

Namibia's Long Walk to Freedom

The Role of Constitution Making in the Creation of an Independent Namibia

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For almost two decades, constitution making lay at the heart of Namibia's peacebuilding and national reconciliation initiatives. In many other countries ravaged by internal and external strife, or harassed by a prolonged struggle for independence from colonial or foreign rule, constitution making came almost as an appendix to the final peace agreement and settlement of a date for independence. In Namibia, however, constitution making was a means to stimulate active politics and focus minds on the future of the country for more than fifteen years. In this regard, Gretchen Carpenter aptly remarks that "the Namibian Constitution did not fall out of the sky; it is the product of many years of negotiation and political growth."¹ To understand the pivotal role of constitution making in the Namibian peace process, it is necessary to summarize the genesis of Namibian independence.

From mandated territory to independent state

Namibia, the League of Nations, and the United Nations

After World War I and Germany's defeat, the allied powers established the erstwhile German colony of South West Africa as a mandate under the supervision of the League of Nations.² South Africa was given the sacred trust of promoting the material and moral well-being of the less than two million people in the territory. To fulfill this mandate, South Africa was allowed to administer the territory as an integral part of itself and required to report periodically to the League's Mandate Commission. South Africa made such reports, but stopped when the League fell into disarray shortly before World War II. After the war, although the newly established United Nations was not the succes-

sor in law to the League of Nations, South Africa approached it in 1945, asking to have the mandated territory officially incorporated into South Africa. The request was denied, and South Africa was instructed to place the territory under the supervision of the General Assembly and its Trusteeship Council. South Africa refused, leading to a prolonged feud in the United Nations and one of the most protracted legal battles in the International Court of Justice (the World Court).

The South West Africa/Namibia Cases in the World Court

A full explanation of the weighty legal issues raised in the South West Africa/Namibia cases is beyond the scope of this chapter. Suffice it to say that in many respects, the advisory opinions, judgments, and separate opinions of individual judges of the World Court regarding the case influenced and shaped international law on such fundamental issues as the succession and powers of international organizations, international peacekeeping, the jurisdiction of the court, and the international protection of human rights. Since the court's involvement supplied the legal justification for the UN's actions, it is necessary to give an overview of these opinions and judgments. The General Assembly approached the court for advisory opinions on three occasions. In 1950, the court advised that the General Assembly had the competence to request South Africa to place the territory under its trusteeship, although it lacked the power to compel the mandatory to do so. It also advised that the obligations of the mandatory under the new trusteeship agreement should not be more burdensome than the obligations that existed previously. In 1955, the court gave an opinion on the voting procedure in the Trusteeship Council as opposed to the procedure of the former Mandate Commission of the League of Nations. In 1956, a court opinion gave the green

light to the Trusteeship Council to receive petitions directly from the inhabitants of the territory. The court's opinions, although of great persuasive authority, had no binding force, and South Africa refused to give effect to them.

In 1960, Liberia and Ethiopia, two former members of the League of Nations, instituted action against South Africa, requesting the court to declare the forfeiture of the mandate on the grounds that South Africa, by applying its apartheid policies in the territory, had betrayed its sacred trust of promoting the material and moral well-being of the territory's inhabitants. It was hoped that, this time, a court judgment with binding force would compel South Africa to relinquish its claims to the territory, or at least comply with UN demands.³ In 1962, the court judged the preliminary issues and found that it had competence to hear the case. But in 1966, with its president casting the deciding vote, the court held that the applicants had failed to prove a legal right and interest in the matter and declined to give judgment. The result of the judgment was far-reaching. Whereas South Africa hailed the outcome of the case as a legal victory and immediately went ahead with its plans to administer South West Africa as its own province, member states of the General Assembly condemned it vehemently. This led the General Assembly to revoke the mandate in 1966, perhaps more an act of political offense and outrage than a legally sound decision.⁴ In the ensuing years, however, the mandate's revocation not only received Security Council support, but was also finally endorsed by the World Court in its opinion of June 21, 1971. Nevertheless, South Africa completely ignored the revocation.

The Revocation of the Mandate and Growing Internal and International Pressure

Resistance to South Africa's continued presence in the territory grew throughout the

1950s and 1960s, not only internationally but also in the territory itself. The South West African People's Organization (SWAPO), the Ovambo-based liberation force in the territory, started with military operations on the northern borders; with Cuban support, this led to a low-intensity war that continued almost to the end of the peace process.⁵

In the mid-1970s, South Africa realized that with growing international pressure and a multitude of UN resolutions calling for its withdrawal from the territory, as well as the insurgency on the northern borders, the time had come to prepare the territory for independence. However, South Africa still hoped that the territory would adopt a kind of apartheid system of government that would ensure the white population a predominant position by assigning black and colored population groups to ethnic homelands, where they would enjoy the benefits, albeit limited in some important respects, of citizenship without being able to exercise direct power in the central government.⁶ This no doubt explains why the South African government frequently interfered in the Namibian constitutional processes in the years before independence, especially when it perceived that political developments in the territory would cast doubts on the tenability and feasibility of its apartheid policies, not only in Namibia, but in South Africa as well. Stated in very simple terms, what chance did apartheid have to succeed in South Africa if it proved to have failed in Namibia?

The Turnhalle Constitutional Conference and the Democratic Turnhalle Alliance

On September 1, 1975, the Turnhalle Constitutional Conference was convened by the ruling white authority in the territory with the support of the South African government.⁷ The Turnhalle conference was a unique experience with decisive political influence. For the first time in Namibia's history, leaders of

the various ethnic groups were convened to debate the constitutional future of their country. SWAPO refused to participate, however, and the United Nations—both the Security Council and the General Assembly—condemned this exercise in constitution making as an unauthorized act of unilateral independence. Notwithstanding the fierce opposition it provoked, the Turnhalle conference constituted a landmark in the processes of Namibian constitutional development and political emancipation. Conference leaders were taken to the United States, United Kingdom, and Europe, where they met unofficially with members of government and leaders of political parties. In the territory itself, as well as in South Africa, the conference and its deliberations received much publicity and exposure. Mainly through the leadership, charisma, and foresightedness of Clemens Kapuuo, chief of the Hereros, and Dirk Mudge, member of the white delegation and chairman of the conference, a new political alliance of eleven ethnic political parties was formed; it was called the Democratic Turnhalle Alliance (DTA).⁸ Toward the beginning of 1978, the Turnhalle conference adopted a constitution for an interim government,⁹ which was promulgated as law by the South African parliament. The elections that followed were conducted on the basis of proportional representation. Although the interim constitution did not include general principles of good government, it provided for a justiciable bill of rights, a parliamentary regime, and decentralized government in the form of ethnic authorities with certain exclusive competences.

The ethnic component of the interim constitution—which was very much in line with the ideologies of the South African government and the white authorities in Namibia—was a compromise that no doubt discredited the constitution and the Turnhalle conference in the eyes of SWAPO and the United Nations. Both summarily rejected this constitutional draft, but it received overwhelm-

ing support in the countrywide elections held later in that same year. Seventy-eight percent of voters supported the constitution for the interim government, which was soon after installed by an act of the South African parliament.¹⁰ Needless to say, neither the United Nations nor SWAPO recognized the interim government.

A South African Administrator-General

With the installation of the interim government in Namibia, the South African government abolished white representation for Namibians in its own parliament and appointed an administrator-general with wide-ranging legislative and administrative powers to prepare Namibia for eventual independence. The newly appointed administrator immediately abolished some of the most offensive apartheid legislation applicable in the territory¹¹ and remained in Namibia until independence. As representative of his government, he played a most important role in preparing the transition. It was with him that the special representative of the United Nations, Martti Ahtisaari, concluded the agreements of the final phases of the peacekeeping and electoral processes in 1989. The administrator-general also assumed full legislative and administrative functions for the territory when the South African government, in 1983, dissolved the interim government.¹² He promulgated Proclamation AG 8, which retained the ethnic authorities of the interim constitution. In the ensuing year, a multiparty conference with a broader political party representation—still without SWAPO participation—was convened to reach consensus on a new permanent constitution.

Security Council Resolution 435 (1978)

In the years of internal political development and turmoil leading to independence,

and especially because of the activities of the Turnhalle conference and the DTA, there was a growing awareness among some Security Council members that South Africa, after all, was not as intransigent as it previously seemed to be, and that a negotiated settlement on Namibia could well be attempted. This awareness led to the formation of the so-called Western contact group, an unofficial body of representatives of the governments of the United States, France, the United Kingdom, Canada, and West Germany. In 1978, the contact group managed to win the support of the South African government and all the Namibian political parties, including SWAPO, for a comprehensive peace and independence process. The Western contact group's negotiated agreement was endorsed by the Security Council as Resolution 435 (1978); in the ensuing years, this resolution would form the basis for the entire political transition up to the elections and independence. However, South Africa (backed by the United States) refused to have Resolution 435 implemented as long as the Cubans maintained their presence in Angola. At that time, the fear of communist intrusion into Africa was not farfetched, and on these grounds, the reluctance to implement Resolution 435 can be appreciated to a certain extent. The dispute concerning the Cuban presence in Angola dragged on for a full ten years and was resolved only in 1988, when South Africa, Angola, and Cuba entered into a trilateral agreement. Under the terms of that agreement, Resolution 435 was to be implemented and Cuban forces withdrawn in accordance with an agreed timetable.

The 1982 Constitutional Principles

Resolution 435 prescribed the peace process, the conducting of free and fair elections under UN supervision, and the formation of a constituent assembly to draw up and adopt

a constitution for an independent Namibia. The resolution did not, however, indicate at all what the nature and content of such a constitution should be. The internal political parties perceived this as a serious shortcoming. In early 1981, an all-party conference in Geneva tried to reach agreement on this matter but did not succeed. The conference, however, did succeed in the sense that leaders of all the political parties and formations formally came together for the first time to express their views on a future constitution. Through vigorous U.S. initiative, the Western contact group managed to reach an agreement with all the interested parties, including the so-called frontline states—the African states that shared borders with Namibia—the Organization for African Unity, South Africa, SWAPO, and the internal political parties, on the principles concerning the constituent assembly and the constitution for an independent Namibia. In July 1981, these principles, which came to be known as the 1982 constitutional principles, were submitted by the Western contact group in a letter to the secretary-general of the United Nations with the request that both the letter and principles be treated as a document of the Security Council. From the ensuing Security Council resolutions as well as further negotiations between the Council and South Africa, it can be deduced that the principles, although not formally adopted and incorporated into Resolution 435, were effectively considered as part of it. At the constituent assembly's first meeting after the elections on November 21, 1989, it resolved to adopt the 1982 constitutional principles as a "framework to draw up a constitution for South West Africa/Namibia."¹³

Resolution 435 was a remarkable exercise in international strategy and diplomacy insofar as it not only provided the parameters for the conduct of the peace and independence processes but also settled the difficult prob-

lem of a transitional authority. In this respect, the resolution made it clear that transitional authority would remain with the South African administrator-general, who would exercise his powers and functions in conjunction with the UN special representative. Thus, a breach in the transition was avoided and the need for interim governing authorities before independence rendered moot.¹⁴ The abandoning of South African authority during the transitional period also would have created considerable political tension and certainly would have jeopardized the electoral processes. However, although the general political situation during the transitional period improved and, as a result of the administrator-general's abolition of the most offensive apartheid laws, human relations also became more relaxed, there still were mistrust and tensions. These existed not only among the ethnic groups that feared Ovambo domination but also among whites, a large number of whom strongly resented the idea of an independent Namibia and were prepared to express their sentiments by violent means.

