

No.

IN THE
Supreme Court of the United States

VEKUII RUKORO, ET AL.,

v.

FEDERAL REPUBLIC OF GERMANY

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

APPENDIX

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APPENDIX

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976 F.3d 218

United States Court of Appeals, Second Circuit.
Vekuui RUKORO, Paramount Chief of the Ovaherero
People and Representative of the Ovaherero
Traditional Authority, The Association of the
Ovaherero Genocide in the USA, Inc., Barnabas Veraa
Katuuo, Individually and as an Officer of the
Association of the Ovaherero Genocide in the USA,
Inc., on Behalf of Themselves and All Other Ovaherero
and Nama Indigenous Peoples, Johannes Isaack, Chief
and Chairman of the Nama Traditional Authorities
Association, Plaintiffs-Appellants,

v.

FEDERAL REPUBLIC OF GERMANY, Defendant-
Appellant.¹

Docket No. 19-609

August Term, 2019

Argued: October 17, 2019

Decided: September 24, 2020

Appeal from the United States District Court for the
Southern District of New York (Swain, *J.*)

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Before: WINTER, POOLER and PARK, Circuit Judges.

Opinion

POOLER, Circuit Judge:

Plaintiffs—members of a putative class action on behalf of members and descendants of the Ovaherero and Nama indigenous peoples—appeal from the March 11, 2019 judgment of the United States District Court for the Southern District of New York (Swain, *J.*) dismissing their amended complaint against the Federal Republic of Germany for lack subject matter jurisdiction under the Foreign Sovereign Immunities Act (“FSIA”). Plaintiffs seek damages for the enslavement and genocide of the Ovaherero and Nama peoples in what is now Namibia, as well as for property they alleged Germany expropriated from the land and peoples. As Germany is a foreign sovereign, the only path for the exercise of jurisdiction is if one of the exceptions to FSIA applies. The district court found none did and dismissed the complaint.

We affirm, although we part ways from the district court on its tracing analysis. FSIA's takings exception provides that “[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... in which rights in property taken in violation of international law are in issue and that property or any property exchanged for

such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.” 28 U.S.C. § 1605(a)(3).

The district court found that in pleading that Germany derived at least a portion of its wealth from property expropriated from Ovaherero and Nama, and those comingled funds were used to purchase property in New York, plaintiffs sufficiently alleged that “property exchanged for such property is present in the United States.” *Id.* We disagree and find plaintiffs’ allegations insufficient to trace the proceeds from property expropriated more than a century ago to present-day property owned by Germany in New York. While its tracing analysis was erroneous, the district court ultimately correctly concluded that no FSIA exception applied, leaving it without subject matter jurisdiction.

BACKGROUND

We review a district court’s dismissal of a complaint pursuant to Rule 12(b)(1) *de novo*, accepting as true all material factual allegations in the complaint and drawing all reasonable inferences in the plaintiff’s favor. *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56-57 (2d Cir. 2016).

Plaintiffs Vekuii Rukoro, Johannes Isaack, The Association of the Ovaherero Genocide in the USA Inc., and Barnabas Veraa Katuuo (collectively, “Plaintiffs”) assert this putative class action on behalf of members

and descendants of the Ovaherero and Nama indigenous peoples. The amended complaint sets out in detail the events that we briefly summarize here. Germany colonized what was then known as German South West Africa, an area that is now Namibia, between roughly 1884 and 1903. Germany occupied Ovaherero and Nama land, seizing livestock, personal property, and natural resources for its own use. The German authorities seized multiple tracts of ancestral land, displacing those who lived there and forcing many Ovaherero and Nama people into slavery. In 1904, Germany sought to exterminate the Ovaherero and Nama peoples, lynching thousands of men, women, and children. Those that survived were moved into concentration camps. The Ovaherero and Nama people were treated as property, rented out as laborers, and worked until they died. Women and children were raped. Medical experiments were performed on live persons, while others were murdered and decapitated so that their remains could be studied by researchers who sought to prove the white race was superior. In 1985, the United Nations Economic and Social Council Commission on Human Rights issued a report deeming the events in Namibia a genocide.

The amended complaint sought damages under the Alien Tort Statute, federal common law, the law of nations, conversion, damages for conversion of various property rights and unjust enrichment, an accounting, the establishment of a constructive trust, as well as injunctive and declaratory relief aimed at forcing Germany and Namibia to allow Plaintiffs' participation in negotiations regarding the events detailed in the amended complaint.

In support of their claim that jurisdiction was proper under several FSIA exceptions, Plaintiffs

alleged that certain human remains, including skeletons and skulls, were shipped from Germany to the American Museum of Natural History (“AMNH”) in New York City (the “AMNH Remains”). The AMNH Remains “were originally collected by Professor Felix von Luschan, a German anthropologist and ethnologist at the Museum for Ethnology in Berlin from 1895-1910,” and then remained a part of von Luschan's “private collection” until his widow sold the collection to the AMNH after von Luschan's death in 1924. App'x at 92 ¶¶ 298-99. Plaintiffs further allege that one of the few surviving copies of the “Blue Book,” a record of the genocide prepared in 1918, is located at the New York Public Library. App'x at 93 ¶ 302.

Additionally, Plaintiffs allege that land, livestock, and personal property stolen by German colonial authorities were either sold or leased to private parties, and that Germany imposed fees, customs, tariffs, and taxes on commercial operations in the territory, with the monies deposited directly into the German treasury. Plaintiffs allege that at least some of these comingled monies were used to buy four real estate properties in New York City: (1) a townhouse located at 119 East 65th Street, (2) a building located at 871 First Avenue, (3) a condominium located at 346 East 49th Street, and (4) a building located at 1014 Fifth Avenue (collectively, the “New York Properties”). Each of the New York Properties is “used in connection with [Germany's] commercial activities” including, among other things, the housing of German officials and employees and “cultural propagation, German-language programs, and other programs to develop American interest in the German people, language, culture, and country with the ultimate goal of

commercial growth through cultural growth.” App'x at 83.

As relevant to this appeal, Germany moved to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing the district court lacked subject matter jurisdiction under FSIA. Plaintiffs opposed and also sought to file a supplemental declaration, or in the alternative, a second amended complaint. The district court granted Germany's motion to dismiss, concluding that the allegations of the amended complaint did not adequately plead that either the takings or commercial activities exceptions applied. As discussed in greater detail below, the district court concluded that the allegations were insufficient to allow jurisdiction under either the commercial activity or takings exceptions to FSIA. *Rukoro v. Federal Republic of Germany*, 363 F. Supp. 3d 436 (S.D.N.Y. 2019). The district court denied Plaintiffs leave to amend on the grounds that amendment was futile. *Id.* at 452-53. This appeal followed.

DISCUSSION

The FSIA “provides the sole basis for obtaining jurisdiction over a foreign state in federal court.” *Pablo Star Ltd. v. Welsh Gov't*, 961 F.3d 555, 559 (2d Cir. 2020) (internal quotation marks omitted). “[A] foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state.” *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993); *see also* 28 U.S.C. § 1604.

“[W]e review the district court's legal conclusions concerning sovereign immunity *de novo* and

its factual findings for clear error.” *Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193, 199 (2d Cir. 2016) (internal quotation marks omitted). “A defendant seeking sovereign immunity bears the burden of establishing a prima facie case that it is a foreign sovereign.” *Pablo Star*, 961 F.3d at 559-60. The burden next shifts to Plaintiffs to demonstrate a FSIA exception applies. *Id.* at 560. “Determining whether that burden is met involves a review of the allegations in the complaint and any undisputed facts, and resolution by the district court of any disputed issues of fact.” *Id.* “Once the plaintiff has met its initial burden of production, the defendant bears the burden of proving, by a preponderance of the evidence, that the alleged exception does not apply.” *Id.*

The parties agree Germany is a foreign state, immune from liability unless an enumerated FSIA exception applies. Plaintiffs below invoked the commercial activities and takings exceptions. To the extent that Plaintiffs still seek to avail themselves of the commercial activities exception, 28 U.S.C. § 1605(a)(2), we affirm the district court for the reasons set out in its thorough opinion.² *Rukoro*, 363 F. Supp. 3d at 444-46. While we agree with the district court's ultimate conclusion that the takings exception does not apply, we disagree with its analysis.

