

# EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS



European Center for  
Constitutional and Human Rights (ECCHR)  
Zossener Str. 55–58  
10961 Berlin Germany

EUROPEAN CENTER FOR  
CONSTITUTIONAL AND  
HUMAN RIGHTS e.V.  
—  
ZOSSENER STR. 55-58  
AUFGANG D  
10961 BERLIN, GERMANY  
—  
PHONE +49.(030).40 04  
85 90  
FAX +49.(030).40 04  
85 92  
MAIL INFO@ECCHR.EU  
WEB WWW.ECCHR.EU

## Questionnaire 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

—  
AMTSGERICHT  
BERLIN-CHARLOTTENBURG  
VR 26608

—  
VORSTAND:  
DIETER HUMMEL  
LOTTE LEICHT  
TOBIAS SINGELNSTEIN

—  
GENERALSEKRETÄR:  
WOLFGANG KALECK

Dear Prof. Salvioli,

This questionnaire is submitted to you by the European Center for Constitutional and Human Rights (ECCHR). It reiterates the dossier submitted to you last year (dossier attached to this questionnaire for consideration for the drafting of your report) and informs about more recent developments and additional points relevant to your inquiry.

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 overall message of this submission reaffirms our assessment made in the dossier submitted to you October 31, 2021. Since then, the negotiations between Namibia and Germany regarding the Genocide 1904-1908 are still on-going, almost stalled, despite previous official statements that an agreement will be achieved early 2021. The government of the Federal Republic of Germany still fails to unconditionally 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 resubmit 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. In addition, we would like to bring to your attention the shortcomings as to the promises made by public officials and other German public institutions like museums and foundations to restitute artefacts and especially human remains/ ancestors stemming from the colonial context. The former often are culturally and spiritually very significant to the affected communities in the former colonies and the latter are – and this is a fundamental point to make – humans, persons whose family and descendants yearn to bring home, to mourn and to bury them according to their respective rituals after decades of loss.<sup>1</sup> It is important to understand that this loss means transgenerational suppression of cultural identity and the negation of their subjectivity as humans, as people with fundamental and human rights to rest in peace. Hence their restitution and repatriation cannot be but an essential part of true reconciliation and building future relationships as contained in the idea of restorative justice. Yet, the German law applicable to these constellations doctrinally, jurisprudentially and factually makes it impossible for the descendants of the affected communities to make their requests heard and accommodated.

## QUESTIONNAIRE

**1. Please indicate which mechanisms have been established in the concerned country to hold accountable persons accused of committing or bearing responsibility for gross violations of human rights and serious violations of international humanitarian law in colonial contexts. If such mechanisms were not adopted, please explain why. Please indicate the challenges and opportunities encountered in investigating, prosecuting and sanctioning such crimes.**

As described in our latest dossier,<sup>2</sup> Germany already had a hard time to acknowledge the historical events of 1904-1908 in German Southwest Africa (GSWA) as genocide. And although Germany applies the term of Genocide since 2015, Germany does not want it to be understood in its legal dimension. This becomes very clear in its refusal to apply the legal term of reparations as consequence of that acknowledgment in the text negotiated with the Namibian state. Moreover, by repeatedly invoking the doctrine of intertemporal law laid out by Huber in the *Isla de Palmas* case<sup>3</sup> as a counterargument against state responsibility for the crime of genocide,<sup>4</sup> it makes sure that accountability is barred in any possible case. May it be in terms of international state responsibility or state responsibility for its officials in individual cases before national courts. Any attempt to understand international law of what it was: a tool of hegemonic domination by the Western states to justify conquest and extraction in the colonies is met with professional disdain. This mainstream argumentation taken on by the German government in various fora (intestate negotiation<sup>5</sup> and

---

<sup>1</sup> There are differences respectively to each country and culture. In the case of Namibia and Tanzania however, the affected communities wish for repatriation, cf. instead of many: <https://www.spiegel.de/geschichte/deutscher-kolonialismus-in-afrika-wo-steckt-der-kopf-des-mangi-meli-a-1e5ab093-222a-4453-93d3-597e8aea417c> (last visited 2021/05/06).

