

## SYMPOSIUM ON ANNA SAUNDERS, “CONSTITUTION-MAKING AS A TECHNIQUE OF INTERNATIONAL LAW: RECONSIDERING THE POST-WAR INHERITANCE”

### BEYOND PEACE AND SECURITY: THE UN TRANSITION ASSISTANCE GROUP IN NAMIBIA AND ITS IMPORTANCE FOR CONTEMPORARY CONSTITUTION-MAKING

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In her article “Constitution-Making as a Technique of International Law: Reconsidering the Post-war Inheritance,” Anna Saunders focuses on constitution-making as an international practice of the past three decades and suggests that its “epistemic boundaries”—namely, the separation between the formal and material dimensions of constitution-making and the latter’s exclusion from contemporary constitution-making assistance—were primarily established by scholarly work on constitution-making in the post-war era.<sup>1</sup> Saunders explicitly acknowledges that her account is not the only possible history of constitution-making assistance.<sup>2</sup> In this essay, I add a different layer to that history, focusing on the UN Transition Assistance Group (UNTAG) in Namibia. UNTAG is often considered the first instance of international constitution-making assistance, a practice that is generally understood to have emerged after the end of the Cold War.<sup>3</sup> However, UNTAG’s mandate, including its constitution-making assistance component, was in fact conceived many years before its actual deployment, dating back to the 1960s and 1970s. The essay shows that UN constitution-making assistance pre-dates the end of the Cold War and is linked to UN efforts to forge modern nation-states in the context of decolonization. I argue that this early case of constitution-making practice was an important blueprint for further iterations of international constitution-making assistance, not least because of the continuous involvement of individual international civil servants. Lastly, the case of Namibia is significantly different from the cases that inspired scholarly work in the post-war era, and we might ask to what extent the post-war inheritance affected this early international practice. I end with a brief reflection on Saunders’s call to address the material dimension of constitution-making and caution against overemphasizing substantive questions in constitution-making assistance.

#### *International Territorial Administration and the United Nations’ Role in Constitution-Making in Namibia*

On April 1, 1989, UNTAG was deployed to Namibia. It is often hailed both as the first major UN operation with a strong civilian mandate and as the first successful case of multidimensional UN

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<sup>1</sup> Anna Saunders, *Constitution-Making as a Technique of International Law: Reconsidering the Post-war Inheritance*, 117 AJIL 251 (2023).

<sup>2</sup> Based on ANNE ORFORD, *INTERNATIONAL LAW AND THE HISTORY OF POLITICS* 254 (2021).

<sup>3</sup> See Saunders, *supra* note 1, at 252; Vijayashri Sripati, *UN Constitutional Assistance Projects in Comprehensive Peace Missions: An Inventory 1989–2011*, 19 INT’L PEACEKEEPING 93 (2012); Sara Kendall, *Inscribing the State: Constitution Drafting Manuals as Textual Technologies*, 11 HUMANITY 101 (2020); Laura Grenfell, *The UN and “Rule-of-Law Constitutions,”* in *STRENGTHENING THE RULE OF LAW THROUGH THE UN SECURITY COUNCIL* (Jeremy Matam Farrall & Hilary Charlesworth eds., 2016) (dating UN constitution-making assistance to the late 2000s).

peacekeeping.<sup>4</sup> But its mandate dates to the late 1970s, and debates on the United Nations' role in transitionally administering Namibia, including constitution-making assistance, to the 1960s.

Namibia, known as "South West Africa" until 1968, was a German colony at the beginning of the twentieth century, and the site of a genocide by the German colonizers against the Herero and Nama people.<sup>5</sup> It came under South African colonial rule in 1915 and later became a class-C South African mandate under the League of Nations mandate system. As such, it was considered one of the least advanced territories, to be "best administered under the laws of the Mandatory."<sup>6</sup> The South African government considered this status akin to sovereignty over the territory.<sup>7</sup>

After the establishment of the United Nations in 1945, South Africa unsuccessfully lobbied to annex Namibia and refused to report on the situation in the territory, as required under the League of Nations' Covenant, on the basis that the League had ceased to exist. The South African government considered Namibia to be part of its territory rather than a territory with international status. A series of advisory opinions by the International Court of Justice confirmed that mandate obligations continued to apply to South Africa, which refused to comply.<sup>8</sup> In light of South African attempts to install apartheid laws in South West Africa and the emergence of the "South West Africa People's Organization" (SWAPO) fighting for independence, the UN General Assembly declared in 1966 that "South Africa has failed to fulfil its obligations . . . and has, in fact, disavowed the Mandate," terminated the mandate, and placed South West Africa under the "direct responsibility of the United Nations."<sup>9</sup>

