

# EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS



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## **Dossier for Consideration and Action to:**

Professor Fabian Salvioli, Special Rapporteur on the promotion of  
truth, justice, reparation and guarantees of non-recurrence  
c/o Office of the High Commissioner for Human Rights  
United Nations at Geneva  
Palais des Nations  
CH-1211 Geneva 10  
Switzerland

Dear Prof. Salvioli,

This dossier is submitted to you by the European Center for  
Constitutional and Human Rights (ECCHR) following a conversation  
with your office earlier this year and in anticipation of the possibility  
to further exchange on this topic.

ECCHR is an independent non-profit human rights organization,  
registered in Berlin (Germany) since 2007. By engaging in strategic  
litigation, ECCHR uses legal means to protect groups and individuals  
against systematic human rights violations and to hold state and non-  
state actors accountable for these egregious acts. Since 2018, ECCHR  
has considered colonial crimes and present-day repercussions of  
European colonialism a priority in its work.

The authors of this dossier seek to draw your attention to the continued refusal of the government of the Federal Republic of Germany to apologize, fully acknowledge and pay reparation for the genocide against the Ovaherero and Nama in the former colony German Southwest Africa (GSWA) from 1904-1908. We submit that the present policy of the government of the Federal Republic of Germany with regard to these events contributes to perpetuate the colonial repercussions and inherent racial discrimination already present in the aftermath of the genocide, when the crimes committed by the military and colonial administration of the German Empire were left completely unaddressed.

Sincerely,

Judith Hackmack  
(Legal Advisor, ECCHR)

Karina Theurer  
(Director at the Institute for Legal  
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I.	Description of incidents .....	3
a.	The term genocide .....	4
b.	Apology .....	5
c.	Representation and inclusion in the ongoing talks between Germany and Namibia .....	6
d.	Reparation .....	9
e.	Remembrance and memorialization .....	11
f.	Gender and Conflict Related Sexualized Violence (CRSV) .....	12
II.	Applicable International norms and standards .....	13
a.	Victims’ rights to truth, to know, to justice and reparation .....	14
b.	Non-adherence to a victim centered and gender sensitive approach in the ongoing process .....	17
III.	Annex: Historical overview .....	20

## I. Description of incidents

From 1904 to 1908 the German imperial military forces (Schutztruppe) were responsible for the death of tens of thousands in the colony German Southwest Africa (GSWA), present day Namibia. Estimated 80 percent of the Ovaherero and 50 percent of the Nama died by means of physical violence, creating conditions of malnutrition, starvation, and thirst.<sup>1</sup> This conduct against the Ovaherero and Nama peoples as targeted groups was qualified as the first genocide of the 20<sup>th</sup> century.<sup>2</sup>

Beyond the physical extermination of the Ovaherero and Nama, the ensuing treatment of the survivors in concentration camps and the establishment of a racist settler-state aiming at the destruction of their culture, history and livelihood characterized the German conduct.<sup>3</sup> While the Ovaherero and Nama were the targeted groups, all Black people living in the so-called “police-zone” of GSWA, namely Damara and San were directly affected by the genocide.<sup>4</sup>

The effects of these historical events consolidated during apartheid. Numerous colonial repercussions can be seen until today in both the Namibian, but also the German society. In Namibia the remnants and traces of racist segregation, transgenerational trauma, the socio-economic effects of the loss of land and assets are still ubiquitous today. Not at least the decrease of the Ovaherero and Nama population in numbers, who were the majority

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<sup>1</sup> Research Service of the German Parliament: Sachstand. Zur Einordnung historischer Sachverhalte als Völkermord, WD 2-3000-092/15, 29 May 2015, p. 10, (in German) available at: <https://www.bundestag.de/resource/blob/459004/ca4beaf04bbf08916db7ba711331184e/WD-2-092-15-pdf-data.pdf>; Köbler, Reinhart: Namibia and Germany: Negotiating the Past (2015), p. 17.

<sup>2</sup> Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Mr. B. Whitaker, UN Doc E/CN.4/Sub.2/1985/6 (2 July 1985), p. 9.

<sup>3</sup> See the Historical Overview (Annex) below.

<sup>4</sup> Köbler, Reinhart: Namibia and Germany: Negotiating the Past (2015), p. 18-22.

population in the police zone and have become minorities in their country, still has a major impact on their everyday life.<sup>5</sup>

In Germany, the colonial past did not play a prominent role in the German public discourse for a long time. This has been described as a state of “colonial amnesia”.<sup>6</sup> This changed only slowly after the Namibian independence in 1990 and over pressure of Namibian and German civil society initiatives. Accordingly, on a visit to Germany in 2018, the Working Group on People of African Descent by the United Nations describes that “Germany’s crimes against Africans and people of African descent are overshadowed by the country’s focus on other parts of its history.”<sup>7</sup>

### **a. The term genocide**

Internationally, the genocide against the Ovaherero and Nama was acknowledged as genocide in the report on the question of the prevention and punishment of the crime of genocide prepared by Mr. B. Whitaker of 2 July 1985.<sup>8</sup>

The government of the Federal Republic of Germany for a long time refused to use the term genocide and until today does not use it without further qualification. In 2004, on the occasion of the centennial of the beginning of the colonial war, a resolution was adopted by the German Federal Parliament (Deutscher Bundestag).<sup>9</sup> This resolution referred to the events from 1904-1908 as source for a “special responsibility” of the Federal Republic of Germany, which the text of the resolution describes as being of a solely political-moral nature. The text of the resolution does not qualify the events as genocide. Instead it refers to them as “suppression of the uprisings” (Niederschlagung der Aufstände) about which the parliament expresses its “deep regret and sorrow” (Bedauern und Trauer). In addition, the resolution describes the German control over the territory as “extremely incomplete” (äußerst unvollständig). While the text of the resolution declares the aim „to contribute to give back their dignity and honor to the ten-thousands of victims”, it does not ask for an apology. These aspects were perceived as paternalistic and caused an overly critical reception in Namibia.<sup>10</sup>

In 2015 discussions regarding another German parliamentary resolution acknowledging the attacks against the Armenian minority in the Ottoman Empire as genocide<sup>11</sup> brought the topic

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<sup>5</sup> See the still relevant Suzman, James: Minorities in Independent Namibia. Minority Rights Group International Report (2002), p. 6-7, available at: <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-152-Minorities-in-Independent-Namibia.pdf>.

<sup>6</sup> See for example: Kößler, Reinhart; Melber, Henning: Koloniale Amnesie. Zum Umgang mit der deutschen Kolonialvergangenheit, Standpunkte 9/2018, (in German) available at: [https://www.rosalux.de/fileadmin/rls\\_uploads/pdfs/Standpunkte/Standpunkte\\_9-2018.pdf](https://www.rosalux.de/fileadmin/rls_uploads/pdfs/Standpunkte/Standpunkte_9-2018.pdf).

<sup>7</sup> Report of the Working Group of Experts on People of African Descent on its mission to Germany, UN Doc A/HRC/36/60/Add.2 (15. August 2017), para 7.

<sup>8</sup> Revised and updated report on the question of the prevention and punishment of the crime of genocide prepared by Mr. B. Whitaker, UN Doc E/CN.4/Sub.2/1985/6 (2 July 1985), p. 9.

<sup>9</sup> Deutscher Bundestag, 15. Wahlperiode: Antrag Zum Gedenken an die Opfer des Kolonialkrieges im damaligen Deutsch-Südwestafrika, BT Drs. 15/3329, 16 June 2004, (in German) available at: <http://dipbt.bundestag.de/dip21/btd/15/033/1503329.pdf>.