The United Nations Transition Assistance Group (UNTAG)

On April 1, 1989, Resolution 435 entered into force. Under it, South Africa would continue to administer the Namibian territory and the administrator-general would organize elections, but UNTAG would supervise and control all aspects of government to the extent required to ensure that the central objective—the creation of conditions for free and fair elections of a constituent assembly—was achieved.

UNTAG, for most of its mission, had about 4,300 military, 1,500 police, and up to 2,000 civilian personnel. At the time of the elections in 1989, UNTAG personnel reached a total of 7,900 with 109 nationalities represented. Total UNTAG outposts, in-

cluding military, were almost 200. UNTAG's task was of a considerable magnitude and is described by Martii Ahtisaari, the Special Representative of the UN Secretary-General, as follows:¹⁵

The [peace] process would move step-by-step, from a cease-fire in a long and bitter war, to the final moment of transition, that of independence. Each aspect—cease-fire, confinement to the base, demobilization, withdrawal of troops, the continuous process of supervising the conduct of the local police, the release of political prisoners,¹⁶ the repeal of discriminatory laws, the adoption of the general amnesty and the return of many thousands of Namibian refugees; then the process of registration for elections, the political campaign, the voting itself—all had to be completed to my satisfaction, as the Representative of the Secretary-General of the United Nations, and in accordance with the Security Council's mandate.¹⁷

The 1989 Elections

Elections for the constituent assembly were held from November 7 to November 11, 1989.¹⁸ Altogether, 701,483 voters registered for the election and 670,830—just over 97 percent—cast their votes. During the elections, on November 9 and 10, 1989, a momentous occurrence took place in Eastern Europe that would directly affect the constitution-making process in Namibia: The Berlin Wall fell, marking the beginning of the demise of communist hegemony. SWAPO emerged as the winner in the Namibian election, with nearly 60 percent of the vote and almost total support by the Ovambo; the DTA polled almost 30 percent, whereas the remaining votes were distributed amongst the smaller parties. In accordance with Resolution 435, the elections were run on a proportional basis, but because the territory, for election purposes, was divided into electoral districts, it was more than evident that SWAPO gained its major support in the northern parts of the territory that were inhabited by the Ovambo.

The DTA defeated SWAPO in many southern districts.

Immediately after the elections, the UN special representative declared them to be free and fair in accordance with Resolution 435, and a seventy-two-member constituent assembly convened for its first session on November 21, 1989. According to principles of proportional representation and based on the outcome of the elections, SWAPO held forty-one seats, the DTA twenty-one seats, and the other five smaller parties ten seats.

The Constituent Assembly and Constitutional Proposals of the Political Parties

Before describing constitutional developments after the elections, it is important to note preceding events that relate to the role of the constitutional council established in 1985. In November 1983, six political parties—excluding SWAPO, the Damara council, and other minor parties—assembled as a multiparty conference to draft a so-called permanent constitution. On April 18, 1984, the multiparty conference reached agreement on a bill of fundamental rights and objectives, which, together with other constitutional proposals, was presented to the South African government along with a call for an interim government of national unity. In 1985, the administrator-general instituted by proclamation the second interim government, following the first interim government that the South African government had installed in 1978. The proposed bill of fundamental rights and objectives was included in the proclamation as an integral part of the constitution of the interim government.

Although instituting an interim government—and especially adopting a bill of fundamental rights and objectives—raised vehement opposition from SWAPO and other political parties, it did serve an immeasurably important purpose in helping to create a human rights culture. Because transgressions of

the bill were made justiciable, a number of major human rights judgments resulted, both in the Namibian courts and the South African appellate division, which remained the final court of appeal for Namibia at that time. The task laid upon the South African court to judge human rights issues was extremely challenging and certainly presented a most important learning experience, especially in light of things to come in South Africa itself. At that stage, South Africa had no justiciable bill of rights and the measuring of laws and governmental acts against the provisions of a bill of rights, was completely foreign to South African law and experience. It is remarkable that the South African human rights decisions that emanated from appeals from Namibia proved, in some cases, to be of major significance, serving as precedents for post-1994 South African legal practice as well as judgments for the situation at hand. The distinction between the legal treatment of human rights in Namibia and South Africa was partly a result of UN oversight in Namibia, but also largely a result of South Africa's realization that the protection of minorities and individuals in Namibia—especially whites, most of whom also had South African citizenship—would depend on a bill of rights.

One of the most important steps that the newly established second interim government undertook was to request the white legislative Council of South West Africa to institute a constitutional council responsible for drafting a national constitution that would ultimately be submitted to the electorate for approval. Some four months after the installation of the second interim government, in 1985, such a council was established to draw up a constitution for an independent Namibia. SWAPO refused to participate, but eighteen other political parties were represented in the body. The council worked for almost two years on a draft constitution. In June 1987, the council's chairman had to report to the cabinet of the interim government that it had failed to

achieve unanimous support for its draft, as four of the eighteen participant parties refused to give their assent. With its clear rejection of any form of institutionalized ethnic categories, the draft constitution also failed to meet the South African government's approval, and was therefore never implemented. The administrator-general abolished the second interim government shortly after that, when the DTA withdrew.

After convening in November 1989, the newly elected constituent assembly immediately invited the participant political parties—that is, all parties that had gained seats in the seventy-two-member assembly—to submit constitutional proposals. The parties all submitted more or less complete constitutional drafts. The proposals of two of the minority parties, the United Democratic Front and the National Patriotic Front, expressly referred to the binding nature and applicability of the 1982 constitutional principles. The DTA proposals were virtually the same as the draft constitution developed by the previous constitutional council, and, as the council kept to the 1982 principles, the DTA proposal conformed to them as well.¹⁹ The constitutional proposals of the two predominantly white minority parties, the National Party and the Action Christian National (which together garnered about 3 percent of the vote), included executive and legislative organs specifically organized on ethnic and racial lines.

The SWAPO proposals were of major significance. In August 1989, the party had circulated its draft proposals in a working document prepared at their Lusaka Institute.²⁰ These proposals reflected East European ideology and constitutional thinking insofar as they emphasized the idea of a party state with party leaders exercising strong influence in both legislative and executive spheres.²¹ A wide range of state and government principles was included without extending binding force or judicial review to them. The original

draft provided for the judicial protection of some basic human rights, but with strong qualifications and extensive governmental powers of derogation and limitation.

Officially, the original SWAPO proposals never saw the light of day; with the fall of the Berlin Wall and the overwhelming signs of a crumbling communist empire, the East European inspiration for these proposals suddenly became extremely suspect. SWAPO then hastily had to convene a drafting committee to draw up new proposals. The proposals eventually submitted to the constituent assembly were contained in a rather untidy document that included almost verbatim many of the proposals of the other participant parties, especially those of the DTA. SWAPO's proposed bill of rights almost literally conformed to the 1984 bill of fundamental rights and objectives of the previous multiparty conference, which drew its inspiration from the UN Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The only element of the original SWAPO proposals that remained related to the rather extensive list of nonjusticiable government principles on socioeconomic and environmental affairs.²²

When the constituent assembly met on November 21, 1989, it was faced with the seemingly insurmountable task of drawing up a constitution from a multitude of proposals. Two breakthroughs of major significance occurred. First, the assembly decided unanimously to adopt the 1982 constitutional principles as a "framework to draw up a constitution for South West Africa/Namibia."²³ Second, Dirk Mudge of the DTA proposed, and the assembly unanimously agreed, that the SWAPO proposals be accepted not as SWAPO proposals, but as a working document that would serve as the basis for the drafting of the constitution. The reason for this unanimous acceptance was obvious.²⁴ All the parties recognized elements of their

own proposals in the SWAPO draft and were quite content to treat the document as a working paper without having to accept it as emanating from SWAPO alone. Ironically, this meant that SWAPO, although the victorious political party with support from 60 percent of the voters, officially had no constitutional proposals on the table. The SWAPO initiative was no doubt a most valuable contribution to the assembly's work, as it consolidated elements of most of the other proposals, albeit in a somewhat crude and untidy form. Moreover, general awareness that the working document emanated from SWAPO produced among SWAPO supporters a perception of credibility and legitimacy for the assembly's work.

Having lived through an extremely stressful year, and having been engaged in a hard election campaign, assembly members were not in the mood to tackle the working document immediately and undertake the arduous task of thrashing out the particulars of a new constitution. The December holidays gave them time to absorb the outcome and effect of the elections, especially among those population groups, such as Herero traditionalists and whites, who found it emotionally difficult to cope with the idea of a mainly Ovambo majority.²⁵

The Drafting Panel of Constitutional Experts

Instead of immediately tackling the working document itself, the constituent assembly appointed a three-member drafting panel of experts charged with presenting to the assembly a constitutional draft early in 1990. Three South African lawyers were appointed: Arthur Chaskalson, Professor Gerhard Erasmus of the University of Stellenbosch, and this author.²⁶ In the assembly, these three members were jokingly referred to as the "men from heaven" who, with celestial wisdom, would have the almost impossible task of preparing the constitutional draft.

It is an intriguing question why the constituent assembly, notwithstanding the fact that an abundance of constitutional expertise was offered to it from all parts of the world, decided to appoint three South African lawyers of whom two were Afrikaners—the Afrikaners being popularly perceived as the original perpetrators of apartheid. On a purely practical level, the answer to this question was quite simple: Assembly members knew that a future Namibian constitution would have its roots in the South African legal system since the common law of the two countries remained the same. Also, the constitutional law and traditions of both countries were similar. On a deeper level, the choice of South African lawyers might well have been the result of rather strong suspicions toward the “outside world.” In particular, the turmoil in Eastern Europe after the fall of the Berlin Wall created the sentiment that the Namibian constitution should not be the product of some foreign experiment. Assembly members conveyed to this author the view that “we should rather have some of our own people, and South Africans and we are family.” It should also not be forgotten that Afrikaans was and still is the lingua franca of Namibia and is well understood by most members of the population, although all the proceedings of the constituent assembly and constitutional committee were conducted in English. Moreover, the assembly realized that appointing South African lawyers would go a long way toward dispelling mistrust in the entire constitution-making process, especially among white members of the population.

