵⁸ Also within Namibia, political power relations have to be considered. Herero have repeatedly expressed the feeling of being politically marginalized in Namibia. Having lost 80% of their population in the genocide might have influenced their current political status. Morgan also argues that this feeling of being sidelined, heightened the interest of some Herero of addressing their experience with early colonialism.¹⁵⁹

Elements of transformative justice can be helpful to consider and address all of these interwoven structures of power and economic relations through its critical evaluation of "intersecting power relationships and structures of exclusion at both local and global levels."¹⁶⁰ The struggle of the Nama and Herero thereby not only points to economic effects of colonial crime, but also to the role of structural racism in the way colonial injustice is (not) dealt with and of political structures on a local and global level.

6. Conclusion

This chapter has started out by raising the issue of connecting the struggle for justice by Nama and Herero communities for the colonial genocide by Germany in 1904–1908 to the concept of transitional justice. An analysis of the the context of the genocide shows that atrocities cannot be dealt with in an isolated manner, but root causes such as economic interests and racist ideologization as well as structural effects like economic hardship and land deprivation have to be accounted for as well. Seeking justice in respect of these interwoven aspects must be a long-term process.

Transitional justice as a field can offer a fruitful ground for such a process, if adapted to the needs of post-colonial justice. The analysis has revealed the limitations of legalistic approaches, as well as those of international law in general regarding colonial injustice. "[A] neocolonial approach to justice that evaluates the experiences of former colonies in terms

¹⁵⁸ Böhlke-Itzelt (note 43), 100.

¹⁵⁹ Morgan (note 34), 25.

¹⁶⁰ Gready, Robins (note 135), 1.

of the path set for them by colonial administrations¹⁶¹ calls for a broader debate about decolonization and the acknowledgement of the need to address colonial injustice on an international level.

Considering elements of transformative justice models and transitional justice from below can open ways to account for power relations on a national and international level, offer space for marginalized groups to voice their perspective and shift the focus to social, political and economic issues. Other actors beyond states and institutions, such as companies and civil societies, can also be addressed and involved. In combination with the inclusive use of restorative and retributive justice these steps can help to overcome the limitation of legalistic approaches and broaden the perspective of transitional justice to include social justice as a goal.

As in the case for the German genocide on indigenous people in Namibia, transformative models of transitional justice may offer an adequate frame for the involved actors to consider. Restricting the debate and measures to legalistic aspects and limiting the involvement to states without participation of the victims' descendants, will probably not lead to successful reconciliation. As the victims' associations have announced, they will continue to organize transnationally and from below. Their voices for justice cannot be ignored any longer.

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¹⁶¹ An-Na'im (note 134).

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