



Submission to the List of Themes for the Review of the Combined 23rd to 26th State Reports of the Federal Republic of Germany at the 111th Session of the UN Committee on the Elimination of Racial Discrimination (CERD)

Submitted July 20 2023

By the coalition of Decolonize Berlin e.V. , Berlin Postkolonial e.V., Flinn Works and the European Center for Constitutional and Human Rights e.V. (ECCHR)

This List of Themes submission is presented to the UN Committee on the Elimination of Racial Discrimination to assist the Committee's upcoming review of the Federal Republic of Germany by the European Center for Constitutional and Human Rights together with its partner organizations Berlin Postkolonial e.V., Decolonize Berlin e.V., and Flinn Works (hereinafter "the coalition").

The submission outlines a key lacuna in the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in the Federal Republic of Germany: **the legal reappraisal of colonialism, colonial crimes, of the historic colonial injustice and its lasting impact on racialized communities.** Paradigmatic for this lacuna is the German government's as well as the respective institutions' (museums'/collections') handling of Human Remains/Ancestors¹ from colonial contexts in their archives and their position and praxis of repatriation. The way Human Remains/Ancestors are treated by German institutions and museums and how the question of restitution is handled by state officials represents a racial discrimination pursuant to Article 1 ICERD. Furthermore, Germany does not abide by its obligations as laid out in particular in Arts. 2, 5, 6 ICERD. In particular, no efforts by the Federal Republic of Germany are apparent to enact legislation on the issue nor to provide necessary remedies for those (unsuccessfully) seeking restitution and thereby end the violation of the rights of the deceased and their descendants as well as ensure legal certainty, adequate participation and access to justice when tackling restitution.

The fulfillment of CERD obligations requires the meaningful redress and repair of historical injustice. Yet, the State Report submitted by the Federal Republic of Germany fails to address the intersection between the colonial past and current experiences of racist discrimination in the present. The coalition deems the CERD to be the right forum to address this missing link, recalling the postcolonial tradition of the ICERD, which states: *"that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist."*²

¹ We use the terminology " Human Remains/ Ancestors or Ancestors/Human Remains" to emphasize that to many people the human remains in public museums or private collections are actually ancestors, whose right to a human dignity have been violated. The terminology "Ancestors" is moreover the most common term used by claimants from former colonies to repatriate their community members and complete their burial rituals.

² ICERD preamble, which then refers to GA, Res. 1514 (XV). Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/RES/15/1514, 14 December 1960.

There is a considerable political struggle for the repatriation of these Ancestors/Human Remains of the descendants of those killed and shipped to Germany during its colonial conquests as a result of colonial violence that in some case amounted to genocide.³ The Namibian Talita Ui-nuses describes the matter as follows:

*The matter of the skulls and bones of the Ovaherero and Nama, San, Baster and Damara who died or were killed during the colonial period, and were then transported to Germany—where they remain today— [...] is a very emotional matter. Unethical eugenic experiments were conducted on our people. We were treated as if we were not human at all. The Germans not only killed them, they degraded my people's dignity, beheading them and taking their remains to Germany. Unthinkable acts!*⁴

Further documented acts of brutal colonial subjugation that resulted in the forceful removal of Human Remains/Ancestors include the execution of Chagga leaders of Tanzanian resistance against German colonial forces – one of them Mangi Meli. Their remains were brought to Germany as trophies and/or for pseudo-scientific research. Their families are demanding the return of the remains to this day.⁵

Decades after the formal end of colonialism, the Human Remains/Ancestors of formerly colonized people continue to be in the possession of German museums, governmental institutions and private collections. Many of these Human Remains/Ancestors originate from the former colonies of the German Empire (1871-1919): Tanzania, Rwanda, Burundi, Namibia, Cameroon, Togo, Papua New Guinea, Kiauchau (China) and Islands in the Pacific such as Tonga and the Marshall Islands.⁶ A recent report surveying museums and scientific institutions in the geographic area of Berlin showed that the collections of 12 state owned institutions contain at least 5,958 remains of people whose appropriation is assumed to be in a colonial context.⁷ This number might even be considerably higher since many institutions contributed only conservative estimates or no information at all toward the survey.⁸ The number rises accordingly when considering all institutions holding Human Remains/Ancestors across the Federal Republic but data has yet to be collected. A comprehensive national inventory on the federal level does not exist or is not made publicly available.