The drafters met in Johannesburg toward the end of December 1989 and the beginning of January 1990, drawing up a draft of the complete constitution based on the working paper. Because the working paper, in certain respects, was incomplete and lacking in detail, the drafters had to augment it in their drafting. These lacunae in the working paper

related mainly to states of emergency and national defense, powers of the president, and, particularly, matters concerning local and regional government. An entire chapter on the second house of parliament, the national council, its composition, and its powers of review also had to be drawn up. In addition, and apart from necessary transitional provisions regarding the application of existing laws and regulations, provision had to be made for implementing the new constitution, especially as far as election of the national assembly and the president was concerned. In the latter regard, the drafters proposed that the members of the constituent assembly become the members of the new national assembly, which should elect the first head of state. After the first term of office, the president would be elected directly by popular vote. In conjunction with the constitutional draft, the drafters compiled a memorandum to explain precisely the scope and meaning of each article and provision of their draft. This memorandum was submitted to the assembly together with the draft constitution.

The Constitutional Committee

In mid-January 1990, the draft constitution was submitted to the constituent assembly and immediately referred to a specialist constitutional committee for scrutiny, discussion, and preparation of a final draft.²⁷ The twelve-member committee was proportionally composed of representatives of the political parties in the assembly. The committee began its work on January 16, 1990, in closed sessions to debate the draft with the panel of drafters. Hage Geingob, who was to become the first prime minister of independent Namibia, was elected the committee's chairperson.

On January 22, 1990, the constitutional committee unanimously adopted the full draft constitution and referred it to the constituent assembly for deliberation and adoption. The assembly unanimously adopted the

draft on February 9, 1990. The work of the constitutional committee was carried out in camera without any direct press coverage. The reason for this secrecy, no doubt, was to aid the members in reaching consensus. Wide-ranging behind-the-scenes negotiations took place during the committee's deliberations, as it was felt that public exposure at such a sensitive stage could jeopardize the process. However, there was extensive press coverage of the debates in the constituent assembly, and the proceedings were open to the public. Given that all the political parties were represented in the constitutional committee, very little debate and certainly no major disagreement occurred in the assembly; unanimous support for the draft was reached without any difficulty.²⁸ When the constituent assembly met in February 1990 for the final adoption of the constitution, it had no fixed timetable. However, because consensus was reached in the constitutional committee, it took little more than a week for the assembly to adopt the final constitution. More important was that the assembly already had decided on the day for Namibia's independence—March 21, 1990—which assuredly made drawn-out debates in the assembly impossible.

Discussions in the constitutional committee were generally of a high standard and the atmosphere most cordial.²⁹ Approved amendments were referred to the drafters, who, during the same night, would reformulate new provisions and present them to the committee.³⁰ Very few modifications of substance were made; the most important concerned the position of the president vis-à-vis parliament. The draft suggested that the president should also be a member of parliament, but the committee decided on a nonparliamentary head of state. Most of the other modifications were of a technical or editorial nature.

Another noteworthy aspect of the committee's deliberations was that SWAPO members constantly expressed individual opinions and convictions and were not afraid

to contradict their other SWAPO colleagues. It was apparent that SWAPO members were not burdened with fixed party directives, which lent much openness to the discussions. In only one matter the SWAPO members expressed their views in concert and clearly under a party directive, namely that the future president should not be a member of the national assembly.

Having discussed and approved every article and provision of the draft constitution, on January 22, 1990, the constitutional committee unanimously approved the draft as a whole and referred it to the constituent assembly.³¹

Adoption of the Constitution and Independence

After a discussion of the constitutional committee's draft constitution, the constituent assembly unanimously approved Namibia's constitution on February 9. Amendments to the draft in the assembly related mainly to grammatical and editorial matters and did not in any way alter the substance. With the new constitution meticulously tested against the 1982 constitutional principles, the secretary-general of the United Nations reported to the Security Council on March 16, 1990: "The Constitution is to enter into force on Independence Day. As the fundamental law of the sovereign and independent Republic of Namibia, the Constitution reflects the 'Principles for a Constituent Assembly and for a Constitution for an Independent Namibia' adopted by all parties concerned in 1982."³²

On March 21, 1990, Namibia became independent; the constitution entered into force; the newly elected president, Sam Njoma, was sworn in by the UN secretary-general³³; and the new government assumed office after having been sworn in by President Njoma. The constitution provided for a justiciable bill of rights and freedoms as well as a non-justiciable set of principles of state policy. It is noteworthy that under the constitution, the

fundamental freedoms may not be diminished or detracted from. An electoral system of proportional representation underpinned the universally elected executive presidency as well as the national assembly. A prime minister became elected by the national assembly from its own members, and a cabinet of ministers was appointed by the president from members of parliament. Decentralized government was instituted in the form of regional councils, the members of which were also elected proportionally within defined constituencies. A national council, elected by members of the regional councils, would in the future form the upper house of parliament. Other important institutions created by the constitution were the ombudsman, a public service commission, and a security commission. Finally, the constitution safeguarded the independence of the judiciary. On the strength of the November 1989 elections, SWAPO gained 62 percent of the seats in parliament. President Njoma became the first head of state, also elected by the national assembly. The transitional provisions of the constitution that converted the constituent assembly into the first national assembly (the number of seats in both assemblies being the same) and provided for the first president to be elected by a majority in the national assembly were necessary to have the major institutions in place by independence. It was quite correctly realized that fresh elections for the newly instituted organs of state would amount simply to a repetition of the November elections; also, at that stage, they would have been infeasible and totally unnecessary.

The extremely successful outcome of the Namibian constitution-making process proved beyond doubt that constitution making could be a potent element in reducing conflict and building peace and national reconciliation. But what were the salient features of the Namibian constitution-making process? Does it hold any lessons for other countries and especially African countries? Did

it influence South Africa's own constitution-making and peace-building processes?

The Central Role of Constitution Making in Conflict Resolution in Namibia

The effect of the Namibian constitution-making process in resolving both internal and external conflict and in facilitating a peaceful transition to independence must be viewed in its particular Namibian context of past systems of government, the land, and its people.

In colonial times, the entire country fell directly under the authority and powers of a German governor. German administration, however, did not extend fully over the territory; the northern parts of Ovambo, Kavango, and Caprivi fell above the so-called red line, which meant that there were no settler farms and very little colonial administration in those parts. When South Africa took up its mandate in 1919, more or less the same administrative arrangement was retained. In 1924, the territory was given a constitution, drawn up and passed by the South African parliament, which provided for limited self-rule under the overall sovereignty of the South African parliament. This self-rule was given to the white part of the population only, with no provisions for power sharing with other population groups. In 1968, acting under the erroneous belief that it had won the South West Africa/Namibia case in the World Court, the South African parliament adopted a new constitution for the territory, under which Namibia virtually became a fifth province of South Africa. Again, whatever vestiges of the former self-rule remained were left in the hands of Namibia's white population. This direct takeover of the Namibian government certainly was also inspired by the policy of dividing Namibia into various ethnic homelands on the same lines as the apartheid policies in South Africa.³⁴ However, the constitutional

situation changed drastically in 1978 when, in preparation for eventual independence, the 1968 constitution was repealed, the administrator-general was appointed to take direct control, and Namibian representation in the South African parliament was terminated.

In short, it can be deduced that apart from its unofficial constitutional processes, Namibia had its fair share of constitutional vicissitudes. However, population groups other than the whites had little or no experience of these constitutional arrangements and manipulations since, for the most part, their homeland governments were under the direct authority of commissioners-general who were South African-appointed officials. Although some members of the homeland governments were elected,³⁵ most of these members were traditional leaders. It could be said that until the advent of the Turnhalle conference, formal political life among the peoples of the territory was extremely underdeveloped, except, of course, among the white population.

On the other hand, informal political organization in the territory was alive and well. These political organizations and activities were, in the main, directed against the South African administration and the application of apartheid policies. In earlier years, under the League of Nations and more so when the United Nations asked for a trusteeship agreement, the Hereros played a major role under the leadership of the famous chief Hosea Kotako and later under the leadership of chief Clemens Kapuuo.³⁶ In later years, when the Hereros and chief Kapuuo took a more conciliatory attitude and declared themselves willing to participate in internal political and peace processes,³⁷ SWAPO increasingly took over active resistance; in the beginning of the 1970s, it started a campaign of military operations and incursions, operating mainly on the Angolan side of Namibia's northern borders.³⁸

To grasp the impact of the Namibian constitution-making processes, a few explanatory remarks on the land and its peoples should also be added. Namibia is a vast, largely arid and desert country. It is sparsely populated, with fewer than two million people.³⁹ The majority of its inhabitants live in the northern parts of Ovambo, Kavango, and the Caprivi—the regions that fell outside the original field of German government administration and to this day consist of tribal land with no commercial farming. For many years, Ovambo workers moved to the south as laborers on farms and in the fishing industry under former migrant worker regulations. The Hereros constitute another dominant traditional group, mainly in the central parts of Namibia; they are fiercely traditional and led the war against the Germans, who severely reduced their numbers in these military clashes. The Damara, probably one of the oldest groups in the territory, were subjugated mainly by the Hereros, and in the process lost their original language. Interestingly enough, they form a heterogeneous group that had much contact with and an understanding of most of the other groups. The Tswana are a small group who originally migrated from neighboring Botswana. The Bushmen are Khoi-San people and certainly the original inhabitants of the territory; they led a nomadic life and were the most marginalized of all the groups. The white population is mainly comprised of descendants of German settlers and South Africans who came to live in the territory after the conquest of Namibia by South African forces in 1915.⁴⁰ In many respects, the various Namibian ethnic groups have some deep ethnic and other cleavages among them. On the other hand, through the development of advanced transport and communication systems in the country,⁴¹ there was a widespread mutual understanding not only of their differences, but also of the common ground they shared.

