

The genesis of the Namibian Constitution: The international and regional setting

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Introduction

German South West Africa, as Namibia was then known, became and remained a German colony from 1884 until 1915, when the country was invaded by South African forces after Great Britain declared war on Germany in August 1914. Under the terms of the Peace Treaty of Versailles that terminated the First World War, South Africa was designated as the mandatory power over Namibia in 1920. Part 1 under Article 22 of the same Treaty established South West Africa as a “C” Mandate, and this was subsequently confirmed by the Council of the League of Nations by resolution in December 1920. Supervisory power over South Africa was transferred to the Permanent Mandates Commission of the League of Nations, to which South Africa was legally obliged to report annually on its administration of the country. Both German and South African colonial rule was marked by gross human rights violations of the dignity, rights and freedoms of the country’s inhabitants. In the case of South African rule in particular, the racial and ethnic policies of apartheid not only discriminated against the majority of citizens, but were in clear violation of the provisions of the Mandate, more especially of Article 22 of the League of Nations Covenant under which mandatory powers had to apply “the principle that the wellbeing and development of such peoples form a sacred trust of civilization ...”. Apartheid was a system of governance where the majority had no say in the manner in which their country was being administered.

Resistance

It is not surprising, therefore, that the people of Namibia made a decision to fight for their right to independence and, ultimately, self-determination. The South West Africa People’s Organisation (SWAPO)¹ came into existence on 19 April 1960, as a successor to the earlier Ovambo Peoples’ Organisation (OPO). That same year, Ethiopia and Liberia brought a petition before the International Court of Justice (ICJ), in which they charged South Africa of materially violating the provisions of Mandate over Namibia, particularly those provided for in Article 22 of the League of Nations Covenant. Moreover, Ethiopia and Liberia argued before the ICJ that the mandate over Namibia had lapsed in 1945 following the founding of the United Nations (UN) and the setting up of the UN Trusteeship Council. The petition failed as the ICJ held that the petitioners (Liberia and Ethiopia) did not have the necessary legal standing to bring the case before the tribunal. This acted as a powerful catalyst for SWAPO to initiate an armed struggle against South Africa’s continued illegal occupation of the country. SWAPO declared, “We will cross

1 Today the ruling SWAPO Party of Namibia.

rivers of blood to liberate Namibia!” On 27 October 1966, the UN General Assembly passed Resolution 2145 (XXI), which revoked South Africa’s mandate over Namibia. The UN subsequently established the UN Council for South West Africa to administer the territory until independence. This was compounded by an advisory opinion of the ICJ in 1971, which held that South Africa’s occupation of Namibia was illegal and in breach of international law. Previously, the UN Security Council (UNSC) had deemed Resolution 2145 a recommendation only, that is, without legal force. The South African government refused to recognise the UN’s authority over Namibia, however, and proceeded to divide the country into ten ethnic homelands (or *Bantustans*) and held elections to this effect.

In 1977, the Western Contact Group (WCG), comprising Canada, France, the Federal Republic of Germany, the United Kingdom and the United States, launched a diplomatic initiative, as a group of UNSC members, to address the stalemate over Namibia. As a result of the WCG’s efforts, the UNSC passed Resolution 435 on 29 September 1978, which sought to address the unresolved problem of ensuring independence and self-determination for Namibia under the aegis of the UN. The proposal was a result of consultations with the then front-line states – Angola, Botswana, Mozambique, Tanzania, Zambia and Zimbabwe –, SWAPO, the UN, and the WCG, but only after SWAPO and the Frontline States had extracted a compromise on Resolution 432 (1978) on Walvis Bay. The most pertinent provisions of the latter Resolution were as follows:²

The Security Council,

...

2. *Reiterates* that its objective is the withdrawal of South Africa’s illegal administration from Namibia and the transfer of power to the people of Namibia with the assistance of the United Nations in accordance with the Security Council resolution 385 (1976);
3. *Decides* to establish under its authority a United Nations Transition Assistance Group in accordance with the above-mentioned report of the Secretary-General for a period of up to 12 months in order to assist his Special Representative to carry out the mandate conferred upon him by the Security Council in paragraph 1 of its resolution 431 (1978), namely, to ensure the early independence of Namibia through free elections under the supervision and control of the United Nations;
4. *Welcomes* the preparedness of the South West Africa People’s Organization to co-operate in the implementation of the Secretary-General’s report, including its expressed readiness to sign and observe the cease-fire provisions as manifested in the letter from its President of 8 September 1978;
5. *Calls upon* South Africa forthwith to co-operate with the Secretary-General in the implementation of the present resolution; ...

