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Submission: report on Colonialism and SOGI

Mr. Victor Madrigal-Borloz, Independent Expert on sexual
orientation and gender identity
OHCHR-UNOG
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Dear Mr. Madrigal-Borloz,

This submission is presented to you by the European Center for
Constitutional and Human Rights (ECCHR) in response for your Call
for Input regarding colonialism, sexual orientation and gender identity.

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. One focus of this work has been on the genocide against the Ovaherero and Nama in the former colony German Southwest Africa (GSWA) from 1904-1908 and the continued refusal of the government of the Federal Republic of Germany to apologize, fully acknowledge and pay reparation for these events. On a larger scale, our work aims at addressing the colonial underpinnings of (international) law and the lasting effects of the establishment of a patriarchal, racist, settler colonial state during German colonialism, whose aspects, at times, were maintained through the South African Apartheid State, until the Namibian independence in 1990 or even until today. To this end we collaborate closely with representatives of the descendants of the surviving Ovaherero and Nama as well as German and Namibian civil society and research institutions. We would be happy to arrange contact with in case of interest.

It is in this context that we became aware of your call for input regarding colonialism and sexual orientation and gender identity. While the intersection of colonialism and gender identity has not been the main focus of our work, we continue to encounter aspects that expose the gendered nature of not only the epistemic and physical colonial violence, but also the postcolonial processes of addressing this violence. Some of them, we would like to bring to your attention in this submission.

Best regards,
Judith Hackmack

(Legal Advisor, ECCHR)

Malte Spielmann

(Legal Trainee, ECCHR)

This submission is structured as follows: A short overview of the (limited) available evidence regarding pre-colonial gender perceptions of the Ovaherero and Nama (I.) will be followed by examples of the forceful imposition of binary gender relations used to establish and maintain German colonial rule (II.). The final section will address the relevance of this problem also for the present intergovernmental process between Germany and Namibia regarding the colonial past (III.). An overview of the historic events as well as the intergovernmental process is provided in Annex I.

It should be stressed that, given the shortness of the requested input, the given examples are very eclectic. Only a very limited set of issues could be addressed, while others, which were equally important, are not touched upon at the length they would deserve.

I. Pre-colonial gender relations of the Ovaherero and Nama

The topic of pre-colonial gender relations in Namibia directly points at the problem of the coloniality of the historic archives. The written archival sources tend to represent primarily or exclusively the perspectives of, mostly male, European colonizers. Accordingly, also the examples given below are mostly related to the perspective of male colonizers and their next of kin. While these examples may serve to highlight certain aspects of how “gender” operated in the colonies and thus (must have) shaped the live of LGBTQI*, they contrast with a widespread silence regarding the direct experience of Ovaherero and Nama.

Some historical research has contrasted the archival records with the vivid and comprehensive oral history of the Ovaherero and Nama.¹ In her study of the commemoration of the colonial war in the Namibian South, Memory Biwa assessed at length the gendered aspects of the commemoration of colonialism in terms of the different roles of men and women. She also addressed the representation of outspoken and non-outspoken collective memory in objects such as the patchwork quilt traditionally worn by Nama women.² To what extent representations specifically of the experiences of LGBTQI* are reflected in the oral history of the Namibian Ovaherero and Nama living today and if these have been subject of research exceeds the knowledge of the submitters.

Notwithstanding, there are archival sources which point at pre-colonial gender relations of the Ovaherero and Nama peoples, which were not structured along strictly binary lines.³ They mention sanctioned and tolerated practices of same sex relationships for both the Ovaherero and Nama indigenous peoples. According to Henrichsen, *oupanga* relations (singular *epanga*, translation: friendship) between young men were reported to be accepted in the pre-colonial Ovaherero society. The relationship could involve homosexual practices and would continue

¹ Biwa, Memory: 'Weaving the Past with Threads of Memory': Narratives and Commemorations of the colonial war in southern Namibia (2012); Förster, Larissa: Postkoloniale Erinnerungslandschaften. Wie Deutsche und Herero in Namibia des Kriegs von 1904 gedenken (2010).

² Biwa, Memory: 'Weaving the Past with Threads of Memory': Narratives and Commemorations of the colonial war in southern Namibia (2012), 95-101.