In the context of Namibia's history, politics, peoples, and progress to independence, the process of conflict resolution and peacebuilding in that country went hand in hand with constitutional reform and constitution making; the latter processes were the means and, in essence, the vehicles for conflict resolution, peacebuilding and national reconciliation. Of course, some issues could not be resolved by constitution making alone and had to be dealt with conjunctively to sustain and strengthen the peacebuilding process. The termination of the border war and the conclusion of a peace agreement were of vital importance, and the abovementioned trilateral agreement among Angola, Cuba, and South Africa to withdraw Cuban forces created the necessary conditions for constitution-making to proceed. The creation of these conditions for peace, although not directly related to constitution making, was not entirely divorced from it; the political parties engaged in the making of the constitution were constantly informed of these developments and indeed attended some of the meetings at which the termination of the war was discussed.

Another issue that could not have been resolved by constitution making alone was the matter of the South African government's presence and role during the period of transition to independence. This depended on an agreement concluded among Namibia's de facto government, South Africa, and the United Nations. As mentioned above, this agreement, which materialized in the form of Resolution 435, was negotiated with all the interested political parties as well as the Organization for African Unity and the so-called frontline states. Some of these transitional arrangements eventually found application in the constitution, but they were not part of the constitution making itself.

The Namibian experience teaches that participants in a constitution-making process must agree and believe that constitution

making is a valid and important means of achieving peace and creating conditions for stability and national reconciliation. From this, it flows naturally that such participants must know what a constitution and its impact on the affairs of state are. This does not mean that members of constitution-making bodies should all be constitutional experts; it is important to have trusted constitutional advisers and expert committees to support and guide the constitution-making process and also formulate agreements and decisions in constitutional terms, without forcing their ideas on the constitution-making body or manipulating the process. In this respect, the Turnhalle Constitutional conference of 1975–78 provided valuable lessons. In that conference, excepting the members of the white legislative assembly, who through their training and experience in that body had considerable knowledge of constitutions, almost all the other members were from ethnic authorities with little or no knowledge of constitutions and constitution making, as their homeland constitutions had been drawn up for them by the South African government. The Bushmen delegates had absolutely no experience because there was no homeland authority for them at all; the delegates themselves were mostly illiterate and had little experience of modern towns and life. Similarly, the Tswana also did not come from a tribal authority, but were members of a small fledgling political party. The Damara ethnic authority, the Damara Council, refused to participate. To have Damara representation at the conference, members of a small Damara opposition party were invited. All the delegations had constitutional advisers, mainly South African lawyers and academics, assigned to them—or, more precisely, the South African government told the homeland authorities whom to appoint as their advisers.⁴² This author was approached by the Damara and Tswana delegations them-

selves, admittedly, in the beginning, with the tacit consent of the conference conveners, the white legislative assembly.⁴³ The constitutional advisers had regular meetings with their respective delegations and drew up proposals for them. They did not participate directly in conference deliberations, but followed the proceedings through microphones in an adjoining venue.

A major breakthrough occurred in the Turnhalle conference's first week, when it adopted a declaration of intent in which the delegations declared themselves to be the true representatives of the Namibian people and took it upon themselves to exercise their right of self-determination by adopting a constitution for their country. A constitutional committee of representatives of all the delegations was elected under the chairmanship of Dirk Mudge. In the following two years, however, the full conference assembled only sporadically, and the constitutional committee carried out the main work and deliberations.

There is every reason to believe that the Pretoria government and some members of the host body, the white legislative assembly of South-West Africa, had previously drawn up a draft constitution. This constitution, drafted on classic apartheid lines, was to create a United States of South-West Africa with self-ruling homeland governments and a rather weak central authority to look after matters of common interest. In this federation of states, the white second-tier government would be assured of a dominant position. The South African government, no doubt, thought that by presenting the United Nations with a homeland-based constitution endorsed by the constitutional conference, it would satisfy the demands that the peoples of the territory must themselves exercise their right of self-determination.⁴⁴

The South African government's original scheme for a Turnhalle constitution—a federation with ethnic state components—never saw the light of day, mainly due to

the initiatives of the Damara and Tswana delegations. Soon after the constitutional committee's work commenced, these delegations presented the conference with a draft constitution for an independent Namibia, comprising a bill of rights and providing for universal franchise and judicial review of all governmental laws and practices. Instead of ethnic governments, it proposed a federation of northern and southern regions with two autonomous legislatures and governments for each of these two regions, as well as a central government composed of representatives of the two regional legislatures and governments. The Damara and Tswana proposals met with outrage on the part of some of the white delegates,⁴⁵ but had the overall effect of diverting plans for a federation based on ethnic systems of government.

Eventually, when the Turnhalle constitution was adopted in 1978, it contained the Tswana and Damara proposal for a bill of rights, but found a compromise in proposing second-tier governments, not to be exclusively territorially based, for the various ethnic groups. These governments would have exclusive jurisdiction over the so-called special affairs of each ethnic group. What constituted special affairs for each group became the bone of contention that eventually led Dirk Mudge and his followers to break away from the white ruling party. The latter's insistence that matters such as agriculture and transport should remain special affairs, even though these matters were clearly geographically defined, proved that at the end of the day, the ruling white party was not prepared to engage in meaningful power sharing with other groups. The other fundamental point of divergence between the ruling white party and Mudge and his followers was the ruling party's refusal to enter into alliance politics with the other groups.

What is of paramount importance, however, is that the Tswana and Damara delegations, at the time of the Turnhalle con-

ference and also in later years, engaged in serious debate among themselves and other delegations on the meaning and importance of a democratic constitution. Evening lectures, seminars, discussions, and workshops were held on a wide range of topics pertaining to constitutions and constitution making, as well as many substantive issues such as the opinions and judgments of the World Court, systems of government, the role of political parties in a multiparty democracy, the international protection of human rights, the role of the United Nations in Namibian affairs, and many other subjects. As a result, in the conference debates, members of these delegations expertly discussed constitutional matters, even when some members of the white delegation wanted to exasperate them with seemingly superior knowledge of these matters. When the Tswana and Damara delegations released their constitutional draft, they held an international press conference at which they discussed and explained their proposals, on their own, with considerable knowledge, understanding, and insight. The infusion of constitutional expertise into the debates tremendously enhanced the level of discussion. It was most encouraging and indeed heartwarming that even the Bushmen delegation started to participate on its own.⁴⁶

At the time of the DTA's formation, a parallel process of unofficial constitution making, albeit of a more political nature, was also taking place. As was mentioned above, the delegations other than the whites were mostly representatives of ethnic authorities and did not represent political parties. Even the Damara and Tswana delegates, who formally represented political parties, had a very rudimentary form of party organization. The DTA was founded as an alliance of political parties, however, which necessitated the drawing up of the political parties' constitutions and their adoption by the party leaderships and annual congresses. Constitutions for all the alliance parties were negotiated and

adopted, including for Dirk Mudge's Republican Party. This parallel process of developing party charters was of significance to the later official constitution-making process because it emphasized the normative and overriding force of constitutions in regulating matters of governance. In addition, the charters required the creation of political party manifestos, in which participation in the official constitution making for a future democracy was contained as a clear goal. In other words, all the political party charters prepared the parties for the constitution-making process.

In the years following Turnhalle, constitutional debate pervaded the political scene and influenced all political developments. The place and importance of a constitution in a democratic system, as well as the vital elements for its protection, were constant themes in the 1978 elections and all the political campaigns leading to the final elections in 1989. In the debates and decisions of the 1985 constitutional council, constitution making was the central issue, and the local press regularly reported on constitution making and constitutional issues.⁴⁷

In the DTA's election campaigns and party propaganda, it as well as most other internal political parties insisted that a constitution had to be written in the hearts and minds of people to become a living document. Events in Namibia before the advent of the final constitution making certainly fostered this conviction.

Another lesson to be learned from the Namibian constitution-making process is that a future constitution must be inspired by an abiding ideology, or more ideally, a clear definition of the nature of the state that the constitution is to govern. For Namibia, this clear definition was provided by the 1982 constitutional principles, which laid down that "Namibia will be a unitary, sovereign, and democratic state." Over and above the other specific instructions of the 1982 prin-

ciples that relate to the binding force of the constitution, the organization and powers of all levels of government, the electoral system, the protection of human rights, and the structuring of public services and local and regional government,⁴⁸ the constituent assembly had to ask itself constantly whether a specific proposal would serve the goal of founding a democratic state. This constant questioning found practical application, for instance, when the tenure of the head of state was discussed and it was unanimously agreed that a life presidency or a presidency for more than two terms of office would be contrary to the tenets of democracy. The 1982 constitutional principles were the guiding star of the assembly's deliberations. They came to be known as the "holy cow" in the deliberations of both the assembly and the constitutional committee. Each time it was perceived that a proposal would offend the "holy cow," the chairperson would immediately rule the proposal out of order.

Another rather obvious but essential element of the success of the Namibian constitution-making process was that all participants expected the process to benefit their parties and themselves in some way. Stated differently, all participants, for some reason or other, assumed ownership of the process. Except perhaps for the three white members of the erstwhile ruling National Party,⁴⁹ who still harbored nostalgia for the continuation of a constitutional connection with South Africa, all the other parties were fiercely patriotic and adamant about eventual Namibian sovereignty. By their total rejection of any kind of ethnic divisions of the country, they fully supported and indeed strongly propagated the concept of a unitary state. It can be said safely that these parties all entered the elections as true freedom parties: All of them realized that the foundation of a sovereign, unitary, and democratic Namibia would depend on the outcome of the constitution-making process, and were therefore bent

on making the process successful. SWAPO not only supported the constitution-making process wholeheartedly, but simultaneously pushed for its timely conclusion because it knew that the coming into operation of an independence constitution was a prerequisite for SWAPO's entry into government. Once a date for independence was set, a prolonged and protracted process of constitution making would have been extremely perilous, as it would have been perceived as a means of deliberately obstructing SWAPO's accession to power. The minority parties also understood the benefits that successful constitution making would hold for them, namely, a system of government under which political freedom would be assured. Adopting a binding and justiciable bill of rights would safeguard the personal liberty and security of all the minority parties' supporters in the face of possible abuse of power by the majority.⁵⁰

The constitution contained two other elements that attracted support for it from most citizens and assured its legitimacy among the broad population; these elements made the population feel that it was their constitution. The first was the constitution's express affirmative action article, which provided that, notwithstanding the constitutional prohibition on different forms of discrimination, the parliament could enact laws that provided directly or indirectly for the advancement of persons who had been socially, economically, or educationally disadvantaged by past discriminatory laws and practices. In this respect, the position of women was explicitly mentioned. The second element that assured broad popularity was a chapter on so-called principles of state policy. Although not enforceable in a court of law, these principles gave the constitution a definite programmatic character and enjoined the government to promote the welfare of the people as well as take care of a broad range of other matters, such as foreign relations and the country's economic order.