<sup>2</sup> Dossier for Consideration and Action to Professor Fabian Salvioli... (31 October 2020), see attachment to this document, in particular at 4-5, 9-11.

<sup>3</sup> *Island of Palmas (Netherlands v USA)* (1928) 2 RIAA 829, 845.

<sup>4</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> (last visited 2021/05/06).

<sup>5</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>. (last visited 2021/05/06).

litigation<sup>6</sup>) leaves colonial crimes in an eternal lacuna of absent accountability, despite the fact that there are many very doctrinally and jurisprudential acceptable and convincing ways to interpret and argue for a different understanding.<sup>7</sup> The position to not even engage with this sort of understanding creates a culture of impunity for colonial crimes that engenders colonial repercussions for the affected communities until today.

Because, when we look for instance at the current restitution debate the same logic prevails. It is yet another way to render accountability for colonial crimes impossible. Besides, again, the reliance on the intertemporality argument establishing the legality of the acquisition of artefacts and even human remains/ ancestors from colonial contexts, it is the strict reading of the statutes of limitation that furthermore shields the German state from legal responsibility for the looting and robbing of artefacts and human remains/ ancestors. Especially noteworthy in this context is the fact that German public museums have published guidelines<sup>8</sup> saying that in cases where restitution is asked for, they will not rely on statutes of limitation. However, these statements are not legally binding. So again, members of affected communities that demand justice<sup>9</sup> to be done by returning to them what is rightfully theirs, can never rely on the law to step in, if museums stall or even refuse to first even give helpful information about the whereabouts, to do research or to return. They are left again with nothing but the promise of an act of grace by German public officials.

And even, where restitution was “granted”, as it is with the very recent commitment to return the Benin Bronzes, the concretization thereof is left to be determined. And when the minister of foreign affairs, Heiko Maas issued a statement on this restitution, he named it a “question of justice”<sup>10</sup>, again playing with the ambiguity of the term between morality and law.

Another very concrete example of where the law fails to accommodate accountability for colonial crimes is the question of standing before courts in cases where family members claim repatriation of their ancestors from the German archives. Relying in these cases on fundamental rights of the deceased under German constitutional law, the claimants need to establish a certain closeness to the deceased in order to even standing to make a case merely admissible. Yet, again because of evident time lapse and legal and factual impediments to claim the infringement of those rights earlier, those claimants would need to rely yet again on the clemency of those institutions that in the past conducted “Racial research” and therefore kept their deceased family members like inert objects in the archives for years. Also, as one last example of the limitation of current laws in Germany to really live up to promises of reckoning with the German colonial past in the context of the restitution debate is the fact that Information laws (IFG)<sup>11</sup> are not far enough, since they do not

---

<sup>6</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, at 7.

<sup>7</sup> Instead of many: Matthias Goldmann, *Decolonizing Intertemporal International Law*, in: ECCHR *Colonial Repercussions: Namibia, 115 years after the Genocide of the Ovaherero and Nama*, available at <https://www.ecchr.eu/publikation/colonial-repercussions-namibia/> (last visited 2021/05/06); Edward Martin, *The Application of the Doctrine of Intertemporality in Contentious Proceedings*, (Berlin: Duncker & Humblot 2021); Mieke van der Minden, *The Acquisition of Africa (1870-1914); The Nature of International Law*, (Leiden, Boston: Brill Nijhoff 2017).

<sup>8</sup> Leitfaden zum Umgang mit Sammlungsgut aus kolonialen Kontexten (2021), at 82ff in reference to Leitfaden zum Umgang mit Sammlungsgut aus kolonialen Kontexten (2019), at 159, available at <https://www.museumbund.de/publikationen/leitfaden-zum-umgang-mit-sammlungsgut-aus-kolonialen-kontexten/> (last visited 2021/05/06).