³ See: Henrichsen, Dag: Namibia, In: Chiang, Howard (ed.) et.al: Global Encyclopedia of Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) History Vol. 2 (2019), 1115-1118; Referring to: Falk, Kurt: Homosexualität bei den Eingeborenen in SüdwestAfrika, In: Archiv für Menschenkunde 1 (1925-1926), 202-214.

also after a heterosexual marriage.⁴ Similar accepted relationships were reported Namibian Nama women and Damara.⁵ Examples of gender flexibility have been documented for Namibia and Angola already in the 16th century. This is the case for cross dressing male diviners, referred to as *zvibanda*, who performed female sexual and social roles.⁶

II. Select gender aspects of the pre-colonial and colonial history

For the colonial period as such, the available evidence is more comprehensive, although here too the above-mentioned limitations must be taken into account. For the German colonial administration, the establishment and maintenance of binary genders as well as the control of sexual relationships were a topic of major importance. This, at first view surprising, insight was explained with the importance attributed to the alleged cultural superiority of the colonists in the context of the colonizing mission, which was used to justify political claims to power.⁷ This superiority could only be maintained and reaffirmed in a context of segregation along racialized and gendered lines, which was an openly declared goal of the colonial administration (*Dissimilationsprinzip/principle of dissimilation*).⁸ As Heike Becker put it, “the very representation of colonial power rested on prior constructions of gender power”.⁹

In the following, the practices and legislation penalizing homosexual relationships between men (a.) and prohibiting and monitoring so-called “mixed” marriages and relationships (b.) will be described. Both are examples of how white masculinity and Black femininity were constructed in the colony and how the German colonial rule was established and forcefully implemented along gendered lines. For both contexts, it is important to note that while colonial relations established i.e. through missionaries and private merchants date further back in history, it was the formal establishment of colony German South West Africa (1884) and, in particular, the radicalization of racism since the genocide of the Ovaherero and Nama from 1904-1908, which allowed to forcefully implement gendered and racist colonial policies, which before existed only on paper.

⁴ Henrichsen (2019), 1115.

⁵ Henrichsen (2019), 1116; Wieranga, Saskia E.: Marriage, Woman-Woman in Africa, In: Chiang, Howard (ed.) et.al: Global Encyclopedia of Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) History. Vol. 2 (2019), 1016.

⁶ Von Hesse, Hermann W.: Gender, Flexible Systems, in Africa, In: Chiang, Howard (ed.) et.al: Global Encyclopedia of Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) History. Vol. 2 (2019), p, 596.

⁷ Henrichsen, Dag: >... unerwünscht im Schutzgebiet ... nicht schlechtin unsittlich: Mischehen und deren Nachkommen im Visier der Kolonialverwaltung in Deutsch-Südwestafrika“, in: Bechhaus-Gerst, Marianne; Leutner Mechthild (ed.): Frauen in den deutschen Kolonien (2009), 80; Becker, Heike: *Efundula*: Women’s Initiation, Gender and Sexual Identities in Colonial and Post-Colonial Namibia, in: Arnfeld, Singe: Re-thinking sexualities in Africa (2004), 37.

⁸ Henrichsen (2009), 82.

⁹ Becker, Heike: *Efundula*: Women’s Initiation, Gender and Sexual Identities in Colonial and Post-Colonial Namibia, in: Arnfeld, Singe: Re-thinking sexualities in Africa (2004), 39; El-Tayeb, Fatima: Schwarze Deutsche. Der Diskurs um >Rasse< und nationale Identität 1890-1933 (2000), 7; Dietrich, Anette: Rassenkonstruktionen im deutschen Kolonialismus, In: Bechhaus-Gerst, Marianne; Leutner Mechthild (ed.): Frauen in den deutschen Kolonien (2009), 177.

a. Enforcing white colonial masculinity through criminal law: the prohibition of “unnatural fornication” (*widernatürliche Unzucht*) in GSWA