Notwithstanding Resolution 435, South Africa continued to administer the country in violation of international law, and went as far as holding internal elections in Namibia in December 1978. These were boycotted by SWAPO and some other political organisations such as the South West Africa National Union (SWANU) and the Namibia National Front (NNF, a grouping of nine political parties). This state of affairs called for renewed and concerted efforts and discussions between SWAPO, the UN, the Frontline States and

2 Emphases in original.

the WCG. One result of these discussions were the 1982 Constitutional Principles, which became the framework for Namibia's Independence Constitution.

SWAPO's perception of the 435 process

SWAPO did not really trust anybody in the 435 framework – whether it be the WCG, the UN, the Frontline States, Nigeria, South Africa, or the internal Namibian parties. From the start, SWAPO was suspicious of the WCG's motives and intentions, and did not believe they were sincerely concerned about the fate of Namibia. For SWAPO, the WCG was only pursuing their economic and political interests in the southern African region. These interests gave the WCG leverage over South Africa. Then there was the question of the status of Walvis Bay and the islands, which, under UNSC Resolution 432 (1978), were recognised as being an integral part of Namibia. SWAPO – like South Africa – did not want this issue to be dealt with by the WCG on the simple grounds of “Why should we negotiate that which is ours?” This put the WCG in a very difficult position because, even by ignoring the issue, they were always open to SWAPO's assertions and accusations that they were endorsing South Africa's historical and legal claim to Namibian territory. Throughout, the Contact Group always had to face the possibility of a breakdown in the negotiations over this question.

Even SWAPO's friends, the Frontline States and Nigeria, who had formed an extended SWAPO delegation in the negotiations, were suspected at times. In fact, SWAPO even resisted their first attempts to persuade it to seek a negotiated settlement on the basis of UN SC Resolution 385 (1976) after the WCG had approached them for just that purpose. The problem was that Nigeria and the former Frontline States were sovereign actors and, therefore, protected their own interests and behaved in their own ways. Often, SWAPO was unaware of the content of the correspondence between Nigeria, the Frontline States and the WCG. There were imponderables and suspicions.

Some commentators have opined that the Frontline States were responsible for ‘delivering’ SWAPO. This is something that we in SWAPO felt they were sometimes trying to do, although we did not always approve. Nevertheless, the whole negotiating framework was a useful arrangement under the circumstances: it confirmed SWAPO's unique status, and enhanced its legitimacy in the eyes of the world.

Linkage

Chester Crocker, the former United States Secretary for African Affairs, described *linkage* as quite a sophisticated strategic formula that took into account the interests of all parties. As one of those parties, however, we did not see it in the same way: for SWAPO, linkage was a negation of the principle of self-determination. The presence of Cuban troops in Angola was a separate deal between two sovereign states. Linkage kept Namibia's independence hostage for about seven years. SWAPO managed to convince our friends in the Frontline States to look at linkage in this way. They forced through a number of General Assembly resolutions that characterised *linkage* as a blockage. What Crocker called “constructive engagement” was for us destructive engagement.

Another reason why SWAPO did not believe in linkage was because, as Crocker himself pointed out, its rationale was regional security, and this was not one of our chief concerns. SWAPO was primarily concerned with an armed liberation struggle, which, in terms of regional security, made the liberation movement a pawn in a larger power game. At the time, it was not politically premature for SWAPO to think in regional terms ahead of independence.

In the end, SWAPO could do nothing. The states themselves agreed on the framework for the withdrawal of the Cuban troops from Angola.

Pre-implementation meeting

As indicated above, the negotiations were not without their shortcomings. For example, why did the Geneva ‘pre-implementation meeting’ in January 1981 fail? Why did the South Africans and the Namibian internal parties behave the way they did at that meeting? If one understands what occurred in the autumn of 1980 when the UN visited South Africa, one can see clearly why nothing materialised in Geneva: the Reagan administration was replacing the Carter administration within a couple of weeks, so South Africa would soon have a friend in Washington.