I. The takings exception

The FSIA's expropriation, or takings, exception strips a foreign sovereign's immunity against claims where:

rights in property taken in violation of international law are in issue and that property or

any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States[.]

28 U.S.C. § 1605(a)(3). “[I]n order to establish jurisdiction pursuant to the FSIA expropriation exception, a plaintiff must show that: (1) rights in property are in issue; (2) that the property was ‘taken’; (3) that the taking was in violation of international law; and (4) that one of the two nexus requirements is satisfied,” *Zappia Middle East Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000). As to the nexus requirement, a plaintiff must show either that “such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state,” or “such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity.” *Id.*

Prior to the Supreme Court's decision in *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, a party seeking to avail itself of the expropriation exception needed only to make a nonfrivolous argument that the exception applied. — U.S. —, 137 S. Ct. 1312, 1316, 197 L.Ed.2d 663 (2017). In *Helmerich*, the Supreme Court rejected that standard as inconsistent with the FSIA, and held that a legally valid claim was required to

establish the elements of the expropriation standard. *Id.*

Thus, “a party's nonfrivolous, but ultimately incorrect, argument that property was taken in violation of international law is insufficient to confer jurisdiction.” *Id.* Instead, “the relevant factual allegations must make out a legally valid claim that a certain kind of right is at issue (property rights) and that the relevant property was taken in a certain way (in violation of international law). A good argument to that effect is not sufficient.” *Id.* (emphasis omitted).

While the Supreme Court in *Helmerich* addressed only the “property taken in violation of international law” element of the expropriation exception, *id.*, as the district court recognized there is no reason to read the decision as applying the valid argument standard to only that element, rather than the entire exception. *Rukoro*, 363 F. Supp. 3d at 447. The Supreme Court held that foreign sovereign immunity should be dealt with “as near to the outset of the case as is reasonably possible,” as “foreign sovereign immunity's basic objective” is “to free a foreign sovereign from suit.” *Helmerich*, 137 S. Ct. at 1317 (emphasis omitted).

Here, the district court assumed without deciding that Plaintiffs alleged rights in property were taken in violation of international law. It then went on to find Plaintiffs also adequately pleaded that “property exchanged for the expropriated property” was present in the United States. *Rukoro*, 363 F. Supp. 3d at 448. The district court relied on the amended complaint that a “portion of [Germany's] enormous wealth ... can be traced from the property it took from the Ovaherero and Nama peoples in violation of international law,” App'x at 82 ¶ 258, and that those comingled funds were

later used to purchase property in New York City. *Id.* Plaintiffs alleged that Germany's New York properties constitute “property exchanged for [expropriated] property” that is present in the United States. App'x at 82 ¶ 258. The district court also considered a declaration submitted by Plaintiffs' economist, Stan V. Smith, who opined that based on the allegations of the amended complaint and declarations submitted by others in support of Plaintiffs, “it can be reasonably concluded” that monies so derived “may be reasonab[ly] presumed to have gone into the general coffers of the German official banking system, and since money is fungible, [that] German government monies were later used to purchase various properties in New York.” App'x at 301-02 ¶ 12.

In finding these allegations sufficed, the district court relied in part on *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016). There, the court allowed plaintiff to proceed based on allegations that the sovereign “liquidated the stolen property, mixed the resulting funds with their general revenues, and devoted the proceeds to funding various governmental and commercial operations,” which it concluded “raise[d] a plausible inference that the defendants retain the property or proceeds thereof, absent a sufficiently convincing indication to the contrary.” *Simon*, 812 F.3d at 147 (internal alteration and quotation marks omitted). However, *Simon* predates *Helmerich*, calling into question its use of a plausibility standard.

The conclusory allegations in the amended complaint simply do not suffice to make a valid argument that property converted into currency and comingled with other monies in Germany's general treasury account can be traced to the purchase of

property in New York decades later. The Smith Declaration fails to sufficiently bolster the allegations, as it states it is merely a “reasonable presum[ption]” that comingled funds were used to buy the properties. App'x at 302 ¶ 12. Such allegations may satisfy a plausibility standard, but not a valid argument standard. There may be circumstances where it is possible to trace the proceeds a sovereign received from expropriated property to funds spent on property present in the United States, but such circumstances are not present here.

In addition, we agree with the district court that the amended complaint “fails to allege that the expropriated property is present ‘in connection with a commercial activity’ carried on by Germany.” *Rukoro*, 363 F. Supp. 3d at 448. The district court found that (1) the New York Properties are not being used in a commercial manner, but rather in a manner usually deemed governmental; and (2) using the New York Properties to promote German culture is a governmental use, not a commercial one. *See id.* at 450-51. Plaintiffs also rely on the allegations of the proposed second amended complaint, which allege that the remains were actually sold to AMNH by a German state museum.

FSIA defines a “commercial activity carried on in the United States by a foreign state” as a “commercial activity carried on by such state and having substantial contact with the United States.” 28 U.S.C. § 1603(e). A “commercial activity” is “either a regular course of commercial conduct or a particular commercial transaction or act.” 28 U.S.C. § 1603(d). “The commercial character of an activity shall be determined by reference to the nature of the course of

conduct or particular transaction or act, rather than by reference to its purpose.” *Id.*

The New York Properties are used to house Germany's mission to the United Nations, including its diplomats, as well as various institutions and programs engaged in propagating German culture. Plaintiffs argue that entering into contracts for repairs and maintenance renders the properties present in the United States “in connection with” a commercial activity of a foreign state, but as the district court aptly noted, “[t]o conclude that contracts for restoration work or boiler repairs render these properties present ‘in connection with’ a commercial activity of a foreign state would expand the scope of the FSIA takings exception well beyond the boundaries of the ‘restrictive’ theory of sovereign immunity embodied in the statute.” *Rukoro*, 363 F. Supp. 3d at 450. We interpret “in connection,” as used in the statute, “narrowly.” *Garb v. Republic of Poland*, 440 F.3d 579, 587 (2d Cir. 2006) (noting that “[a]cts are ‘in connection’ with ... commercial activity so long as there is a ‘substantive connection’ or a ‘causal link’ between them and the commercial activity” (alterations in original) (citation omitted)).

Nor are we persuaded by Plaintiffs’ argument that the use of the New York Properties in connection with “cultural propagation, German-language programs, and other programs to develop American interest in the German people, language, culture, and country with the ultimate goal of commercial growth through cultural growth” are commercial activities. App’x at 83 ¶ 261, 84-85 ¶¶ 263, 265, 86 ¶ 269. We agree with the district court that these sorts of activities are the kind undertaken by sovereigns and not commercial activities. *See, e.g., Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S.Ct. 2160, 119 L.Ed.2d 394

(1992) (commercial activities must be of the sort “by which a private party engages in trade and traffic or commerce” (citation and internal quotation marks omitted)); *see also* *LaLoup v. United States*, 29 F. Supp. 3d 530, 551-52 (E.D. Pa. 2014) (allegations that a foreign sovereign maintained consulates, promoted business interests, and sponsored tourism are actions typically engaged in by a sovereign, and thus are insufficient to constitute commercial activity under the FSIA).

Our recent decision in *Pablo Star* does not compel a different result. There, the activity at issue was the advertising used to sell tickets to a walking tour that in turn was to promote tourism to Wales. Advertising is an activity “performed by private-sector businesses.” *Pablo Star*, 961 F.3d at 562. Taking out advertisements promoting activities that are meant to encourage tourism is not the same as actually providing the activities.

Plaintiffs also argue that the AMNH Remains are present in the United States in connection with a commercial activity carried on in the United States by Germany. Neither the amended complaint, nor the proposed second amended complaint supports such a conclusion.