³ S. Geiseb, 'The Genocide Against the Ovaherero and Nama Peoples' in ECCHR and Akademie der Künste (eds), Colonial Repercussions: Namibia (2019), at 8, available at https://www.ecchr.eu/fileadmin/Publikationen/ECCHR_NAMIBIA_DS.pdf.

⁴ T. Ui-nuses, 'On Human Remains and Restorative Justice' in ECCHR and Akademie der Künste (eds), Colonial Repercussions: Namibia (2019), at 57, available at https://www.ecchr.eu/fileadmin/Publikationen/ECCHR_NAMIBIA_DS.pdf.

⁵ As further elaborated: C. Chandler, 'Skeletons from Kilimanjaro', 28/3/2023, available at <https://www.thedial.world/issue-3/germany-reparations-tanzania-skeletons-maji-maji-rebellion> and K. Iken, 'Wo steckt der Kopf des Mangi Meli in Der Spiegel', 28/3/2021 <https://www.spiegel.de/geschichte/deutscher-kolonialismus-in-afrika-wo-steckt-der-kopf-des-mangi-meli-a-1e5ab093-222a-4453-93d3-597e8aea417c> and Navid Kermani in Die Zeit, 19/1/2023, available at <https://www.zeit.de/2023/04/kolonialismus-afrika-europa-skelette-raub>.

⁶ Lest forget also from colonies of other European powers, such as Hawaii or New Zealand. Germany built the third-largest colonial empire at the time, after the British and French and played a vital part in settling territorial claims of colonial powers as host of the Berlin Conference in 1884/85.

⁷ I. Reimann/Decolonize Berlin e.V. (eds.), We Want Them Back: Scientific report on the presence of human remains from colonial contexts in Berlin (available at: https://decolonize-berlin.de/wp-content/uploads/2022/02/We-Want-Them-Back_english-web.pdf), 2022, at 25.

⁸ Ibid.

The objective to participate in this upcoming state report review process before CERD is to enter into a constructive dialogue with the German government on this topic. Seeking a better understanding of the colonial past, the colonial injustices and the effects that are still reverberating in the present lives of the descendants and affected communities that lost so much during the colonial rule. Their needs have to be the baseline for any fruitful engagement on the topic.

1. Recognizing (post)colonial injustice as racial discrimination (Art. 1)

We regret that the term “racial discrimination” is interpreted very narrowly in German legal and political practice. This runs contrary to the committee’s understanding that has always emphasized a broad understanding of the concept of racial discrimination.⁹ In particular, the Committee highlighted in General Recommendation 34 that racism and racial discrimination against people of African descent are expressed in many forms, notably structural and cultural.¹⁰ The notion of structural discrimination is entrenched deeply in the history of colonialism and the transatlantic trade of enslaved people. The committee and other bodies have repeatedly emphasized the connection and continuities between racially discriminatory practices and colonial injustices – not least in the Durban Declaration (especially No. 14 and No. 99)¹¹ and in the proclamations through the Permanent Forum of People of African Descent.¹²

The existing political and legal practice by the German state continues to disregard the colonial dimension inherent in many expressions of racial discrimination to this day. Racist practices and perspectives that are informed by past colonial injustices, world views and stereotypes are further upheld. This is especially apparent in the treatment of Human Remains/Ancestors where colonial continuities are neither recognized nor explored. The ongoing (mis)treatment of Human Remains/Ancestors seized in colonial context and held in German (state) institutions exemplifies aptly that structural and institutional forms of discrimination are the result of a historical process that excludes certain racialized people and communities from the realization of fundamental rights.¹³ The continued objectification of the deceased perpetuates a denial of the colonized subjects humanity and thus their human dignity.

Despite the immense number of Ancestors/Human Remains from colonial contexts in Germany, there have so far only been few repatriations. Ancestors/Human Remains were returned to Tanzania by the *Überseemuseum Bremen* in 1954 and to New Zealand in 2006 and 2017.¹⁴ However, it was the repatriations of the *Charité Berlin* (one of the largest German public university hospitals) to Namibia (2011 and 2014), Paraguay (2012) and Australia (2013

⁹ Cf. P. Gragl, D. Angst and E. Lantschner (eds), *ICERD Internationales Übereinkommen zur Beseitigung jeder Form von Rassismus: Handkommentar* (1st ed., 2020), at Artikel 1 para. 16.