In SWAPO’s opinion, by the time the UN team arrived in Pretoria in the autumn of 1980, the South Africans were being fed on the hope of a Republican victory in the forthcoming US presidential elections. They believed a Reagan administration would act in their favour. They also probably managed to convince the internal parties in Namibia, notably the Democratic Turnhalle Alliance (DTA), to see things the same way. So, despite all the UN efforts to encourage confidence-building by holding receptions and cocktail parties, simply nothing happened in Geneva. That is, nothing happened except for the internal parties’ elaboration of their position concerning – to use their words – the UN’s arbitrary recognition of SWAPO as “the sole and authentic representative of the people of Namibia”, and, therefore, “partiality in favour of SWAPO”. This stalled the process, and the result was that some of SWAPO’s friends in the UN began to think that perhaps such recognition by the UN General Assembly had not been such a good idea in the first place. In fact, the internal parties – and the DTA in particular – were South Africa’s pawns and received unlimited slush funds.

UN recognition of SWAPO

Firstly, the criticism directed at the UN for according SWAPO sole and authentic status is either a deliberate distortion of history or ignorance about the origin of such status. Firstly, its origin was not within the UN but within the former Organisation of African Unity (OAU). For reasons of decolonisation, the OAU Liberation Committee identified colonies where there were ongoing armed struggles in order to determine which had legitimate liberation movements or political organisations that they could support. In some cases, such as Angola and Zimbabwe, the OAU Liberation Committee even recognised more than one liberation movement because, in their judgment, those were bona fide

liberation movements fighting equally on behalf of the oppressed.³ The OAU then did what was its standard practice: it recommended to the UN and other international bodies to recognise these accredited movements. Such recognition was awarded to SWAPO in 1973 by the UN General Assembly by way of Resolution 1435. In 1978, recognition was upgraded to the status of permanent observer.

Secondly, the status of being the “sole and authentic” representatives of the Namibian people had no relation to other organisations or political parties in Namibia. It was merely in relation to South Africa, the colonial power that occupied the country against the wishes of the majority of the people. In that context, the OAU judged SWAPO to be the movement deserving support and recognition. That the UN General Assembly accepted the OAU recommendation was not, therefore, an arbitrary decision.

Thirdly, neither the OAU nor the UN denied the existence of other political organisations in Namibia. However, in terms of the independence struggle – something in which the OAU and the UN were interested – the contribution of other political organisations was felt to be wanting. The other worthy Namibian political organisations abdicated on their own.

The Constitutional Principles and the Impartiality Package

The introduction of the 1982 Constitutional Principles by the WCG into the negotiations was an idea SWAPO resisted. SWAPO saw it for what it really was, namely a dilatory tactic. It was not the substance of the principles that was problematic, but the political subterfuge of introducing them. The Principles themselves, which were lifted from the 1948 Universal Declaration of Human Rights, were not new to SWAPO: they were the very basis of our struggle for human dignity, equality and freedom, democracy and social justice. It was for this very reason that most countries, governments and peoples recognised and supported SWAPO.

SWAPO felt that, by introducing this extraneous issue, the rules of the game were being changed midstream to suit South Africa and the internal parties of Namibia. In particular, SWAPO opposed the requirement of a two-thirds majority for the adoption of an Independence Constitution. We saw it as a deliberate attempt to deny SWAPO a clear victory by raising the bar. Even the envisaged electoral rules would have been countered to influence the outcome in favour of the puppets.

It can be seen that, even after the election of the Constituent Assembly in November 1989, the Constitutional Principles were always before us. In fact, when the members of the Constituent Assembly wrote the Constitution, they transcended them. Quite simply, the Principles were not a stretch of the imagination for SWAPO: the Constitution we adopted in early 1990 would have been written without them. As a matter of fact, SWAPO’s own draft constitution was the basis on which the work was carried out.

3 There have been instances when the OAU has even withdrawn its recognition of certain liberation movements.

As regards the so-called Impartiality Package, from SWAPO's perspective this had to do with the relationship between SWAPO and the UN on the one hand, and South Africa and the internal parties on the other. The Package meant that any political and financial benefits that SWAPO derived from the UN and its specialised agencies would be forfeited. Yet, if this was an attempt to restore balance, it failed. During the run-up to the November 1989 elections, the UN imposed the terms of the Package on SWAPO – cutting the flow of money and political resources – but left South Africa free to continue its support to the internal parties. In other words, at the end of the day, the Impartiality Package was not that impartial after all, and worked to the benefit of one party in particular. We were not fooled, however, despite even some of our friends missing the point that nothing is over until it is over. SWAPO stayed the course and won the final victory.