Analysis starts with “identify[ing] the act of the foreign sovereign State that serves as the basis for plaintiffs’ claims.” *Garb*, 440 F.3d at 586. “[A]n action is ‘based upon’ the ‘particular conduct’ that constitutes the ‘gravamen’ of the suit.” *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 136 S. Ct. 390, 396, 193 L.Ed.2d 269 (2015). Courts must “zero[] in on the core of [the] suit: the ... sovereign acts that actually injured [plaintiff].” *Id.* at 396; *see also* *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 107 (2d Cir. 2016) (defining “gravamen” as

“[t]he substantial point or essence of a claim, grievance, or complaint” (alteration in original) (quoting Black's Law Dictionary 817 (10th ed. 2014))).

Here, Plaintiffs argue that Germany engaged in the requisite commercial activity when it sold the remains of genocide victims to the AMNH. The proposed second amended complaint alleges that the remains were shipped from the “Museum für Völkerkunde, Berlin, Germany” to the AMNH, and that such “[t]rading and trafficking [of] human crania are not typical sovereign activities, but quintessential ‘trade and traffic.’ ” Appellants’ Br. at 13-14. However, as the district court correctly found, “the gravamen of the [Amended Complaint] is the taking of Plaintiffs’ land, livestock, and personal property in connection with the Ovaherero and Nama genocide.” *Rukoro*, 363 F. Supp. 3d at 445. Germany's seizure of “land, livestock, and personal property” is not a commercial activity within the meaning of FSIA. *Id.*

Moreover, Plaintiffs fail to allege that the AMNH Remains are currently present in the United States in connection with a German commercial activity. Even assuming for argument's sake that Germany engaged in an international commercial market for bones when it sold the remains to the AMNH, there are no allegations that Germany continues to engage in such sales. The statute requires that the commercial activity be “carried on in the United States by the foreign state,” 28 U.S.C. § 1605(a)(3), which requires the activity at issue be current. The legislative history supports such a reading:

The first category involves cases where the property in question or any property exchanged for such property is present in the United

States, and where such presence is in connection with a commercial activity carried on in the United States by the foreign state, or political subdivision, agency or instrumentality of the foreign state.

H.R. Rep. No. 94-1487, at 19 (1976), *reported at* 1976 U.S.C.C.A.N. 6604, 6618. *See also Schubarth v. Fed. Republic of Ger.*, 220 F. Supp. 3d 111, 115 (D.D.C. 2016) (“Courts assessing the FSIA’s commercial activity requirement, however, have looked for evidence of recent or ongoing transactions”) (collecting cases), *aff’d in part, rev’d in part*, 891 F.3d 392, 399 n.4 (D.C. Cir. 2018) (noting that “[t]his interpretation is supported by the FSIA’s plain text, which employs the present tense”).

II. Leave to amend

“When the denial of leave to amend is based on a determination that amendment would be futile, a reviewing court conducts a de novo review.” *Eastman Kodak Co. v. Henry Bath, LLC*, 936 F.3d 86, 98 (2d Cir. 2019) (citation, italics, and internal quotation marks omitted). “Futility is a determination, as a matter of law, that proposed amendments would fail to cure prior deficiencies” *Panther Partners Inc. v. Ikanos Commc’ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012). Setting aside the issues of undue delay and prejudice, we agree with the district court that the real problem is that even taking the allegations in the proposed second amended complaint as true, Plaintiffs still fail to adequately allege jurisdiction. Neither the revised complaint nor the proposed supplemental declaration sufficiently alleges that the expropriated property is

currently present in the United States in connection with commercial activity. The repatriation of certain Hawaiian and Alaskan remains from Germany does not rise to the level of commercial activity, nor is it sufficiently related to the transfer of the AMNH remains a century ago.

CONCLUSION

For the reasons given above, we affirm the district court's dismissal for lack of subject matter jurisdiction. The terrible wrongs elucidated in Plaintiffs' complaint must be addressed through a vehicle other than the U.S. court system.

Footnotes

1The Clerk of the Court is directed to amend the caption as above.

2During oral argument, the Plaintiffs waived their arguments regarding the commercial activities exception.

17a

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United States District Court, S.D. New York.

Vekuii RUKORO et al., Plaintiffs,

v.

FEDERAL REPUBLIC OF GERMANY, Defendant.

No. 17 CV 62-LTS

Signed March 6, 2019

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OPINION & ORDER

LAURA TAYLOR SWAIN, United States District Judge

Plaintiffs Vekuii Rukoro, Johannes Isaack, The Association of the Ovaherero Genocide in the USA Inc., and Barnabas Veraa Katuuu bring this putative class action on behalf of members and descendants of the Ovaherero and Nama indigenous peoples against the Federal Republic of Germany (“Germany”) for damages, declaratory, and other equitable relief arising from the genocide of thousands of Ovaherero and Nama

people in German South West Africa, now modern day Namibia, from 1885 to 1909. Before the Court is Defendant Germany's motion, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(2), to dismiss Plaintiffs' Amended Complaint (docket entry no. 39, the "AC") for lack of subject matter and personal jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 ("FSIA"). (Docket entry no. 42.) Germany also moves to dismiss the AC for lack of subject matter jurisdiction under the political question doctrine and, in the alternative, argues that the Court should decline to exercise both subject matter and personal jurisdiction pursuant to the doctrines of forum non conveniens and prudential exhaustion. On October 31, 2018, Plaintiffs filed a motion for leave to file a supplemental declaration or, in the alternative, to file a Second Amended Complaint. (Docket entry no. 61.) The Court has considered the submissions of the parties carefully and, for the following reasons, Germany's motion to dismiss the Amended Complaint is granted and Plaintiffs' motion for leave to file a supplemental declaration or a Second Amended Complaint is denied.

BACKGROUND

The AC recites in extensive detail the sequence of events that culminated in the brutal exploitation, enslavement, and extermination of substantial numbers of the Ovaherero and Nama peoples. The following abbreviated recitation of relevant facts is drawn from the AC, the well-pleaded factual content of which is taken as true for purposes of this motion practice.

Plaintiffs are U.S. and non-U.S. citizens who are members, or direct descendants of members, of the

Ovaherero and Nama indigenous peoples. (AC ¶ 316.) From approximately 1884 to 1903, German colonial authorities arrived in what was then known as German South West Africa and began to occupy and seize Ovaherero and Nama land, livestock, personal property, and natural resources using violence and coercion. (AC ¶¶ 5, 69-93.) Through various decrees and ordinances, German authorities forced the relocation of the Ovaherero and Nama peoples and seized multiple tracts of ancestral land. (AC ¶¶ 88-89, 92.) Deprived of their homes and livelihoods, many Ovaherero and Nama people were forced into debt and slavery. (AC ¶¶ 89, 94.)

In 1904, the German Empire began a violent campaign to exterminate the Ovaherero and Nama peoples. (AC ¶¶ 99, 102-145.) Under the leadership of German military commander Adrien Dietrich Lothar von Trotha, German troops captured and lynched countless Ovaherero men, women, and children. (AC ¶¶ 105-106, 119-120.) In one particularly gruesome incident, German troops massacred thousands of unarmed and vulnerable Ovaherero members who had gathered in the town of Waterberg for the purpose of surrendering to German forces. (AC ¶¶ 107-112.) Those who survived or managed to escape the German forces were driven to the Omaheke Desert to die of starvation and thirst. (AC ¶¶ 114-115, 118.) As one German lieutenant observed: “There's a path that leads out of Onduru towards Omuramba. Alongside the path are human skulls, rib cages, and thousands of fallen cattle and other livestock. This is the path on which the Ovaherero fled.... Everything suggests this was a march of death.” (AC ¶ 124.) German troops carried out a similar campaign against the Nama people, calling for

members to surrender on pain of death. (AC ¶¶ 143-144.)

In 1905, the German imperial government ordered all surviving Ovaherero and Nama peoples to report to shelters from which they were transported to concentration camps. (AC ¶¶ 129-130, 145.) At these camps, Ovaherero and Nama people were treated as property, rented out as laborers and, ultimately, worked to death. (AC ¶¶ 148, 150-152.) Women and children in the camps were raped and sexually abused. (AC ¶ 154.) At a concentration camp located on Shark Island, Plaintiffs allege, hundreds of Ovaherero and Nama bodies were dissected for medical research, and hundreds more men, women, and children were brutally murdered and decapitated so that their remains could be studied by researchers who believed in the superiority of the white race. (AC ¶¶ 167-176.)