¹⁰ CERD, General recommendation No. 34 adopted by the Committee - Racial discrimination against people of African descent, UN Doc. CERD/C/GC/34, 3 October 2001, para. 5.

¹¹ Durban Declaration, UN Doc. A/CONF.189/12, 8 September 2008 para. 14 and 99.

¹² Cf. Statement by United Nations Permanent Forum of People of African Descent, 30.8.2022, <https://www.ohchr.org/en/statements/2022/08/statement-united-nations-permanent-forum-people-african-descent>.

¹³ Cf. P. Gragl, D. Angst and E. Lantschner, *supra* note 8, at 116.

¹⁴ Cf. Überseemuseum Bremen <https://www.uebersee-museum.de/ueber-uns/projekte-positionen/provenienzforschung/>.

and 2014) that raised the issue of scientific, state and public awareness.¹⁵ Most recently, in February 2022, the *Überseemuseum Bremen* returned 8 iwi kupuna (ancestral remains) to a delegation from Hawaii.¹⁶ Shortly afterwards, the *Stiftung Preußischer Kulturbesitz Berlin* (SPK - Prussian Cultural Heritage Foundation) handed over 32 iwi kupuna (ancestral remains) to a representative of the Office of Hawaiian Affairs (OHA).¹⁷ In June 2023, after 20 years of campaigning for repatriation, a delegation of Māori from New Zealand and Moriori from the Chatham Islands received 95 Ancestors/Human Remains from institutions across Germany.¹⁸ Given the large number of Ancestors/Human Remains from colonial contexts held in German state and private institutions, the number of undertaken repatriations continues to be extremely low.

We acknowledge and commend that after decades' long struggle the conversation around the restitution of Human Remains/Ancestors seems to be finally moving forward. State institutions and government representatives no longer outright question the necessity to repatriate (the "if"), but rather affirm it: Katja Keul, Minister of State at the Federal Foreign Office, has publicly declared to work toward returning Human Remains/Ancestors, especially to Tanzania.¹⁹ There is further movement in the restitution debate in Germany – also with regard to the restitution of cultural artefacts, another important field where colonial continuities inform the debate and the actual lifeworlds of the affected communities in a way that infringes upon their basic right to their cultural identity and their right to access their cultural heritage in a discriminatory way.²⁰ The Prussian Cultural Heritage Foundation (Berlin) has finally started research into their large holdings of African Human Remains/Ancestors and declared willingness to retribute.²¹ Yet, the "how" to retribute, actually the rather decisive part for the actual implementation of these declarations both in regard to Human Remains/Ancestors and spiritual artefacts, still remains unclear and government and public officials remain vague in their statements. Furthermore, there are known cases where repatriation is delayed due to lack of funding. This is worrisome, since everything should be done to not repeat the mistakes of past decades, where restitution efforts mostly stalled at a declaratory level.²²

¹⁵ cf. Reimann, supra note 6, at 46 in reference to Winkelmann 2020 (a full list of bibliography is included in the Reimann report).

¹⁶ Cf. Statement OHA, 8/2/2022, available at <https://www.oha.org/news/ubersee-museum-bremen-returns-ancestral-remains-to-hawai%CA%BBi/>.

¹⁷ Cf. Statement OHA, 11/2/2022, available at <https://www.oha.org/news/spk-returns-ancestral-remains-from-hawaii/>.

¹⁸ T. McClure in *The Guardian*, 13/6/2023, available at <https://www.theguardian.com/world/2023/jun/14/maori-ancestral-remains-and-mummified-heads-returned-to-new-zealand-from-germany>.

¹⁹ Cf. Deutscher Bundestag, Drucksache 20/6943, 24 May 2023, at 2 (available at: <https://dserver.bundestag.de/btd/20/069/2006943.pdf>); see also: M. Schwikowski in DW, 22/3/2023, available at <https://www.dw.com/en/clarifying-german-colonial-era-atrocities-in-tanzania/a-65077397>.

²⁰ Cf. E. Campfens and I. Bosza Provenance Research and Claims to Bangwa Collections, <https://verfassungsblog.de/provenance-research-and-claims-to-bangwa-collections/>; Santander Art and Culture Law Review, issue on Colonial Loot and Its Resitution, 2/2022, available at <https://www.ejournals.eu/SAACLR/>; See recent research into Cameroon cultural heritage in Germany: Assilkinga, Mikael et al.: *Atlas der Abwesenheit: Kameruns Kulturerbe in Deutschland*, 2023, available at: <https://books.ub.uni-heidelberg.de/arthistoricum/catalog/book/1219>.