<sup>9</sup> On the importance of restitution of human remains/ ancestors in order to heal: Talita/ UI-#Nuses, on human remains and restorative justice, in: ECCHR *Colonial Repercussions: Namibia, 115 years after the Genocide of the Ovaherero and Nama*, available at <https://www.ecchr.eu/publikation/colonial-repercussions-namibia/> (last visited 2021/05/06).

<sup>10</sup> <https://www.sueddeutsche.de/kultur/heiko-maas-benin-bronzen-restitution-1.5245996> (last visited 2021/05/06).

<sup>11</sup> [https://www.gesetze-im-internet.de/englisch\\_ifg/englisch\\_ifg.html](https://www.gesetze-im-internet.de/englisch_ifg/englisch_ifg.html). This act on the federal level grants access to information held by the Federal Government. There exist corresponding acts on state level which grant access to information held by state authorities (see the Berlin IFG: [https://gesetze.berlin.de/perma?a=InfFrG\\_BE](https://gesetze.berlin.de/perma?a=InfFrG_BE)).

grant a right to ask for research, which in most of the cases because of poorly executed archiving practices by the institutions, would be needed in order to link the living and the dead. Yet, it is exactly that missing linkage that is often used by institutions in order to justify why they cannot help people to identify their deceased in the archives, again creating a circle of impunity in the past to the present.

**2. Please indicate which measures have been established in the concerned country to inquire on and establish the truth about gross violations of human rights and serious violations of international humanitarian law committed in colonial contexts. If such mechanisms were established, please indicate how was the outcome of the inquiries made public and conveyed to victims and civil society in the affected country as well as to civil society in the former colonizing power. If such mechanisms were not adopted, please explain why. Please indicate the challenges and opportunities encountered in this regard, whether victims and affected communities have been effectively consulted in the design and implementation of these measures, and whether a gender perspective was adopted.**

Truth telling requires education especially on the side of those who committed crimes and who were perpetrator of gross human rights violations, or who are part, through historical responsibility, of the community of perpetrators. In our previous dossier we mentioned the problem of colonial amnesia in Germany. This point cannot be overemphasized. Lancunae in education<sup>12</sup> and public discourse are still prevalent and omnipresent in Germany.<sup>13</sup> Prof. Zimmerer<sup>14</sup>, a leading academic very much involved with research on the colonial legacy of Germany and how to tackle it in a reasonable and responsible way, made the statement that most of his students, when they enter university never or very sporadically heard about the Genocide in German Southwest Africa (GSWA), nor German colonialism in general. And often in these cases, the knowledge and interest were thanks to the individual teacher's input rather than a systematic inclusion into the curriculum.<sup>15</sup> This impression was echoed by Naita Hishoono from the Namibian NGOs Center for Democracy during a talk this month at the GIGA, a regional research institute in Hamburg.<sup>16</sup> Furthermore, as regards the activities by the German government of providing information on the Namibia-Germany talks and programs nothing new was published on the foreign ministry's homepage since October last year.<sup>17</sup> Hence there is a certain disinterest to inform society about German responsibility for its colonial past, especially when it comes to colonial crimes such as Genocide in Namibia and massacres such as the Maji-Maji massacre in Tanzania. In the cases of Namibia for instance acts of symbolic acknowledgement of Germany's colonial legacy and memorialization is perceived as insufficient and non-inclusive as regards the affected communities<sup>18</sup> and at times conflicted with co-memorialization of German soldiers on Namibian grounds. As to the latter, again I would like to refer to the dossier.<sup>19</sup>

---

<sup>12</sup> <https://www.dw.com/de/kolonialgeschichte-kein-platz-im-unterricht/a-55200764> (last visited 2021/05/06).

<sup>13</sup> <https://www.dw.com/de/wie-l%C3%A4uft-die-aufarbeitung-des-deutschen-kolonialismus/a-57314614> (last visited 2021/05/06);...

<sup>14</sup> <https://www.dw.com/de/wie-l%C3%A4uft-die-aufarbeitung-des-deutschen-kolonialismus/a-57314614> (last visited 2021/05/06).