SWAPO: Defender of the UN

Upon and after Independence, the UN enjoyed the limelight. I like to think that SWAPO was among the defenders of the organisation – to keep it going – particularly during the 1980s when 'UN-bashing' was fashionable. Thus, after Namibia became independent, SWAPO was happy that the UN had achieved global recognition and encouragement for its peacemaking and peacekeeping efforts. Even with all the disappointments, suspicions, mistakes, and misjudgments, the UN in the end played its role successfully. Indeed, the UN's success story in Namibia became its best practice for other operations, including that launched in Cambodia.

Beyond the struggle: National reconciliation

The objective of SWAPO's struggle was an independent Namibia. Therefore, since the beginning, the movement not only had to keep abreast of political developments and the various political formations that were taking place inside the country, it also attempted to foster greater unity, solidarity, and cooperation amongst all Namibians. At the onset, our natural ally was obviously the South West Africa National Union (SWANU) because we were very close: we were old school friends, saying one and the same thing. From the early 1960s, there were attempts to unite our parties or, failing that, at least forge a common front against a common enemy, as the saying went. This kind of relationship between SWAPO and SWANU has persisted into the present, all things aside.

Both SWAPO and SWANU also attempted to link up with smaller political parties and groups led by progressive traditional and religious leaders, again on the same platform of showing a united front against a common enemy. SWAPO AND SWANU both concentrated on the black constituency because it was necessary and natural to capture and rely on a grass-roots and broad-based support. We are talking about the world of apartheid, divided communities, and a society of oppressor and oppressed. But as time moved on, we also started the process of zeroing in on sections of the white population. That proved successful and, in retrospect, all this has served our nation well.

Initial contacts with the white community started around 1980. They began with a meeting in Germany just after an international conference on Namibia that had been

held in Paris. A few of us quietly went to meet some German-speaking Namibian businesspersons in an effort to start a dialogue. Although the meeting was constructive because we were at least talking to each other, it abounded with suspicions, distrust, and uncertainties. Our compatriots were sceptical – if not entirely cynical – about our overtures. Stockholm, New York, London, Amsterdam and, later, Lusaka and Harare served for further meetings.

Then, in January 1981, during the so-called pre-implementation meeting in Geneva, the West German Foreign Minister, Hans-Dietrich Genscher, facilitated a dinner for SWAPO leaders and a larger number of representatives of the German-speaking community from Namibia. Our compatriots put many questions to us at that meeting. This allowed us to begin assessing their views and, in particular, how they perceived change in Namibia. The still unresolved land issue was at the core and the colonial past was ever present.

Following this meeting, between 1982 and 1987, SWAPO started to meet with different groups. Although mostly German, we had contact with Afrikaans-speakers, English-speakers, and even coloureds and blacks whom we had not approached before. The open policy we kept going everywhere later served the transition well.

In 1988, just prior to the beginning of the implementation of the UN Plan for Namibia, our dialogue with the whites started to take shape in two important meetings: one in June in Stockholm, and the other in Kabwe, Zambia, in October. At these meetings we progressed from the usual question-and-answer session to more serious and topical discussions. The meetings produced more substantive dialogue. We discussed issues such as the land question, nationalisation, SWAPO's Marxism, the future of whites in Namibia, violence and, later on in 1988, of course, the Cubans in Angola. We welcomed very much the openness that we were detecting among our compatriots, who had hitherto not really been part of the national perspective in Namibia.

SWAPO also engaged in additional efforts. Notably, sometime in 1983 and 1984, we contacted a friend, a prominent businessperson, who was a US ambassador to the UN, to help us meet Harry Oppenheimer. Through those contacts we were able to meet with Oppenheimer for the first time in October 1984 in New York. Although the then SWAPO President Sam Nujoma was to have met Oppenheimer, because the two men could not synchronise their schedules, in the end it was Andimba Toivo ya Toivo and I who went. The meeting was not formal: we were not negotiating or even engaging in serious discussion over the role of De Beers' Anglo-American Consolidated Diamond Mining in Namibia. All we were doing was trying to open further channels for dialogue and building mutual understanding with the future in mind.

