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Approaches to Human Rights Work in Governmental and Non-Governmental Organizations

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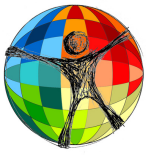

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ABSTRACT

This paper analyzes how differing structures and social and political positionings impact the legal approaches used by government and non-governmental organizations (NGOs) in advocating for human rights. The work of Avocats Sans Frontières Canada regarding the genocide in Guatemala, and that of the Ministry of Justice in Namibia in negotiations regarding genocide reparations with Germany, are taken as a starting place for this discussion.

This paper focuses on how government organizations and NGOs employ legal and political arguments differently and how this is impacted by, and in turn impacts, the work in which these organizations engage. This paper further analyzes how power dynamics between organizations and impacted communities influences matters of representation in negotiations, strategic litigation, and apologies.

This paper found that there is a mutual relationship between the structure of an organization and how they are able to approach human rights work. It would be reductive to argue that one manner of advocacy is more important than another, but it is valuable for organizations to assess their structures and positionings when determining what, for them, would be the most effective approach to human rights work.

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Introduction

The law cannot account for all of the loss created by genocide, but it is one possible resource that can be applied as time moves forward. This paper investigates how the human rights work done by organizations is impacted by their organizational structures and positionalities. This is done through comparative case studies on how human rights projects related to genocide responses are approached differently by governments and non-governmental organizations.

While interning through the International Human Rights Internship Program at McGill University's Faculty of Law during the summer of 2021, I worked with the Ministry of Justice in Namibia and with Avocats Sans Frontières Canada (ASFC), based in Québec City, Canada. By virtue of their structures and institutional positionalities, human rights work done by national governments is different from that done by international non-governmental organizations, and these organizations thus encounter different challenges and advantages, which I examine in this paper.

The project I that worked on pertaining to genocide at ASFC focused on responding to amnesties for violent crimes committed during the genocide in Guatemala, whereas the project in Namibia focused on reparation negotiations with Germany for the genocide committed during 1904–1908. These case studies do not allow for a direct factual comparison, but analysis of their contexts and approaches remains significant for illustrating how the functions of different organizations shape the approaches with which they engage.

I argue that the different structures and positions of the organizations necessitate different legal strategies. In such complex and multifaceted cases, it would be a vast oversimplification to state that any one approach is superior to another, and this paper instead proposes that different organizations can use their strengths to facilitate different aspects of justice. Though I take these case studies as a starting place to situate some of the existing academic work, much of the analysis that follows is based on government and NGO actions more broadly.

This paper specifically investigates transitional justice as an avenue for reconciliation; however, it should be noted that these are not identical concepts. Rather, reconciliation as a process is one potential outcome of transitional justice, which is a process that can facilitate a number of other objectives.[1] Seils argues that there are different kinds of reconciliation that occur on individual, interpersonal, institutional, and socio-political levels.[2] This paper will focus on the institutional and socio-political impacts of some legal instruments employed by government and non-governmental organizations, though these impact and are impacted by individual and interpersonal reconciliation as well.

The paper will first briefly outline the social, legal, and political history each of the genocides; following this, I will situate the Namibian Ministry of Justice and ASFC in the context of each genocide per their relations with impacted communities and governments; I will then discuss the legal and political approaches used by governments and NGOs more broadly before concluding the paper with a discussion of why legal work may look different between organizations.

Introduction to transitional justice

To situate this paper in common legal practices, I will begin by briefly outlining transitional justice, which is an oft-used framework and seen as a constructive approach to facilitating reconciliation and stabilizing communities.[3] Paul Seils defines transitional justice as "justice-focused processes that societies undertake in the aftermath of large-scale human rights violations."[4] Part of the reason that transitional justice is used following particularly devastating events is because it centres the rights of victim to justice.[5] Truth commissions, for example, are often used in transitional justice processes in part because of their

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[1] See Paul Seils, "The Place of Reconciliation in Transitional Justice: Conceptions and Misconceptions", Briefing Paper, International Center for Transitional Justice (28 June 2017) at 9.

[2] See *supra* note 1 at 5.

[3] See *ibid* at 1.

[4] *Ibid* at 2.

[5] See *ibid*.

ability to validate the experiences of victims and survivors as psychological, rather than historical, truths when trauma and the barring of cross-examination make this distinction legally important.[6] This delineation allows the experiences of victims and survivors to be heard in significant ways that may be important to individual healing, potentially retraumatizing legal contestation.

Other legal frameworks may be more focused on economics or punitive measures. Though these aspects are not irrelevant to transitional justice and, indeed, they may be crucial to achieving justice for victims, transitional justice has the ability to remove some of the barriers that victims may face in strictly civil or criminal proceedings. [7] Transitional justice processes often occur in conditions where civil and criminal justice systems have failed and are unable to cope with human rights violations on such massive scales.[8] The highly contextual nature of transitional justice means that it can account, though sometimes to a limited degree, for the complications that trauma—for example—can bring to victims seeking justice.[9]

Transitional justice will look different based on the context and content of the human rights violations as well as on the body or organization that is enforcing or contributing to transitional justice processes.[10] In accounting for the obstacles that transitional justice may face (including political instability, a dearth of economic resources, and corruption), Seils argues that "transitional justice processes are more of an art than a science."[11] There is not a prescribed legal test or water-tight set of conditions that must be satisfied for transitional justice to take place; as such, there are a variety of strategies that organizations

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[6] See Martha L Minow, "Brown v. Board in the World: How the Global Turn Matters for School Reform, Human Rights, and Legal Knowledge" (2013) 50:1 San Diego L Rev 1 at 4.

[7] See *supra* note 1 at 2

[8] See *ibid* at 2.

[9] See *supra* note 6 at 4, 13.

[10] See *supra* note 1 at 2; see e.g. Ruben Carranza, Cristián Correa & Elena Naughton "Reparative Justice: More than Words: Apologies as a Form of Reparation" (December 2015) at 4, online (pdf): *International Center for Transitional Justice* <www.ictj.org/sites/default/files/ICTJ-Report-Apologies-2015.pdf> at 8.

[11] *Ibid*.

may employ in efforts to facilitate transitional justice and achieve different kinds of justice for victims.[12]

Brief outline of the genocides against the Nama, Herero, and Maya people

In addition to approaches to transitional justice differing based on organizational structure, the nature and context of massive human rights violations will impact how justice can be facilitated.[13] This paper is based on two cases of genocide; however, the genocides themselves are very different. The following sections very briefly outline the genocides that ASFC and the Ministry of Justice were responding to while I worked with them. Given the scope of this paper, these sections will be simplified overviews of complex historical and ongoing events.

The *Convention on the Prevention and Punishment of the Crime of Genocide* (*Genocide Convention*), which was adopted by the United Nations General Assembly on 9 December 1948, is the international human rights authority on issues of genocide.[14] Both Germany and Guatemala are have been participants to the *Genocide Convention* since the mid-twentieth century.[15] For the purposes of this paper, I will use the description of genocide outlined in the *Genocide Convention* to define the violence

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[12] See Catherine Corey Barber, "Tackling the evaluation challenge in human rights: assessing the impact of strategic litigation organisations", (2011) 16:3 Intl JHR 411 at 411.

[13] See *supra* note 1 at 2.

[14] See *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol 78 (entry into force 12 January 1951, in accordance with article XIII).

[15] See Historical Clarification Commission, "Guatemala Memory of Silence: Report of the Commission for Historical Clarification Conclusion and Recommendations" (1999) at para 108, online (pdf): *Human Rights Data Analysis Group* <hrdag.org/wp-content/uploads/2013/01/CEHreport-english.pdf> [Historical Clarification Commission]; United Nations Treaty Collection, "Chapter IV: Human Rights: Convention on the Prevention and Punishment of the Crime of Genocide", online (pdf): <treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-1.en.pdf> [Treaty Collection].

against the Nama and Herero people and against the Maya people in Guatemala as genocide. As the facts below will outline, both cases fit the UN definition of genocide, which is as follows, per Article II of the *Convention*:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.[16]

Genocide of the Nama and Herero people

During the "scramble for Africa," as it has been termed, Germany colonized what is now Namibia.[17] Between 1904–1908, Germany enacted mass atrocities on the Herero and Nama people in what was then known as German South-West Africa.[18] This included concentration camps, systemic sexual violence, and articulated intent to annihilate the Nama and Herero people.[19] Some of the physical remains of those murdered by German forces were sent to Germany, where they were studied under

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[16] *Supra* note 14, art II.