As the Germans colonized SWA, they brought with them their criminal law including the prohibition of “unnatural fornication” (*widernatürliche Unzucht*) in Section 175 Reichsstrafgesetzbuch (RStGB) which criminalized sexual acts between men. While there exist no records of trials for the first half of colonial rule until 1900 approximately 25 trials took place between 1900 and 1915. The greatest number took place after 1906 when on 2 or more persons were prosecuted every year for sexual acts involving *white* or indigenous men or boys.¹⁰ This coincides with the consolidation of the German settler-colonial project, including a more pronounced racist ideological justification¹¹, the significant growth of the settler population¹², and an intensification of military and bureaucratic control as part of the policing and repression in the wake of the genocide.¹³

The court files as the primary sources are available in the National Archive of Namibia (NAN).¹⁴ In a majority of these cases involving acts between *white* and indigenous men, coercion and abuse as well as the exploitation of positions of power in the context of (forced) labor on farms or elsewhere are pervasive. The case of Victor von Alten¹⁵ is exemplary for the complex, contradictory intersections of discrimination and power in the colony. It is also exceptional, because of the publicity it received and the extensive medical expert testimonies in the colony and Germany (including the advocate for the decriminalization of homosexuality, Magnus Hirschfeld).¹⁶ Between 1904 and 1906, the German colonist, van Alten, received three short jail sentences under Section 175 for sexual acts (likely rape) of indigenous boys and young men and was then expelled from GSWA. The testimony of the victims, including the Ovaherero Gerhart Metirju who appeared before the court despite the unfolding genocide are recorded in the files.¹⁷ Notably, charges were broad under Section 175 and male indigenous victims could not appeal to the prohibition of rape in Section 176. Section 176 did not find application in any of the mentioned cases, except for the case of Walter Sobotzick¹⁸ in 1913, who was also accused of raping a Namibian woman and Dimitris Sametes¹⁹ who received the harshest sentence under

¹⁰ Severin, Jan. "Male Same-Sex Conduct and Masculinity in Colonial German Southwest Africa." *New Perspectives on the History of Gender and Empire: Comparative and Global Approaches*. Ed. Ulrike Lindner and Dörte Ler London: Bloomsbury Academic, 2018. 149–176, 163. <<http://dx.doi.org/10.5040/9781350056343.ch-006>>.

¹¹ Walther, Daniel Joseph. "Racializing Sex: Same-Sex Relations, German Colonial Authority, and Deutschtum." *Journal of the History of Sexuality*, vol. 17 no. 1, 2008, 11-24. <http://doi.org/10.1353/sex.2008.0001>

¹² Severin (2018), 164.

¹³ Ibid.

¹⁴ See the cases of Victor Van Alten; NAN GWI 587 D6/06, vol. 1, 68–79v; Maximilian von Rudno-Rudinski NAN GWI 733 3K7/14; Walter Sobotzick NAN GWI 732 3K5/13; Dimitris Sametes NAN GWI 725 3K21/08, 19–20; Salomon Süskin NAN GWI 723 K5/08; and others NAN GSW 361 D39/03; NAN GSW 346 C41/01.

¹⁵ NAN GWI 587 D6/06, vol. 1, 68–79v.

¹⁶ Tobin, Robert Deam. "Widernatürliche Unzucht!: Paragraph 175 in Deutsch-Südwestafrika". *Crimes of Passion: Repräsentationen der Sexualpathologie im frühen 20. Jahrhundert*, edited by Oliver Böni and Japhet Johnstone, Berlin, München, Boston: De Gruyter, 2015, 277-300. <https://doi.org/10.1515/9783110420142-017>

¹⁷ Gerhart Metirju, Kaiserliche Gerichtsanstalt (23 February 1905) NAN H3/05. Generally, NAN GWI 587 D6/06, vol. 1, 68–79v

¹⁸ Walter Sobotzick NAN GWI 732 3K5/13

¹⁹ Dimitris Sametes NAN GWI 725 3K21/08, 19–20.