The General Assembly subsequently affirmed that it had "become incumbent upon the United Nations to give effect to its obligations by taking practical steps to transfer power to the people of South West Africa," and to this end established a UN Council for South West Africa (since 1968: "UN Council for Namibia"), upon the request of the people of Namibia. The Council was tasked with: (1) administrating until independence "with the maximum possible participation of the people of the Territory"; (2) promulgating necessary legislation and administrative regulations "until a legislative assembly is established following elections conducted on the basis of universal adult suffrage"; (3) taking as "an immediate task all the necessary measures, in consultation with the people of the Territory, for the establishment of a constituent assembly to draw up a constitution on the basis of which elections will be held for the establishment of a legislative assembly and a responsible government"; (4) taking all necessary measures for the maintenance of law and order in the Territory; and (5) transferring all powers to the people of the Territory upon the declaration of independence.<sup>10</sup> The Council was to be composed of eleven member state representatives, with executive and administrative tasks to be carried out by a UN commissioner, who was recruited from UN Secretariat staff.

The General Assembly adopted this mandate for the UN Council for Namibia as early as 1967. It foreshadows the UN transitional authority framework that was subsequently adopted in Cambodia, Kosovo, and East Timor,

<sup>4</sup> For this assessment, see, e.g., CARSTEN STAHN, [THE LAW AND PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION: VERSAILLES TO IRAQ AND BEYOND](#) 220 (2008); Lise M. Howard, [United Nations Transition Assistance Group \(UNTAG\)](#), in [OXFORD HANDBOOK OF UNITED NATIONS PEACEKEEPING OPERATIONS](#) (Joachim A. Koops, Thierry Tardy, Norrie MacQueen & Paul D. Williams eds., 2015).

<sup>5</sup> The genocide was only officially recognized by the German government in 2021, and questions on how to adequately address the issue of reparations for the genocide are far from being settled. Cf. [Joint Statement of Several United Nations Special Rapporteurs of 23 February 2023](#).

<sup>6</sup> [Covenant of the League of Nations](#), Art. 22.

<sup>7</sup> On the South African position, see Faye Carroll, [SOUTH WEST AFRICA AND THE UNITED NATIONS](#), Ch. 2 (1967).

<sup>8</sup> International Status of South-West Africa, [Advisory Opinion](#), 1950 ICJ Rep. 128 (July 11); South-West Africa-Voting Procedure, [Advisory Opinion](#), 1955 ICJ Rep. 67 (June 7); Admissibility of Hearings of Petitioners by the Committee on South West Africa, [Advisory Opinion](#), 1956 ICJ Rep. 23 (June 1).

<sup>9</sup> [GA Res. 2145 \(XXI\)](#) (Oct. 27, 1966).

<sup>10</sup> [GA Res. 2248 \(S-V\)](#), p.mbl. (May 19, 1967).

involving wide-ranging civilian, legislative, administrative, and executive (law and order) authority vested in the organization itself. Importantly, in the context of the present symposium, it also explicitly authorized the United Nations to organize a constituent assembly “in consultation with the people of the Territory.” The elements of present-day constitution-making assistance by the United Nations were all present in the case of Namibia in the 1960s.

*The UN Transition Assistance Group as an Enforcement Authority*

Despite the wide de jure powers wielded by the UN Council for Namibia, the Council’s impact was negligible. South Africa exercised de facto power over Namibian territory and refused to withdraw its administration. The UN Security Council condemned the government of South Africa “for its persistent defiance of the authority of the United Nations” in 1969, but to little avail.<sup>11</sup> In 1972, the Security Council put into place a contact group composed of Security Council representatives to serve as a conduit for negotiations with all parties involved.<sup>12</sup> One year later, the General Assembly officially recognized SWAPO as a national liberation movement and “the authentic representative of the Namibian people.”<sup>13</sup> In 1976, the Security Council declared it “imperative that free elections under the supervision and control of the United Nations be held.”<sup>14</sup> On this basis, the contact group (consisting of five Western states, namely, Canada, France, West Germany, the United Kingdom, and the United States) submitted a “Proposal for a settlement of the Namibian situation,” a negotiated compromise between SWAPO and the South African government brokered by the contact group.<sup>15</sup>

The Proposal contained the main elements of the future mission, and at the same time evoked the 1967 UN Council for Namibia’s original mandate: a UN special representative, to be appointed by the secretary-general, would work together with a South Africa-appointed “administrator general” in leading Namibia toward independence, assisted by a UN Transition Assistance Group (UNTAG). The UN special representative and UNTAG were tasked with ensuring that elections for a constituent assembly would be held. The constituent assembly would then be charged with drafting and adopting a constitution. The Proposal also provided a detailed timeline for the withdrawal of South African troops from Namibia to be supervised by the UN special representative and UNTAG. The Security Council subsequently established UNTAG on the terms outlined in the Proposal and a further report by the secretary-general.<sup>16</sup> UNTAG’s mandate is thus best understood as an enforcement mandate, designed to implement what the UN Council for Namibia had not been able to achieve in over a decade, namely, the realization of free and fair elections and a constitution-making process that would lead to Namibia’s independence. Continuity between the General Assembly and the Security Council is also visible in the appointment of the UN special representative: Finnish diplomat Martti Ahtisaari, who had been appointed UN Commissioner for Namibia one year earlier, was chosen for the job.<sup>17</sup>