[17] See Franziska Boehme "Reactive remembrance: The political struggle over apologies and reparations between Germany and Namibia for the Herero genocide" (2020) 19:2 Journal of Human Rights 238 at 242.

[18] See Casper W Erichsen & David Olusoga, "Death through Exhaustion" in Casper W Erichsen & David Olusoga, eds, *The Kaiser's Holocaust: Germany's Forgotten Genocide and the Colonial Roots of Nazism* (London: Faber & Faber, 2010) at 151.

[19] See *ibid* at 161–66; Casper W Erichsen & David Olusoga, "The Island of Death" in Erichsen & Olusoga, *supra* note 18 at 223 ["The Island of Death"].

eugenic programs.[20] In 1904, Samuel Maharero led a resistance to German violence and, following the 1904 Battle of Waterberg, over ten thousand Herero people fled German abuse to the Omaheke Desert.[21] German General von Trotha isolated the people off in the desert to starve or die by exposure.[22] On October 2, 1904, von Trotha stated that "[w]ithin the German borders every Herero with or without rifle, with or without cattle, will be shot, I will not take in more women and children, push them back to their people or let them be shot at."[23] The Nama people rebelled against this order and on April 22, 1905, another extermination order was issued by German officers.[24] The military period of conflict ended at this point and the genocide of the Nama and Herero people began with concentration camps, which were used as models to concentration camps in the Holocaust.[25] The actions taken against the Herero and Nama people fit the definition of *genocide* in the UN *Convention on the Prevention and Punishment of the Crime of Genocide*.[26] Despite this definition and the fact that Germany had responded to other human rights abuses that it committed as genocide—notably, the Holocaust—Germany did not acknowledge the violence committed against the Nama and Herero during 1904–1908 as genocide until May 28, 2021.[27]

This is not for lack of awareness on Germany's part, nor for lack of effort on the part of the Herero and Nama people. Though there are complications in relationships between the

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[20] See Reinhart Kössler, "The Saga of the Skulls: Restitution Without Recognition" in Reinhart Kössler, ed, *Namibia and Germany: Negotiating the Past* (Windhoek: UNAM Press, 2015) at 271 [Kössler, "Without Recognition"]; "The Island of Death", *supra* note 19 at 225.

[21] See *supra* note 19 at 242.

[22] See *ibid*.

[23] *Ibid*.

[24] See *ibid*.

[25] See Casper W Erichsen & David Olusoga, "Introduction: Cell 5" in Erichsen & Olusoga, *supra* note 18 at 6–9 ["Introduction: Cell 5"]; Casper W Erichsen & David Olusoga, "Germany's California" in *supra* note 18 at 329.

[26] See *supra* note 14.

[27] See German Ministry of Foreign Affairs, Press Release, "Foreign Minister Maas on the Conclusion of Negotiations with Namibia" (28 May 2021) online: <www.auswaertiges-amt.de/de/newsroom/-/2463396>.

Herero and Nama people and the Namibian government, the Government of Namibia has also more recently been campaigning for an apology and reparations.[28] Human rights norms since World War Two have made it more difficult for states to neglect accountability for past violence, and given Germany's public reparations and remembrance of the Holocaust, practitioners and scholars have noted a dissonance in how Germany has responded to what some call the "first genocide of the 20th century."[29]

There are several significant differences between the Holocaust and the genocide of the Nama and Herero people, which merit a longer discussion than what I can provide in this paper; however, there are some particularly pressing and legally relevant elements that I will survey.

One significant complication in the case of Nama and Herero reparations is the fact that, unlike with survivors of the Holocaust, there are no remaining direct survivors nor perpetrators of the 1904–1908 genocide. This presents legal elements that complicate what transitional justice may look like as reparations and apologies cannot be issued directly to survivors, as was done for some Holocaust survivors.[30] Germany has been in conversation and consultation with the Namibian government about acknowledging the genocide as such and on the matter of reparations, but this has led to tensions between the Namibian government and the Herero people, many of whom do not feel represented in these conversations.[31]

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[28] See Cai Nebe, Sakeus Iikela, "Namibia debates German genocide deal", *DW.com* (21 September, 2021), online: <www.dw.com/en/namibia-debates-german-genocide-deal/a-59243358>.

[29] *Supra* note 19 at 238, 240.

[30] See Regina Menachery Paulose & Ronald Gordon Rogo, "Addressing Colonial Crimes Through Reparations: The Mau Mau, Herero and Nama" (2018) 7:2 State Crime Journal 369 at 377.

[31] See Ronald Niezen, "Speaking for the Dead: The Memorial Politics of Genocide in Namibia and Germany" (2018) 24:5 International Journal of Heritage Studies 547 at 548, 550; "Namibia: Controversy in Parliament over German genocide deal" *AfricaNews* (23 September 2021), online: <www.africanews.com/2021/09/23/namibia-controversy-in-parliament-over-german-genocide-deal//> [Namibia: Controversy in Parliament over German Genocide Deal].

Though somewhat resolved, there has also been a question about whether contemporary Germany should be held to account for actions committed at the beginning of the 20th century. Though international law has historically absolved successor states of actions committed by predecessors, this would not be a strong argument for Germany to make because the widely understood legal position is that Germany has not had a state succession since the first German Reich in 1871. Though this was followed by the Weimar Republic; then the Third Reich; then the German Democratic Republic and the Federal Republic of Germany; and in 1990 the reunification of the Federal Republic of Germany, none of these events since 1871 are considered state successions.[32] Thus the current Federal Republic of Germany has inherited the legal obligations of each of its previous incarnations.[33] This indicates that the current Germany should be accountable for the 1904–1908 genocide and its consequences.

Genocide of the Maya People

Beginning in 1962 and continuing into the 1990s, Maya communities in Guatemala were disproportionately the targets of abhorrent violence during successive military dictatorships and the civil war.[34] It was not until the Commission for Historical Clarification (CEH) was created in 1994 and published an impartial report on the conflict that the atrocities faced by the Maya people was named as genocide.[35] During the armed

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[32] See David Bargueño, "Cash for Genocide? The Politics of Memory in the Herero Case for Reparations" (2012) 26:3 Holocaust and Genocide Studies 394 at 401–402; Max du Plessis, "Reparations and International Law: How are Reparations to be Determined (Past Wrong of Current Effects), Against Whom, and What Form Should They Take (comments)" (2003) 22 Windsor YB Access Just 41 at 45.

[33] See *ibid*.

[34] See International Center for Transitional Justice, "Holding a Mirror to Society: Acknowledgment and the Struggle for Indigenous Peoples Rights", (8 August 2018), online: *International Center for Transitional Justice* <www.ictj.org/news/holding-mirror-society-acknowledgment-and-struggle-indigenous-peoples-rights> ["Holding a Mirror to Society"]; *supra* note 16 at para 1.

[35] See *ibid*.

conflicts in Guatemala, the CEH registered a total 42,272 victims, 83% of identified victims were Maya.[36]

From 1978 to 1983, the violence escalated. The CEH found that the Guatemalan state had intentionally curated narratives of Maya allegiances with guerilla forces.[37] This built on existing anti-Maya racism and encouraged violence and aggression against Maya people, regardless of whether they were aligned with guerrilla groups and without regard "their status as a non-combatant civilian population."[38] This construction was used to justify scorched earth operations, sexual violence, forced disappearances and executions of spiritual guides and Maya leaders, as well as massacres.[39] Survivors of the sexual violence committed during this time, the majority of whom were Maya women, still contend with intense trauma from these violations.[40] "Death squads" were also created, which conducted executions and kidnappings, but also employed psychological warfare, propaganda, and intimidation tactics against Maya people.[41]

The CEH found that the intentional construction of alliance between the Maya and guerrillas was fed by State doctrines of superiority over the Maya people and became a justification or destroying Maya cultural values. [42] According to the CEH, destruction of the Maya people became a military objective.[43] Due to terror and violence, many Maya people were forced to hide their ethnic identifies and refrain from speaking in their language or wearing traditional dress and disrupted the

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[36] See Historical Clarification Commission, *supra* note 15 at para 1.