<sup>10</sup> Kößler, Reinhart; Melber, Henning: Völkermord und was dann? Die Politik deutsch-namibischer Vergangenheitsbearbeitung (2017), p. 58 (in German).

<sup>11</sup> Adopted on 2 June 2016, Deutscher Bundestag, 18. Wahlperiode: Antrag der Fraktionen CDU/CSU, SPD und BÜNDNIS 90/DIE GRÜNEN Erinnerung und Gedenken an den Völkermord an den Armeniern und anderen

of the Ovaherero and Nama genocide again on the table. On 10 July 2015, a press speaker of the German Foreign Office for the first time indirectly confirmed the qualification of the 1904-1908 events as genocide. Reporting about the current German-Namibian relationship, he mentioned an exchange of the German Foreign minister with his Namibian counterpart starting from 2014 and described the goal of this German Namibian dialogue as aiming at

“reaching a common understanding of what happened and a common language, to publish it and on this basis develop a collection of projects, aiming at responding to and addressing the effects that can be felt today of the deeds committed in the German name between 1904-1908.”<sup>12</sup>

He then read aloud a quotation of the former German Minister on Economic Cooperation and Development of 2004 regarding a moral-ethical responsibility resulting from the German colonization and the qualification of the events as genocide according to present-day standards. Asked by a journalist whether the Federal Government’s position was: “Yes, this was a genocide”, the speaker confirmed: “This is what I have just read out loud to you; indeed”.<sup>13</sup>

While since then the use of the term “genocide” can be regarded as established, the German Foreign Office and other state representatives use it only with further qualifications. Accordingly, the current wording as presented on the website of the German Foreign Office reads as follows:

“Was this a case of genocide? The atrocities committed in Germany’s name at the time constituted what would now be called genocide, although it only proved possible to define and legally codify the crime of “genocide” after the Holocaust. For this reason, the talks [between Germany and Namibia] are also looking at putting the term “genocide” in a historical and political context.”<sup>14</sup>

## **b. Apology**

While German representatives have apologized in their personal capacity, the Federal Republic of Germany so far has not apologized for the Ovaherero and Nama genocide. In a speech on 14 August 2004 in Namibia, the German minister for Economic Cooperation and Development Heidemarie Wieczorek-Zeul said:

“The atrocities at the time were what one would describe as genocide today – a General von Trotha would now be brought and sentenced before court. [...] We Germans accept our historical-political and moral-ethical responsibility and guilt incurred by Germans at that time.”<sup>15</sup>

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christlichen Minderheiten in den Jahren 1915 und 1916, BT Drs. 18/8613, 31 May 2016, (in German) available at: <https://dip21.bundestag.de/dip21/btd/18/086/1808613.pdf>.

<sup>12</sup> Translated by the authors, original: “[...] gemeinsames Verständnis über das, was geschehen ist, zu gewinnen, das auch in Sprache zu fassen und dann irgendwann, wenn es denn fertig ist, zu publizieren und auf dieser Grundlage eine Sammlung von Projekten zu entwickeln, mit denen den auch heute noch spürbaren Folgen dieser im deutschen Namen begangenen Taten zwischen 1904 und 1908 beantwortet und begegnet werden kann. [...]”, Dr. Martin Schäfer, Bundespressekonferenz vom 10. Juli 2015. German transcript available at: <https://www.bundesregierung.de/breg-de/aktuelles/pressekonferenzen/regierungspressekonferenz-vom-10-juli-847582>.

<sup>13</sup> *Ibid.*

<sup>14</sup> Federal Foreign Office: Addressing Germany and Namibia’s past and looking to the future, Article. Last updated: 1 July 2019, available at: <https://www.auswaertiges-amt.de/en/aussenpolitik/regionaleschwerpunkte/afrika/-/1991702> (last visited 31.10.2020).

<sup>15</sup> Translation by the authors, Original as represented in Köbler, Reinhart; Melber, Henning: *Völkermord und was dann? Die Politik deutsch-namibischer Vergangenheitsbearbeitung* (2017), p. 52:

Asked by the audience for an apology, Wieczorek-Zeul made it clear that the whole speech was intended as an apology. However, she was not speaking on behalf of the Federal Republic of Germany and also the expressed view was not shared by other members of the German Federal government.<sup>16</sup> A similar, personal statement has been made by the German Minister of State for International Cultural Policy at the Federal Foreign Office, Michelle Müntefering, in 2018.<sup>17</sup>

Accordingly, the current website of the German Foreign Office still makes it clear that an apology has not yet been given:

“Is Germany willing to apologise? Yes. The German Government aims to ask for forgiveness for the events on the basis of common language.”<sup>18</sup>

### **c. Representation and inclusion in the ongoing talks between Germany and Namibia**

Since 2015 talks<sup>19</sup> are held between Germany and Namibia, which deal with an acknowledgment, apology and reparation for the genocide of the Ovaherero and Nama. From the beginning, these talks were overshadowed by disputes regarding the non-inclusion of the affected communities.<sup>20</sup> Until today, this matter continues to be a major hindrance for the successful conclusion of this process.

Initially, the government of Namibia seemed to support an approach involving direct talks between the Ovaherero and Nama and the Federal Republic of Germany with the Namibian state as a mediator - as set out in a resolution, which the Namibian National Assembly unanimously adopted in October 2006. When negotiations with Germany were taken up in 2015, this triologue format was abandoned.

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“Die damaligen Gräueltaten waren das, was man heute als Völkermord bezeichnen würde – ein General von Trotha würde dafür heute vor Gericht gebracht und verurteilt. [...] Wir Deutsche bekennen uns zu unserer historisch-politischen, moralisch-ethischen Verantwortung und zu der Schuld, die Deutsche damals auf uns geladen haben.“

<sup>16</sup> “My attitude at the time did not correspond to the official understanding German politics“, translated by the authors: “Meine Haltung entsprach damals nicht dem offiziellen Verständnis deutscher Politik” *Wieczorek-Zeul, Heidemarie: Vorwort, in: Kößler, Reinhart; Melber, Henning: Völkermord und was dann? Die Politik deutsch-namibischer Vergangenheitsbearbeitung* (2017), p. 7.

<sup>17</sup> Address by Minister of State Müntefering at the restitution ceremony of human remains to Namibia in Windhoek, 31 August 2018, available at: <https://www.auswaertiges-amt.de/en/newsroom/news/muntefering-windhoek/2134260>

<sup>18</sup> Federal Foreign Office: Addressing Germany and Namibia’s past and looking to the future, Article. Last updated: 1 July 2019, available at: <https://www.auswaertiges-amt.de/en/aussenpolitik/regionaleschwerpunkte/afrika/-/1991702> (last visited 31.10.2020).

<sup>19</sup> The wording used by the German Foreign Office is: “intergovernmental dialogue on coming to terms with the past”: Federal Foreign Office: Addressing Germany and Namibia’s past and looking to the future, Article. Last updated: 1 July 2019, available at: <https://www.auswaertiges-amt.de/en/aussenpolitik/regionaleschwerpunkte/afrika/-/1991702> (last visited 31.10.2020); the wording used by the Embassy of the Republic of Namibia in the Federal Republic of Germany is “deliberations on the 1904-1908 genocide”, <http://www.namibia-botschaft.de/index.php/component/content/article/53-uncategorised/701-ngavirue-appointed-as-special-envoy-on-genocide>.

<sup>20</sup> See only: OvaHerero and Nama Resistance Order Against German Arrogance and Neo-Imperialist Tendencies Towards the Namibian Government and its People (3 October 2015), available at: <http://genocide-namibia.net/wp-content/uploads/2015/10/Statement-delivered-to-the-Press-by-Paramount-Chief-Adv-Rukoro.pdf>.