In 1985, the United Nations Economic and Social Council Commission on Human Rights issued a report classifying the events described in the AC as a genocide. (AC ¶ 271); see also Special Rapporteur to Sub-Comm'n on Prevention of Discrimination & Prot. Of Minorities, Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide ¶ 24, U.N. Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985) (by Benjamin Whitaker). In recent years, Germany has begun negotiations with the government of Namibia regarding the events described in the AC. (AC ¶ 288.) Plaintiffs have not been invited to participate in those negotiations. (AC ¶ 289.)

Plaintiffs seek damages for the genocide pursuant to the Alien Tort Statute, federal common law, and the law of nations (AC ¶¶ 327-332), damages for conversion of various property rights (AC ¶¶ 333-370), damages for unjust enrichment (AC ¶¶ 371-373),

an accounting (AC ¶¶ 374-375), the establishment of a constructive trust (AC ¶¶ 376-377), and declaratory relief recognizing Plaintiffs as the “legitimate successors to sovereign nations” and declaring that the exclusion of Plaintiffs from negotiations between Germany and Namibia constitutes a violation of Plaintiffs' rights under international law, including the United Nations Declaration on the Rights of Indigenous Peoples (AC ¶¶ 378-382). Plaintiffs also seek injunctive relief prohibiting Germany from continuing to exclude Plaintiffs from its negotiations with Namibia. (AC at 91.)

In aid of their argument that jurisdiction exists pursuant to one or more of the enumerated exceptions under the FSIA, Plaintiffs allege that many of the Ovaherero and Nama skulls and body parts used for medical experiments remain in Germany's possession (AC ¶ 222), and that certain human remains have been transported to the American Museum of Natural History (“AMNH”) in New York City (the “AMNH Remains”) (AC ¶¶ 297-300). Plaintiffs aver that the AMNH Remains “were originally collected by Professor Felix von Luschan, a German anthropologist and ethnologist at the Museum for Ethnology in Berlin from 1895-1910,” and then remained a part of von Luschan's “private collection” until his widow sold the collection to the AMNH after von Luschan's death in 1924. (AC ¶¶ 298-299.) In addition to the AMNH Remains, Plaintiffs allege that one of the few surviving copies of the “Blue Book,” a record of the genocide prepared in 1918, is located at the New York Public Library (AC ¶¶ 302-303), and that New York “has become one of the leading research and conference centers for the study of the Ovaherero/Nama genocide” (AC ¶¶ 304-307).

Plaintiffs also allege that land, livestock, and other personal property seized by German colonial authorities was either sold or leased to settlers or other private parties, and that all proceeds from those transactions were deposited into the German treasury. (AC ¶¶ 179-180, 182-86.) Plaintiffs aver that Germany further profited from these seizures by imposing and collecting fees, customs, tariffs and taxes on exports, mining operations, railway construction, and other ventures in German South West Africa. (AC ¶¶ 188-206.) The AC alleges that “[u]pon realization of the benefits achieved by its takings of Ovaherero and Nama property ... [Germany] commingled these fungible values within its general Imperial treasury and departmental treasuries of various Imperial ministries, agencies, and instrumentalities.” (AC ¶ 249; see also AC ¶¶ 250-55, 258.) Plaintiffs contend that portions of these commingled funds were used to purchase four real estate properties in New York City: (1) a townhouse located at 119 East 65th Street, (2) a building located at 871 First Avenue, (3) a condominium located at 346 East 49th Street, and (4) a building located at 1014 Fifth Avenue (collectively, the “New York Properties”). (AC ¶ 259.) The AC alleges that each of the New York Properties is “used in connection with [Germany's] commercial activities” including, among other things, the “performance and existence of contractual obligations related to the housing of German officials and employees,” the “performance and existence of contractual obligations related to contracts for maintenance, restoration, cleaning, and other services provided by contractors located in New York City,” and “cultural propagation, German-language programs, and other programs to develop American interest in the German people, language, culture, and

country with the ultimate goal of commercial growth through cultural growth.” (AC ¶¶ 261, 263, 265, 269.)

DISCUSSION

As other courts in this circuit have noted in similar circumstances, “strong moral claims are not easily converted into successful legal causes of action.” Garb v. Republic of Poland, 440 F.3d 579, 581 (2d Cir. 2006) (internal quotations omitted).

The FSIA provides the “sole basis for obtaining jurisdiction over a foreign sovereign in the United States,” Argentina v. Weltover, 504 U.S. 607, 611, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992) (internal quotations omitted), and thus the “the capacity of United States courts to exercise jurisdiction over [P]laintiffs' claims hinges on a legal inquiry narrowly circumscribed by statute,” Garb, 440 F.3d at 581. Under the FSIA, foreign states and their agencies and instrumentalities are presumptively immune from the jurisdiction of the courts of the United States, unless a statutory exception to immunity applies. 28 U.S.C. § 1604; Saudi Arabia v. Nelson, 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). “Once the defendant presents prima facie evidence that it is a foreign sovereign, the burden falls on the plaintiff to establish by a preponderance of the evidence that an exception under the FSIA permits jurisdiction over the foreign sovereign. Where the plaintiff satisfies [its] burden that an FSIA exception applies, the foreign sovereign then bears the ultimate burden of persuasion that the FSIA exception does not apply.” Swarna v. Al-Awadi, 622 F.3d 123, 144 (2d Cir. 2010) (internal citations omitted). If the claim does not fall within one of the FSIA's statutory exceptions, federal courts lack subject matter

jurisdiction of the claim, as well as personal jurisdiction over the foreign state defendant. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489 & n.14, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983).

It is uncontested here that Germany is a foreign state and is therefore generally immune from liability under FSIA, unless a statutory exception applies. Plaintiffs argue that their claims fall within two of the exceptions to immunity specified in the FSIA: the commercial activity exception, 28 U.S.C. § 1605(a)(2),¹ and the takings exception, 28 U.S.C. § 1605(a)(3).

Commercial Activity Exception

The commercial activity exception provides, in pertinent part, that a foreign state shall not be immune from jurisdiction in any case in which the action is “based ... upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.” 28 U.S.C. § 1605(a)(2)(LexisNexis 2014). The “threshold step” in assessing the applicability of the commercial activity exception is to “identify the act of the foreign sovereign State that serves as the basis for plaintiffs' claims.” Garb, 440 F.3d at 586 (2d Cir. 2006). An action is “based upon” the “particular conduct that constitutes the gravamen of the suit.” OBB Personenverkehr AG v. Sachs, — U.S. —, 136 S.Ct. 390, 395, 193 L.Ed.2d 269 (2015); see also MMA Consultants 1, Inc. v. Republic of Peru, 719 Fed. App'x 47, 52 (2d Cir. 2017) (“Gravamen is defined as the basis or foundation of a claim, that is, those elements that, if proven, would entitle a plaintiff to relief. In other

words, [the Court] must zero in on the core of the suit and determine a lawsuit's foundation”) (internal citations, quotations, and emphasis omitted). An effect is “direct” within the meaning of the commercial activity exception if it “follows as an immediate consequence of the defendant's ... activity.” Weltover, 504 U.S. at 618, 112 S.Ct. 2160 (internal quotations omitted). The Second Circuit has held that “ ‘the requisite immediacy’ is lacking where the alleged effect ‘depend[s] crucially on variables independent of’ the conduct of the foreign state.” Guirlando v. TC Ziraat Bankasi A.S., 602 F.3d 69, 75 (2d Cir. 2010) (quoting Virtual Countries, Inc. v. South Africa, 300 F.3d 230, 238 (2d Cir. 2002)).