[37] See *ibid* at para 31.

[38] *Ibid* at para 32.

[39] See *ibid* at paras 32–33, 89, 91

[40] See *ibid* at para 91; Marta Martínez, "Impunity's Eclipse: The Long Journey to the Historic Genocide Trial in Guatemala" *International Centre for Transitional Justice* (last visited 29 July 2022), online: <www.ictj.org/sites/default/files/subsites/guatemala-genocide-impunity-eclipse/>.

[41] See Historical Clarification Commission, *supra* note 15 at para 92; Marcia Esparza, "Post-War Guatemala: Long-Term Effects of Psychological and Ideological Militarization of the K'iche Mayans" (2005) 7:3 Journal of Genocide Research 377 at 385.

[42] See Historical Clarification Commission, *supra* note 15 at paras 32–33, 62. See e.g. Martínez, *supra* note 40.

[43] See Historical Clarification Commission, *supra* note 15 at para 62.

community structures and the transmission of culture.[44] In 1982, armed and military forces began to infiltrate, co-opt, and control Maya leadership structures, which further disrupted community structures and replaced them with authoritarian structures.[45] From 1981 to 1983, there was mass forced internal and external displacement of civilians due to terror and fear of violence and persecution and the majority of those who fled their homes were Maya.[46] Estimates of the number of displaced people during this time ranges from 500,000 to a million and a half people.[47] As Maya were constructed as "natural allies" of the guerillas, there was further division within Maya communities as well as isolation and ostracization from the communities to which they fled because Maya people were held partially responsible for the violence in Guatemala.[48]

The CEH registered 626 scorched earth operations, which flattened communities and decimated the land, that were organized by the State.[49] These massacres exterminated entire Maya communities and destroyed any resources or means to survival that may have otherwise supported survivors.[50] The CEH noted that agents of the State murdered defenceless civilians, including children, in extremely cruel and degrading ways.[51]

During this time, the legal system—which was already weak in some areas of Guatemala before the armed confrontations escalated—was effectively undermined by high rates of impunity and corruption.[52] Military tribunals had been established to investigate and try crimes committed by those within military jurisdictions, but they were ineffective sources of justice for victims and communities because they were deeply entangled with the

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[44] See *ibid*; Martínez, *supra* note 40.

[45] See Historical Clarification Commission, *supra* note 15 at para 32.

[46] See *ibid* at para 65; Martínez, *supra* note 40.

[47] See Historical Clarification Commission, *supra* note 15 at para 66.

[48] See *ibid* at paras 69, 85.

[49] See *ibid* at para 86.

[50] See *ibid*.

[51] See *ibid* at para 87; Esparza, *supra* note 41 at 383.

[52] See Historical Clarification Commission, *supra* note 15 at paras 56–57.

very military system that had committed the crimes.[53] Individuals could not rely on military tribunals nor ordinary justice systems for protection from the state, even for basic human rights violations.[54]

The CEH was limited in not being allowed to attribute responsibility to any individuals; however, it found that the State of Guatemala should be held accountable for human rights violations that were committed by the State through public servants, state agencies, and by civilians who were given authority to act for the State.[55] Further, the CEH argues that the State should be accountable for breaching their legal obligation to investigate, hear, and punish violations—even when they were not committed directly by the State or agents acting on its behalf.[56] The CEH found that State agents breached Common Article III of the 1949 *Geneva Conventions* "particularly with respect to attacks against life and bodily integrity, mutilation, cruel treatment, torture and torment, the taking of hostages, attacks on personal dignity, and particularly humiliating and degrading treatment, including the rape of women" and that the State of Guatemala was responsible for these infractions.[57]

Since the Guatemalan State signed the *Genocide Convention* in 1949 and then ratified its participation in 1950, the *Convention* has been an unreliable resource for organizations seeking justice for Maya people and communities.[58] Though the *Convention* offers a resource to define the violence committed as a genocide, the *Convention* suffers from many of the same weaknesses faced by many UN conventions, with lack of enforceability creating particular difficulties for Maya people.[59] Despite these challenges, as the violence began to be officially recognized as genocide by the international community, Maya

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[53] See *ibid* at para 94.

[54] See *ibid* at para 57.

[55] See *ibid* at para 80; Martínez, *supra* note 40.

[56] See Historical Clarification Commission, *supra* note 15 at para 81.

[57] *Ibid* at para 100. See also *ibid* at para 122; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135.

[58] See Historical Clarification Commission, *supra* note 15 at para 108; Treaty Collection, *supra* note 15.

[59] See Martínez, *supra* note 40.

people began to file legal complaints against the ex-President Efraín Ríos Montt.[60]

The ineffectiveness of ordinary and military courts during the armed conflicts facilitates a particular "culture of impunity" in Guatemala that has created difficulties for those seeking justice. For example, though Efraín Ríos Montt was initially found responsible for crimes of genocide, this ruling was overturned.[61] This initial finding did, however, catalyze trials against others who had committed gross violations of human rights.[62] These ongoing issues of legal immunity for those who committed acts of genocide against the Maya people in Guatemala has been given international attention by some groups, including Avocats Sans Frontières Canada.[63]

Situating the Case Studies

The genocides against the Maya, Nama, and Herero people are in and of themselves very different, which necessitates different legal approaches; however, I argue that the different approaches taken by the Ministry of Justice and Avocats Sans Frontières Canada also necessitated different approaches to human rights advocacy and transitional justice. The following section will situate the work of ASFC and the Ministry of Justice in Namibia in relation to the communities in which, and with which, they work. Following this, I will examine how these structures impact the ways in which the organizations engage with legal strategies, with a focus on political relations and strategic litigation.

The role and structure of the Namibian Ministry of Justice

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[60] See *supra* note 40.

[61] See *ibid*.

[62] See *ibid*; *supra* note 16 at para 94. See e.g. UN Women, "*Sepur Zarco* case: The Guatemalan women who rose for justice in a war-torn nation" (19 October 2018), online: *UN Women* <www.unwomen.org/en/news/stories/2018/10/feature-sepur-zarco-case>.

[63] See ASFC & CPRJ, "Alleged Massacre Perpetrator Lives Freely in Canada: Canadian Government Called to Act" (16 June 2021), online (pdf): *Avocats Sans Frontières Canada and Canadian Partnership for International Justice* <www.asfcanada.ca/site/assets/files/8244/pr_asfc-cpij_case-sosa.pdf>.

The Namibian Ministry of Justice is tasked with providing access to justice through legal services to people in Namibia.[64] As a government office, there are challenges and resources that differ from those faced by non-governmental organizations.

There is significant political power designated to government offices, which can be an incredibly effective advocacy tool as there is a certain amount of authority, legitimacy, and deference given to statements and arguments made by government offices. This is impactful on domestic and international levels and is significant on issues of genocide committed within national boundaries by foreign nations. As a democratic government, there is also a particular relationship between the government, which holds significant power over national resources and thus the everyday lives of citizens, and the citizens to whom the government is accountable through elections.[65]

The relationship between the Government of Namibia and the Nama and Herero people

Though my internship was at the Ministry of Justice, this section of the paper will focus on the Government of Namibia more broadly. As in any democratic government, there are tensions between offices that facilitate the representation of a variety of perspectives. Analyzing the role of the Ministry of Justice alone would require an investigation of the relationship between the Ministry of Justice and other government offices, which would have implications on confidentiality.