In fall 2015, two special envoys were appointed by the governments to lead the talks between the Federal Republic of Germany and the Republic of Namibia, Dr. Zedekia Ngavirue (Namibia)<sup>21</sup> and Mr. Ruprecht Polenz (Germany).<sup>22</sup> After the appointment, the German special envoy made it clear in an interview that the talks were to be held only between the two governments represented by the special envoys:

“The direct counterpart of the Federal Republic [of Germany] is of course the government of Namibia. I assume that the Namibian government will lead the dialogue in a way that the Namibian population as a whole will be involved – and thus also the descendants of those who have particularly suffered under the German colonial rule.”<sup>23</sup>

While the German special envoy and the German Foreign office thus seem to take the position that it is the responsibility of Namibia to ensure the inclusion of the Ovaherero and Nama, the Namibian special envoy said that the inter-governmental format finally adopted was a result of initial German pressure. He said that:

“The outcome of the motion of parliament [of 2006 in Namibia] was that the government must facilitate the process, but the affected communities must speak for themselves. The position is not that the government doesn’t want them, but it is that they want to negotiate directly with the Germans, which the Germans have declined and deemed impossible [emphasis added by the authors]”.<sup>24</sup>

In direct conversations and statements representatives of the Foreign Office have asserted that they would consider any format involving direct talks between Germany and the Ovaherero and Nama a violation of international law.

In spring 2016, the government of the Republic of Namibia set up a technical committee advising the Namibian special envoy. This committee as such and its members do not take part in the negotiations on their own standing. The composition of the committee as well as its relationship to other advisory bodies in the Namibian administration, was not publicly disclosed, but Ovaherero and Nama organizations have publicly commented on their (non)involvement in the process: In April 2016, the Ovaherero/Ovambanderu Council for Dialogue on the 1904 Genocide (OCD-1904) issued a press release declaring their cooperation in the provided governmental framework.<sup>25</sup> The Ovaherero Genocide Foundation (OGF), linked to the Ovaherero Paramount Chief, as well as the Nama Traditional Leaders Association

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<sup>21</sup> Embassy of the Republic of Namibia in the Federal Republic of Germany: Ngavirue appointed as special envoy on genocide, 5 November 2015, available at: <http://www.namibia-botschaft.de/aktuelles/701-ngavirue-appointed-as-special-envoy-on-genocide.html>.

<sup>22</sup> Federal Foreign Office: Addressing Germany and Namibia’s past and looking to the future, Article. Last updated: 1 July 2019, available at: <https://www.auswaertiges-amt.de/en/aussenpolitik/regionaleschwerpunkte/afrika/-/1991702> (last visited 31.10.2020).

<sup>23</sup> Translated by the authors, original: “Der direkte Ansprechpartner der Bundesrepublik ist natürlich die Regierung Namibias. Ich gehe davon aus, dass die namibische Regierung die Gespräche so führen will, dass die namibische Bevölkerung insgesamt einbezogen wird - und damit auch die Nachfahren derer, die unter der deutschen Kolonialherrschaft besonders gelitten haben.“, Deutsche Welle: Polenz: "Ich habe Erfahrung mit heikler Außenpolitik"(4 November 2015), (in German) available at: <https://www.dw.com/de/polenz-ich-habe-erfahrung-mit-heikler-au%C3%9Fenpolitik/a-18828724>.

<sup>24</sup> Windhoek Observer, Ngavirue: Rukoro not alphy and omega, available at: <https://www.observer.com.na/index.php/national/item/6558-rukoro-not-alpha-and-omega-ngavirue>

<sup>25</sup> OCD-1904: Press Statement (7 April 2016), available at: <http://genocide-namibia.net/wp-content/uploads/2015/03/OCD-1904-Media-Statement-7-April-2016-1.pdf>.

(NTLA) and the Nama Genocide Technical Committee (NGTC) opposed the process and asked for a return to the format suggested by the 2006 parliamentary resolution.<sup>26</sup> While the organized Nama are thus not represented, the Ovaherero organizations are split between parts of the Ovaherero supporting and other parts opposing the process.

The German Foreign office describes this situation as follows:

“Are representatives of the Herero and Nama involved? Yes. The Namibian Government has set up advisory committees in order to include the Herero and Nama ethnic groups, which are particularly affected by the past, in the talks. The Namibian Government has repeatedly underlined that everyone is welcome to take part. A number of ethnic groups are taking part in the talks, while others refuse to join in.”<sup>27</sup>

In the course of the following years, this divide between both different groups of the Ovaherero and the governments of Namibia and Germany has not improved. The High Commissioner for Human Rights of the United Nations, Michelle Bachelet, during the last Universal Periodic Review (UPR) asked the German Minister of Foreign Affairs, Heiko Maas, in a letter of 2 November 2018 to ensure:

“... that Ovaherero and Nama peoples are included in the negotiations between the Governments of Germany and Namibia following the apology by Germany for the genocide of these people.”<sup>28</sup>

As the negotiations are further proceeding, the effects of this divide become more concrete, as a possible agreement between Germany and Namibia would have numerous impacts on the societies of both states. According to comments by the special envoys, the negotiated draft comprises instruments of collective commemoration as well as material redress i.e. through development projects.<sup>29</sup> According to the German Foreign Office, topics discussed involve inter alia, infrastructure, energy, water supply and professional training.<sup>30</sup> All of these would have a direct impact on the dignity and livelihood of people living in Namibia today, starting from the question whose memories will be represented in any commemorative process to the question who will be reached by the measures intended to ameliorate the long-term effects of the genocide.

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<sup>26</sup> Press Statement by Paramount Chief Adv. Vekuii Rukoro (7 February 2016), available at: <http://genocide-namibia.net/wp-content/uploads/2015/03/PRESS-CONFERENCE-17-FEBRUARY-2016.pdf>; Nama Traditional Authorities Association and the Council of Traditional Leaders, Presentation (25 May 2016), available at: <http://genocide-namibia.net/wp-content/uploads/2016/05/The-Dichotomy-of-Historic-Responsibility-and-the-Quest-for-Restorative-Justice.pdf>; Nama Genocide Technical Committee, Media Statement by Hon. Ida Hoffmann (1 December 2016), available at: <http://genocide-namibia.net/wp-content/uploads/2015/03/PRESS-RELEASE-NOV-2016.pdf>.

<sup>27</sup> Federal Foreign Office: Addressing Germany and Namibia’s past and looking to the future, Article. Last updated: 1 July 2019, available at: <https://www.auswaertiges-amt.de/en/aussenpolitik/regionaleschwerpunkte/afrika/-/1991702> (last visited 31.10.2020).

<sup>28</sup> Letter: High Commissioner of Human Rights Michelle Bachelet to the Federal Minister of Foreign Affairs Heiko Josef Maas of 2 November 2018, available at: [https://lib.ohchr.org/HRBodies/UPR/Documents/Session30/DE/HC\\_LetterGermany\\_30Session.pdf](https://lib.ohchr.org/HRBodies/UPR/Documents/Session30/DE/HC_LetterGermany_30Session.pdf)

<sup>29</sup> See only: Dr. Zedekia Ngavirue, as quoted in New Era (25 March 2019), <https://neweralive.na/posts/genocide-negotiations-a-window-of-opportunity-ngavirue>.

<sup>30</sup> Federal Foreign Office: Addressing Germany and Namibia’s past and looking to the future, Article. Last updated: 1 July 2019, available at: <https://www.auswaertiges-amt.de/en/aussenpolitik/regionaleschwerpunkte/afrika/-/1991702> (last visited 31.10.2020).