Structure of the Process

In Namibia, the 1982 constitutional principles simply provided that “in accordance with UN Security Council resolution 435(1978), elections will be held to select a Constituent Assembly which will adopt a Constitution for an independent Namibia” and that “the Constitution will determine the organization and powers of all levels of government.” Nothing further was added about the way the constituent assembly would go about drafting the constitution, setting a timetable, or implementing the document—nor were any such provisions really necessary. There was a general realization that the parties in the assembly, as a result of the considerable constitutional expertise and acumen gained in the years leading up to the elections, would know how to proceed and reach agreement on these matters. Moreover, it was apparent that the time was ripe for Namibian independence and that most parties would press for the constitution’s expeditious drafting and adoption. The way that the constituent assembly dealt with the rather vexed questions of installing the new government, applying the new constitution, and declaring independence bore ample witness to the assembly’s astuteness and readiness to assume ownership of its own constitution-making process.

Other countries, as a result of their particular circumstances and preceding events, had to initiate and further strengthen their constitution-making processes, first by appointing a constitutional commission, then by electing an interim authority. Namibia, however, as a result of the experiences of the preceding years and especially through the internal constitutional and political developments that took place, was geared for the structuring of a relatively simple and efficient constitution-making process: the straightforward election of a constituent assembly, which, it was realized, would be well equipped to proceed with the process on its own.

Public Participation in the Process

There was little direct public participation in the process in either the years preceding the final constitution-making phase in Namibia or the final phase itself. Referendums and plebiscites were not part of the Namibian constitution-making process, except a plebiscite organized for white voters in May 1977 to ask them whether they favored the installation of an interim government and independence of the territory on the basis of a constitution to be adopted by the Turnhalle Constitutional Conference. Some 95 percent of the white voters answered in the affirmative. A referendum was held at that time because the leaders of the white legislative assembly wanted to give force to the deliberations and decisions of the Turnhalle conference but on their conditions, namely, the adoption of an interim constitution drawn up on the lines of ethnic governmental structures. Mudge and his followers were strongly opposed to the idea of a referendum for the white electorate only. The plebiscite’s effect was largely overtaken by subsequent events, especially the adoption of Resolution 435, but, importantly, it conditioned white voters’ minds by preparing them to accept the idea of eventual Namibian independence.

However, indirect public participation in the Namibian constitution-making process was intense and stretched over many years, reaching its climax in the 1989 elections. This indirect public participation underpinned the elections of 1978 and 1989, as elections and election campaigns clearly would be meaningless without public participation. Election campaigns in Namibia were extensive, and party political meetings and rallies drew thousands of people, even in the remotest parts of the country. Political rallies and meetings—especially those of the DTA—were huge social events, with food, song, and dance. The border war made some of the rallies in the northern areas rather perilous at

times, but on the whole, these political events infused the country with social activity never before experienced on that scale. In addition, advanced communication systems spread political messages over the whole land. In pre-independence days, SWAPO conducted a network of radio services from outside Namibia's borders. SWAPO was never banned formally in the years leading up to the 1989 elections, but its leaders were constantly harassed and even imprisoned, making political life and open participation extremely difficult, if not impossible. Overall, the Namibian population was saturated with political propaganda and information, much of the latter relating to constitutional matters and the content of a future constitution for an independent Namibia.

The process of constitution making must be driven by elites. It cannot be conducted and successfully concluded solely by popular initiative and mass movements. Elites have to plan, conduct, and conclude the process of constitution making, although, admittedly, this process must, for its ultimate legitimacy, be continuously sustained by popular support. Because political parties in Namibia were the major actors in planning and conducting the constitution-making process, while at the same time vying for popular support, a word should be added about the political party leadership in that country. For a long time, the white population supplied the strongest political party leadership, and largely because of their dominant position, its leaders constituted the elites of Namibian society. Most of the SWAPO leadership and elites had to flee the country during the years of transition, and some of them were imprisoned. This created a gap among the elites of the country. Among the other population groups, there were very few political elites, except for some traditional leaders such as chief Clemens Kapuuu and a few others, who as a result of their political engagement and personal qualities of mod-

ern leadership, transcended pure traditional leadership and achieved elite political stature. The DTA—and more particularly, the white alliance party of Dirk Mudge, the Republican Party—was the major factor in broadening the basis of the Namibian elite among the other population groups by drawing their leaderships into the alliance. Without this broadening of the Namibian elite, the final phase of the constitution-making process would not have had its successful outcome. Though it might have become politically incorrect to acknowledge the crucial role of some of the white elite, the success of the Namibian constitution-making process must to a large measure also be ascribed to Mudge and his followers, who not only wholeheartedly immersed themselves in the liberation movement, but also created the opportunities for many other political leaders to join in the class of Namibian elites.

Receiving information surely also constitutes a form of public participation, albeit a more passive one. The Namibian media and particularly its press played an important role in this regard. Over the years, Namibia had a well-developed radio system, and radio stations operated in the languages of the various population groups. In the preindependence years, SWAPO's radio station, the Voice of Namibia, broadcasted extensively from Zambia. Namibia always had a relatively large number of newspapers, given its small population numbers. Apart from the Afrikaans press, there were also newspapers in English and German as well as newspapers in some of the indigenous languages, though these were mainly supplements of the Afrikaans and English press. In 1978, the newly formed DTA started its own party mouthpiece, the Republican Press, which in later years took over the German and one of the English newspapers to become the strongest press company in the country. Understandably, the Republican Press of the DTA, in its

early years, was fiercely partisan, but after independence, it became more neutral without entirely losing its character of being, if not in direct opposition, then rather critical of government. Television service became available in the country toward the end of the 1970s and was a forceful instrument in informing the population about political developments.

In the period leading up to the elections of 1989 and during the time of implementing Resolution 435, UNTAG also provided extensive information services. A total of forty-two regional and district centers were established and provided the necessary information network to assist in the process of reconciliation. In addition, the UNTAG information service produced 32 television programs and 201 radio programs in thirteen languages; it also distributed 600,000 UNTAG shirts, buttons, stickers, pamphlets, and posters. UNTAG regional and district officials spoke to local opinion formers, political parties, churches, and farmers, and directly contacted the people. Admittedly, the UNTAG information campaign was not about constitution making, but it reinforced the constitution-making process tremendously in that it propagated the idea of free and fair elections for all. Such elections, of course, were an absolute prerequisite for the constitution-making process that was to follow.

At least in indirect forms, public participation in the overall constitution-making processes was so wide-ranging and intense that additional ratification of the final constitutional draft by means of a plebiscite or referendum was seen as unnecessary. It can safely be said that public education in Namibia on constitutional matters, including the contents of the final constitution as well as future public participation in political affairs, was so effective that the legitimacy of the final independence constitution was ensured by the time the constituent assembly adopted it. Moreover, the nature and compo-

sition of the assembly and public respect for that body made an additional act of ratification seem superfluous.

One proposal, considered by the committee and rejected, has some potential relationship with public participation: that the constitution be subjected to a periodic review process. Some authorities have suggested that such a procedure could be the occasion for public participation on an ongoing basis, which in some cases could offer opportunities for participation over and above that associated with adopting the final text. The proposal was rejected because the committee feared that such a procedure would create the impression that the constitution was a precarious document that needed to be amended and changed. The committee feared that the creation of such an impression might encroach on the fundamental character of the text.

Democratic Representation

In Namibia, the question of democratic representation in the constituent assembly was not a bone of contention. It was simply agreed during the peace negotiations that the various political parties would be represented in the constitution-making body. This longstanding agreement eventually found its place in Resolution 435 and the 1982 constitutional principles. The elections for the constituent assembly established the distribution of power among the political parties and could not be contested, as the UN special representative certified the elections to have been free and fair.⁵¹

At the commencement of the UNTAG operations, the relationship between the UN special representative and the interim authority, the South African administrator-general, was somewhat strained. Over time, however, the relationship became increasingly cooperative.⁵² The constitution contains a remarkable provision regarding the administration of the

administrator-general as well as the previous South African administration, stating⁵³ that “nothing contained in this Constitution shall be construed as recognizing in any way the validity of the Administration of Namibia by the Government of the Republic of South Africa or by the Administrator-General appointed by the Government of the Republic of South Africa to administer Namibia.” This was a rather clever legal device to solve (or sidestep) the vexed problem of, on the one hand, accepting the continuation of existing laws and regulations and not creating a break in the evolutionary development, and on the other hand, acknowledging the idea, which SWAPO held very strongly, that the South African administration was illegal after the mandate had been revoked. In law, the provision did not affect the actual application of the relevant laws and regulations because it did not declare them invalid, but merely refused to recognize them as valid. In legal theoretical terms, this provision is a textbook example of the so-called *Normative Kraft des Faktischen*—the normative force of an existing factual state of affairs.

The Namibian constituent assembly made no provision for any kind of representation on the basis of ethnic origin. This did not mean, as explained above, that there were not marked ethnic divisions in Namibia. Active party politics to a large measure resolved this difficult and potentially explosive element. SWAPO, although predominantly Ovambo, included in its voting list many members of other ethnic origins, and some of these members held important positions in the party and later government.⁵⁴ Whereas SWAPO’s voting list basically was composed on the strength of candidates’ rank and position in the party, the DTA’s list, in accordance with its alliance nature, allotted an equal number of candidates to the respective alliance parties. In this manner, equal ethnic representation in the constituent assembly was assured. The political party solution to the vexed

question of ethnic representation certainly relieved the assembly of a massive burden; the matter presented no hurdle in deliberations about the future constitution. With respect to the DTA in particular, affording the various ethnically based political parties an equal status in the alliance defused any possible ethnic conflict within its ranks.

The Namibian experience also offers a lesson for dealing with a political party or group that refuses to join in the constitution-making process. With the support of the UN General Assembly, SWAPO refused to be part of the internal constitutional processes until the final stages, once Resolution 435 was implemented. This refusal by SWAPO, however, did not deter the other parties from proceeding with their constitution-making efforts. In the end, these efforts bore fruit and certainly contributed to the ultimate success of the country’s final constitution making. The lesson to be learned is that where groups and parties are prepared to engage themselves in constitution-making processes for a future democracy, such initiatives should be encouraged. Eventually, it becomes almost inevitable that recalcitrant groups and parties, especially with the encouragement and even coercion of the international community, will follow the course of events and join in the process. Admittedly, this approach can prolong the constitution-making process, but it will help ensure its ultimate legitimacy.⁵⁵

The Timing and Sequencing of the Constitution-Making Process

Timing issues have been addressed above and need only be summarized. First, in Namibia, the conclusion of a peace agreement and the Cuban withdrawal of its presence in Angola were preconditions for applying Resolution 435 and certainly created a propitious climate for the country’s final phases of constitution making. The fortuitous crumbling of the Soviet and communist hegemony was

a factor that saved the Namibian constitution from many complications and burdens of political ideology.