The relationship between the Government of Namibia and the Nama and Herero people is complex, particularly regarding the 1904–1908 genocide. During the time of the genocide, Namibia did not exist in the same legal terms as it does presently, and the genocide itself was not committed against the state of Namibia itself, but rather against the Nama and Herero people who lived in what is now known as Namibia.[66]

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[64] See Republic of Namibia, "Ministry of Justice" (last visited 29 July 2022), online: *Republic of Namibia* <moj.gov.na/minister>.

[65] See *Namibian Constitution*, 1990, art 17(2).

[66] See Casper W Erichsen & David Olusoga, "Rivers of Blood and Money" in Erichsen & Olusoga, *supra* note 18 at 144–48; *supra* note 19 at 242.

Notably, representatives of the Herero people have been advocating for reparations from Germany for years, including returning skulls and body parts that were taken to Germany back to Namibia for proper burial and treatment and civil cases brought against Germany in the United States.[67]

In 2004, Heidemarie Wieczorek-Zeul, the German Minister of Economic Cooperation and Development, acknowledged the violence at a commemorative ceremony for the hundredth anniversary of the beginning of the genocide.[68] Wieczorek-Zeul apologized to the Herero people on behalf of Germans—though this acknowledgement was met with criticism for being more performative than genuine.[69] In 2007, the von Trotha family apologized directly to the Herero people for their ancestor's role in the genocide.[70] These apologies were made directly to the Herero people and illustrate the importance of explicitly acknowledging harmed communities.

The political nature of government organizations that facilitates a certain amount of authority internationally complicates the relationship between the Nama and Herero people and the Government of Namibia. Germany has been in direct conversation with the Government of Namibia about the genocide, which has led to tensions between the Government and the Nama and Herero people, who have felt left out of these conversations and negotiations.[71]

The Government of Namibia contends with complications unique to a government office that would are not faced in the same way by non-governmental organizations. Namibia's political atmosphere is deeply impacted by its relatively recent

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[67] See Kössler, "Without Recognition", *supra* note 20 at 271; Bargueño, *supra* note 32 at 395; *supra* note 19 at 245, 250. See e.g. *The Herero People's Reparations Corporation, et al, v Deutsche Bank, Ag and Woermann Line, D/b/a Deutsche Afrika-linien Gmblt & Company*, 2004, 370 F3d 1192 (DC Cir).

[68] See Bargueño *supra* note 32 at 397.

[69] See *ibid* at 397; Namibia: Controversy in Parliament over German Genocide Deal, *supra* note 37.

[70] See Bargueño *supra* note 32 at 397

[71] See *supra* 19 at 250; Namibia: Controversy in Parliament over German Genocide Deal, *supra* note 37.

independence, which was gained from South Africa in 1990.[72] At the time, the South West Africa People's Organisation (SWAPO party), which has remained a significant political power in the country, chose to focus on "future-facing" messages that attempted to move away from the fraught past of the country, which some have criticized as dismissive of the genocide.[73] Additionally, when Namibia gained independence in 1990, there was an effort to obtain reparations from Germany; however, the Berlin Wall had fallen months before in 1989, obscuring attempts to have the genocide recognized and reconciled.[74]

Relationships between the Herero people and the Namibian Government have remained tense in regards to discussions of the genocide with Germany, particularly with regard to the issue of reparations.[75] Representatives of Herero groups have been in vocal opposition to the Namibian Government accepting the payments offered by Germany on May 28, 2021.[76] The Government itself is divided on the issue, and it's worth noting that Germany has presented the payments not as reparations, but as aid payments.[77] I will discuss the conversations between the Government of Germany and that of Namibia in the next section.

The relationship between the Ministry of Justice and Germany

[72] See *supra* 19 at 249.

[73] See Niezen, *supra* note 37 at 548.

[74] See *ibid* at 552.

[75] See Namibia: Controversy in Parliament over German Genocide Deal, *supra* note 37; Reinhart Kössler, "A Mute Conversation: The Rise of the Reparations Issue" in Reinhart Kössler, ed, *Namibia and Germany: Negotiating the Past* (Windhoek: UNAM Press, 2015) at 235.

[76] See Namibia: Controversy in Parliament over German Genocide Deal, *supra* note 37.

[77] See Nora McGreevy, "Germany Acknowledges Genocide in Namibia but Stops Short of Reparations", *The Smithsonian* (4 June 2021), online: <www.smithsonianmag.com/smart-news/germany-acknowledges-genocide-namibia-stops-short-reparations-180977886/>; Philip Oltermann, "Germany Agrees to Pay Namibia €1.1bn over Historical Herero-Nama Genocide", *The Guardian* (28 May 2021), online: <www.theguardian.com/world/2021/may/28/germany-agrees-to-pay-namibia-11bn-over-historical-herero-nama-genocide>.

On May 28, 2021, German Foreign Minister Maas Published a press release on the conclusion of negotiations with Namibia.[78] Namibia entered these negotiations with three objectives, those being that Germany:

a) Acknowledge that the German State committed genocide in Namibia during the period 1904–1908;

b) Render an unconditional apology to Namibia for the genocide; and

c) Pay reparations.[79]

In the German press release from the same day, German Foreign Minister Heiko Maas stated that "[w]e will now officially refer to these events [those between 1904–1908] as what they were from today's perspective; genocide."[80]

Germany has pledged 1.1 billion euros to Namibia over the next 30 years to address the genocide; however, it is widely understood that this is not sufficient to address the violence, which had devasting impacts on the Nama and Herero communities and has continued to impact the economic status of Namibia.[81] Although the Vice President of Namibia, Nangolo Mbumba, stated in his media release that the financial commitment may be revisited and renegotiated,[82] the German press release states that "no legal claims to compensation can be derived from this [the statement that genocide-affected communities will be central to "shaping and implementing" the financial compensation]."[83] This signals a potential issue for Namibia, should further compensation be sought. Moreover, Germany has avoided the term *reparations*, instead terming the financial commitment a "gesture of recognition"

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[78] See German Ministry of Foreign Affairs, Press Release, "Foreign Minister Maas on the Conclusion of Negotiations with Namibia" (28 May 2021), online: <www.auswaertiges-amt.de/de/newsroom/-/2463396>.

[79] Vice President of The Republic Of Namibia, Media Release, "On The Occasion of The National Briefing On Genocide, Apology And Reparations Negotiations Between Namibia And The Federal Republic Of Germany" (4 June 2021) at 3.

[80] *Supra* note 78.

[81] See *supra* note 78 at 8; *ibid* at 3.

[82] See *ibid* at 8.

[83] See *supra* note 78.

for the genocide.[84] Problematically, this allows Germany to potentially avoid legal responsibility for compensation beyond what has already been committed.[85]

Beyond economic reasons for not wanting to pay reparations, there are a number of social, political, and cultural reasons that Germany may be resistant to paying reparations. Casper Erichsen and David Olusoga argue that Germany in particular may be hesitant to admit its full responsibility, and thus pay reparations, because of its additional history of genocide with the Holocaust during the Second World War.[86] There is a volume of academic work investigating the ways that the Namibian genocide was a predecessor for the genocidal practices used during the Holocaust in Europe.[87] Though Germany has now acknowledged both as genocide, drawing a link between the two exposes that the practices used by Nazi Germany were not isolated to the rule by Adolf Hitler but existed in German political culture through a more deeply entrenched history.[88] This historical connection between events destabilizes some of the distance that Germany has been able to put between itself and the Holocaust.[89] Though this is a political and cultural, rather than strictly legal issue, the legal context of Namibia and Germany is deeply impacted by the histories of both countries.

The role and structure of Avocats Sans Frontières Canada

Avocats Sans Frontières Canada is an international co-operation non-governmental organization based in Québec City, Canada. ASFC's mission is to defend human rights by providing access to justice and legal representation.[90] The organization has lawyers physically located in multiple countries, including

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[84] See *supra* note 78 at 3.

[85] See McGreevy, *supra* note 77; Oltermann, *supra* note 77.

[86] See "Introduction: Cell 5", *supra* note 28 at 8–9.