In August 2020 representatives of the Ovaherero Traditional Authority and Nama Traditional Leaders Association (NTLA), reacting to a press statement of the President of the Federal Republic of Namibia on the status of the negotiations,<sup>31</sup> have made it clear that they will not accept an agreement, if they weren't sitting at the table:

„ The participation of Nama and Ovaherero people, in the process of designing and implementation of the reparation measures is vital but missing in this instance. [...]

The Namibian President evidently with pride announced that Germany will “heal the wounds of the past” with water provision, rural electrification and road construction amongst others. Yet he mentions nothing about the restoration of dignity, integrity, humanity, culture, language. Material assets apparently in the view of the two governments is supposed to make up for skulls scraped, women raped and sexually violated in every sense of the word, men worked to death and hanged for all to see, their bones still scattered across southern and central Namibia. The great grand-children of the women raped are still alive TODAY! [...]

For those who ask us what do you wish as compensation, we say SEE US AS HUMAN BEINGS, THEN WE CAN TALK.”<sup>32</sup>

#### **d. Reparation**

Regardless of the use of the term “genocide” outlined above, representatives of the government of Germany were and continue to be very clear that the events are not legally to be qualified as genocide and that accordingly there is no material basis for victims' claims for reparation. The website of the German Foreign Office states:

“There is no legal basis for material claims against Germany by the state of Namibia or by individual Herero or Nama or representatives of these ethnic groups because of events from the colonial past. The talks therefore cannot address compensation payments or reparations.”<sup>33</sup>

Accordingly, in a press statement of 11 August 2020 the President of the Republic of Namibia, Hage Geingob, said that:

“While the Namibian Government agreed to negotiate the issue of redress (reparations), which the German Government consistently referred to as “healing the wounds”, Germany has declined to accept the term “reparations”.”<sup>34</sup>

This refusal is related both to the general qualification of the events as genocide under international law and to the rights of the descendants of the survivors living today.

The German special envoy expressed his opinion on this matter on several occasions. As reflected in an expert opinion of the Research Service of the German Parliament, he emphasized that compensation claims were void as national courts would not consider these claims admissible.<sup>35</sup> According to the special envoy, Ovaherero and Nama living today did not qualify

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<sup>31</sup> Republic of Namibia, The Presidency, Media Release, 11 August 2020 (attached).

<sup>32</sup> Joint Statement Nama Traditional Leaders Association (NTLA) and Ovaherero Traditional Authority (OTA) On President Hage Geingob's expression of Satisfaction to Negotiations on Genocide, Apology and Reparations Issued this 13th day of August 2020 (attached).

<sup>33</sup> Federal Foreign Office: Addressing Germany and Namibia's past and looking to the future, Article. Last updated: 1 July 2019, available at: <https://www.auswaertiges-amt.de/en/aussenpolitik/regionaleschwerpunkte/afrika/-/1991702> (last visited 31.10.2020).

<sup>34</sup> Republic of Namibia, The Presidency, Media Release, 11 August 2020 (attached).

<sup>35</sup> Research Service of the German Parliament: Ausarbeitung. Der Aufstand der Volksgruppen der Herero und Nama in Deutsch-Südwestafrika (1904-1908) Völkerrechtliche Implikationen und haftungsrechtliche

as victims and also could not refer to any inherited rights, as compensation claims for tort are not hereditary under German civil law.<sup>36</sup> The German special envoy confirmed in an interview on 6 January 2017 that from their point of view, the subject of the negotiations were political-moral and not legal questions.<sup>37</sup> This understanding is quite common in the German legal mainstream. Accordingly, the mentioned legal opinion of the Research Service of the German Parliament denied the illegality of the conduct between 1904-1908 under international law referring to the principle of intertemporality:<sup>38</sup>

“The German Empire has in principle not violated international contract law through the suppression of the uprisings [...]. As for international customary law, it can be concluded in contrast that individuals already enjoyed a rudimentary protection in the beginning of the 20<sup>th</sup> century, dictated by the imperatives of humanity and civilization. However, the legal conviction of the community of international law at the time excluded the in their view “uncivilized” indigenous peoples also from this minimum protection.”<sup>39</sup>

A similar line of argument was presented by the lawyers representing the Federal Republic of Germany in court. On 5 January 2017 a lawsuit was filed by Vekuii Rukoro, David Frederick, the Association of The Ovaherero Genocide in the USA, Inc. and Barnabas Veraa Katuuo on behalf of themselves and all other Ovaherero and Nama indigenous peoples against the Federal Republic of Germany to the U.S. District Court of the Southern District of New York. In the lawsuit, plaintiffs were seeking compensation for the atrocities committed as well as linked

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Konsequenzen, WD 2 - 3000 - 112/16, 27. September 2016, (in German) available at: <https://www.bundestag.de/resource/blob/478060/28786b58a9c7ae7c6ef358b19ee9f1f0/wd-2-112-16-pdf-data.pdf>.

<sup>36</sup> *ibid*, p. 5.; „In einer nicht öffentlichen Sitzung des Ausschusses für Menschenrechte und humanitäre Hilfe vom 21. September 2016 erklärte der Sondergesandte für die deutsch-namibische Vergangenheitsbewältigung, Ruprecht Polenz, dass es in den aktuellen Verhandlungen beider Regierungen nicht um Rechtsfragen ginge, sondern um politisch-moralische Fragen. Deutschland knüpfe – ähnlich wie bei der Armenien-Resolution des Deutschen Bundestages – an die Anerkennung der Geschehnisse als Völkermord keine Rechts-, sondern allein moralische Folgen. Etwaige Ansprüche auf Entschädigungszahlungen seien ohnehin aus zweierlei Gründen ausgeschlossen: Einerseits hätten bisherige Klageverfahren der Herero gezeigt, dass sich nationale Gerichte und Gerichte für unzuständig erklären. Andererseits würden Entschädigungen allein den individuellen Opfern zustehen und gerade nicht deren Nachfahren, da Entschädigungsansprüche nach geltendem Recht nicht vererbbar seien.”

<sup>37</sup> Deutsche Welle, Völkermord-Klage: Berlin bleibt gelassen (6 January 2017), (in German) available at <https://www.dw.com/de/völkermord-klage-berlin-bleibt-gelassen/a-37042060-0>.

<sup>38</sup> Research Service of the German Parliament: Ausarbeitung. Der Aufstand der Volksgruppen der Herero und Nama in Deutsch-Südwestafrika (1904-1908) Völkerrechtliche Implikationen und haftungsrechtliche Konsequenzen, WD 2 - 3000 - 112/16, 27. September 2016, (in German) available at: <https://www.bundestag.de/resource/blob/478060/28786b58a9c7ae7c6ef358b19ee9f1f0/wd-2-112-16-pdf-data.pdf>

<sup>39</sup> Translated by the authors, original: „Das Deutsche Reich hat durch die Niederschlagung der Herero und Nama am Waterberg grundsätzlich nicht gegen Völkervertragsrecht verstoßen. [...] Im Hinblick auf das Völkergewohnheitsrecht lässt sich feststellen, dass Individuen demgegenüber schon zu Beginn des 20. Jahrhunderts einen rudimentären Schutz genossen, der sich aus den Geboten der Menschlichkeit und Zivilisation herleiten ließ. Die Rechtsüberzeugung der damaligen Völkerrechtsgemeinschaft schloss allerdings die in ihren Augen „unzivilisierten“, indigenen Völker auch von diesen Mindeststandards aus.“; Research Service of the German Parliament: Ausarbeitung. Der Aufstand der Volksgruppen der Herero und Nama in Deutsch-Südwestafrika (1904-1908) Völkerrechtliche Implikationen und haftungsrechtliche Konsequenzen, WD 2 - 3000 - 112/16, 27. September 2016, p. 16, (in German) available at: <https://www.bundestag.de/resource/blob/478060/28786b58a9c7ae7c6ef358b19ee9f1f0/wd-2-112-16-pdf-data.pdf>

expropriations. They also asked for the recognition that the exclusion from the ongoing talks between the states constitutes a violation of international law.<sup>40</sup>