²¹ Cf. O. Hoischen for SPK, 24/11/2022, available at https://www.preussischer-kulturbesitz.de/en/newsroom/dossiers-und-nachrichten/dossiers/dossier-forschung/der-vergessenheit-entrissen.html?no_cache=1.

²² Cf. GA, Res. 3187 (XXVIII). Restitution of works of art to countries victims of appropriation, UN Doc. A/RES/3187(XXVIII), 18 December 1973 (<https://digitallibrary.un.org/record/190996?ln=en>).

The same concerns apply to the fact that German authorities tend to continue using a language of comity and courtesy when addressing the realities of Human Remains/Ancestors in German institutions.²³ The German government as well as the responsible state institutions fail to address this issue as a matter of legal obligations, human rights, and human dignity. Restitution of Human Remains/Ancestors is considered a matter of cultural policy only.²⁴ The federal government has declared willingness to restitution only through interstate negotiations/dialogues and instructed the involved institutions accordingly.²⁵ Thus, past and present violation of fundamental rights of the deceased and their descendants are neither recognized nor addressed. The Federal Republic of Germany has yet to offer any insurance to appropriately include the descendants, relatives and communities of origin in the restitution process.

The coalition calls on the German government and to the attention of the Committee to recognize the legal dimension in the treatment of Human Remains/Ancestors in German public and private institutions, to stop the racialized mistreatment of the deceased and their descendants and recognize their human legal subjectivity. Having proclaimed their willingness to retribute the German government together with the institutions involved must now be held accountable as to their human and constitutional rights obligations applicable to restitution processes. This entails adherence to international human rights standards as provided in ICERD to prevent further rights violations.

Questions

- What obstacles prevent Germany from assuming a comprehensive understanding of its obligation under ICERD that takes into account the particular intersection between its colonial past and racial discrimination in the present?
- When will Germany unconditionally recognize colonialism as a system of injustice and offer a form of recognition of its responsibility for past and present that is reflected i.a. in the practice of restitution of Human Remains/Ancestors as well as cultural artefacts?
- What prevents Germany from ensuring Human Remains/Ancestors and their descendants the non-discriminatory enjoyment and exercise of their fundamental and human rights to dignity in life and in death?
- Is there any consensus, statement or expression of will on the part of the federal government that repatriations of Human Remains/ancestors and restitution of cultural artefacts will be implemented unconditionally and in a timely and committed manner?

2. Implementing legislative measures to ensure just restitution processes (Art. 1, 2)

We are deeply concerned, that there is a lack of a consolidated legal basis or at least a consolidated commitment beyond the performative, to effectively initiate and formalize a

²³ Cf. especially comments of former cultural secretary Grütters before German parliament: Deutscher Bundestag (2021), *Stenografischer Bericht 213. Sitzung*, 26 February 2021, Plenarprotokoll 19/213, at 80 (<https://dserver.bundestag.de/btp/19/19213.pdf>).

²⁴ As apparent in the Governments statement in Deutscher Bundestag, supra note 18, at 2.

²⁵ Ibid.

constitutional and human rights-based restitution policy and practice. Instead, what we have are single cases, based on individual, hence legally speaking arbitrary decisions on a case-by-case basis. Even after completed provenance research, the restitution of Human Remains/Ancestors continues to be stalled in political commitments and statements with no or very unspecified concrete next steps or coordination plans and efforts. Hence descendants and affected communities cannot rely on principles of the rule of law, when they ask for restitution.

Not least because of the constitutional and human rights infringed by the status quo, the restitution of Human Remains/Ancestors goes beyond acts of *noblesse oblige*. The obligations laid down in Art. 2 ICERD rather demands the implementation of effective measures, which must here include enacting legislation.