Plaintiffs argue that the commercial activity exception is applicable here because Germany's “bone activities” and the “construction and operation of, e.g., the railway to Grootfontein in what is now Namibia” are primarily commercial in nature. (Docket entry no. 49, Opp. at 18-19.) Plaintiffs' characterization of these activities as commercial is not, however, sufficient to demonstrate that the commercial activity exception to the FSIA applies. At their core, Plaintiffs' conversion, unjust enrichment, and restitution claims are not centered upon the collection, sale, and display of Ovaherero and Nama bones, nor does the AC predicate Germany's liability upon the construction of railways in German South West Africa. As Plaintiffs conceded at oral argument, the gravamen of the AC is the taking of Plaintiffs' land, livestock, and personal property in connection with the Ovaherero and Nama genocide. (See docket entry no. 58, Hr'g Tr. at 23:7-24:8.) Thus, even if Germany's “bone activities” and railway construction are “commercial activities” within the meaning of the FSIA, the commercial activity

exception is inapplicable because Plaintiffs' claims are not sufficiently “based upon” those allegations.

Separately, the AC alleges that Germany's actions caused a “direct effect” in the United States because (1) members of the class who were injured by the genocide currently reside in the United States (AC ¶¶ 295-96), (2) certain human remains collected by German anthropologist Felix von Luschan are present at the AMNH (AC ¶¶ 297-301), (3) a copy of the “Blue Book” is located in the New York Public Library (AC ¶¶ 302-303), and (4) New York has become a leading research and conference center for the study of the genocide (AC ¶¶ 304-308). These allegations appear to assume that the acts of genocide and expropriation which form the basis of Plaintiffs' claims can themselves fairly be considered as acts “in connection with a commercial activity” of Germany, an argument that Plaintiffs do not expressly make. However, assuming without deciding that this is the case, Plaintiffs have still failed to allege facts sufficient to support their contention that Germany's conduct caused a “direct effect” in the United States.

First, the location of some class members in the United States is insufficient to constitute a “direct effect.” See Guirlando, 602 F.3d at 78 (“[T]he mere fact that a foreign state's commercial activity outside of the United States caused physical or financial injury to a United States citizen is not itself sufficient to constitute a direct effect in the United States.”). Plaintiffs' allegations regarding the presence of a copy of the “Blue Book” at the New York Public Library and New York's role as a leading research and conference center for the study of the Ovaherero and Nama genocide similarly fall far short of the types of “direct effects” required to support jurisdiction. Although the efforts of

scholars and descendants to document and study the genocide are important and laudable, these activities bear no direct and immediate causal connection to Germany's actions in South West Africa and are thus insufficient to give rise to subject matter jurisdiction.

The presence of human remains at the American Museum of Natural History is also insufficient to constitute a “direct effect” of the Ovaherero and Nama genocide because the transfer of those remains to the AMNH was not an immediate consequence of the acts upon which Plaintiffs' claims are based. According to the AC, the remains were part of a “private collection” belonging to a German anthropologist, and they were sold by the anthropologist's wife to the AMNH following his death in 1924, more than a decade after the events alleged in the AC. (AC ¶¶ 298-300.) Plaintiffs have thus failed to demonstrate that the alleged transfer of the remains was the result of any act by a foreign state, or that it flowed directly from Germany's conduct in South West Africa.² On the contrary, the transfer “ ‘depend[ed] crucially on variables independent of the conduct of the foreign state,” Guirlando, 602 F.3d at 75. In this sense, the transportation of remains to New York is more akin to a “subsequent commercial transaction[] involving expropriated property,” which is generally insufficient to give rise to subject matter jurisdiction under the commercial activity exception. See Garb, 440 F.3d at 587(finding subsequent commercial treatment of expropriated property not sufficiently “in connection with” the prior expropriation to satisfy the commercial activity exception).³

Because Plaintiffs' causes of action are based primarily upon the extermination of the Ovaherero and Nama people and the expropriation of their property,

and because Plaintiffs have failed to allege facts sufficient to support their allegation that Germany's acts of expropriation caused a direct effect in the United States, the Court cannot exercise subject matter jurisdiction of Plaintiffs' claims pursuant to FSIA's commercial activity exception. Accordingly, the Court proceeds to consider whether Plaintiffs' claims fall within the FSIA's takings exception.

Takings Exception

The takings exception provides, in pertinent part, that a foreign state shall not be immune from jurisdiction in any case “in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.” 28 U.S.C. § 1605(a)(3) (LexisNexis 2014). Thus, to establish subject matter jurisdiction pursuant to the takings exception of the FSIA, a plaintiff must demonstrate: “(1) that rights in property are at issue; (2) that the property was “taken”; (3) that the taking was in violation of international law; and either (4)(a) “that property ... is present in the United States in connection with a commercial activity carried on in the United States by the foreign state,” or (4)(b) “that property ... is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States[.]” Garb, 440 F.3d at 588 (emphasis in original).

At the pleading stage, a plaintiff must make more than a nonfrivolous argument that the jurisdictional requirements of the FSIA's takings exception are satisfied. Venezuela v. Helmerich & Payne Intern. Drilling Co., — U.S. —, 137 S.Ct. 1312, 1316-1318, 197 L.Ed.2d 663 (2017). Germany argues that, in the wake of Helmerich, Plaintiffs must demonstrate at the pleading stage that each element of the takings exception applies. (Docket entry no. 43, Motion at 11-12.) In response, Plaintiffs argue that the holding in Helmerich is limited to the first three elements of the takings exception (whether (1) rights in property (2) were taken (3) in violation of international law), but does not apply to the fourth (whether the expropriated property, or property exchanged for the expropriated property, is present in the United States in connection with a commercial activity of the foreign state). (Opp. at 13.) In Helmerich, the Supreme Court rejected the lower court's application of a “wholly insubstantial” or “non-frivolous” pleading standard to the FSIA's takings exception. 137 S.Ct. at 1318. Instead, the Court held that the takings exception “grants jurisdiction only where there is a valid claim that ‘property’ has been ‘taken in violation of international law.’ A nonfrivolous argument to that effect is insufficient.” Id. at 1318-1319. Nothing in Helmerich supports Plaintiffs' contention that a more than non-frivolous pleading standard applies to the first three elements of the takings exception, but not the fourth. Indeed, the Court's reasoning in Helmerich, which is rooted in the FSIA's language, history, and structure, suggests that Plaintiffs' interpretation would “embroil the foreign sovereign in an American lawsuit for an increased period of time” and “substitute for a more workable standard ... a standard limited only by

the bounds of a lawyer's (nonfrivolous) imagination.” Id. at 1321. Thus, a merely non-frivolous argument that property exchanged for expropriated property is present in the United States in connection with a commercial activity of the foreign state is insufficient under Helmerich.

Assuming arguendo that Plaintiffs have sufficiently alleged under Helmerich that rights in property were taken in violation of international law,⁴ the Court nonetheless concludes that it lacks subject matter jurisdiction of Plaintiffs' claims. As explained below, even though Plaintiffs allege sufficiently that the expropriated property, or property exchanged for the expropriated property, is present in the United States, the AC fails to allege that the expropriated property is present “in connection with a commercial activity” carried on by Germany. 28 U.S.C. § 1605(a)(3) (LexisNexis 2014).

(1) Plaintiffs Have Alleged Sufficiently That “Property Exchanged For Such Property Is Present In The United States”

Plaintiffs allege that a “portion of [Germany's] enormous wealth ... can be traced from the property it took from the Ovaherero and Nama peoples in violation of international law,” and that “[Germany's] investments in New York City constitute property exchanged for the property taken in violation of international law and which were derived from a portion of [Germany's] commingled funds.” (AC ¶ 258.) Specifically, Plaintiffs contend that the New York Properties constitute “property exchanged for [expropriated] property” that is present in the United States.⁵ (AC ¶ 259.) In support of their position,

Plaintiffs proffer the declaration of economist Stan V. Smith, who opines that revenues derived from Germany's activities in South West Africa “may be reasonably presumed to have gone into the general coffers of the German official banking system, and since money is fungible, [that] German government monies were later used to purchase various properties in New York.” (Docket entry no. 45-5, Smith Decl. ¶ 12.) Without proffering any evidence to the contrary,⁶ Germany contends that Plaintiffs cannot, as a matter of law, prove that property taken from the Ovaherero and Nama peoples is traceable to Germany's present-day investments in the New York Properties. (Motion at 12-13.)