Sections 175 and 176 for the rape of *white* underage boys. This illustrates the ambivalence of these norms and the primary importance attributed to the protection of *white* German colonial masculinity and the disregard for the harm and suffering experienced by indigenous Namibians but also the inability to consider their active participation in any same-sex acts.²⁰ Accordingly, there are also no records of prosecutions by the authorities of same-sex actions among indigenous communities, which the submitters are currently aware of. Those prosecuted under Section 175 were jailed and expelled because their transgressions of the sexual and *racial borders*²¹ of the “white, middle-class, male-dominated, heterosexual culture”²² were perceived as threatening the legitimacy of German rule and by extension the project of German nation building.²³

b. Monitoring and sanctioning so-called “mixed relationships: The Black female body “as a border marker of the German nation and the white >race<”²⁴

The colonial administration used the term “mixed marriages” (Mischehen) to refer to official (non-church) marriages between white men and Black women. While such marriages were a rare exception,²⁵ they were given a considerable symbolic importance and played a prominent role in the colonial discourse. According to Henrichsen, there was probably no group that was as intensely observed and registered as persons who lived or were born into such marriages.²⁶ While tolerated during the first decades of the colony, they were considered a problem by the colonial administration in the first years of the 20th century. At that time, first measures were taken against them, i.e. employees of the administration were fired or children expelled from school.²⁷ On 23 September 1905 an order was adopted, which sanctioned these marriages.²⁸ In 1907 and 1909 Colonial District Court in Windhoek (Bezirksgericht Windhuk) applied this regulation in a divorce case of an Ovaherero Woman against her husband (Leinhos case).²⁹ In the judgment, the court did not only affirm the legality of the regulation, but also held that

²⁰ Severin (2018), 154.

²¹ Severin (2018), 164.

²² Walter (2008), 23.

²³ Walther (2008), 24; Tobin, Robert Deam, *Peripheral Desires: The German Discovery of Sex* (University of Pennsylvania Press 2015), 135; Jan Severin, ‘ Ausweisungen als Element der (Re-)Produktion koloniale Männlichkeit während der deutschen Kolonialherrschaft in Deutsch-Südwestafrika (1884–1915) ’, in *Männlichkeit und Reproduktion: Zum gesellschaftlichen Ort historischer und aktueller Mannlichkeitsproduktionen*, ed. Andreas Heilman et al. (Wiesbaden : VS Verlag , 2015), 237.

²⁴ „Der weibliche Körper fungierte dabei als Grenzmarker deutscher Nation und weißer >Rasse<“, Dietrich, Anette: Rassenkonstruktionen im deutschen Kolonialismus, In: Bechhaus-Gerst, Marianne; Leutner Mechthild (ed.): *Frauen in den deutschen Kolonien* (2009), 178.

²⁵ Archival data confirms 42-50 of such marriages compared to roughly 14800 registered white colonists in 1912. See: Henrichsen, Dag: >... unerwünscht im Schutzgebiet ... nicht schlechtin unsittlich: Mischehen und deren Nachkommen im Visier der Kolonialverwaltung in Deutsch-Südwestafrika“, in: Bechhaus-Gerst, Marianne; Leutner Mechthild (ed.): *Frauen in den deutschen Kolonien* (2009), 81.

²⁶ Henrichsen (2009), 80.

²⁷ *ibid.*

²⁸ Circular Order" of Deputy Governor Hans Tecklenburg of September 23, 1905, concerning "civil marriages between whites and natives or bastards that have become doubtful"; Orig: „Rundverfügung“ des stellvertretenden Gouverneurs Hans Tecklenburg vom 23. September 1905 bzgl. „zweifelhaft gewordene standesamtliche Trauungen zwischen Weißen und Eingeborenen beziehungsweise Bastards“.

²⁹ Henrichsen (2009), 84 f.

marriages between white men and Black women were void retroactively, given the status of the Black wife as “aboriginal” (Eingeborene). According to the court, this status was passed on by the Black mother over the generations.