The current treatment of Human Remains/Ancestors from colonial contexts in German (state) institutions violates the following rights guaranteed by the German Constitution (“Basic Law” (BL))²⁶ as further spelled out in jurisprudence, especially by the Federal Constitutional Court (Bundesverfassungsgericht (BVerfG)):

- The **post-mortal right to human dignity** (*postmortaler Achtungsanspruch / Würderecht*), pursuant to Art. 1 para. 1 BL.²⁷
- The **right to peace in death** (*Recht auf Totenruhe*), pursuant to Art. 1 para. 1 BL.²⁸
- The **right to commemoration** of those who have died (*Recht auf würdiges Totengedenken*) of the bereaved pursuant to Art. 2 para. 1 BL.
- The **right to care for the deceased** (*Totenfürsorgerecht*) which, depending on the competent court, has been understood to derive either from private custom, the law of inheritance, family law or post-mortal personal rights pursuant to Art. 2 para. 1 BL (*Postmortales Persönlichkeitsrecht*).

Yet, it is exactly those rights, enumerated above, that racialized and colonized humans, whose bodies are treated like objects in the archives, are denied. First, by factually being treated as objects in the archives and second by not acknowledging even in the slightest manner the restitution debates as a matter of German constitutional law and constitutional rights.²⁹ The affected people were not considered legal subjects during their forceful appropriation to Germany and this continues into the present. The bodies and Human Remains of people of African descent were captured without any consent.³⁰ This mistreatment based on race continues to be upheld to this day as Human Remains/Ancestors remain in dismal conditions in state institutions instead of being restituted to their descendants and allowed dignified burials.

²⁶ Basic Law for the Federal Republic of Germany (Grundgesetz der Bundesrepublik Deutschland), English text available at https://www.gesetze-im-internet.de/englisch_gg/.

²⁷ According to the Federal Constitutional Court it is incompatible with the constitutionally guaranteed requirement of the inviolability of human dignity, which underlies all other fundamental rights, if a person, who is entitled to dignity by virtue of being a person, were allowed to be degraded or humiliated after their death, cf. Bundesverfassungsgericht, 24.02.1971, 1 BvR 435/68, (BVerfGE 30, 173) at 194.

²⁸ Bundesverfassungsgericht, 09.05.2016, 1 BvR 2202/13; Further, as the Bavarian Constitutional Court clarified, human corpses may not be treated in a derogatory or ridiculing manner, Verwaltungsgerichtshof München, 21. 2. 2003, 4 CS 03.462.

²⁹ See Deutscher Museumsbund, Guidelines, Care of Human Remains in Museums and Collections, 6/2021, where it is clearly stated that claims for restitution based on fundamental rights are highly unlikely, at 99.

³⁰ Cf. J. Hackmack, Law and the Challenge of Rehumanization, 3/12/2022, <https://verfassungsblog.de/law-and-the-challenge-of-rehumanization/>.

At the same time the rights of the descendants to bury commemorate, bury and care for the deceased are blatantly ignored.

This disrespect for and infringement of those rights is deplorable, not least since the ratification of ICERD by Germany, where it is expressively made clear that all people and hence also those from the former colonies and their families enjoy and can claim the same rights to same extent as white people and bodies have these rights. Not acknowledging those commitments to their full extent is a colonial continuation of racial stereotyping and hence discrimination in life and death, in their post-mortal rights to human dignity and right to rest in peace endures. The treatment of Human Remains/Ancestors stands in violation of the obligation under Art. 2 to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms. This includes taking special measures to ensure the full and equal enjoyment of rights, e.g. in form of legislation.³¹

The coalition calls on Germany to commit to taking these measures.³² Legislation is needed to create legal clarity, establish fair and effective procedures, and provide descendants with access to justice. With such legislation the Germany must aim to establish legally secure claims for former colonized persons and the gesture and obligation for reparation of colonial injustice. In addition, such a law should also provide public as well as private institutions concerned with a legal basis and a framework for action.

Questions

- What prevents the Federal Republic of Germany from enacting comprehensive and coherent legislation that fosters restitution, transparency and certainty based on the rule of law for descendants and affected communities claiming their rights to restitution?
- How will Germany ensure that restitution efforts are covered financially and funding is provided for in federal and/or state budgets?
- What is the German government doing to monitor and review more closely reactions of museums to restitution claims and whether they are in accordance with constitutional and human rights?
- Does Germany plan to declare in a joint statement with other former colonial powers to assist in resolving issues relating to stolen Human Remains/Ancestors as well as cultural artifacts and objects (e.g. inspired by Washington Conference on Holocaust-Era Assets)?
- Is Germany working towards a concerted approach to establish fair and effective measures on restitution on the level of the European Union?