A few years later, in 1988, we met Oppenheimer's son, Nicholas Oppenheimer, in London in a spirit of continuing contacts. On that occasion he and his colleagues asked SWAPO President Nujoma to indicate to all present to say the kind of things that Comrade Robert Mugabe had started saying about national reconciliation in Zimbabwe. But we told them that Mugabe was speaking from Harare and we were in London; if we had been back home in Windhoek, the situation would have been different.

There were also other ways in which SWAPO tried to read the minds of the white community in Namibia. We used some of our white members who were able to go back and forth; we also used other people as couriers to go in with specific instructions, contact people, ask questions, and get certain information. We even had someone high up in Martti Ahtisaari's, the UN Special Representative on Namibia's cabinet. But that was before his UN job.

SWAPO also tried to start a dialogue with the DTA, and with Dirk Mudge in particular, for we had received intimations that he wanted to contact us. He wanted us to renounce the armed struggle, while we wanted him to give up the nonsense of the so-called Interim Government. The South African regime, and in respect of a good African, Frederik van Zyl Slabbert, wanted Mudge to be in. But for SWAPO, this was not how it was to be.

These developments outline how SWAPO paved the way for the constitutional process. SWAPO went through things consciously because, as a party, we were preparing to score a victory and form the first Independence government. SWAPO did not think that the liberation struggle was an end in itself, and that that alone would lead to change; rather, we wanted to be ready to bring about Namibia's genuine liberation, independence, and a new beginning.

During the struggle, SWAPO had been saying that we were ready for the bullet, but also for the ballot box. Thus, when election time came, we were the first party to draw up a draft national constitution and election manifesto, which we unveiled in Windhoek on 2 July 1989. This was a turning point. It was the closing of one chapter and the opening of another. It was a point at which our language, our image, our thinking, and our modes of communication with the Namibian people were recast in a new context and mindset. Dirk Mudge also contributed to this change in SWAPO. During one of the first drafting sessions for the Constitution, in which we were dealing with one of these issues of substance, Mudge cautioned us not to change our new stance. I understood how he meant it. Since then, we in SWAPO have managed to allay many fears in the white community.

Mudge was not trying to convince SWAPO to be less militant. Rather, as a Namibian, he was concerned about a breakdown of the process and what the repercussions would be. Hage G Geingob, then Chairman of the Drafting Committee, understood that, and built bridges to encourage dialogue towards progress. We were able to reflect on those days during the recently celebrated 20th anniversary of our Constitution.

Mudge was also correct when he said that we, the elected representatives of the Namibian people, wrote the Constitution. Although we had the 1982 Constitutional Principles before us as a drafting framework, our Constitution is the product of serious internal political negotiations and progress. We debated every aspect of it until we reached consensus. Only then, did we instruct, in specific terms, the drafters to put that consensus into the appropriate legal language to our collective satisfaction. All this was done under a very able, forceful chairperson, Hage G Geingob, who was also a great builder of consensus. We never had to vote on a single issue even though we were a collection of political parties from across a wide spectrum of political and ideological convictions.

The point is that, when we first sat together in that Drafting Committee, an All-Party Standing Committee, we realised we had a common mandate from the Namibian people to produce a truly Namibian Constitution. I like to think that it was this sense of shared obligation that made us instantly think as Namibians and not in the first instance as leaders or members of political parties. This is what made it so easy for us to write a constitution in 80 days. The Namibian Constitution is, therefore, the collective brainchild of all those who served on that Committee. It is a constitution that, to my mind, represents a new vision, self-determination, and reconciliation. Our Constitution is at once our victory, our shield, and our guide for the future for all our compatriots.

But it is only a piece of paper: Namibians did not inherit a democratic political culture. Such a culture did not exist in Namibia. Indeed, it did not exist in South Africa until we succeeded here and showed them the way forward. So, in the process of creating that political culture, the values of tolerance and cooperation became very important. This is our task as elected leaders in our National Assembly and we dare not deviate from it.

Conclusion

I conclude by submitting that, yes, we have a fine Constitution; so far, so good. There is political stability, visible peace, and social relations in the country are harmonious. But for our democracy to flourish, for our Constitution to be written into the hearts and minds of the people, we – as the government, as the Parliament, as the Judiciary, as a nation – must be able to deal with poverty, land reform, homelessness, joblessness, and all the other social challenges. If not, this model, this success story so far, will be short-lived. Without economic and financial underpinnings, Namibia's democracy will remain fragile. Namibia's people must have confidence in the future.