Second, the prolonged process of Namibian constitution making no doubt gave internal parties much opportunity to activate political life and strengthen and position themselves. It must be emphatically stated that a multiparty democracy in Namibia would have been impossible if internal parties were not afforded these opportunities, as a political culture of multiparty democracy does not come easily, especially in African countries.

Third, the final phase of constitution making in Namibia was remarkably quick. The speed with which the process was concluded must be ascribed to the host of internal and external factors described above, and was not achieved merely because, at a given point, interested parties agreed to draft a constitution for an independent Namibia.

Fourth, the final Namibian constitution emanated from a single draft, drawn from the constitutional proposals of the various parties—which was possible because the proposals contained considerable points of convergence. In a very real sense, the elections for the constituent assembly served three purposes: first, to elect an assembly; second, to inform the electorate what would be the content of the future constitution; and third, to elect a future government. This explains why the assembly had the legitimacy necessary to form the new independence government. When the constituent assembly was convened in November 1989, voters and political leaders already knew who, from a political point of view, would be the future government; the constitution was needed to legalize this future government. This was certainly a factor that serves to explain why the process moved so smoothly and expeditiously from that point.

Fifth, Resolution 435, which underpinned the peace process in Namibia, was also the guiding light in the constitution-making

process. This is understandable, as Resolution 435 was the concrete outcome of a long and complex process of peacebuilding, international diplomacy, negotiation, and agreement. Put very succinctly, it could be said that a country in transition, for its constitution making, ideally should have some type of road map such as Resolution 435.

Sixth, Namibia had its fair share of interim constitutions and notwithstanding their imperfections and lack of acceptance, they were crucial in all the phases leading up to the final constitution making. The effect and overall value of these interim arrangements speak from the above.

Finally, the role of the internal parties in Namibia during the time when the conflict was still raging and the international disputes continued unabated proved to have been of the utmost importance. Attempts at constitution making in the 1970s were initial efforts that exercised a beneficial influence in the final phase. The Namibian case demonstrates the potential benefits for a country in transition of beginning the process of constitution making as early as possible, even though such early constitution making may be rather hesitant and rudimentary.

The Role of the International Community

From the end of World War I, the organized international community's part in Namibia's journey toward independence was all-pervasive and encompassing, culminating in the implementation of Resolution 435 and the deployment of UNTAG. The international community's involvement in Namibia's affairs was, of course, a direct consequence of the territory's international status.

Namibia's international status flowed from the mandate system, and although South Africa fiercely denied it for a long time, this system was the justifying and determining factor for international preoccupation with

the territory. What should not be forgotten is that, before independence, Namibia represented the last vestige of colonial rule in Africa. This raised much emotion among Third World countries in the UN General Assembly, especially among African members. To them, what was infinitely worse was South Africa's continued occupation of Namibia, widely labeled as illegal after the revocation of the mandate. The South African government itself became branded as "colonialism of a special kind." Also, the buildup of the Cold War after World War II increased and intensified the Namibian conflict. Support for the Namibian cause became the yardstick against which East and West identification with anticolonial movements and causes was measured.

In those years, and especially in General Assembly debates, South Africa's presence in the territory and obduracy in the matter were constantly branded as threats to world peace. This was certainly far-fetched, but it has to be understood in the context of the United Nations. The UN's peacekeeping powers are well defined in its Charter and mainly reserved for the Security Council. Over the years, however, the General Assembly became more and more anxious to exercise peacekeeping competences and to bypass the hurdle of a Security Council endorsement. When, in the 1960s, the Third World members of the General Assembly became dominant, these new members understandably tried to assume more and more peacekeeping powers on behalf of the Assembly. Their identification of threats to world peace raised the expectation that the Security Council would become operative and discard its lethargy. In the case of Namibia, the matter was extremely sensitive. Neglect of the General Assembly's demands to have the Namibian conflict treated as a threat or potential threat to world peace subjected the Western members of the Security Council to severe censure for supporting the white racist South Afri-

can regime. This, of necessity, could severely damage relations with the Third World and nonaligned countries. All these reasons explain why the Western contact group was so concerned to have Resolution 435 accepted by all interested parties and be put into operation. Namibia, certainly, was not a country of major importance, but the political implications of the dispute there were immense and had international dimensions.

Fortunately for Namibia, the involvement of the organized international community ultimately was spearheaded not by the General Assembly—with its at times disproportionate political emotions—but by the Security Council and, more particularly, the Western contact group. The Contact Group's even-handed and diplomatic treatment of the Namibian problem was to a large measure the reason for its successful outcome. Similarly, the role of the then secretary-general of the United Nations and his balanced way of dealing with the obstacles as they arose deserve credit. Namibia's former international status as a dependent territory was terminated at the time of independence when the country acceded to its new international status, that of a sovereign independent state and full member of the family of nations. Recognition of Namibia's independence on the basis of Resolution 435 immediately assured the country of *de jure* recognition by the international community.

However, even as all Namibian parties recognized the international community's crucial role in Namibian independence, they were set on the idea of preserving the autochthony of their constitution-making process. There is little doubt that the 1982 constitutional principles that gave instructions about the nature and contents of the future Namibian constitution would not have gained the political parties' acceptance had these principles emanated from an outside source or been imposed on them by the international community. The constituent assembly's ap-

pointment of three South African lawyers to write the draft constitution for them could be explained in the same way.

The Role of International Law

In the Namibian experience, with all its international ramifications, the importance of international law does not need to be emphasized. For years, the Namibian dispute dominated the jurisprudence of the World Court. Other pertinent international law issues also pervaded the peace process, such as the competences of the United Nations and its secretary-general, the Security Council's peacekeeping powers, the status of political prisoners, and the status of the Walvis Bay enclave.⁵⁶

What is of overriding importance is that the Namibian dispute, apart from having been regulated by international law, also contributed to the progressive development of general principles of international law as well as customary international law on such matters as international protection of human rights, the elimination of racial discrimination, and the succession of international organizations. This development came about mainly as a result of the World Court's jurisprudence in the Namibia disputes and played a considerable role in the court's later decisions.

Given the immense impact of international law in Namibian affairs, it is little wonder that the Namibian constitution expressly provided that unless otherwise provided in the constitution or an act of parliament, general rules of international law and treaties binding upon Namibia under the constitution were to form part of the law of Namibia.⁵⁷

Essential Issues of Substance

In Namibia, essential issues of substance—such as the protection of human rights, the elimination of racial and other forms of dis-

crimination, socioeconomic development, regionalism, and democratic representation—all had to be considered in assuring the constitution-making process's success. It can safely be said that the formal process of constitution making was never divorced from matters of substance. If it were not so, the process would have become hollow and would not have contributed to peacebuilding and national reconciliation.

Of special interest is the question of the legal force of the 1982 constitutional principles after the conclusion of the constitution-making process. Many would probably argue that these principles, after having been complied with, lost their binding force and effect; in other words, according to this reasoning, the principles were mainly directed to the constitution-making process and, once absorbed into the constitution's provisions, ceased to exert any legal force, except insofar as they assisted in constitutional interpretation in the future. This author's (more contested) opinion is that the principles were preconstitutional inasmuch as they defined the democratic foundations of the future Namibian state. According to this reasoning, if a future government were to amend the constitution and discard these principles, the nature of a democratic Namibia would be violated. Given that the principles constituted the conditions for Namibian statehood, rejecting them arguably would constitute such a fundamental encroachment that the international recognition of Namibia as an independent democratic state could be affected.⁵⁸

Conclusion

The Namibian constitution-making process was an unqualified success. It gave Namibians a modern constitution in which the protection of human rights, the independence of the judiciary, the accountability of government, the decentralization of government, and the

conducting of free and fair elections were all constitutionally ensured and safeguarded. Most important, it laid the foundations for a multiparty democracy. In this respect, the people themselves, probably for the first time in Africa, totally rejected the concept of a one-party state. Namibians are proud of their constitution and the values it contains. What is more, the Namibian constitution-making process, in many respects, gave invaluable guidance and provided some important lessons for South Africa's constitution making in the 1990s. Perhaps the most important lesson was that a rigid apartheid regime could peacefully evolve into a fully democratic system. On a practical level, Namibian constitution making taught South Africa the importance of having a set of constitutional principles in the making of a constitution. The South African constitutional principles, adopted at the time of the drafting of the interim constitution, were accepted by all the parties as a solemn pact and provided the basic tenets of the final constitution.

Yet there are disconcerting elements in the evolution of the Namibian constitutional practice. A democracy should constantly be vigilant and guard against unconstitutional tendencies and developments. In Namibia, a large part of the population, perhaps out of complacency based on the fact that they adopted a model constitution, lost interest in practical politics. This apathy has led to increased political maneuvering and abuse of power on the part of government. Presently, opposition parties lack effective leadership, and the alliance parties of the DTA have lost their organization and coherence. Concentration of power in the hands of central government and the neglect of regional and local institutions suggest a disturbing *jacobinisme*. The exaltation of Ovambo nationalism does not augur well for national unity and reconciliation. The vital issue of necessary land reform is addressed more to gain short-term political advantages than to

resolve acute economic and social malaise. A third term of office for the president in 2000 was manifestly unconstitutional and calls up the horrifying threat of an African life presidency.⁵⁹ It is said all is well that ends well. This is surely true as far as the Namibian constitution-making process was concerned; whether it is true for the continued application and role of the constitution itself remains to be seen.

After more than sixteen years of independence, the Namibian Constitution still holds good. Notwithstanding the misgivings expressed, political party life is still active. A small but vibrant opposition party—the Namibia Democratic Party, which emerged from SWAPO ranks—and other political parties still enjoy all their constitutional rights and freedoms. Most comforting, there are no signs of the constitution being side-stepped or parts of it being suspended. In its years of independence, Namibia has not known any state of emergency or undergone any serious political upheavals.

The final word here belongs to Bryan O'Linn, staunch opponent of apartheid, seasoned politician, and esteemed judge of the Namibian High Court:

The question whether or not all the ideals of the sacred trust of civilization have been realized can not be answered convincingly at this point in time. The ideal of the self-determination of the Namibian people has been achieved. However, it still has to be seen whether the ideal will be realized of a lasting and enlightened democracy and compassionate society with substantial economic and social benefits to all its people, which not only ensures the protection of their human rights and freedoms, but enjoins them to meet their responsibilities.⁶⁰

Notes

1. Gretchen Carpenter, "The Namibian Constitution: Ex Africa Aliquid Novi After All?" *South African Yearbook of International Law*, vol. 15 (1989–90), p. 63.