³¹ Other countries have enacted laws on repatriation of Human Remains/Ancestors and/or cultural artefacts, one example being the US Native American Graves Protection and Repatriation Act of 1990 (<https://uscode.house.gov/view.xhtml?path=/prelim@title25/chapter32&edition=prelim>), which can provide guidance for legislative measures in Germany.

³² The Government has not yet committed to do so cf. Deutscher Bundestag, supra note 18, at 4; see also B. Lotze in Berliner Morgenpost, 24/4/2023, <https://www.morgenpost.de/berlin/article238232981/Ehepaar-will-Kopf-des-Urgrossvaters-nach-Hause-holen.html>.

- How is Germany supporting and actively informing restitution policy initiatives on the African continent?

3. Ensure Rights of Affected Persons and Communities in the Restitution Processes (Art. 5)

Art. 5 para. 1 e) obligates Germany to guarantee the enjoyment of economic, social and cultural rights, especially the right to equal participation in cultural activities. As elaborated, the status quo of Human Remains/Ancestors kept by German (state) institutions violates the human and constitutional rights not only of the deceased but also of their relatives, descendants and the communities of origin. Current state practice is infringing on the cultural rights of racialized minorities and indigenous people.

The way, Germany is handling ancestral remains does not take into account that “*For descendant communities, the remains of their ancestors are not objects, but spiritually living entities, often possessing agency*”³³ Nor does it understand what this treatment implies to the descendants and affected communities, that Honor Keeler (Cherokee and long-standing involved in NAGPRA) describes as: “*They [our Ancestral Relatives] are treated as property and reside in a perpetual state of posthumous slavery.*”³⁴ In the culture of the affected communities – such as the Chagga in Tanzania – the burial of a body after death is an essential ritual. Without a proper funeral and resting place, the soul cannot find peace.³⁵ The preclusion of the chance to commemorate their ancestors according to their rituals, together with the dehumanizing effect of storing ancestral remains as if they were mere objects, in shelves, in boxes, negates the constitutional rights of the formerly colonized whose remains are within the jurisdiction of Germany. To be left out of claims and processes for restitution makes it impossible to the affected communities to bury, mourn and integrate their ancestors the way their cultural and religious practice demand.

The relatives and descendants of the deceased are the ones legally entitled when seeking to remedy the post-mortem fundamental rights of the deceased. Furthermore their own rights to mourn the dead are decisive when implementing just and culturally sensitive restitution processes. The cultural rights of the deceased as well as the communities of origin as put forward in Art. 5 e) ICERD are further defined and guaranteed through Art 15 para. 1 ICESCR and in the UNDRIP. As a right to one’s cultural identity these rights are further guaranteed by the German constitution. All of these stipulations entail legal obligations on the side of the German government.

We call on Germany to ensure an indiscriminate enjoyment of cultural rights, especially respecting the obligation put down in Art. 12 UNDRIP: “Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; [...] and the right to the repatriation of their human remains. **States shall seek to enable the access and/or repatriation of [...] human remains in their possession through**

³³ Reimann, supra note 6, at 5 in reference to Ayau u. a. 2018, 90 (a full list of bibliography is included in the Reimann report).

³⁴ Ibid, at 5 in reference to Ayau u. a. 2018, 90 (a full list of bibliography is included in the Reimann report).

³⁵ Cf. supra note 4.

fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.³⁶

The coalition calls on Germany to propose or initiate proceedings to meaningfully include descendants and affected communities in restitution processes. So far the official course of action is to only pursue interstate negotiations.³⁷ This stands in stark contrast to recent communication issued by the UN Special Rapporteurs on the promotion of truth, justice, reparation and guarantees of non-recurrence et. al. reprimanding the German government for not ensuring meaningful participation of affected communities in their negotiations on remedying colonial injustices with Namibia.³⁸