The Court finds that the uncontroverted allegations in the AC, combined with the Smith Declaration, are sufficient to show under Helmerich that property exchanged for the allegedly expropriated property is present in the United States. Because Germany does not dispute any of the facts in the AC, the Court “assume[s] the truth of [Plaintiffs'] allegations, make[s] all reasonable inferences in [their] favor” and, because Germany asserts it is immune under the FSIA, “properly place[s] the ultimate burden of proof with the Defendant[.]” Schubarth v. Federal Republic of Germany, 891 F.3d 392, 401 (D.C. Cir. 2018). Under this standard, the Court concludes that Plaintiffs have alleged facts sufficient to support their theory that property expropriated by Germany in the early twentieth century was either sold or leased, and that the proceeds of those transactions were commingled into the German treasury and used to purchase the New York Properties. As other courts have noted when evaluating similar commingling theories, “further

factual development may reveal these allegations to be false or unsupportable, but for now they must be presumed to be true and construed liberally.” Id.; see also Simon, 812 F.3d at 147 (finding allegations that the foreign state “liquidated the stolen property, mixed the resulting funds with their general revenues, and devoted the proceeds to funding various governmental and commercial operations” sufficient to “raise a plausible inference that the defendants retain the property or proceeds thereof, absent a sufficiently convincing indication to the contrary”); Abelesz, 692 F.3d at 697 (finding commingling allegations plausible where “defendants have offered no case or fact that demonstrates conclusively that the value of the expropriated property is not traceable to their present day cash and other holdings.”).

To the extent that Germany argues that it is impossible, as a matter of law, to trace funds expropriated over a century ago, Germany presents no legal authority to support its position. The only case cited by Germany in support of its argument, Alperin v. Vatican Bank, 365 Fed. App'x 74, 75 (9th Cir. 2010), is unpersuasive because the plaintiff in that case failed to make any allegation in the pleadings that the expropriated property, or property exchanged for such property, was currently in the United States.

(2) Plaintiffs Have Failed To Allege That Property In The United States Is Present “In Connection With” A German Commercial Activity

Germany next argues that, even if the New York Properties are property exchanged for expropriated property within the meaning of the takings exception, Plaintiffs have failed to show, as a matter of law, that

these properties are present in the United States in connection with a commercial activity carried on in the United States by Germany. (Motion at 15-17.) The FSIA defines a “commercial activity on in the United States by a foreign state” as a “commercial activity carried on by such state and having substantial contact with the United States.” 28 U.S.C. § 1603(e) (LexisNexis 2014). A “commercial activity” is “either a regular course of commercial conduct or a particular commercial transaction or act.” 28 U.S.C. § 1603(d) (LexisNexis 2014). The statute notes that “[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” *Id.* Courts have found that a state engages in “commercial activity” where it acts “in the manner of a private player within the market.” *Nelson*, 507 U.S. at 358-59, 113 S.Ct. 1471.

Plaintiffs contend that the New York Properties are present in the United States in connection primarily with two types of commercial activities. First, Plaintiffs argue that the “performance and existence of contractual obligations” related to housing, maintenance, and insurance at each of the four properties is sufficient to demonstrate that the properties are present “in connection with” commercial activities. (See AC ¶¶ 261, 263, 265, 269.) This argument, however, ignores the primary function of each property, and focuses instead on activities that are incidental to the property's operations. Although contracts for construction, maintenance, insurance, and repair are concomitant commercial aspects of property ownership, they bear no “substantive connection” or “causal link” to the primary purposes for which these properties are held and operated. *Garb*, 440 F.3d at

587 (“The statutory term ‘in connection,’ as used in the FSIA, is a term of art, and we interpret it narrowly.”). As the parties acknowledge, the New York Properties are used principally as a private residence for Germany's diplomats or to house Germany's mission to the United Nations, its consulate general, or other entities engaged in the propagation of German culture such as the German Academic Exchange Service, the Goethe Institute, and the German Academy of Art. (See Motion at 15-16; AC ¶¶ 262, 267-68.) To conclude that contracts for restoration work or boiler repairs render these properties present “in connection with” a commercial activity of a foreign state would expand the scope of the FSIA takings exception well beyond the boundaries of the “restrictive” theory of sovereign immunity embodied in the statute. See Helmerich, 137 S.Ct. at 1320 (“The [FSIA] ... by and large continues to reflect basic principles of international law, in particular those principles embodied in what jurists refer to as the ‘restrictive’ theory of sovereign immunity”); Restatement (Third) of Foreign Relations Law of the United States § 451 cmt. a (1986) (“Under the restrictive theory, a state is immune from any exercise of judicial jurisdiction by another state in respect of claims arising out of governmental activities.”). Under Plaintiffs' interpretation, a foreign state would be amenable to suit under the takings exception simply because its personnel have to be housed, fed, or transported while in the United States. Plaintiffs' reading of the commercial nexus requirement conflates commerce in connection with property and property held in connection with commerce, and it swallows the general rule that foreign states are presumptively immune from the jurisdiction of the courts of the United States. Accordingly, the Court

finds, as a matter of law, that Plaintiffs' allegations are insufficient to establish subject matter jurisdiction under the takings exception.⁷

Second, Plaintiffs argue that each of the New York Properties is present in connection with a “commercial” activity because they are involved in “cultural propagation, German-language programs, and other programs to develop American interest in the German people, language, culture, and country with the ultimate goal of commercial growth through cultural growth.” (AC ¶¶ 261, 263, 265, 269.) In support of their allegations, Plaintiffs proffer the declaration of attorney Michael Lockman, who claims to have visited each of the New York Properties and states, among other things, that he “saw no indication of official state use” at any of the four properties. (Docket entry no. 45-6, Lockman Decl. ¶¶ 5, 6-8.) Plaintiffs' arguments and evidence seek to stretch the definition of “commercial” to encompass activities that are ordinarily considered governmental. The use of the New York Properties to support cultural exchange or arts programs is not fundamentally concerned with “the buying and selling of goods,” nor are these activities goods “[m]anufactured for the markets” or “put up for trade,” or related to “the ability of a product or business to make a profit.” Black's Law Dictionary (10th ed. 2014); see also Restatement (Third) of Foreign Relations Law of the United States § 453 cmt. b (1986) (“An activity is deemed commercial ... if it is concerned with production, sale, or purchase of goods; hiring or leasing of property; borrowing or lending of money; performance of or contracting for the performance of services; and similar activities of the kind....”). Plaintiffs proffer no evidence of a commercial relationship between, for instance, Germany and the German

Academic Exchange Service, and unlike the sale of railway tickets or the issuance of bonds—activities which other courts have determined to be sufficiently “commercial” in nature—the programs and activities described in the AC and referenced in the Lockman Declaration appear to be sovereign and diplomatic undertakings aimed at promoting interest in German culture and are thus not the “type of actions by which a private party engages in trade and traffic or commerce.” Welterover, 504 U.S. at 614, 112 S.Ct. 2160; see also LaLoup v. United States, 29 F.Supp.3d 530, 551-552 (E.D. Pa. 2014) (finding allegations that a foreign sovereign maintained consulates, promoted business interests, and sponsored tourism insufficient to constitute commercial activity under the FSIA). Accordingly, the Court finds that the AC does not allege plausibly that the New York Properties are present in the United States “in connection with a commercial activity” carried on by Germany, and the Court lacks subject matter jurisdiction under the FSIA's takings exception.

In light of the Court's conclusion that it lacks subject matter jurisdiction pursuant to the FSIA commercial activity and takings exceptions, the Court declines to address Germany's remaining arguments in favor of dismissal.