<sup>15</sup> <https://www.dw.com/de/kolonialgeschichte-kein-platz-im-unterricht/a-55200764> (last visited 2021/05/06).

<sup>16</sup> <https://www.dw.com/de/wie-l%C3%A4uft-die-aufarbeitung-des-deutschen-kolonialismus/a-57314614> (last visited 2021/05/06).

<sup>17</sup> <https://www.auswaertiges-amt.de/en/-/231710> (last visited 2021/05/06).

<sup>18</sup> One very recent example was the renaming of the Wissmann Street in Berlin to Lucy Lamarck Street. Wissmann was a controversial colonialist. However, the Diaspora as well as the Tanzanian ambassadors deplores that other Wissmann Streets are keeping their name, cf. <https://diasporanrw.net/botschafter-tansanias-wissmannstrassen-in-deutschland-sollten-umbenannt-werden/> (last visited 2021/05/06). Also on the question of remembrance and memorialization in the Namibian context, cf. dossier, at 11-12.

<sup>19</sup> At 11-12.

**3. Please indicate which measures have been established in the concerned country to provide reparation to victims of gross violations of human rights and serious violations of international humanitarian law committed in colonial contexts. If such processes were established, please indicate which type of reparation was provided to victims (for example: restitution, compensation, satisfaction, and /or rehabilitation). If such measures were not adopted, please explain why. Please indicate the challenges and opportunities encountered in this regard, whether victims and affected communities have been effectively consulted in the design and implementation of these measures, and whether a gender perspective was adopted.**

In regard to reparations in the strict legal sense, I would like to reiterate the dossier submitted to you<sup>20</sup>: “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>21</sup>

Germany refuses to use the term reparations<sup>22</sup> and considers material redress to be achieved through development aid. According to the German Foreign Office, topics discussed involve inter alia, infrastructure, energy, water supply and professional training. However even here no concrete action was registered.<sup>23</sup> In general, not many details are known about the latest state of the intergovernmental negotiations. Some sources indicate that Germany had offered a meagre €10 million.<sup>24</sup> Moreover, things get even more problematic, as Germany argues that development aid it has paid to Namibia and will continue to pay in the future should also enter the equation. This contingency, together with wording of the “healing of the wounds” expose again colonial continuities governing the relationship between the former colonizer and the formerly colonized. It lays bare an understructure of hierarchy prevalent since colonial times: one is giving and setting the condition for the other to receive “aid. This framework permits it to leave the most pressing issues for true reconciliation and rebuilding a deeply hurt society and new relationships out of the equation. Hence Germany is not required to address issues like unequal land distribution marked by the German colonial rule.<sup>25</sup> The same is true for the negation of human dignity, cultural identity, and equal legal standing as legal subjects for the members of the affected communities as consequence of a clearly hegemonic, apologetical international law of the so-called ‘civilized

---

<sup>20</sup> For more details, cf. at 9-11.

<sup>21</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 2021/05/06).

<sup>22</sup> Republic of Namibia, The Presidency, Media Release, 11 August 2020 (attached to the submission in October 2020).

<sup>23</sup> <https://www.namibian.com.na/100764/read/German-elections-could-derail-genocide-talks>

(last visited 2021/05/06).

<sup>24</sup> Matthias Goldmann, *Why the Key to the Past Lies in the Future: The Dispute about Reparations for Namibia*, *VerfBlog*, 2020/8/20, <https://verfassungsblog.de/why-the-key-to-the-past-lies-in-the-future/>,

(last visited 2021/05/06).