[87] See Bargueño *supra* note 32 at 396; Lewis *supra* note 5 at 144; *supra* note 15 at 8–9, 4.

[88] See Bargueño *supra* note 32 at 404; *supra* note 15 at 4; "Introduction: Cell 5", *supra* note 28 at 3, 9.

[89] See *supra* note 95 at 8–9.

[90] See ASFC, "Fière d'être engagée" (last visited 29 July 2022), online: *ASFC* <www.asfcanada.ca/>.

Guatemala, Mali, Burkina Faso, and Bénin. One of the most notable legal strategies with which ASFC engages with is strategic litigation, upon which I will focus in this paper.

The organizational structure at ASFC is quite different than that at the Namibian Ministry of Justice, which has a legally determined structure based on the rules of democracy in the country. [91] ASFC has more flexibility in determining its organizational structure and intentionally uses a "collaborative management" system that de-emphasizes hierarchy and encourages cross-team conversation and collaboration.[92]

This is not only helpful for a sense of comradery in the organization, but also in addressing issues that often arise in international NGO work. A common critique of strategic litigation is that it exploits the experiences of individuals and communities for the sake of the mission of the litigating organization. [93] Collaborative management facilitates more equitable conversations between management located in Canada and lawyers and advocates working locally and directly with impacted communities.

The relationship between the Avocats Sans Frontières Canada and the Maya people

As an organization based in Canada, Avocats Sans Frontières Canada has a much different relationship with Maya people in Guatemala than the Government of Namibia has with its population in Namibia. Though there are lawyers associated with ASFC present in Guatemala, the central office is geographically and politically removed from many of the people it serves.

Critiques of international NGOs argue that this kind of structure can create a sterile division between organizations and

[91] See *Namibian Constitution*, 1990, Chapters 5–12.

[92] ASFC, "Partenaires de Services: Gestion collaborative" (last visited 29 July 2022), online: *ASFC* <www.asfcanada.ca/a-propos/partenaire/donateurs-de-services/>.

[93] See Barbora Buvoska, "Perpetrating Good: Unintended Consequences of International Human Rights Advocacy" (2008) 4(se) Sur - Revista Internacional de Direitos Humanos 6 at 10, 12, 15.

the impacted individuals.[94] Though there is merit to these arguments, I argue that the distance between the central organization and the people they serve can offer a different strength to legal advocacy. Though there is no perfect way to approach human rights work, it would be dismissive and reductionist to write off all human rights work that is done by foreign-based organizations.

As demonstrated by the above sections on the relationship between the Ministry of Justice and the Nama and Herero people, it is important for groups directly impacted by human rights abuses to be included in conversations on apologies and reparations. The political and legal corruption being reckoned with in Guatemala, however, risks that organizations too closely tied with State authority in the country will not have the trust of victims who were abused by those very systems.[95] Given the violence committed by agents of the Guatemalan State, hesitancy on the part of survivors to trust organizations without significant international accountability is easily understood.[96] Thus, the distance between foreign-based organization, such as ASFC, may actually facilitate better trust and openness for victims and survivors.[97]

The relationship between Avocats Sans Frontières Canada and the State of Guatemala

As noted in the above section, ASFC is not affiliated with the State of Guatemala. As the State has widely been recognized as responsible for some of the mass atrocities committed against Maya people, the distance between the State and ASFC is advantageous to the work of ASFC. This allows ASFC to be critical of the State's actions, not only during the genocides but also in response to the violence.

One of the issues that ASFC has been working on is limiting judicial immunity for human rights offenders.[98] The geographic

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[94] See *supra* note 14 at 412.

[95] See *supra* note 1 at 3.

[96] See Martínez, *supra* note 40.

[97] See *supra* note 1 at 3; Martínez, *supra* note 40; ASFC & Jamaicans for Justice, "Strategic Litigation of Human Rights Abuses: A Guidebook for Legal Practitioners from the Commonwealth Caribbean" (2014), online (pdf) <www.asfcanada.ca/uploads/publications/uploaded_final-strategic-litigation-guidebook-pdf-58.pdf> [Guidebook].

[98] See *supra* note 69; Guidebook, *supra* note 97.

distance of the organization allows for safe expression of this critical lens; however, notice should be paid to the power dynamics between Canada and Guatemala in this relationship. Though it is fortunate that organizations like ASFC are using the political, economic, and social power of internationally powerful states like Canada to defend human rights and respond to calls for accountability following genocide,[99] part of the ability of organizations like ASFC to do this sort of work comes from the political privilege of being based in Canada.

Approaches to Human Rights Advocacy

Legal Arguments

Strengths and Challenges in Government Advocacy

A major strength of government advocacy is the authority carried by a formal state. In the present case, rather than sending Germany a call to action or something similar, the Government of Namibia can engage directly with the German Government in country-to-country negotiations. The following section outlines some legal strategies suggested for Namibia by legal and social scholars, and I have analyzed some of the strengths and weaknesses of these approaches, based on the contexts and relationships within which the Government of Namibia operates.

Germany has in the past resisted paying reparations to the Herero people in Namibia because of its hesitancy to compensate a specific ethnic group because "this could reinforce ethnic tensions and thus undermine the policy of national reconciliation which we [Germany] fully support."[100] As Lewis points out, a better solution than denying reparations would be to compensate any and all impacted ethnic groups or to allocate a lump sum of payments to the government of Namibia, which could then be divided as the Namibian government sees fit.[101] This closely aligns

[99] See "Holding a Mirror to Society", *supra* note 34.

[100] Kenneth L Jr Lewis, "The Namibian Holocaust: Genocide Ignored, History Repeated, Yet Reparations Denied" (2017) 29:1 Fla J Intl L 133 at 143.

[101] See *ibid*.

with the negotiations thus far established between Namibia and Germany.[102] In further addressing the potential argument that reparations may be inappropriate should they be allocated to specific ethnic groups, it is worth noting that the Austrian government compensated impacted Jews for the Nazi genocide upon recognizing a moral and legal responsibility to do so, and did not attempt to make distinctions based on whether victims were Ashkenazi or Sephardi Jews, even before Israel was established state.[103] As Namibia has been an independent state since 1990, Germany does not have the benefit of supposed confusion as to a centralized state to which reparations could be appropriately paid through which compensations to victims of the genocide could be disseminated. Complicating this is the relationship between the Nama and Herero people, who have not felt represented in these conversations.[104] No government can perfectly represent its constituents, but this context does complicate a strength of government advocacy.

There is also a question of who can be considered a victim for a historic genocide, given that many victims were killed during the genocide and those who survived but were enslaved may have since died. The reparations may thus be framed as addressing the systemic disadvantage at which Namibia was placed by the genocide, which has resulted in *inter alia* intergenerational trauma as well as unjust enrichment for Germany.[105] Though the genocide targeted Nama and Herero people, it has also financially and politically impacted Namibia as a country. The federal government is well-suited to address these aspects of reconciliation, as the branch with the resources to contend with international relationships. The state of Namibia is also invested in a nation-building project, providing additional motivation for their involvement. The Governments of Germany and Namibia negotiating together also holds symbolic value as Germany must concede the legitimacy of a country it tried to

[102] See *supra* note 87; supra note 88.

[103] See *supra* note 19 at 144. See also Lynn Berat, "Genocide: The Namibian Case against Germany" (1993) 5 Pace Intl L Rev 165 at 209.

[104] See *supra* 19 at 250; Namibia: Controversy in Parliament over German Genocide Deal, *supra* note 37.

[105] See *supra* note 95 at 31.

colonize. This symbolism could not exist in the same way if these legal actions were taken by an NGO.