Motion for Leave to File a Supplemental Declaration or a Second Amended Complaint

<https://1-next-westlaw-com.cod.idm.oclc.org/Document/If936224040ba11e9bb0cd983136a9739/View/FullText.html?listSource=RelatedInfo&docFamilyGuid=If9cd322040ba11e99c9f890366d53014&originationContext=judicialHistory&transitionTyp>

[e=HistoryItem&contextData=%28sc.Search%29-co_anchor_F242047695973](#)On October 31, 2018, Plaintiffs filed a motion seeking leave to file a supplemental declaration in support of their motion to dismiss or, in the alternative, to file a Second Amended Complaint. The proposed supplemental declaration proffers additional facts related to, among other things, the history and provenance of the AMNH Remains (docket entry no. 61-2, Supp. Decl. ¶¶ 5-7), von Luschan's relationship with the Museum of Ethnology in Berlin (*id.* ¶¶ 4, 31-36), the Museum of Ethnology's acquisition and study of human remains from other institutions within and outside of the United States (*id.* ¶¶ 8-14, 24-26), von Luschan's acquisition of other remains from the United States (*id.* ¶¶ 24, 27-30), the collection of other human remains by other individuals and institutions in Germany (*id.* ¶¶ 17-23), the repatriation of certain Ovaherero and Nama remains to Namibia (*id.* ¶¶ 38-39), and the repatriation of certain human remains from Germany to the United States (*id.* ¶¶ 40-41). Plaintiffs' proposed Second Amended Complaint primarily adds factual allegations substantially similar to those presented in their proposed supplemental declaration. (See generally docket entry no. 61-3.)

Federal Rule of Civil Procedure 15(a) provides that leave to amend the pleadings “shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). Leave to amend may, however, be denied if the amendment (1) has been delayed unduly, (2) is sought for dilatory purposes or is made in bad faith, (3) the opposing party would be prejudiced, or (4) would be futile. Kim v. Kimm, 884 F.3d 98, 105 (2d Cir. 2018). Other than a general reference to delays and difficulties in gaining access to research documents, Plaintiffs offer no

explanation as to why the facts alleged in the proposed supplemental declaration and Second Amended Complaint—which are primarily derived from historical and scholarly documents, the contents of which have presumably been available to Plaintiffs for decades since the events described in the AC—were not included in earlier iterations of their complaint. The initial complaint in this action was filed over two years ago, on January 5, 2017, and Plaintiffs have already availed themselves of an opportunity to amend their complaint. The instant motion to dismiss has been fully briefed twice and oral argument was held on the motion on July 31, 2018. The Court finds that Plaintiffs' undue delay in supplementing their motion and seeking leave to file an amended pleading is prejudicial to Germany at this late stage.

Furthermore, even if the Court were to consider the additional factual material proffered in the supplemental declaration and Second Amended Complaint, leave to amend must be denied as futile. As discussed above, the presence of Ovaherero and Nama remains at the AMNH is insufficient to give rise to subject matter jurisdiction under either the commercial activity or the takings exception to the FSIA. The additional factual allegations regarding the history and provenance of the AMNH Remains that Plaintiffs have proffered do not alter the Court's conclusion that the transfer of these remains ten years after the events described in the AC is not a direct effect of the acts of genocide upon which Plaintiffs' claims are based. The same is true with respect to the Court's conclusion regarding the applicability of the takings exception. While the facts proffered in Plaintiffs' supplemental declaration and proposed Second Amended Complaint now suggest that Germany's “bone trade” activities

bore some relationship to the United States in the early twentieth century, they do not sufficiently demonstrate that Germany's ongoing "bone trade" activities in the form of repatriation efforts entail substantial, commercial contact with the United States or share a substantive or causal connection to the AMNH Remains, nor do they provide any basis from which the Court can conclude that the activities of the German entities engaged in these repatriation efforts can all fairly be considered activities of the German state. In this context, the Court finds that allegations regarding the recent repatriation of certain Hawaiian and Alaskan remains from Germany are insufficient to demonstrate that the AMNH Remains are "present in the United States in connection with" a German commercial activity having substantial contact with the United States. Accordingly, Plaintiffs' motion for leave to file a supplemental declaration or, in the alternative, to file a Second Amended Complaint is denied.

CONCLUSION

For the foregoing reasons, Germany's motion to dismiss the Amended Complaint is granted and Plaintiffs' motion for leave to file a supplemental declaration or a Second Amended Complaint is denied. The Clerk of Court is requested to enter judgment dismissing the Amended Complaint for lack of subject matter jurisdiction and to close this case. This Opinion and Order resolves docket entry nos. 42 and 61.

SO ORDERED.

Footnotes

1Germany contends that Plaintiffs have waived their arguments under the commercial activity exception because the AC does not expressly assert that this exception applies. Although Plaintiffs do not specifically invoke 28 U.S.C. § 1605(a)(2) in the AC, they do plead in general terms that Germany's acts “in connection with its commercial activities elsewhere” caused a “direct, material, and deleterious effect” in the United States. (See AC ¶¶ 33, 295-308.) Accordingly, the Court finds no waiver and will consider Plaintiffs' arguments regarding the applicability of the commercial activity exception.

2In connection with the instant motion practice, Plaintiffs proffer documentary evidence which they argue shows that the remains in question were transferred from the Royal Museum of Ethnology, “a German government royal museum,” rather than from von Luschan's private collection. (See docket entry no. 45-2, Katuuo Decl.) Even if this were the case, the proffered evidence does not demonstrate that the AMNH's acquisition of the remains was a direct effect of the acts upon which Plaintiffs' claims are actually based—namely, Germany's acts of genocide and the expropriation of Plaintiffs' property, all of which occurred in German South West Africa. Regardless of whether the remains were transferred by von Luschan or the Museum of Ethnology, the Court cannot conclude that a transfer of expropriated property between museums over a decade after the events described in the AC was an immediate or direct consequence of the Ovaherero and Nama genocide. See Westfield v. Federal Republic of Germany, 633 F.3d 409, 416-17 (6th Cir. 2011) (holding that Germany's conversion of plaintiff's art in Germany did not have a direct effect in the United States).

3To the extent Plaintiffs assert that the remains are themselves property taken in violation of international law, Plaintiffs cannot evade the requirements of § 1605(a)(3) by recharacterizing what are essentially takings claims as acts “in connection with a commercial activity of the foreign state.” See Garb, 440 F.3d at 588 (“Federal courts have repeatedly rejected litigants' attempts to establish subject matter jurisdiction pursuant to other FSIA exceptions when their claims are in essence based on disputed takings of property.”).

4Other circuits have recognized that property losses arising from genocides are takings “in violation of international law” within the meaning of the FSIA's takings exception. See Simon v. Republic of Hungary, 812 F.3d 127, 143-44 (D.C. Cir. 2016); Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 674-75 (7th Cir. 2012); Fischer v. Magyar Allamvasutak Zrt., 777 F.3d 847 (7th Cir. 2015); Davoyan v. Republic of Turkey, 116 F.Supp.3d 1084, 1103 (C.D. Cal. 2013). The Court notes, however, that not all of Plaintiffs' allegedly expropriated rights appear to involve “rights in property.” For example, Plaintiffs provide no authority to support their contention that “sovereignty rights” or “labor and tort rights” are legally cognizable property rights. Plaintiffs' claims for the conversion of these rights appear to seek compensation for rape, forced slave labor, wrongful death and other torts, as well as recognition as sovereign equals to governmental units under international law and at the United Nations. (See AC ¶¶ 207-212, 213-218.) However, it is well recognized that the takings exception does not apply to claims for personal injury or death. Simon, 812 F.3d at 141 (“The [takings] exception therefore affords no avenue by which to ‘bring claims for personal injury or death’ ”); Abelesz, 692 F.3d at 697. Plaintiffs' claims

for declaratory relief related to participation in ongoing negotiations similarly are not claims where “rights in property” are at issue, and the Court accordingly lacks subject matter jurisdiction of those claims under the FSIA.

5Separately, Plaintiffs assert claims for the conversion of actual physical human remains. (AC ¶¶ 219-227.) The AC alleges that some of these remains are present in the United States at the AMNH (AC ¶¶ 297-301), but also alleges that “[n]umerous skulls and body parts of the Ovaherero and Nama peoples remain in [Germany's] possession” (AC ¶ 222). To the extent that Plaintiffs' takings claims seek the return of remains in Germany's possession, the Court lacks subject matter jurisdiction of those claims because Plaintiffs have not demonstrated that the taken property is “present in the United States.” As discussed below, to the extent that Plaintiffs seek the return of the AMNH Remains, they have not sufficiently alleged that those remains are present in the United States in connection with a German commercial activity.