<sup>25</sup> John Nakuta, Why Bygones can’t be Bygones, in: (eds. Willem Odendaal and Wolfgang Werner) *Neither here nor there Indigeneity, marginalisation and land rights in post-independence Namibia*, (Land, Environment and Development Project, Legal Assistance Centre 2020).

nations.<sup>26</sup> Moreover, the refusal to accept legal responsibility for the past and a respective legal obligation in the present hinders building a partnership that is based on a legal relationship between two equal legal subjects for the future. Instead, it holds onto colonial conceptions of one giving grace, showing acts of comity and the other left with no choice except to accept or be left with nothing. Overall, since today, the language and the process of the negotiations regarding the colonial past of Germany in Namibia misses the opportunity to truly work towards restorative justice. To the contrary, the language and process encompasses many colonial continuities and entails many colonial repercussions. Hence colonialism and colonial injustice recurs in the law and political reality of today.

This situation is exacerbated, when we look at reparations in the wider, restorative sense, there, too many issues go unaddressed and/ or remain unsolved. First, for instance an apology is still pending despite promises to the contrary: “Germany has said it will make a formal apology - though the wording is still to be worked out”<sup>27</sup>. In addition, Germany still refuses to give some transparency into negotiations process. As for the German side, it declines to say anything publicly about the progress of the talks.<sup>28</sup>

Secondly, as to the issues of remembrance and memorialization, please refer to the dossier at 11-12. Again, it is important to highlight, that in the Namibian case, the Ovaherero and Nama state that access to the ancestral lands is deemed as essential for the process of “healing the wounds” as it remains unsolved. The same can be said for the inclusion of the affected communities. Representatives of the Ovaherero and Nama still criticize that they are not included in the negotiation process, which means the rights of the victims are less framed in terms of human rights but rather as negotiation leverage, nullifying any honest attempt of a victim’s centered approach right from the start. Moreover, on the basis of the dossier<sup>29</sup>, we resubmit that a gender perspective is utterly lacking in the negotiation process, may it be in terms of addressing gender-based crimes and/ or sexualized violence during the colonial rule, or may it be in terms of inclusion of non-male perspectives in the present’s day negotiation process.

To conclude, let’s turn on last time to the term of “healing the wounds”<sup>30</sup>. Because it is a perfect example for how Germany still aims a shaping the narrative of reconciliation in terms of morality instead of the law and legal obligation, where it suits the German state. That hasn’t changed with the acknowledgment of the Genocide as genocide. First, because, it was a conditioned acceptance of the term, namely not in its legal dimension, a point repeatedly stressed by Germany.<sup>31</sup> Secondly, the same intent and strategy behind the initial refusal to call it genocide merely shifted to the refusal to apply the legal terminology of reparations, again framing the whole discussion in terms of comity. And finally, while this term seems to emphasize the relational aspect of restorative justice, the strategic usage of exactly that dimension, i.e. to avoid legal obligations one-sidedly, does the exact opposite of what the relational dimension of restorative justice processes originally is supposed to do, namely to create equality, where there was oppression and restore the humanity of both the violator as well as the violated. Instead, it corrodes the meaning of such a relational, restorative language. The semantic usage of “healing the wounds” applied by the German side brings it to a point of insincerity that continues to harm the affected communities, and that solidifies the colonial logic of the center and the periphery, of the law for the civilized and comity for “the other” before the process of reconciliation, of the “healing the wounds” could even had had the chance to begin.

---

<sup>26</sup> Karina Theurer, Racist Repercussion and transgenerational Exclusion in reference to Anthony Anghie and other TWAIL scholars in: ECCHR *Colonial Repercussions: Namibia, 115 years after the Genocide of the Ovaherero and Nama*, available at <https://www.ecchr.eu/publikation/colonial-repercussions-namibia/> (last visited 2021/05/06).

<sup>27</sup> <https://www.bbc.com/news/stories-56583994> (last visited 2021/05/06).

<sup>28</sup> <https://www.bbc.com/news/stories-56583994> (last visited 2021/05/06).

<sup>29</sup> At 12-13

<sup>30</sup> <https://www.dw.com/en/namibia-germany-reparations/a-54535589> (last visited 2021/05/06).

<sup>31</sup> Cf. Dossier 4-5.

Sarah Imani  
(Legal Advisor ECCHR)

Attachment:

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 (31 October 2020).