That the Nama and Herero people have expressed feeling unheard for so many decades indicates a thin degree of reconciliation, if even that. Seils defines thin reconciliation as individuals and groups co-existing in peace but with little trust and shared values. This degree on reconciliation is positioned on a spectrum opposite to thick reconciliation, wherein relationships are built on trust and respect.[106] The legal relationship between Germany and Namibia necessitates that aspects of the reparations be done by the Namibian Government, which has resources and symbolic value better positioned to these negotiations precisely because it is a government body. The relationship between the Nama and Herero people and the Government, however, may be an obstacle to justice for some communities in Namibia that were directly targeted by the genocide. These complicated relationships do not entirely eliminate the value of the Government of Namibia's work, but do prompt a need for cognizant community engagement by the Government to attempt to overcome this challenge and "thicken" the reconciliation.

Strengths and Challenges in Non-Governmental Organizational Advocacy

This section will focus specifically on strategic litigation, which is a particular strength of ASFC. Though governments are able to engage in strategic litigation, there are formal political relationships that may limit the projects with which they can engage. NGOs are positioned differently and don't have the same political barriers, though this section will discuss other limiting aspects.

As noted by Barbora Bukovská, strategic litigation is an important methodology in human rights advocacy and has been an important tool in shaming governments for rights abuses, raising public attention and concern, and in advocating for law reforms. [107] Though the shaming approaches may be more

[106] See *supra* note 1 at 6

[107] See *supra* note 93 at 9.

antagonistic, which is not always a bad thing, using formal legal routes through strategic litigation also provides NGOs with a legitimacy and respectability to their actions that can make NGOs important partners for governments and other significant actors.[108] It is worth noting that strategic litigation is generally most impactful where the law is already respected.[109]

Strategic litigation also creates unique relationships between the impacted communities and individuals and the organizations doing the litigation.[110] There is an acute power imbalance, particularly when those being represented are in need of legal assistance because of their social, economic, and political vulnerabilities.[111] There is risk of entering into what Makau Mutua refers to as the savage-victim-saviour metaphor.[112] There is, however, also opportunity to develop meaningful relationships between organizations and those they represent legally. Bukovská notes that, when a case of strategic litigation is won "victims are not reduced to passive objects completely (without getting any material or even moral compensation), in the care of brave human rights advocates" because they at least receive a judgement in their favour.[113]

There are, however, significant potential issues with strategic litigation as individuals and communities are unlikely to have the same legal experience as organizations which are set up exactly to navigate legal structures.[114] Immediately, there is a significant power imbalance in which people are made to rely on human rights advocates in a disproportionate manner.[115] There is a risk that organizations based in politically powerful nations will

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[108] See *ibid*.

[109] See Open Society Justice Initiative, "Executive Summary" in Strategic Litigation Impacts: Insights from Global Experience" (2018) at 17, online (pdf): *Open Society Justice Initiative* <www.justiceinitiative.org/uploads/fd7809e2-bd2b-4f5b-964f-522c7c70e747/strategic-litigation-impacts-insights-20181023.pdf>.

[110] See *supra* note 102 at 12.

[111] See *ibid*.

[112] See *ibid* at 10; Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42:1 Harv Intl LJ 201 at 202.

[113] *Supra* note 93 at 12.

[114] See *ibid* at 13.

[115] See *ibid* at 13, 15.

impose their own norms for how rights should be implemented. Abdullahi Ahmed An-Na'im cautions that this can reproduce exactly "the civilizing mission" that was used to justify colonialism—such as the actions of Germany in what is now Namibia.[116] The above issues are not necessarily limited to NGOs, but rather may apply to any organization using strategic litigation. They are, however, significant and merit discussion.

A challenge more specific to NGOs is that they are accountable to their funders, who Bukovská argues can become the constituents of NGOs.[117] This may in turn impact the projects and approaches with which NGOs engage. Additionally, there is the issue of assessing whether a project has been effective. As a matter of accountability, it is important that organizations report on the work they have been doing so that funders make informed decisions on how they support the organizations. Strategic litigation is a complicated matter to assess in part because international human rights communities do not have a definition of what success looks like in strategic litigation campaigns.[118] Given that strategic litigation can be "successful" on a variety of fronts, which may include more obvious outcomes like winning a case, arguably, bringing public and political attention to an issue can also be considered a success, even if a case is lost.[119] Ongoing evaluations of success create complications as they require assessments of work in progress, which may change and adapt based on the communities in which organizations are working.[120] The priority of funders may thus complicate the ability of an organization to respond to the needs of those they are meant to be working with or it may lead to significant simplifications in reports to donors to demonstrate an alignment with the goals of the funders. Evaluation has been considered a normative activity that adheres to the values and beliefs of those to whom an evaluation is being provided and the efficacy of evaluation may be impacted by the fact that organizations know

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[116] "The Spirit of Laws is Not Universal: Alternatives to the Enforcement Paradigm for Human Rights" (2016) 21 Tilburg L Rev 255 at 256.

[117] See *supra* note 102 at 15.

[118] See *supra* note 13 at 411.

[119] See Guidebook, *supra* note 97 at vi.

[120] See *supra* note 13 at 416.

they are being evaluated and this act in certain ways to "prove" their efficacy.[121]

Political Arguments

Strengths and Challenges in Government Advocacy

Germany's history may give the country more motivation to distance itself from legal obligations amounting from its genocide in Namibia; however, this very history may be a strong counterargument for Namibia because of analogous argumentation regarding reparations for the Second World War. The moral and political argumentation facilitated through these analogous arguments are both documented as important instruments for legitimizing a legal obligation for genocide reparations. [122] Notably, Lynn Berat found that diplomatic relations between Namibia and Germany would be the most efficient means of making a claim for reparations and should be pursued to settle the matter quickly to obtain the necessary financial resources for the recovery of Namibian citizens.[123] The current agreements between Namibia and Germany are reflective of this, but this is not the only channel by which Namibia can seek reparations.

Apologies in the context of mass human rights violations, such as genocides, can be an important political element of repair. Transitional justice frameworks recognize apologies as a formal and generally public acknowledgement of factual and moral harm and they often place an element of responsibility on the issuing body.[124] Of note for legal purposes is the notion that apologies obligate the responsible party issuing the apology to mend the harm.[125] When issued by a party or agent with significant power and authority, apologies generally attract public attention and

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[121] See *ibid*.

[122] See Ryan M Spitzer, "The African Holocaust: Should Europe Pay Reparations to Africa for Colonialism and Slavery (notes)" (2002) 35:4 Vand J Transnat'l L 1313 at 1326, 1343; du Plessis, *supra* note 32 at 51.

[123] See Berat, *supra* note 103 at 209.

[124] See Carranza, Correa & Naughton, *supra* note 10 at 4.

[125] See *ibid*.

scrutiny by direct and indirect stakeholders with a variety of perspectives.[126]Apologies are thus often sources of controversy as they address matters that are often simultaneously hugely political and deeply intimate, while balancing the positions and interests of multiple unique parties.[127] Arguably, apologies may have more value as a symbolic rather than material reparation, and may be suited to address moral damages that cannot be made right through monetizable exchange.[128]

Apologies are also impacted by the power relations that exist within governments themselves. For example, Carranza, Correa, and Naughton cite apologies by the Guatemalan Vice President Eduardo Stein to those who survived the Plan de Sanchez massacre as an example of responsibility being taken at a high level of government but delivered locally.[129] The authors problematize that the scope of local apologies can place accountability too low on the power hierarchy of governments and highlight that those in higher positions of power, who may have orchestrated the harm, may not be held to adequate account.[130]

Democratic governments are well positioned for political arguments because of the authority they have in acting on behalf of their constituents. That being said, the above are actions that could be taken by NGOs, who may be well positioned to highlight moral and political inconsistencies. The symbolic importance of an apology comes from formal representatives of the harm caused, which could in fact be an NGO. There is particular importance to governments advocating for their citizens, but moral and political argumentation is by no means distinct to government bodies.

Strengths and Challenges in Non-Governmental Organizational Advocacy

There are some clear distinctions separating legal from political advocacy; however, legal and political spheres have a

[126] See *ibid*.

[127] See *ibid* at 5.

[128] See *ibid* at 8.

[129] See *ibid* at 9.