The Federal Republic of Germany at first avoided service, but finally responded to the allegations in view of the risk of a default judgment. Through a strict application of the principle of intertemporality and a narrow interpretation of the law of the time along the lines of the hegemonic opinion within the German Empire, Germany's lawyers denied a violation of international law through the German empire and concluded:

“History cannot be rewritten, as far as its legal framework is concerned. Legal rules change as time goes by, but the law of the 21st century cannot be introduced back more than 110 years in history.”<sup>41</sup>

The court case was dismissed by the U.S. District Court of the Southern District of New York on 6 March 2019 for lack of subject matter jurisdiction.<sup>42</sup> This decision was upheld by the United States Court of Appeals for the Second Circuit on 24 September 2020.<sup>43</sup> The German Foreign office comments on the proceedings as follows:

“What is the lawsuit in New York about? A number of representatives of the Nama and Herero ethnic groups have taken a class-action suit against Germany in New York seeking compensation and direct participation in the German-Namibian intergovernmental consultations. In March 2019, the lawsuit was dismissed as unlawful by the competent US court as US courts have no jurisdiction over the lawsuit due to the principle of sovereign immunity. This decision confirms the position of the German Government, namely that, over 100 years after the events, the past can only be addressed politically and not by legal means.”<sup>44</sup>

#### **e. Remembrance and memorialization**

As described above, the colonial past has not played a prominent role in the German public discourse for a long time and also in Namibia, the historical sites of the genocide are often badly preserved, unexplained or lying inaccessibly on private land.<sup>45</sup>

Public information or memorial sites regarding Germany's colonial history in general and the Ovaherero and Nama genocide in particular remain scarce. The coalition agreement of 12 March 2018 of the current German federal government for first time stressed the importance of

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<sup>40</sup> For more details see: Dören Richard; Wentker, Alexander: Jurisdictional Immunities in the New York Southern District Court? The case of Rukoro et al. v. Federal Republic of Germany, in: EJIL:Talk! (13 August 2018), available at: <https://www.ejiltalk.org/jurisdictional-immunities-in-the-new-york-southern-district-court-the-case-of-rukoro-et-al-v-federal-republic-of-germany/>.

<sup>41</sup> U.S. District Court of the Southern District of New York, Rukoro et al. v. Federal Republic of Germany, Case 1:17-cv-00062-LTS, Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss, 13 March 2018, p. 7.

<sup>42</sup> U.S. District Court of the Southern District of New York, Rukoro et al. v. Federal Republic of Germany, Case 1:17-cv-00062-LTS, Opinion & Order, 6 March 2019.

<sup>43</sup> U.S. Court of Appeals for the Second Circuit, Rukoro et al. v. Federal Republic of Germany, Docket No. 19-609, 24 September 2020 - affirming the district court's dismissal for lack of subject matter jurisdiction.

<sup>44</sup> Federal Foreign Office: Addressing Germany and Namibia's past and looking to the future, Article. Last updated: 1 July 2019, available at: <https://www.auswaertiges-amt.de/en/aussenpolitik/regionaleschwerpunkte/afrika/-/1991702> (last visited 31.10.2020).

<sup>45</sup> For a detailed account of commemoration practices in Namibia see: Förster, Larissa: Erinnerungslandschaften. Postkoloniale Erinnerungslandschaften. Wie Deutsche und Herero in Namibia des Kriegs von 1904 gedenken (2010) (in German).

dealing with the colonial past as a foundation for a stronger collaboration with states in Africa.<sup>46</sup> While a number of temporary initiatives followed this commitment, the colonial history is still largely invisible in the, in other aspects quite abundant, German memory landscapes. So far there is no museum or public memorial site dealing with German colonialism. The current Federal Concept for Memorial Sites (Gedenkstättenkonzeption des Bundes) is designed exclusively for the historical contexts and places of the National Socialist Regime and the Dictatorship in the German Democratic Republic.<sup>47</sup>

At the same time, existing sites commemorating the colonizers often continue to be maintained, uncommented or unexplained. This is true for many streets named after former colonizers or using racist terms referring to Black people<sup>48</sup> and also for graves of the former colonizers. The German War Graves Commission (Volksbund Deutsche Kriegsgräberfürsorge e.V.), funded in parts by the German Foreign Office, is maintaining graves of exclusively German soldiers in Namibia who died abroad during the German colonization of Namibia from 1884-1915, leaving the history of the Ovaherero and Nama who lost their lives largely invisible in Namibia.<sup>49</sup>

In Germany the grave of Lothar von Trotha, who gave the extermination order against the Ovaherero and Nama in 1904, is located at the Poppelsdorfer Friedhof in Bonn. Until recently, the grave was mentioned on a sign listing the graves of honor on the cemetery and until today, there is no comment on the historical context available on site.<sup>50</sup>

#### **f. Gender and Conflict Related Sexualized Violence (CRSV)**

The German colonizers and soldiers were initially mostly men, which led to an increase of sexual violence and unequal relationships as well as marriages between German men and Ovaherero and Nama women during the first decades of colonialism. The so called “mixed marriages” (Mischehen) were considered a problem by the colonial administration, leading to

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<sup>46</sup> Coalition Agreement between the Political Parties CDU, CSU and SPD for the 19th legislative period, 12 March 2018, line 7954-7957: „Ohne Erinnerung keine Zukunft – zum demokratischen Grundkonsens in Deutschland gehören die Aufarbeitung der NS-Terrorherrschaft und der SED-Diktatur, der deutschen Kolonialgeschichte, aber auch positive Momente unserer Demokratiegeschichte.“; Wir wollen die kulturelle Zusammenarbeit mit Afrika verstärken und einen stärkeren Kulturaustausch befördern, insbesondere durch die Aufarbeitung des Kolonialismus sowie den Aufbau von Museen und Kultureinrichtungen in Afrika,” line 7320-7322, (in German) available at: <https://www.bundesregierung.de/resource/blob/975226/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1>.

<sup>47</sup> Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Dr. Kirsten Kappert-Gonther, Erhard Grundl, Margit Stumpp, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN, BT Drs. 19/5130, 18 October 2018, p. 4-5, (in German) available at: <https://dip21.bundestag.de/dip21/btd/19/051/1905130.pdf>.

<sup>48</sup> For example the „Mohrenstraße“, „M\*street“ in Berlin. For the planned renaming of two streets in Berlin based on an initiative by Berlin-Postkolonial e.V. and others, see here: Bechhaus-Gerst, Marianne: Koloniale Spuren im städtischen Raum, in: APuZ 69. Jahrgang, 40–42/2019, 30. September 2019, p.40-45, 42-44.

<sup>49</sup> See the online search module on the website of the Volksbund Deutsche Kriegsgräberfürsorge e.V., (in German), available at: <https://kriegersgraeberstaetten.volksbund.de/friedhof>, for further details see: Förster, Larissa: Erinnerungslandschaften. Postkoloniale Erinnerungslandschaften. Wie Deutsche und Herero in Namibia des Kriegs von 1904 gedenken (2010), p. 104.