2. There is a wealth of literature on Namibia, its history, geography, peoples, politics, etc. Probably one of the most comprehensive and authoritative works remains John Dugard's *The SWA/Namibia Dispute* (Lansdowne: Juta, 1973).

3. At the same time, the court's condemnation of South Africa's apartheid policies in the territory would have had the much broader effect of giving the United Nations a legal basis for attacking the application of these policies in South Africa as well. As it speaks for itself that should the court have declared apartheid policies detrimental to the material and moral well-being of the inhabitants of the territory, the same argument would hold against South Africa, where identical policies were in place. A clear condemnation of its governmental policies could have led to a questioning of the legitimacy of the South African regime, as happened in the ensuing years when the South African regime became branded as "colonialism of a special kind."

4. For a criticism of the legal grounds for the revocation of the Mandate, see Marinus Wiechers, "South West Africa: The Background, Content, and Significance of the Opinion of the World Court of 21 June 1971," *South Africa Journal of Foreign and Comparative Law*, vol. 5 (1975), pp. 123–70.

5. SWAPO, although not exclusively Ovambo, draws its main support from that population group. The Ovambo, who constitute more than half of the Namibian population, live mainly in the northern part of the territory. The colonial border between South West Africa and Angola, as happened in many parts of Africa, divided the various Ovambo tribes, although their ethnic ties and sympathies remained. This explains why SWAPO could maintain its military operations on the northern borders for so many years: They were assured of the support of the local populations on both sides of the border. The Angolan government supported SWAPO from the outset. Jonas Savimbi's insurgency against the Angolan government made him a natural ally of the South African forces, and this alliance remained until the end of the struggle for independence. In South Africa, the border war was justified as a war against communist expansion; the Cuban presence lent credibility to this conviction. The restriction of the border war to the northern confines of the territory allowed political parties and groupings other than SWAPO to develop their constitutional experiences and political organization in a relatively peaceful manner.

6. In 1962, the South African government appointed a commission for South West Africa that

recommended that the territory should be divided into homelands for the various ethnic groups and be governed on exactly the same apartheid lines as in South Africa. After that, the recommendations of the commission were vigorously applied in the territory.

7. The Turnhalle is an old historical building in Windhoek that was a gymnasium in German colonial times.

8. Chief Clemens Kapuuu was assassinated on March 27, 1978. To this day, his murder is unsolved. After independence, President Sam Njoma acknowledged Dirk Mudge, a white farmer and member of the ruling white legislative assembly, to have been one of two white leaders who contributed most to the peace process in Namibia. Mudge, a leading member of the ruling white Nationalist Party—in all respects an offspring of the ruling Nationalist Party in South Africa—realized that his party would never win broad support among the other population groups, and decided on March 18, 1977, to break away and form the Republican Party, founded on the express premise of joining the other ethnic parties and forming the Democratic Turnhalle Alliance (DTA). The breakaway by Mudge and his followers created deep animosities among the Afrikaner community; it is only recently, years after independence, that these rifts have closed. For an excellent account of the life and political career of Dirk Mudge, see At van Wyk, *Dirk Mudge Reënmaker van die Namib* (Pretoria: JL van Schaik Publishers, 1999) (in Afrikaans).

9. The making of the 1978 interim constitution adopted by the Turnhalle conference had a history of its own. At the end of 1977, deliberations in the conference did not go well, especially as a result of the formation of the DTA and the clash of opinions between Mudge and his followers on the one side and the members of the white legislative assembly on the other side. Members of other groups also increasingly felt that the conference was just a ploy of the white government to have a kind of homeland constitution adopted. To assuage feelings, the legal advisers were asked to find some common ground and to draw up a working document for further discussion. In December 1977, the legal advisers met in Pretoria and this author was asked to draw up such a working document. Instead, a draft interim constitution was drawn up and laid before the conference. The prompt drafting of an interim constitution aroused considerable emotions among the members of the ruling white party and the South African government, especially as the draft constitution proposed that South West

Africa's name should be changed to Namibia. In the minds of these members, the name Namibia was synonymous with UN interference and implied support for SWAPO, as during those years, the UN General Assembly (but not the Security Council), came to regard SWAPO as the "sole and true representatives of the people of Namibia." Eventually, the conflict was resolved when the conference opted for the name South West Africa/Namibia. This name remained until independence.

10. The elections, which gave the vote to all adult Namibians, were hurriedly organized without proper voter registration and other necessary safeguards. There is every reason to believe that the 78 percent was inflated and even manipulated. However, the elections were important in that influential religious leaders supported them and that all Namibians, for the first time in history, were given the opportunity to have a voice in their own destiny. The result was that the masses flocked to the voting polls notwithstanding the opposition by the United Nations and SWAPO.

11. For instance, the laws prohibiting mixed marriages and sexual relations between the races.

12. The dissolution of the interim government was a result of deep-seated differences between Dirk Mudge, the chairman of the interim cabinet, and the then-South African president P.W. Botha. Whereas Mudge wanted more autonomy for his interim government, Botha insisted on a definite entrenchment of the rights of the white population. In those years, especially with the rise of white right-wing opposition, Botha and his government were extremely wary of being seen to sell the white man out in South West Africa.

13. For a full account of the background, content, and application of the 1982 constitutional principles, see Marinus Wiechers, "Namibia: The 1982 Constitutional Principles and Their Legal Significance," *South African Yearbook of International Law*, vol. 15 (1989-90), pp. 1-21. Immediately after the elections, there were some misgivings among some of the internal political parties that the 1982 principles were not binding and constituted mere guidelines. The South African administrator-general tried to assuage these fears by incorporating the principles in his proclamation governing the constitution-making process. The UN special representative strongly opposed this, quite correctly contending that such an incorporation would have made the principles seem to be South African prescriptions, depriving them of their legitimacy. Fortunately, all doubt concerning the principles' binding

force was removed when the constituent assembly, at its first meeting, took it upon itself to adopt them.

14. That the South African parliament adopted the Recognition of the Independence of Namibia Act 34 of 1990 is proof, constitutionally speaking, of the evolutionary nature of Namibian independence and the transfer of sovereignty. In international law, transfer of sovereignty to an independent Namibia posed a problem. As a result of the revocation of the mandate in 1966, South Africa ceased to exercise legal authority over the territory. Thus, strictly speaking, South Africa's emancipatory power to confer sovereignty to an independent Namibia also ended. The United Nations also did not have such authority under its charter. This problem was solved by Resolution 435, under which it was agreed that South Africa's de facto administration of the territory would be recognized for the purpose of transferring sovereignty. However, it was also agreed that the Namibian constitution would not mention South Africa's bestowing of sovereignty and independence. Looking at the process from a constitutional law perspective, it can well be described as evolutionary rather than revolutionary.

15. Martii Ahtisaari, "Foreword," *South African Yearbook of International Law*, vol. 15 (1989-90), p. ix.

16. The administrator-general released all but sixteen political prisoners; after reconsideration by an independent arbiter, Professor Norgaard, another nine were released. See Gerhard Erasmus, "Namibian Independence and the Release of Political Prisoners," *South African Yearbook of International Law*, vol. 14 (1988-90), p. 137.

17. To quote Ahtisaari, "Foreword": "The Namibian exiles repatriated by the UN High Commissioner for Refugees were 43,332, and they came from forty countries of exile. The discriminatory laws repealed in whole or in part were fifty-six. The political prisoners released under the UN required amnesty were thirty."

18. Notably, the UN secretary-general, during his visit to Namibia in July 1989, negotiated a code of conduct for political parties that was adopted by the ten parties that registered for the election.

19. Bryan O'Linn, *Namibia: The Sacred Trust of Civilization, Ideal and Reality* (Gamsberg: Macmillan Press, 2004), p. 357.

20. The Lusaka Institute was a SWAPO research institute, predominantly funded by East European governments, which in the 1980s drew up political plans and formulated constitutional proposals for a postindependent Namibia. The institute

also gathered and disseminated valuable information regarding exiles, political prisoners, and socioeconomic conditions in Namibia generally.

21. For instance, in these original proposals, it was foreseen that political parties would have the authority to recall their disobedient members in the legislature. Such a proposal was dropped from the final SWAPO proposals.

22. On matters such as emergency powers as well as the powers of the executive, regional, and local governments, the SWAPO proposals were very cursory, no doubt because the proposals had to be produced in such a very short time.

23. Constituent Assembly Resolution of November 21, 1989.

24. The only members with serious misgivings about the SWAPO proposals and the decision to use them as a working document were the representatives of the two white minority parties. On the other hand, they realized that their objection would have no effect, as resolutions of the constituent assembly, in accordance with Resolution 435, were to be taken with a two-thirds majority.

25. In fact, on November 20, 1989, the Herero council issued a statement that it was not prepared to accept an Ovambo government.

26. Justice Chaskalson is one of South Africa's most prominent and respected lawyers; for years he excelled as a human rights lawyer and was a leader in the field of legal aid movements. He gained a reputation as one of the country's staunchest opponents of apartheid, and in the 1950s and 1960s was a legal counsel in the Mandela trials. In the 1993 Kempton Park conference for a new South Africa constitution, he played a leading role in the constitutional technical committee and later, after the first democratic elections in 1994, was appointed president of the first South African constitutional court. Professor Gerhard Erasmus, a native of South West Africa, was a well-known academic writer on matters of international law and also a known opponent to apartheid policies. This author's own involvement in Namibian politics went back to the Turnhalle conference and the ensuing political and constitutional development within Namibia. In South Africa, I had the reputation of being a constitutional activist and, although I was mainly involved in governmental and other informal processes, my personal conviction, during those years, was that constitution making on various levels could break up monolithic apartheid structures. For this reason, I drafted constitutions for the independent homelands of Bophuthatswana and Ciskei, each with

their own justiciable bills of rights. During my years of active participation, I drew up several charters of human rights for implementation by the business communities and other organizations. During these years, I also had frequent informal contact with SWAPO and ANC leaders; because I was a teacher of constitutional law at the University of South Africa, the world's pioneering university for distance teaching, it happened that SWAPO and ANC leaders in exile or prison knew my writings and teachings, as many of them, including Nelson Mandela, were my students.

27. It was rumored at that time that some members of the constituent assembly felt that the panel of drafters, in drafting a complete constitution, went beyond the limits of their mandate. This author, however, could never discover the grounds for their objections. It is presumed that some members—especially those of the minority opposition parties who previously had positions of power and influence—hoped that the constitution-making process would take much longer so that they could settle their affairs under the existing regime. The promptness with which the panel of drafters presented them with a fully-fledged constitutional draft certainly took them by surprise.