Questions

- How will Germany include descendants and affected communities in the development of just restitution mechanisms as well as restitution processes itself? What measures does the Government propose ensuring the cultural rights of affected minorities and indigenous people?
- How does the German government plan to ensure participatory rights of the affected communities, how does it plan to prevent a lack of meaningful incorporation learning from ongoing negotiations with Namibia, after having been reprimanded by a number of UN Special Rapporteurs?
- Which measures will ensure that repatriation request from descendants as well as affected communities are adequately acknowledged and may lead to repatriation of Human Remains/Ancestors directly back into their communities without being stalled by slow interstate negotiations?
- How does Germany plan to ensure that restitution of Human Remains/Ancestors are practiced in a dignified manner in accordance with rituals, customs and the culture of the originating communities? What measures does Germany plan to take ensuring burials of Human Remains/Ancestors in a dignified manner in accordance with their rituals, customs and the culture even in the case when Human Remains/Ancestors cannot be further identified?
- Is Germany planning to establish an Advisory Board or a commission to accompany the further provenance research and repatriation work, including the handling of the inventory information? An Advisory Board or commission should be instated to ensure just restitution processes integrating all stakeholders. The Advisory Board should be made up of experienced repatriation practitioners as well as representatives of communities and indigenous organizations whose ancestors are likely to be in the collections.³⁹

³⁶ Emphasis added.

³⁷ cf. Deutscher Bundestag, supra note 18 at 2.

³⁸ Cf. Mandates of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence et. al.; AL DEU 1/2023, 23 February 2023 (available at: <https://spcommreports.ohchr.org/TmSearch/RelCom?code=NAM%201/2023>).

³⁹ Cf. Reimann, supra note 6, at 26.

4. Granting access to justice (Art. 5 a) and Art. 6)

Article 6 encompasses the notion that any breach of the rights protected by the Convention must be remedied. The drafting process has shown that formulating Art. 6 to “seek” reparation emphasizes the importance of dismantling barriers for those who attempt to access remedies.⁴⁰ Thereby, the meaning of remedies is twofold: in one sense remedies are processes by which arguable claims of human right violations are heard whether by courts administrative agencies or other competent bodies.⁴¹ The second notion refers to the outcome of the proceedings the relief afforded to the successful claimant.⁴²

There have been no cases tried in the German justice system regarding the restitution of Human Remains/Ancestors. We must point out that the absence of complaints is generally not regarded as a positive sign.⁴³ The barriers that the current legislative framework and jurisprudence pose as well as the practice of German institutions regarding the restitution of Human Remains/Ancestors prevent those affected from seeking effective protection and remedies in front of courts for the ongoing violation of the fundamental rights of the deceased. This is especially the case since repatriations have been few and were carried out on arbitrary case by case basis only without legislative guidelines and without access to remedies in place. This is worrisome in light of rule of law principles such as access to justice. Furthermore, the current legislation and jurisprudence in Germany regarding anti-discrimination claims – especially when invoking post-mortal fundamental rights – do not meet the standards of effectiveness as set forth in the convention. Legal claims to address the persisting mistreatment of the racialized Human Remains/Ancestors are void when under current jurisprudence legal standing is disputed. Furthermore remedies will not be granted when further procedural barriers are in place – like standards of proof.⁴⁴ The committee has expressed concern regarding high standards of proof that inhibit the ability to secure recognition of the rights of the Convention.⁴⁵

Another decisive barrier keeping affected persons from seeking justice or demanding restitution is the immense lack of availability of concrete information regarding Human Remains/Ancestors. This is the case both regarding the lack of comprehensive provenance research done on inventories as well as inaccessibility of information available within institutions. Only with complete and reliable information can members and representatives of indigenous communities know about the location of their missing Ancestors and make informed decisions about any further process. Gathering and providing this information requires cooperation between institutions in order to bring together different information and sources, for example on Human Remains from the same appropriation contexts that are stored in different institutions and archives, or on the same consignors.

⁴⁰ P. Thornberry, *ICERD: A commentary* (1st ed., 2016), at 425

⁴¹ *Ibid.*, at 426.

⁴² *Ibid.*, at 426.

⁴³ *Ibid.*, at 409.

⁴⁴ I. Reimann and N. Samour, Vom individuellen Unrechtskontext zum systematischen Umgang mit kolonialem Unrecht, 7/12/2022, <https://verfassungsblog.de/vom-individuellen-unrechtskontext-zum-proaktiven-umgang-mit-kolonialem-unrecht/>.

⁴⁵ P. Thornberry, *supra* note 39, at 320 and 408.