<sup>50</sup> General-Anzeiger-Bonn: Poppelsdorfer Friedhof: Der Name von Trotha soll verschwinden, 17. Februar 2017, (in German) available at: [https://www.general-anzeiger-bonn.de/bonn/stadt-bonn/der-name-von-trotha-soll-verschwinden\\_aid-43234089](https://www.general-anzeiger-bonn.de/bonn/stadt-bonn/der-name-von-trotha-soll-verschwinden_aid-43234089).

the establishment of programs bringing German women to GSWA. With the adoption of an order sanctioning these marriages in 1905, the women in these marriages faced double discrimination for being linked to the colonizers and the colonized.<sup>51</sup> A problem inherited by many Ovaherero and Nama living today, who have German descendants, but whose special relationship to Germany, unlike for their German speaking Namibian relatives, has not been recognized until today.

Sexualized violence against Ovaherero and Nama women was widespread and considered by some contemporary commentators as one of the major reasons for the colonial war.<sup>52</sup> In the concentration camps and related contexts of forced labor, women faced different treatment and types of tasks by the colonial administration. For example, Ovaherero and Nama women were forced to scrape the skulls of people who died in the camps, which would be sent to Germany.<sup>53</sup>

Gendered aspects of the German colonial rule in general and more specifically the Ovaherero and Nama genocide deserve more attention.<sup>54</sup> Still, the perspectives of women seem to play no relevant role in the negotiation process so far. The special envoys appointed by the government of the Republic of Namibia and Federal Republic of Germany are men. The authors are not aware of any Ovaherero or Nama women formally involved in the mentioned formats of the negotiation process and do not have any information about or indication of a gender sensitive approach taken by either of the two governments.

## **II. Applicable International norms and standards**

It is submitted that, regardless of the wording chosen by the governments of the Federal Republic of Germany and the Republic of Namibia, the case at hand factually involves a context of transitional justice. In the 2004 report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies “transitional justice” is defined as:

“[...] the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”<sup>55</sup>

This definition applies to the case at hand. The fact that the events described happened over a century ago is no hindrance for addressing them in the above-mentioned framework. During most of this time no measures were taken to address these past abuses, which continue to unfold numerous effects until today. As the Special Rapporteur on the promotion of truth, justice,

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<sup>51</sup> See only account of Sima Luipert in: ECCHR: Namibia: Colonial Repercussions (2019), p. 46-47, available at: [https://www.ecchr.eu/fileadmin/Publikationen/ECCHR\\_NAMIBIA\\_DS.pdf](https://www.ecchr.eu/fileadmin/Publikationen/ECCHR_NAMIBIA_DS.pdf)

<sup>52</sup> See for example: Missionary Joh. Neitz, Die Herero betreffend, Reise zu Samuel Herero, 8.11.2907, Archiv der Vereinigten Evangelischen Missio Wuppertal: A/k 5, zitiert in Gründer: Geschichte der deutschen Kolonien, S. 130.; „Aber das schlimmste Übel ist, was viel böses Blut und Streit hervorgerufen hat, die Vergewaltigung unserer Frauen durch Weiße. Manche Männer sind totgeschossen [worden] wie Hunde, wenn sie sich weigerten, ihre Frauen und Töchter preiszugeben und drohten, sie mit der Waffe in ihrer Hand zu verteidigen. Wären solche Dinge nicht geschehen, wäre kein Krieg gekommen, aber er ist bei solchen Vergewaltigungen ausgebrochen.”

<sup>53</sup> Erichsen, Caspar W.: “The angel of death has descended violently among them” Concentration camps and prisoners-of-war in Namibia, 1904-08 African Studies Centre Research Report 79 (2005), p. 56 ff., 142 f.

<sup>54</sup> For more see: von Joeden-Forgey, Elisa: Women in the Herero Genocide, in: Bemporad, Elissa; Warren and Joyce W: Women and Genocide, Indiana University Press (2018), p. 36 ff.

<sup>55</sup> Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice, United Nations Approach to Transitional Justice (March 2010), p. 2.

reparation and guarantees of non-recurrence, Pablo de Greiff, has elaborated in his report on reparations of 14 October 2014:

“The violation of fundamental rights can be shattering for victims and have long-lasting effects with ripples felt by many persons and even across generations. The non-implementation of measures that can mitigate (they can never fully neutralize) the legacies of the violations, in addition to being a breach of a legal obligation, has severe consequences for both individuals and collectivities.”<sup>56</sup>

Correspondingly, both the report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, of 23 January 2014<sup>57</sup> and the recent report on memorialization published under your mandate as Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence address the topic of the historical slave trade in the context of memorialization and transitional justice.<sup>58</sup> Nothing else can follow for European colonialism and its long-term effects.

The ongoing processes raise several questions as to the compliance with international norms and standards, in particular regarding the rights and roles of the victims in the described processes aiming at addressing past abuses.

#### **a. Victims’ rights to truth, to know, to justice and reparation**

As set out in the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity based on the report of the independent expert Diane Orentlicher,<sup>59</sup> “there can be no just and lasting reconciliation unless the need for justice is effectively satisfied,” and “forgiveness, which may be an important element of reconciliation, implies, insofar as it is a private act, that the victim or the victim’s beneficiaries know the perpetrator of the violations and that the latter has acknowledged his or her deeds”. Accordingly, the Updated Set of Principles provides that:

“every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.” (Principle 2),

and

“Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.” (Principle 4)

“States must take appropriate action, including measures necessary to ensure the independent and effective operation of the judiciary, to give effect to the right to know. Appropriate measures to ensure

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<sup>56</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc A/69/518 (14 August 2014), para 7.

<sup>57</sup> Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed Memorialization processes, UN Doc A/HRC/25/49 (23 January 2014), para 83-83.

<sup>58</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc A/HRC/45/45 (9 July 2020), para. 24.

<sup>59</sup> Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc E/CN.4/2005/102/Add.1 (8 February 2005), Principle 2-5.

this right may include non-judicial processes that complement the role of the judiciary. Societies that have experienced heinous crimes perpetrated on a massive or systematic basis may benefit in particular from the creation of a truth commission or other commission of inquiry to establish the facts surrounding those violations so that the truth may be ascertained and to prevent the disappearance of evidence. Regardless of whether a State establishes such a body, it must ensure the preservation of, and access to, archives concerning violations of human rights and humanitarian law.” (Principle 5)

In addition, the legal basis for a right to a remedy and reparation is meanwhile firmly enshrined in the corpus of international human rights instruments, now widely accepted by States.<sup>60</sup> To comply with these standards, States have the obligation to investigate and punish human rights violations and to combat impunity. Failure to investigate and prosecute such violations is in itself a breach of the norms of human rights treaties.<sup>61</sup> As elaborated further in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>62</sup> the rights of victims to remedies comprise the equal and effective access to justice, adequate, effective and prompt reparation for harm suffered as well as access to relevant information concerning violations and reparation mechanisms (Principle 11).

Principle 18-23 provide further details on the different *modi* to fulfill the right to reparation, through restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Some of these are complimentary to the obligation of the State to investigate, such as the verification of the facts and full and public disclosure of the truth, the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities. Satisfaction may also comprise an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim, a public apology, including acknowledgement of the facts and acceptance of responsibility as well as commemorations and tributes to the victims.<sup>63</sup>

Of the outlined measures to address grave and systematic abuses, so far, only very few any have been implemented by the States in the case at hand. After the events of 1904-1908, but also during the remaining decades of the 20<sup>th</sup> century, no efforts have been taken to fulfill the rights to truth, to know, to justice and to reparation in the lifetime of the direct survivors or their children and grandchildren.

Until today there is no official investigation or account available on the events between 1904-1908, nor has there been a process established that systematically considers the accounts of the affected communities on these events. Available resources are limited to the results of historical

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<sup>60</sup> United Nations High Commissioner for Human Rights, Rule-of-law tools for post-conflict states, Reparations programmes (2008), HR/PUB/08/1, p. 5 f.