[130] See *ibid*.

huge amount of overlap and impact on one another. Though NGOs can use legal advocacy to force the hands of governments and organizations, effective advocacy necessitates paying attention to the political context in which the matter is situated.[131] Part of the strategy of strategic litigation is accounting for exactly this and leveraging political context, public context, and legal instruments to pressure the organizations to whom the NGO is advocating to take the actions that the NGO sees fit.

Reporting and advocacy avenues beyond litigation are other approaches that NGOs may choose to take though producing "shadow reports," which may contradict the reporting that governments have done on their own conformity with international commitments, protest letters and letters of concern.[132] As a well-regarded organization, ASFC has used its position not only for strategic litigation, but also to produce press releases to disseminate information on legal matters not only to impacted communities, but also to the public more generally. On June 16, 2021, ASFC collaborated with the Canadian Partnership for International Justice (CPIJ) on a press release about Jorge Vinicio Sosa Orantes's alleged role in a 1982 massacre in Guatemala.[133] As an NGO, ASFC is well positioned for this kind of political advocacy because their non-governmental status allows them to make statements that governments may be prevented from making due to matters of diplomacy.[134] Moreover, NGOs are able to engage in domestic advocacy and hold their own governments accountable, as is the case in the Jorge Vinicio Sosa Orantes's press release wherein ASFC and CPIJ call on Canada to act in accordance with the countries responsibility to prosecute crimes against humanity and war crimes.[135]

Beyond working in relation to governments, there are structural political implications to working with communities. Sally Engle Merry discusses how lawyers and legal organizations act as translators between the people for whom they advocate and international communities that are often removed spatially, socially, and economically from the context in which the legal

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[131] See *ibid* at 14.

[132] See *supra* note 102 at 9.

[133] See *supra* note 69.

[134] See e.g. *ibid*; Guidebook, *supra* note 97 at vi.

[135] See *supra* note 69.

teams work.[136] For example, legal teams must negotiate making projects appealing for international donors while ensuring that the projects fit the needs of local communities. This risks (re)imposing the interests of the economically powerful on marginalized groups.[137] David Kennedy and Makua Mutua both argue that NGO reports on human rights violations create voyeuristic narratives that serve the goals of the organizations themselves, rather than the communities for whom the organizations are meant to be working.

Comparison between Legal and Political Approaches of Governments and NGOs

Many of the reasons that NGOs and governments cannot advocate for human rights in the same way are somewhat common sense. For example, ASFC could not enter into genocide reparation negotiations for the 1904–1908 genocide in the same way as the Government of Namibia. This is in part to do with the structure of the organizations and the fact that, as elected leaders, governments carry a different authority than NGOs. Additionally, there is some symbolic importance to Germany negotiating directly with the leaders of a nation that they attempted to colonize and, though that process, being made to recognize and respect the representatives of the nation they tried to colonize. This is complicated by relations between the Herero and Nama people and the Government, but these complexities do not entirely negate the positive developments made by the government. The different actors in the genocides is also a critical factor as, for example, the Guatemalan state was responsible for the genocide of the Maya people, which is a much different context than Germany as a foreign state committing genocide within what is now Namibia.

The Government of Namibia would also not be able to intervene in conversations of immunity for alleged violations of human rights in Guatemala in the same way as ASFC. Though the work on ASFC in strategic litigation and other advocacy work is

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[136] See Sally Engle Merry, "Transnational Human Rights and Local Activism: Mapping the Middle", in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism*, 2013: (New York: Springer, 2013) at 214.

[137] See *ibid*.

political by nature, the organization does not bring in the same level of formal politics that interventions by another government would inject. Though there are political implications to the work of NGOs and some may be impacted by the values of their funders, NGOs can advocate on issues that might be off limits to some governments.

In accordance with their different positions and structures, the organizations are impacted by different power dynamics. Tony Evans cites Foucault in arguing that knowledge does not require an absence of power, but rather that an analysis of the power inevitably present in all relations is required to understand the social world in which the knowledge is produced.[138] An understanding of the power relations afforded to each organization is important in strategically determining which approaches for transitional justice will be most effective. This paper demonstrates that both NGOs and governments operate within power dynamics that can be an advantage or obstacle to their work. As Rieff contends, power can be made to serve moral ends.[139] Paying attention to how organizations are situated may be key to understanding how best they can accomplish their goals. By working with their strengths and being aware of their limitations, both NGOs and governments can do meaningful human rights work, though this work may (and perhaps should) look different between organizations.

Conclusion

While interning at the Namibian Ministry of Justice and ASFC, I noticed experientially that the Ministry of Justice employed more directly political means than ASFC. No work on human rights takes place in a vacuum and arguably all the work done by both organizations was political in nature. After examining the social, historical, and political structures in which the organizations operate, in addition to the unique relationships that each organization has with the impacted parties, it is evident

[138] See Tony Evans, "International Human Rights Law as Power/Knowledge" (2005) 27:3 Hum Rts Q 1046 at 1050.

[139] See David Rieff, "Chapter 4: The Victory of Memory over History" in David Rieff, ed, *In Praise of Forgetting: Historical Memory and its Ironies* (New Haven: Yale University Press, 2017) at 68.

that certain strategies are better matched to the structure and position of each organization.

Government offices and NGOs are, by the nature of the roles that they occupy in their communities and their positions internationally, set up to work differently. This does not mean that they will always be working in opposition, and this paper demonstrates how both can bring justice to victims and survivors of genocide through different means.

Given how different the work of governments and NGOS often can be, and how much the work that can be done is influenced by the position of the organization, it would be reductive to say that one is better or worse than the other. Rather, this paper demonstrates the importance of organizations leveraging their strengths to address human rights violations in the manner by which they are best suited, based on the context of the violation. It takes a variety of organizations and strategies to make legal, political, and social change and the weaknesses of some organizations can be compensated by the strengths of others.

It would be myopic to expect one organization to be able to comprehensively address every issue in the communities with which they work. As demonstrated by this paper, the very structure of an organization will act as an advantage and obstacle to political and legal work. In addition to being influenced by the structure of the organization, advocacy strategies are impacted by the context and content of the issue itself. Strategic litigation, press releases, and apologies are not methodologies limited strictly to either government bodies nor to NGOs; however, the matter itself will necessitate that organizations take inventory of their positions, strengths, and challenges before entering into legal or political advocacy.

Bibliography

LEGISLATION

Namibian Constitution, 1990.

JURISPRUDENCE

The Herero People's Reparations Corporation, et al, v Deutsche Bank, Ag and Woermann Line, D/b/a Deutsche Afrika-linien Gmblt & Company, 2004, 370 F3d 1192 (DC Cir).

INTERNATIONAL MATERIALS

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol 78 (entry into force 12 January 1951, in accordance with article XIII).

International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, *75* UNTS 135.

United Nations Treaty Collection, "Chapter IV: Human Rights: Convention on the Prevention and Punishment of the Crime of Genocide", online (pdf): <treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-1.en.pdf>.

SECONDARY MATERIALS: ARTICLES

An-Na'im, Abdullahi Ahmed, "The Spirit of Laws is Not Universal: Alternatives to the Enforcement Paradigm for Human Rights" (2016) 21 Tilburg L Rev 255.

Bargueño, David, "Cash for Genocide? The Politics of Memory in the Herero Case for Reparations" (2012) 26:3 Holocaust and Genocide Studies 394.

Berat, Lynn, "Genocide: The Namibian Case against Germany" (1993) 5 Pace Intl L Rev 165.

Boehme, Franziska, "Reactive remembrance: The political struggle over apologies and reparations between Germany and Namibia

for the Herero genocide" (2020) 19:2 Journal of Human Rights 238.

Buvoska, Barbora, "Perpetrating Good: Unintended Consequences of International Human Rights Advocacy" (2008) 4(se) Sur - Revista Internacional de Direitos Humanos 6.

Corey Barber, Catherine, "Tackling the evaluation challenge in human rights: assessing the impact of strategic litigation organisations", (2011) 16:3 Intl JHR 411.

du Plessis, Max, "Reparations and International Law: How are Reparations to be Determined (Past Wrong of Current Effects), Against Whom, and What Form Should They Take (comments)" (2003) 22 Windsor YB Access Just 41.