Due to the poor documentation relating to many anthropological collections, provenance research is an essential prerequisite for repatriations.⁴⁶ We commend the efforts of institutions like the recent effort by the Prussian Heritage collection which led to the publication "Human Remains from the Former German Colony of East Africa. Recontextualization and Approaches for Restitution".⁴⁷ First steps have been taken to identify the provenance of Human Remains inventories. However, provenance research has so far been carried out purely on a voluntary basis if the institutions themselves recognize the legitimacy of requests for information and repatriation requests, or due to moral and political pressure from outside. In the German context, there is no research obligation resulting from inquiries from representatives of indigenous peoples or descendants neither is funding guaranteed.⁴⁸ Furthermore, conducted research such as the by the Prussian Heritage Foundation is put out in scientific publications only and thus largely illegible and inaccessible for the affected.

The lack of creation and access to a national inventory of Human Remains/Ancestors in German archives, is one main reason, why systematic restitution efforts are missing or not carried out thoroughly. The lack of information and coordination needs to be overcome, since in many cases, it is this lack that impedes even the willingness of institutions to initiate restitution.

Questions

- What prevents the German government to comply with their positive obligation under Article 6 to introduce remedies that are available, adequate, and effective, that protect against racial discrimination and to recognize the right to restitution of Human Remains/Ancestors as just compensation and reparation for acts of racial discrimination as per Art 6 ICERD?
- Is Germany planning to enact legislation that explicitly addresses and ensures locus standi to those affected by the violations of Human remains/ancestors; including by providing legal aid, facilitating individual or group claims, and encouraging non-governmental organizations to defend their rights?
- How will Germany ensure that institutions start and/or continue provenance research on their inventories in form of fully funded, cross-institutional, interdisciplinary and transnationally oriented research projects conducted in a timely manner? What measures are taken ensure invasive provenance research is conducted only with the consent of the respective communities and communities are included in the projects overall?
- Will the German government make their queries into the scope of inventories of Human Remains/Ancestors in German institutions available? Furthermore, what measures are taken to ensure accessibility of information on Human Remains/Ancestors already collected in institutions or in the future, especially for affected communities?

⁴⁶ Reimann, *supra* note 6, at 29.

⁴⁷ Cf. O. Hoischen, *supra* note 20.

⁴⁸ Cf. Reimann, *supra* note 6, at 96.



Decolonize Berlin e.V. advocates for a critical examination of German colonialism and its continuities, such as current racism within contemporary German society, the recognition and critical reappraisal of colonial injustices, and decolonization of German for society as a whole. We call on the state of Berlin and its districts to embed decolonialization as a cross-cutting issue in education, science, research, business, urban planning, justice and culture, and to actively promote decolonization of the cityscape. The association Decolonize Berlin e.V. consists of several civil society organizations and is supported by many dedicated individual activists. **Contact:** merelfuchs@decolonize-berlin.de

Berlin Postkolonial e.V. is an association that seeks to critically reappraise the colonial history of Berlin and the Federal Republic of Germany. The non-governmental organisation was founded in 2007. It organises cultural tours of the city, lectures, exhibitions, conferences and campaigns. Since Germany's first return of stolen ancestral remains to the Ovaherero and Nama in 2011, it has been involved in the campaign „No Amnesty on Genocide!“ Berlin Postkolonial is currently a cooperation partner in the joint project "Dekoloniale. Memory Culture in the City". **Contact:** buero@berlin-postkolonial.de

Flinn Works is a (performing) arts company based in Berlin/Kassel, Germany. It has independently produced and presented more than 20 productions in a wide range of different venues and festivals. Always engaging with current social and political issues and a focus on post-colonial and feminist themes, the company devises its work in collaboration with professional artists and performers. Flinn Works has expanded its activities beyond Europe, with the input of writers, performers and musicians from other countries, including India, Bangladesh, Tanzania, Rwanda and Nigeria. Employing multiperspectivity and a strong commitment to intensive research are the key aspects of Flinn Works' productions. Flinn Works also works closely with academics for their research based approach. **Contact:** mail@konradinkunze.de



The European Center for Constitutional and Human Rights e.V.

(ECCHR) is a non-governmental, non-profit organization dedicated to enforcing human rights in Europe and beyond through strategic human rights litigation and human rights education and advocacy. That entails classical litigation before national, European and international courts and tribunals. This case work is embedded in wider communication strategies and close collaborations with political and social activists in the respective fields of action as well as the academy and the arts. Founded in 2007 by a small group of lawyers in Berlin, its main objective is to hold state and non-state actors accountable for grave human rights abuses and international crimes and inform the public discourse beyond expert circles.

Contact: melchior@ecchr.eu, imani@ecchr.eu