In the following, the colonial administration used this decision as a precedent and started to declare other marriages as retroactively void, including in cases where the marriage pre-dated German colonialism. This has drastic consequences for the affected, as the women in these relationships as well as their children, who so far were treated like German citizens, lost this status and accordingly all attached rights, i.e. to the right to possess land and cattle or for the children to go to school or the right to inherit. Due to the described transgenerational effect, these decisions affected a larger number of persons in the colony. For example, there was a series of court cases regarding the status of the members of a larger family, who descended from the same great-grandmother, who was a Nama woman.³⁰

In the 1910s, the colonial administration went a step further and started to generally keep lists of “half-white” children, regardless of the marital status of their parents. They also took measures to criminalize and separate the respective relationships between the parents. This policy was openly adopted to serve the “purity of our race and to inhibit the further increase of the politically and socially harmful mixed population.”³¹ Legally this was implemented through another administrative order regarding “the mixed population”,³² as well as by applying the criminal provision sanctioning the “excitation of public nuisance” (Erregung öffentlichen Ärgernisses). Remarkably, this criminal provision was one of several which were used to persecute LGBTQO* persons in Germany in later times. The listing of so-called “Mischlinge” affected a relevant part of the population. According to estimates, these children – if granted citizen rights – would have constituted about twelve percent of the white population in 1914. In extremely rare cases, the laws on the “mixed marriages” are applied by German Courts until today. In 2022, the Administrative Court of Berlin, rejected the claim to German nationality by Gerson Liebl, a descendant of a German colonist and a woman from Togo, on grounds of the legal annulment of “mixed-marriages” in colonial times.³³

The practices and legislation regarding so-called “mixed” marriages (Mischehen) and relationships are emblematic for the way in which “whiteness” was defined along gendered categories. The described role attributed to the Black woman in passing on the status as “aboriginal” (Eingeborene) over generations, aligned with the contemporary colonial propaganda. Images of Black women as “black beast” (schwarze Bestie), which at the same time was depicted as sexually available, were opposed to notions of hygiene, order and purity attributed to white womanhood.³⁴ At the same time, sexualized violence against Ovaherero and Nama women was widespread and considered by some contemporary commentators as one of

³⁰ Henrichsen (2009), 84-86.

³¹ „im Interesse der Reinhaltung unserer Rasse und zur Verhinderung weiterer Zunahme der politischen und sozial schädlichen Mischlingsbevölkerung“ quoted according to: Henrichsen (2009), 89.

³² Henrichsen (2009), 88-89.

³³ Newspaper article: Taz, 19.05.2022, “Er streite für sein Recht“, available here: <https://taz.de/Folgen-des-deutschen-Kolonialismus!/5852561/>.

³⁴ Krüger, Gesine: Bestien und Opfer: Frauen im Kolonialkrieg, In: Zimmer, Jürgen; Zeller: Der Kolonialkrieg (1904-1908) in Namibia und seine Folgen, p. 143-159.

the major reasons for the colonial war.³⁵ As Dietrich pointedly put it, the Black “female body functioned as a border marker of the German nation and the white >race<“.³⁶

III. Outlook: Lack of a gender perspective in processes addressing German colonialism

Gendered forms of control played a relevant role in establishing and maintaining the German colonial rule. The long-term effects of this conduct can be linked to several aspects of the current debates regarding reparations for the German colonial crimes, the topic of rehabilitation, but also the right to truth, the right to know as well as guarantees of non-recurrence. Notwithstanding, the gendered aspects of the German colonial rule have not played a notable role in the recent intergovernmental processes regarding the Ovaherero and Nama genocide (for an overview of the process, see Annex I.). To the knowledge of the submitters, no Ovaherero or Nama women were members of the negotiation team or consulting technical committee involved in the intergovernmental negotiations – not to speak of LGBTQ* persons and their perspectives. The relevance of such representation in principle and also for the very concrete case at hand, is supported by the, albeit scattered and limited, sources quoted above.

³⁵ See von Joeden-Forgey, Elia: Woman and the Herero Genocide, in: Bemporad, Elissa; Warren, Joye W. (eds): Woman and Genocide: Survivors, Victims, Perpetrators (2018), 36-57; see also: Missionary Joh. Neitz, Die Herero betreffend, Reise zu Samuel Herero, 8.11.2907, Archiv der Vereinigten Evangelischen Missio Wuppertal: A/k 5, quoted in: Gründer, Horst: Geschichte der deutschen Kolonien, 7th ed. (2018), 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.“

³⁶ „Der weibliche Körper fungierte dabei als Grenzmarker deutscher Nation und weißer >Rasse<“, Dietrich (2009), 178.