Esparza, Marcia, "Post-War Guatemala: Long-Term Effects of Psychological and Ideological Militarization of the K'iche Mayans" (2005) 7:3 Journal of Genocide Research 377.

Evans, Tony, "International Human Rights Law as Power/Knowledge" (2005) 27:3 Hum Rts Q 1046.

Lewis, Kenneth L Jr, "The Namibian Holocaust: Genocide Ignored, History Repeated, Yet Reparations Denied" (2017) 29:1 Fla J Intl L 133.

Menachery Paulose, Regina & Gordon Rogo, Ronald, "Addressing Colonial Crimes Through Reparations: The Mau Mau, Herero and Nama" (2018) 7:2 State Crime Journal 369.

Minow, Martha L, "Brown v. Board in the World: How the Global Turn Matters for School Reform, Human Rights, and Legal Knowledge" (2013) 50:1 San Diego L Rev 1.

Mutua, Makau, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42:1 Harv Intl LJ 201.

Niezen, Ronald, "Speaking for the Dead: The Memorial Politics of Genocide in Namibia and Germany" (2018) 24:5 International Journal of Heritage Studies 547.

Spitzer, Ryan M, "The African Holocaust: Should Europe Pay Reparations to Africa for Colonialism and Slavery (notes)" (2002) 35:4 Vand J Transnat'l L 1313.

Engle Merry, Sally, "Transnational Human Rights and Local Activism: Mapping the Middle", in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism*, 2013: (New York: Springer, 2013).

Erichsen, Casper W & Olusoga, David, "Death through Exhaustion" in Casper W Erichsen & David Olusoga, eds, *The Kaiser's Holocaust: Germany's Forgotten Genocide and the Colonial Roots of Nazism* (London: Faber & Faber, 2010).

——, "Germany's California" in Casper W Erichsen & David Olusoga, eds, *The Kaiser's Holocaust: Germany's Forgotten Genocide and the Colonial Roots of Nazism* (London: Faber & Faber, 2010).

——, "Introduction: Cell 5" in Casper W Erichsen & David Olusoga, eds, *The Kaiser's Holocaust: Germany's Forgotten Genocide and the Colonial Roots of Nazism* (London: Faber & Faber, 2010).

——, "Rivers of Blood and Money" in Casper W Erichsen & David Olusoga, eds, *The Kaiser's Holocaust: Germany's Forgotten Genocide and the Colonial Roots of Nazism* (London: Faber & Faber, 2010).

——, "The Island of Death" in Casper W Erichsen & David Olusoga, eds, *The Kaiser's Holocaust: Germany's Forgotten Genocide and the Colonial Roots of Nazism* (London: Faber & Faber, 2010).

Kössler, Reinhart, "A Mute Conversation: The Rise of the Reparations Issue" in Reinhart Kössler, ed, *Namibia and Germany: Negotiating the Past* (Windhoek: UNAM Press, 2015).

——, "The Saga of the Skulls: Restitution Without Recognition" in Reinhart Kössler, ed, Namibia and Germany: Negotiating the Past (Windhoek: UNAM Press, 2015).

Rieff, David, "Chapter 4: The Victory of Memory over History" in David Rieff, ed, *In Praise of Forgetting: Historical Memory and its Ironies* (New Haven: Yale University Press, 2017).

SECONDARY MATERIALS: NEWSPAPERS

"Namibia: Controversy in Parliament over German genocide deal" *AfricaNews* (23 September 2021), online: <www.africanews.com/2021/09/23/namibia-controversy-in-parliament-over-german-genocide-deal//>.

McGreevy, Nora, "Germany Acknowledges Genocide in Namibia but Stops Short of Reparations", *The Smithsonian* (4 June 2021), online: <www.smithsonianmag.com/smart-news/germany-

acknowledges-genocide-namibia-stops-short-reparations-180977886/>.

Nebe, Cai & Iikela, Sakeus, "Namibia debates German genocide deal", *DW.com* (21 September, 2021), online: <www.dw.com/en/namibia-debates-german-genocide-deal/a-59243358>.

Oltermann, Philip, "Germany Agrees to Pay Namibia €1.1bn over Historical Herero-Nama Genocide", *The Guardian* (28 May 2021), online: <www.theguardian.com/world/2021/may/28/germany-agrees-to-pay-namibia-11bn-over-historical-herero-nama-genocide>.

SECONDARY MATERIALS: ONLINE DOCUMENTS

ASFC & CPRJ, "Alleged Massacre Perpetrator Lives Freely in Canada: Canadian Government Called to Act" (16 June 2021), online (pdf): *Avocats Sans Frontières Canada and Canadian Partnership for International Justice* <www.asfcanada.ca/site/assets/files/8244/pr_asfc-cpij_case-sosa.pdf>.

ASFC & Jamaicans for Justice, "Strategic Litigation of Human Rights Abuses: A Guidebook for Legal Practitioners from the Commonwealth Caribbean" (2014), online (pdf): <www.asfcanada.ca/uploads/publications/uploaded_final-strategic-litigation-guidebook-pdf-58.pdf>.

ASFC, "Fière d'être engagée" (last visited 29 July 2022), online: *ASFC* <www.asfcanada.ca/>.

ASFC, "Partenaires de Services: Gestion Collaborative" (last visited 29 July 2022), online: *ASFC* <www.asfcanada.ca/a-propos/partenaire/donateurs-de-services/>.

Carranza, Ruben & Correa, Cristián, & Naughton, Elena, "Reparative Justice: More than Words: Apologies as a Form of Reparation" (December 2015), online (pdf): *International Center for Transitional Justice* <www.ictj.org/sites/default/files/ICTJ-Report-Apologies-2015.pdf>.

Historical Clarification Commission, "Guatemala Memory of Silence: Report of the Commission for Historical Clarification Conclusion and Recommendations" (1999) online (pdf): *Human Rights Data Analysis Group* <hrdag.org/wp-content/uploads/2013/01/CEHreport-english.pdf>.

International Center for Transitional Justice, "Holding a Mirror to Society: Acknowledgment and the Struggle for Indigenous Peoples Rights", (8 August 2018), online: *International Center for Transitional Justice* <www.ictj.org/news/holding-mirror-society-acknowledgment-and-struggle-indigenous-peoples-rights>.

Martínez, Marta, "Impunity's Eclipse: The Long Journey to the Historic Genocide Trial in Guatemala" *International Centre for Transitional Justice* (last visited 29 July 2022), online: <www.ictj.org/sites/default/files/subsites/guatemala-genocide-impunity-eclipse/>.

Open Society Justice Initiative, "Executive Summary" in Strategic Litigation Impacts: Insights from Global Experience" (2018), online (pdf): *Open Society Justice Initiative* <www.justiceinitiative.org/uploads/fd7809e2-bd2b-4f5b-964f-522c7c70e747/strategic-litigation-impacts-insights-20181023.pdf>.

Republic of Namibia, "Ministry of Justice" (last visited 29 July 2022), online: *Republic of Namibia* <moj.gov.na/minister>.

Seils, Paul, "The Place of Reconciliation in Transitional Justice: Conceptions and Misconceptions", Briefing Paper, International Center for Transitional Justice (28 June 2017).

UN Women, "*Sepur Zarco* case: The Guatemalan women who rose for justice in a war-torn nation" (19 October 2018), online: *UN Women* <www.unwomen.org/en/news/stories/2018/10/feature-sepur-zarco-case>.

OTHER MATERIALS

German Ministry of Foreign Affairs, Press Release, "Foreign Minister Maas on the Conclusion of Negotiations with Namibia" (28 May 2021) online: <www.auswaertiges-amt.de/de/newsroom/-/2463396>.

Vice President of The Republic Of Namibia, Media Release, "On The Occasion of The National Briefing On Genocide, Apology And Reparations Negotiations Between Namibia And The Federal Republic Of Germany" (4 June 2021).