<sup>61</sup> Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant Adopted on 29 March 2004 (2187th meeting), para 18.

<sup>62</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Resolution, UN Doc A/Res/60/147 (16 December 2005).

<sup>63</sup> *Ibid.*, Principle IX, Reparation for harm suffered, Nr. 19-23.

research and, usually German language, documents in archives. Of the available literature on the topic, most research has been conducted by Europeans and there is a broad range of literature based primarily on the accounts of colonizers and, at times, with openly colonial-apologetic tendencies.<sup>64</sup> According to the sources publicly available, a comprehensive investigation or a judicial decision restoring the dignity, the reputation and the rights of the victim is also not a planned part of the ongoing negotiation process.

As described above, an official apology of the Federal Republic of Germany for the events between 1904-1908 has not been given so far. While the German State has acknowledged that the events qualify as genocide according to present-day international legal standards, the further qualifications attached to this acknowledgment cast doubt that any legal consequences will result from this qualification. The continuous affirmation of the German Republic of Germany that the conduct involved no violation of international law at the time and, as a result, also not today and that the events, legally, did not qualify as genocide have contributed to retraumatization in the affected communities and have given rise to doubts as to the seriousness of this acknowledgment. As elaborated by Pablo de Greiff in his report on reparations of 14 October 2014:

“In some cases [...] it is argued that the benefits are given not as a way of satisfying the legal obligations of the State and the rights of the victims but as an expression of “solidarity” with them [or] the acts that are the subject of redress are declared to be “unjust” but such a declaration is also said to have no legal consequences [...]

Reparation programmes that fail to acknowledge responsibility in effect attempt to do the impossible. Just as an apology is ineffective unless it involves an acknowledgment of responsibility for wrongdoing (an apology depends on such recognition, everything else being an excuse or an expression of regret) reparation programmes that fail to acknowledge responsibility do not provide reparation [...].<sup>65</sup>

This assessment matches the problems visible in the case at hand. The above is all the more true for the conclusion drawn by the representatives of the Federal Republic of Germany regarding possible rights of the affected communities. Neither the survivors nor their descendants have been provided with a remedy or reparations. This is true for both monetary and other forms of compensation, but also the mentioned means of rehabilitation, satisfaction and guarantees of non-repetition. As described above, representatives of the German State continue to make it very clear that there will be no reparation or other remedies to individual claims by descendants given at any point in time. This goes as far as the refusal to consider the descendants of the survivors as victims.

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<sup>64</sup> See Schneider-Waterberg, Hinrich R. *Zur Geschichte des Hererokrieges in Deutsch-Südwestafrika 1904 - 1907*, 3rd ed. (2012) (in German).

<sup>65</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc A/69/518 (14 August 2014), para. 62-63.

## **b. Non-adherence to a victim centered and gender sensitive approach in the ongoing process**

While it is to be applauded that the Federal Republic of Germany and the Republic of Namibia have initiated an official process to address the described abuses, the way this process has been designed raises significant doubts as to its adherence with international standards.

These include, in particular, the adoption of a victim-centered and gender sensitive approach. As elaborated already in the report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies of 2004 “the most successful transitional justice experiences owe a large part of their success to the quantity and quality of public and victim consultation carried out.”<sup>66</sup> The participation of victims is meanwhile recognized both as an epistemic resource and as a source of legitimacy for transitional justice processes.<sup>67</sup>

Several aspects of the ongoing process deserve closer scrutiny in this regard. As described, the Foreign Office of the Federal Republic of Germany refers to the Ovaherero and Nama living today as “ethnic groups [...] particularly affected by the past”,<sup>68</sup> but not as victims. This goes along with the denial of any individual rights of members of the affected communities resulting from the described events (above I.d.).

The Federal Republic of Germany also seems to consider the involvement of the affected groups is an exclusively Namibian responsibility (see above I.c.). However, as pointed out in the OHCHR study on the right to reparation:

“Before the proclamation of internationally protected human rights, the prevailing view in international law was that wrongs committed by a State against its own nationals were essentially a domestic matter and that wrongs committed by a State against nationals of another State could give rise to claims only by that other State as asserting its own rights.

[...]

With the adoption of the Universal Declaration of Human Rights and the International Covenants on Human Rights, it was recognized that human rights were no longer a matter of exclusively domestic jurisdiction and that consistent patterns of gross violations of human rights warranted international involvement. Furthermore, international human rights law progressively recognized the right of victims of human rights violations to pursue their claims for redress and reparation before national justice mechanisms and, if need be, before international forums.”<sup>69</sup>

It is only consequent that, in an inter-governmental process as described above, the obligation to ensure that the victims’ perspectives and voices are heard lies with both states involved in this process.

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<sup>66</sup> Report of the Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies, UN Doc S/2004/616 (23 August 2004), para. 16.

<sup>67</sup> See only: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on the participation of victims in transitional justice measures, UN Doc A/HRC/34/62 (27 December 2016), para. 24-26.

<sup>68</sup> Federal Foreign Office: Addressing Germany and Namibia’s past and looking to the future, Article. Last updated: 1 July 2019, available at: <https://www.auswaertiges-amt.de/en/aussenpolitik/regionaleschwerpunkte/afrika/-/1991702> (last visited 31.10.2020).

<sup>69</sup> United Nations High Commissioner for Human Rights, Rule-of-law tools for post-conflict states, Reparations programmes (2008), HR/PUB/08/1, p. 5.

In addition, the format finally adopted has led to considerable tensions within the Ovaherero and Nama communities. The current format imposes the full responsibility to ensure their inclusion on the Republic of Namibia. It allows only certain members of the community to be involved in the ongoing process and only on the premise of their acceptance of no direct representation in the negotiations between the States. As a result, the Ovaherero and Nama are divided between those who decided to accept these prerequisites and those who insist on a triologue format. These tensions are even furthered by the language adopted by the German Foreign office, referring to the second groups, for example, as “others [who] refuse to join in” (above I.c.) or “A number of representatives” (above I.d.) who filed the lawsuit in New York.

In addition, regardless of the direct involvement in the negotiations, there is nothing that indicates that a concept for a comprehensive inclusion of the memories and perspectives of Ovaherero and Nama living today is envisioned in the above-described process.

Similar observations can be made regarding the different roles and perspectives of women or of LGBT persons in the described process. As pointed out in the report on gender perspective in transitional justice processes published of 17 July 2020,

“A gender perspective requires the complex experiences of sexual and gender-based violence, not only of women, but also of men and of lesbian, gay, bisexual and transgender persons, be consciously and duly recognized and captured by any transitional justice measures that have been designed and implemented, taking into account the criterion of intersectionality. Otherwise the processes of truth-seeking, justice, comprehensive reparation, guarantees of non-repetition and memorialization would be incomplete”.<sup>70</sup>

As outlined, the authors are not aware of any Ovaherero or Nama women currently involved in the negotiations. Likewise, indications of the adoption of a gender sensitive approach or a historical assessment that considers the outlined gendered aspects of the German colonial rule (see above I.f.) are not perceptible. The fact that Germany recognizes a special relationship to German speaking Namibian because of the language, but not to those, mostly Black, descendants of the German colonizers who do not speak the German language only adds to the already prevalent racial discrimination in the German-Namibian post-colonial context.

Finally, the thorough refusal to legally qualify the events as genocide or to consider any legal obligations at all towards the affected communities has led to retraumatization. In this vein, it should be noted that the very negation of legal subjectivity, first as peoples through colonization and then within the colonial settler state through the loss of the legal capacity to own land or cattle, move freely or exercise the own culture stood at the core of the colonial trauma affecting the formerly colonized societies until today. Also against this background, the negative impact of the continued resistance of representatives of the German Federal Republic to recognize the affected communities as holders of rights should not be underestimated, be it through the statements made in court or regarding the legality of the historical German conduct, the negation of individual claim to reparation (above I.d.) or the denial of a possible direct involvement in the negotiation process (above I.c.).