28. During its first meeting in November 1989, the constituent assembly resolved to have the constitution adopted by a two-thirds majority. However, since complete consensus was reached, applying this resolution became unnecessary.

29. This was most remarkable, as at the committee table were members who suffered personally under apartheid, and also opposition members who as former dissidents of SWAPO in previous years suffered severely in SWAPO punishment camps. It was also most encouraging that the apprehensions of the representative of the white minority party were addressed sympathetically and with understanding.

30. Differences and serious clashes of opinion were often diverted to the panel of drafters by blaming them for not having considered all aspects of a particular matter sufficiently. It was sometimes jokingly said that the lack of wisdom on the part of the "men from heaven" was perhaps proof that they were not from heaven, but from the other place. The drafters understood this as a necessary diversion to avoid open conflict or acrimony. At the close of deliberations, the drafters received effusive praise and words of thanks from all members.

31. Close scrutiny of the constitution reveals many idiosyncrasies on the part of individual members. For instance, Article 10(2) reads: "No persons

may be discriminated against on the grounds of *sex*, race, colour, ethnic origin, religion, creed or social or economic status." Discrimination on the ground of sex was mentioned first and foremost because the only woman member of the committee felt strongly that discrimination on the ground of sex was worse than any other kind of discrimination. The other members of the committee, all males, agreed. In the committee, individual personalities were significant, and again, it was Dirk Mudge who gave direction and guidance in many respects. It was clear that no proposal would get full support, not even among all SWAPO members, if Mudge himself did not support it.

32. S/20967/add 2. SC Document.

33. It was considered inappropriate and politically incorrect that the new president should be sworn in by the South African head of state, as such an act would have created the impression that Namibia was a former colony of South Africa.

34. The 1968 constitution was also an act of defiance in the face of the UN General Assembly, which unilaterally revoked the mandate in 1966.

35. The elections for homeland governments were poorly supported, especially when resistance to the application of these South African apartheid policies grew. The political formations that participated in these homeland elections were generally very rudimentary and, for the most part, organized and funded by the South African government in Pretoria.

36. In those earlier years, the Herero regularly petitioned the Mandate Commission and later the UN General Assembly; this practice led the General Assembly to seek a World Court opinion in 1956.

37. The fact that chief Kapuuo was prepared to participate in the Turnhalle Constitutional Conference was of tremendous importance and was, to a large extent, the result of the personal friendship and trust between him and Dirk Mudge. To this day, Mudge is still regarded by members of the traditional Herero Council as "the brother of chief Kapuuo."

38. SWAPO was founded in Cape Town in 1960. The founding leaders were Herman Toivo ya Toivo, who, following many years of incarceration, became a member of the Namibian cabinet after independence; Murumba Kerina, who returned to Namibia from exile in the 1970s by invitation of the South African government, founded his own political party, and won a seat in the Namibian national assembly; and Sam Njoma, who was in exile from

the 1960s to 1989 and was elected by the assembly as Namibia's first head of state.

39. There are eleven ethnic groups in Namibia: the Ovambo, Kovango, Caprivians, Hereros, Damara, Tswana, Nama, Coloureds, the Basters (a small group of mixed European and indigenous origin), the Bushmen, and the Whites. Being such a small population, Namibians were familiar with the leadership of the various groups. It was amazing at the time of constitution making how well those leaders knew each other, even though some of them spent years in exile.

40. Whites in Namibia became greatly attached to their new country over the years, which explains why, after independence, there was no significant exodus of whites from the country. Moreover, many of the white leaders, especially those who joined the DTA, regarded themselves as very much part of the independence processes. This, however, does not deny that for many years, the majority of whites in Namibia strongly supported the National Party of South Africa and were loyal members of the National Party of South West Africa, which was in all respects a daughter party of the South African party. This also explains why the rift in the party that occurred when the DTA was formed was such a traumatic and bitter experience for many whites.

41. As a result of South Africa's war efforts on the northern borders, the transport and communication systems in the northern outreaches became very advanced. This factor, namely the development of an excellent infrastructure, served the election campaigns and eventual peace processes admirably and was crucial to UNTAG's peacekeeping task.

42. Except for the Herero, chief Kapuuo, in the beginning, was rather distrustful and appointed two American lawyers, but as all the proceedings of the Turnhalle conference were conducted in Afrikaans, the lawyers found it very difficult to follow the process. Eventually, Fanuel Kosanguisi, a returned Herero exile and London barrister, became the Hereros' adviser. After independence, he was appointed as the country's first ombudsman.

43. The constitutional advisers were handsomely rewarded for their services by the South African government, through the various ethnic authorities. This author was an exception: When it soon became apparent that the Damara and Tswana were to take up an independent line of thinking, the South African government refused any kind of remuneration or payment for expenses on the pretext that the appointment had not been ratified by any ethnic authority. Private funding for expenses was

arranged. This is mentioned to demonstrate concretely that not all the conference participants were paid puppets of the South African government, as SWAPO averred in the years to come.

44. The direct inspiration for this political move was the 1974 report of the special UN delegate, Dr. Esscher, and his recommendation that future independence of the territory should be worked out by the people themselves in the exercise of their right to self-determination. See O'Linn, *Namibia*, p. 82. The South African government always insisted that their apartheid and homeland policies were intended to afford other ethnic groups the opportunity to give effect to their right to self-determination.

45. When open conflict between members occurred and it seemed that the conference itself was in jeopardy, recourse would be had to prayer. After praying, members were more pacified and the debate could continue on a more conciliatory note. Traditionally in Namibia, all official meetings as well as party political rallies, gatherings, and proceedings were opened by prayer. The Namibian population is overwhelmingly Christian, and the churches wielded much influence in political affairs, with church leaders often assuming party political roles. Pastor Cornelis Njoba, who was assassinated in 1985, was president of the DTA.

46. Bushmen members of the DTA remained in politics, and two of them eventually became members of the independent Namibian legislature. The history of the Bushmen's role in the Namibian constitutional process proves how strongly emancipating the experience of participation in constitution making can be on a human level.

47. This author became a regular writer of articles on constitutional issues in the local press and addressed numerous church, school, business, and agricultural associations. Speeches written by this author for many of the DTA leaders concentrated on constitutional matters as central themes. At the initial report-back meetings of the Turnhalle conference and later, after the formation of the DTA when it became engaged in various election campaigns, this author accompanied political campaigners, often to the remotest parts of the country, to give addresses on the constitution and constitutional issues.

48. The exact wording of these instructions read as follows:

The Constitution will be the supreme law of the state. It may be amended only by a designated process involving the legislature and/or votes cast in a popular referendum.

The Constitution will determine the organization and powers of all levels of government. It will provide for a system of government with three branches: a legislative branch to be elected by universal and equal suffrage which will be responsible for the passage of all laws; and an independent judicial branch which will be responsible for the interpretation of the Constitution and for ensuring its supremacy and the authority of the law. The executive and legislative branches will be constituted by periodic and genuine elections which will be held by secret vote.

The electoral system will seek to ensure fair representation in the Constituent Assembly to different political parties which gain substantial support in the election.

There will be a declaration of fundamental rights, which will include the rights to life, personal liberty and freedom of movement; to freedom of conscience; to freedom of expression, including freedom of speech and a free press; to freedom of assembly and association, including political parties and trade unions; to due process and equality before the law; to protection of arbitrary deprivation of property or deprivation of private property without just compensation; and to freedom from racial, ethnic, religious or sexual discrimination. The declaration of rights will be consistent with the provisions of the Universal Declaration of Human Rights. Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights.

It will be forbidden to create criminal offences with retrospective effect or to provide for increased penalties with retrospective effect.

Provision will be made for the balanced structuring of the public service, the police service and defence services and for equal access by all to recruitment of these services. The fair administration of personnel policy in relation to these services will be assured by appropriate independent bodies.

Provision will be made for the establishment of elected councils for local and/or regional administration (S/15287).

49. In the 1989 elections, the old National Party was renamed Action Christian National, which then belatedly and without any real success preached alliance politics with other parties and groups.

50. This is in essence the integrating and emancipating force of a bill of rights, namely that it not only empowers every individual against state authority and power but also integrates individuals into the operation and application of the constitution, as the constitution finally ensures that the bill of rights is safeguarded. The protection that a future

bill of rights would afford to them convinced the former National Party members of the constitutional assembly to vote for adopting the constitution, notwithstanding the severe reservations they had in many other respects. As it turned out, these very same members, after independence, fulfilled valuable roles as part of the opposition to the government, and were—and still are—held in high government and public regard.

51. Immediately after the elections, there were rumors of malpractices and election fraud. This was to be expected, as the elections evoked much fervor and raised many expectations. However, the special representative's certification ended these rumors, and during the process of actual constitution making, the distribution of power among the parties that resulted from the elections was never contested.

52. See Ahtisaari, "Foreword," p. xi: "As for South-African co-operation, mutual suspicion was prevalent at the beginning, but there was a steady relaxation, especially, I believe, as the objectivity and professionalism of UNTAG became accepted. At a number of levels, the co-operation was excellent."

53. Art. 145(2) of the constitution.

54. For instance, Captain Hendrik Witbooi of the Namas was vice-president of SWAPO, and both the later prime minister (Mr. Geingob) and minister of foreign affairs (Mr. Ben-Guriab) were Damara.

55. In a real sense, this is what happened in the South African constitution-making process

when the right-wing white parties and Zulu-based Inkatha Freedom Party initially refused to join or later threatened to withdraw from the process.

56. South Africa, perhaps justifiably, maintained that Walvis Bay was never included in the mandated territory and therefore fell outside UN jurisdiction. The constitution, in a sense, preempted the whole matter, including in art. 1(4) the Walvis Bay enclave in its identification of Namibian state territory. After independence, South Africa and Namibia, through agreement and international convention, settled the matter and the Walvis Bay enclave was incorporated into Namibia.

57. Art. 144 of the constitution, therefore, does away with the requirement of express incorporation by act of parliament. See Gerhard Erasmus, "The Namibian Constitution and the Application of International Law," *South African Yearbook of International Law*, vol. 15 (1989–90), p. 90.

58. See Wiechers, "Namibia," p. 17.

59. This clear breach of the constitution was justified on the ground that the president's first election was not by direct popular suffrage, but by the new national assembly, whereas the constitution prescribed two terms of office by virtue of direct, popular suffrage. This clearly goes against the original intent. Surely, a presidential term of office is a term of office, notwithstanding the method of election.

60. O'Linn, *Namibia*, p. 390.