Official deployment of UNTAG would take another decade. This was due to several factors, including charges that the United Nations was biased in favor of SWAPO, but primarily because of the so-called “linkage” issue: South Africa requested that the withdrawal of its troops from Namibia be linked to the parallel withdrawal of

<sup>11</sup> [SC Res. 269](#) (Aug. 12, 1969).

<sup>12</sup> [SC Res. 309](#) (Feb. 4, 1972).

<sup>13</sup> [GA Res. 3111 \(XXVIII\)](#) (Dec. 12, 1973).

<sup>14</sup> [SC Res. 385](#) (Jan. 30, 1976).

<sup>15</sup> [UN Doc. S/12636](#) (Apr. 10, 1978).

<sup>16</sup> [SC Res. 435](#) (Sept. 29, 1978).

<sup>17</sup> [Howard](#), *supra* note 4, at 295. Note that Ahtisaari would later design the Comprehensive Proposal for the Kosovo Status Settlement, also known as the “Ahtisaari Plan.” See [UN Doc. S/2007/168/Add.1](#) (Mar. 26, 2007).

Cuban troops from neighboring Angola.<sup>18</sup> It was only in 1988 that Cuba, Angola, and South Africa agreed on parallel withdrawal under UN supervision.<sup>19</sup> In 1989, the Security Council decided that UNTAG's mandate was to be implemented in its original and definitive form of 1978.<sup>20</sup> Peaceful elections were held in November 1989, with a 97 percent turnout.<sup>21</sup> The newly elected constituent assembly convened on November 21, 1989, and the assembly adopted a Constitution by consensus on February 9, 1990. UNTAG gradually wound down its functions in early 1990. In his last report to the Security Council, on March 28, 1990, the secretary-general noted that with Namibia's formal independence, UNTAG's mandate had come to an end.<sup>22</sup>

### *Assessing UNTAG's Import*

As mentioned before, UNTAG is commonly hailed as ringing in the era of multidimensional peacekeeping and as the first case of UN constitution-making assistance.<sup>23</sup> But, as I demonstrated above, UNTAG's mandate, including its constitution-making assistance component, can be traced back to the 1960s. This challenges the narrative of the end of the Cold War as a "turning point" for UN peacekeeping and other assistance activities. The post-Cold War moment was rather co-opted as an opportunity to finally accomplish the vision of a unified "international community," a vision that many considered to have been in embryo stage throughout the Cold War.<sup>24</sup> Indeed, most of the United Nations' assistance activities (e.g., in the field of human rights, or development) can be traced back to the organization's earliest days. Guy Sinclair has shown that assistance was used as a technique of post-colonial state formation: UN civil servants were promoting a specific image of statehood in the post-war era and designed assistance activities accordingly.<sup>25</sup> But many of these activities were only implemented and upscaled much later. UNTAG, which had been planned for many years, is a case in point.

Lise Howard has credited large parts of UNTAG's success to the role played by UN Special Representative Martti Ahtisaari, and the fact that he had a decade to plan not only for the practical aspects of the mission but also for its political and social dimensions.<sup>26</sup> Ahtisaari actively recruited the best staff into UNTAG and buttressed the civilian component with a large-scale information campaign, seeking dialogue with community leaders, civil society groups, and unions on a regular basis.<sup>27</sup> Here, we see engagement with a variety of social groups and the roots of the idea of "local ownership" as engagement with, and representation of, a large number of diverse groups in the constitution-making process. In many ways, UNTAG served as a blueprint for further iterations of constitution-making assistance and transitional territorial administration by the United Nations, not least through the person of Ahtisaari himself. It is no coincidence that there are strong parallels between the tasks of UNTAG and the design of transitional administration in Kosovo, which was largely spearheaded by Ahtisaari. Due to personal continuity, this early practice strongly influenced the evolution of constitution-making assistance within the United

<sup>18</sup> Margaret P. Karns, *Ad Hoc Multilateral Diplomacy: The United States, the Contact Group, and Namibia*, 41 INT'L ORG. 93, 114–16 (1987).

<sup>19</sup> Resulting in the UN Angola Verification Mission (UNAVEM I).