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<sup>70</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc A/75/174 (17 July 2020), para 93.

As a state, the Federal Republic of Germany has considerable resources and knowledge about processes addressing past abuses and injustice. By refusing to attach any legal consequence at all to the above described events, the Federal Republic of Germany deprives itself of the possibility to draw on existing resources to address the above-described events adequately and inclusively.

### III. Annex: Historical overview

The **genocide** as such followed a first escalation in 1903 in Warmbad in the South-East of the country, with the killing of Abraham Witbooi, head of the Bondelswarts Nama, by Walther Jobst, a German lieutenant. The ensuing armed conflicts with the Bondelswarts bound relevant part of the Schutztruppe under the leadership of Theodor Leutwein in the South. The majority of the Herero groups under the leadership of Samuel Maharero took the opportunity to attack farms on 12 January 1904.<sup>71</sup>

Several farmers were killed, but the Ovaherero widely stuck to their orders to spare women and children. In reaction to these developments, the German Empire deployed further troops to Namibia and the command of the Schutztruppe was given to lieutenant general Lothar v. Trotha, who followed a strategy of extermination and destruction.<sup>72</sup>

On 11 August 1904, the most relevant battle of the war took place at the Waterberg plateau, where the Ovaherero had gathered at the Ohamakari water holes together with their cattle and families after prior confrontations with the German military. The Ovaherero lost the battle at Waterberg, but they were at that point not completely beaten and forced to retreat into more arid areas. Instead of seeking an opportunity for negotiations, the Schutztruppe under v. Trothas command started to pursue the Ovaherero, who fled in the direction of the arid Omaheke.<sup>73</sup> This flight lasted several months, during which they lost most of their cattle and many Ovaherero died due to the extreme conditions under the German pursuit. This flight mounted in the Proclamation of Lothar von Trotha of 2 October 1904 in Otjinene, in the Omaheke region:

“The Herero are no longer German subjects. They have murdered and stolen, they have cut off the ears, noses and other body-parts of wounded soldiers, now out of cowardice they no longer wish to fight. I say to the people: Anyone who delivers a captain will receive 1000 Mark, whoever delivers Samuel\* will receive 5000 Mark.

The Herero people must however leave the land. If the populace does not do this I will force them with the Groot Rohr [Cannon]. Within the German borders every Herero, with or without a gun, with or without cattle, will be shot. I will no longer accept women and children, I will drive them back to their people or I will let them be shot at.

These are my words to the Herero people. The great General of the mighty German Kaiser”<sup>74</sup>

When the Nama in the South took up arms after the lost battle of the Ovaherero in the North, von Trotha issued a proclamation targeted at the Nama in which he referred to the above quoted proclamation against the Ovaherero on 25 April 1905.<sup>75</sup>

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<sup>71</sup> Kößler, Reinhart: *Namibia and Germany: Negotiating the Past* (2015), p. 15.

<sup>72</sup> Gewalt, Jan-Bart: *The Great General of the Kaiser, Botswana Notes and Records, Volume 26*, p. 67, Kößler, Reinhart: *Namibia and Germany: Negotiating the Past* (2015), p. 16-17; for a detailed account see: Häussler, Matthias: *Der Genozid an den Herero. Krieg, Emotion und extreme Gewalt in »Deutsch-Südwestafrika«* (2018), p. 118 ff. (in German).

<sup>73</sup> Ibid.

<sup>74</sup> As translated in Gewalt, Jan-Bart: *The Great General of the Kaiser, Botswana Notes and Records, Volume 26*, p. 67-76.

<sup>75</sup> Kößler, Reinhart: *Namibia and Germany: Negotiating the Past* (2015), p. 16.

The **concentration camps** (Konzentrationslager) were created already during the war. While they were established in different areas all over the country, the most prominent camps were the concentration camps in Swakopmund and Lüderitz. Beyond serving as detainment sites for prisoners of war, these camps provided forced labor for companies and the development of the colonial infrastructure, namely ports and railways, as the extermination strategy had led to the loss of workforce for the German settlers.<sup>76</sup> Some of them were located at the coast in Swakopmund and Lüderitz. The Lüderitz camp was established on a small, stony peninsula, Shark Island (Haifischinsel). The situation especially in these coastal camps was characterized by a wet and cool climate, which the detainees from central Namibia, in the case of Lüderitz mainly Nama, were not used to.

The Harsh living conditions in these camps, including malnutrition, lack of clothing and heavy labor as „educational measure“, led to a death toll of 7682 persons, between thirty and nearly fifty percent of the detainees,<sup>77</sup> according to official German accounts. Regarding Shark Island, reports of Witbooi Nama mention a death toll of more than 90 percent out of 3500 persons detained on Shark Island. The end of the war was declared on 31 March 1918. However, the concentration camps were only closed for Ovaherero on 28 May 1918. Several Nama were not officially released until the beginning of the First World War in 1914.<sup>78</sup>

The surviving Ovaherero and Nama who had not fled to the neighboring countries Botswana, South Africa and Angola, faced a radical change in their living conditions in comparison to the time before the war from 1904-1918. The German colonial administration now could fully implement their plans for a **racialized colonial settler state**. Living conditions for the Black population (referred to as “Eingeborene”) were characterized by systematic surveillance and discrimination. In 1905 and 1906 property including the land, cattle and other property were **expropriated** through an imperial regulation (Kaiserliche Verordnung: Einziehung von Vermögen Eingeborener).

Following regulations of 1918 prohibited the possession of land and cattle by the Black population who were thus deprived not only of their means of economic production, but also the reproduction of their culture and collective identity.<sup>79</sup> The **freedom of movement** was repealed. As part of general passport obligations, Black people over the age of seven were required to wear an identity tag (Erkennungsmarke) made of sheet metal indicating the district where they lived. The Union of South Africa controlled Namibia starting from 1915, later backed by a League of Nations Mandate, and kept several core characteristics of the German

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<sup>76</sup> Erichsen, Caspar W.: “The angel of death has descended violently among them” Concentration camps and prisoners-of-war in Namibia, 1904-08 African Studies Centre Research Report 79 (2005); Kreienbaum, Jonas: “Ein trauriges Fiasko”. Koloniale Konzentrationslager im südlichen Afrika 1900-1918 (2015).

<sup>77</sup> Kreienbaum, Jonas: “Ein trauriges Fiasko”. Koloniale Konzentrationslager im südlichen Afrika 1900-1918 (2015), p. 121 (in German).

<sup>78</sup> Kößler, Reinhart; Melber, Henning: Völkermord und was dann? Die Politik deutsch-namibischer Vergangenheitsbearbeitung (2017), p. 25 (in German).

<sup>79</sup> Zimmerer, Jürgen: Krieg, KZ und Völkermord in Südwestafrika. Der erste deutsche Genozid, in: Zimmer, Jürgen; Zeller: Der Kolonialkrieg (1904-1918) in Namibia und seine Folgen, p. 60-61 (in German).

colonial system, among them the duty to work (Arbeitspflicht) for Black people and the passport regulations.<sup>80</sup>

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<sup>80</sup> Ibid; and: Kößler, Reinhart; Melber, Henning: Völkermord und was dann? Die Politik deutsch-namibischer Vergangenheitsbearbeitung (2017), p. 25 (in German), Kößler, Reinhart: Namibia and Germany: Negotiating the Past (2015), p. 20 f.