<sup>20</sup> [SC Res. 629](#), para. 1 (Jan. 16, 1989); [SC Res. 632](#), para. 2 (Feb. 16, 1989).

<sup>21</sup> [STAHN](#), *supra* note 4, at 224.

<sup>22</sup> [UN Doc. S/21215](#), para. 3 (1990).

<sup>23</sup> See notes 3 and 4 *supra*.

<sup>24</sup> Scott Newton, *Post-War to New World Order and Post-Socialist Transition: 1989 as Pseudo-Event*, in [EVENTS: THE FORCE OF INTERNATIONAL LAW](#) 107 (Fleur Johns, Richard Joyce & Sundhaya Pahuja eds., 2010).

<sup>25</sup> Guy Fiti Sinclair, *Forging Modern States with Imperfect Tools: United Nations Technical Assistance for Public Administration in Decolonized States*, 11 HUMANITY (2020).

<sup>26</sup> [Howard](#), *supra* note 4, at 294–305, 298–99.

<sup>27</sup> [Id.](#)

Nations, while most elements of the contemporary international practice of constitution-making assistance were already present in UNTAG's initial mandate from the 1960s.

We might ask to what extent this early instance of constitution-making assistance was subject to the epistemic boundaries that Saunders focuses on in her article.<sup>28</sup> She retrieves authors addressing constitution-making for Germany and Japan after World War II—cases of constitution-making that are markedly distinct from the case of Namibia, as they concerned two entities that were already well-established nation-states, not a case of decolonization. Constitution-making in Germany and Japan was constitution-making for the colonizer. Namibia in turn became an independent nation-state only in 1990, after having been colonized over a century earlier. It was a case of constitution-making for the colonized and had been designed as such since the 1960s. This is not to say that UNTAG's staff was free of the epistemic boundaries Saunders identifies. Rather, I believe that there might be a more complex relationship between epistemic boundaries from a tradition of constitution-making for the colonizer and other boundaries established by the early, and concurrent, devising of constitution-making for the colonized that would be worthwhile exploring in further research.

### *Resisting the Separation of the Juridical and the Material?*

I end this essay with a brief reflection on Saunders's call to reconsider what she names "selective technicity" or the separation of the juridical from the material. For Saunders, the material refers to the international economic and political constellation in which a constitution plays out, and she explicitly calls for the inclusion of this material dimension into "constitutionalist thought and practice for the world."<sup>29</sup> I understand Saunders's criticism of current constitution-making assistance to be directed specifically at the idea that local ownership is limited to the political representation of a variety of groups, but does not address questions of material equality, at least not as a goal in itself. As an example, she invokes the case of Namibia, where formal property guarantees in the 1990 Constitution prevented various groups from recovering ancestral lands of which they had been dispossessed during colonization, thus perpetuating the colonial legacy that the Constitution had sought to overcome.<sup>30</sup>

While I share Saunders's concern regarding this concrete instance of formal property rights impeding material justice as well as her broader appeal to address questions of economic inequality, I am skeptical whether constitution-making assistance is the appropriate place for it. In fact, I would caution against a form of constitution-making assistance that seeks to resolve issues of what Saunders calls "the material"—questions of economic redistribution, substantive equality, and material justice. In the case of Namibia, the inclusion of formal property rights and the embrace of foreign investment were based on the conventional wisdom at the time that both elements would contribute to the economic development of the newly minted sovereign state of Namibia. We know today that this was not the case. But we are ignorant as to the consequences of the material considerations we undertake today. I am doubtful whether there is a form of constitution-making assistance in practice that can genuinely address this question without imposition. Rather, I suggest that current constitution-making assistance by international organizations is *too* loaded with substantive requirements. The 2020 Guidance Note on Constitutional Assistance mentions a host of international norms and standards that "are usually particularly pertinent in constitution making includ[ing] those relating to the rule of law, elections, transitional justice and human rights."<sup>31</sup> This suggests that the United Nations, through constitution-making assistance, will advocate standards that it believes will contribute to materially better outcomes—as it did in the late 1980s and throughout the 1990s with reference

<sup>28</sup> Saunders, *supra* note 1, at 271–72; *passim*.

<sup>29</sup> *Id.* at 298.

<sup>30</sup> *Id.* at 300.

<sup>31</sup> [Guidance Note of the Secretary-General on United Nations Constitutional Assistance](#), 3 (Sept. 2020).

to formal property rights. Indeed, the Guidance Note explicitly mentions agenda-setting as a task of constitution-making assistance, which is crucial in determining what gets addressed and what is left out. I share Saunders's call that lawyers ought to reflect on the material dimension of constitution-making assistance, but we should resist attempting to *solve* the material problems through this tool, because addressing the material through constitution-making *assistance*, I submit, will never be free of external imposition.