6Germany asks the Court to “take judicial notice of the historical fact that the German colonies were in constant need of additional funding by the German government in Berlin,” thus ensuring that “any cash received in exchange for the allegedly expropriated property ... would not have become part of [Germany's] general revenues,” but provides no evidentiary materials to support its assertions. (Motion at 13.) Because the financial arrangements between German colonies and the German government in Berlin are not facts that are “generally known within the trial court's territorial jurisdiction,” nor can they be “accurately and readily determined from sources whose accuracy cannot reasonably be questioned,” the Court declines to take

judicial notice of Germany's proffered "historical fact." See Fed. R. Evid. 201. In addition, Germany argues that it was "financially ruined at the end of World War I" and cites to the Treaty of Versailles, which provides that all property in Germany's overseas territories "shall pass to the Government exercising authority over such territories." (Id. at 14.) The treaty provisions cited by Germany, however, do not relate to funds in the German treasury or monies held locally by Germany, which are the subject of Plaintiffs' commingling claims.

7For similar reasons, the Court also concludes that the AMNH Remains are not present in the United States in connection with a German commercial activity. Plaintiffs argue that the remains were sold by the Museum of Ethnology to the AMNH "as part of a commercial transaction," and that von Luschan, the Museum's director, employed the assistance of "German soldiers and agents to locate and/or transfer human remains from Ovaherero and Nama territory and lands to Germany." (Katuuo Decl. ¶¶ 6-7.) Plaintiffs argue generally that Germany was a "market maker," "market participant," and "major player" in the "bone trade" and the "business of bone display." (Hr'g Tr. at 17-19.) Even accepting that the "bone trade" is a commercial activity, and that Germany acted in the manner of a private participant in the bone trade, Plaintiffs present no facts from which the Court can infer that the AMNH Remains are currently present at the AMNH in connection with the bone trade, or that Germany continues to participate in the bone trade. See Schubarth v. Federal Republic of Germany, 220 F.Supp.3d 111, 115 (D.D.C. 2016) ("Courts assessing the FSIA's commercial activity requirement, however, have looked for evidence of recent or ongoing

transactions”), aff’d in part, rev’d in part, 891 F.3d 392 (D.C. Cir. 2018) (noting that “[t]his interpretation is supported by the FSIA’s plain text, which employs the present tense”). Moreover, Plaintiffs present no facts from which the Court can infer that Germany’s engagement in the bone trade in the early twentieth century was “in the United States” or had any substantial contact with the United States. To the extent that Plaintiffs argue that the AMNH transfer itself was a substantial contact with the United States, the Court finds that a single commercial transaction is not substantial enough to constitute a “commercial activity carried on in the United States by a foreign state” as that term is defined by 28 U.S.C. § 1603(e), particularly where Plaintiffs’ simple conclusory assertion that the Museum is a “German government royal museum” is insufficient to demonstrate that the Museum of Ethnology’s actions in connection with the sale can fairly be considered activities of the German state.

11/19/20

Docket No: 19-609

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of November, two thousand twenty.

Vekuii Rukoro, Paramount Chief of the Ovaherero
People and Representative of the Ovaherero
Traditional Authority, The Association of The
Ovaherero Genocide in the USA, Inc., Barnabas Veraa
Katuuo, Individually and as an Officer of The
Association of the Ovaherero Genocide in the USA,
Inc., on behalf of themselves and all other Ovaherero
and Nama indigenous peoples, Johannes Isaack, Chief
and Chairman of the Nama Traditional Authorities
Association,
Plaintiffs - Appellants,

v.

46a

Federal Republic of Germany,
Defendant - Appellee.

ORDER

Appellants filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

11/30/20

Docket No: 19-609

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of November, two thousand twenty.

Before: Ralph K. Winter, Rosemary S. Pooler, Michael H. Park, *Circuit Judges*

Vekuii Rukoro, Paramount Chief of the Ovaherero
People and Representative of the Ovaherero
Traditional Authority, The Association of The
Ovaherero Genocide in the USA, Inc., Barnabas Veraa
Katuuo, Individually and as an Officer of The
Association of the Ovaherero Genocide in the USA,
Inc., on behalf of themselves and all other Ovaherero
and Nama indigenous peoples, Johannes Isaack, Chief
and Chairman of the Nama Traditional Authorities
Association,

Plaintiffs - Appellants,

48a

v.

Federal Republic of Germany,

Defendant - Appellee.

JUDGMENT

The appeal in the above captioned case from a judgment of the United States District Court for the Southern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the district court's dismissal for lack of subject matter jurisdiction is AFFIRMED. The terrible wrongs elucidated in Plaintiffs' complaint must be addressed through a vehicle other than the U.S. court system.

For the Court:

Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VEKUII RUKORO, Paramount
Chief of the Ovaherero People
and Representative of the
Ovaherero Traditional
Authority; JOHANNES
ISAACK, Chief and

Chairman of the Nama
Traditional Authorities
Association; THE
ASSOCIATION OF THE
OVAHERERO GENOCIDE IN
THE USA INC.; and
BARNABAS VERAA
KATUUO, Individually and as
an Officer of The Association of
the Ovaherero Genocide in the
USA, Inc., on behalf of
themselves and all other
Ovaherero and Nama indigenous
peoples,

Civ. No. 17-0062

**AMENDED
CLASS ACTION
COMPLAINT**

**Jury Trial
Demanded**

Plaintiffs,

-against-

FEDERAL REPUBLIC OF
GERMANY,

Defendant.

Dated: New York, New York

February 14, 2018

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Plaintiffs, by and through their undersigned attorneys, bring this Amended Class Action Complaint against Defendant Federal Republic of Germany as follows:

SUMMARY OF THE COMPLAINT

INTRODUCTION

1. Plaintiffs bring this action in their individual and representative capacity on behalf of all the Ovaherero and Nama peoples for damages resulting from the horrific genocide and unlawful taking of property in violation of international law by the German colonial authorities during the 1885 to 1909 period in southwestern Africa, part of which was formerly referred to by Germany as German South West Africa and is now Namibia.

2. Plaintiffs also bring this action to, among other things, enjoin and restrain the Federal Republic of Germany from continuing to exclude Plaintiffs from participation in discussions and negotiations regarding the subject matter of this Complaint, in violation of Plaintiffs' rights under international law, including the U.N. Declaration on the Rights of Indigenous People to self-determination for all indigenous peoples and their right to participate and speak for themselves regarding all matters relating to the losses that they have suffered.

3. Germany's express written policy to exterminate the Ovaherero and Nama indigenous peoples in southwestern Africa during the 1904–1908 period was Germany's first genocide of the twentieth century. In many ways, Germany's genocidal policies and practices towards the Ovaherero and Nama peoples, including the use of mass exterminations, concentration camps and mistreatment of a targeted population as a "sub-human" group, was a precursor to Germany's later effort to exterminate European Jewry. Indeed, some of the architects and key participants of Hitler's "Final Solution" learned their barbaric practices during the period of the Ovaherero and Nama Genocide. Even the German "brown shirts" that the Nazis wore in the 1920s and 1930s were "holdovers" from the earlier genocide.

4. When German colonial authorities arrived in southwest Africa around 1885, they established contact with the Ovaherero and Nama peoples, who owned the land and had their own highly advanced sovereign governmental structures and customs. They called their country Hereroland (also known as Damaraland), and Great Namaqualand. They also owned portions of the Omaheke Desert, and the Amboland and Kaokoveld deserts, as well as surrounding territories, much of which Germany later wrongfully claimed to be "German South West Africa." For purposes of this Amended Complaint, "southwest Africa" is defined as the geographic territory under the present sovereign control of the Republic of Namibia ("Namibia") and includes the traditional sovereign territories of the Ovaherero and Nama peoples that

were wrongfully taken from them both during and following the Ovaherero and Nama Genocide of 1904-1908.

5. At first, Germany entered into various written treaties and contracts with the Ovaherero and Nama leadership, giving Germany and German colonists the right to settle in certain limited areas. However, Germany soon broke these treaties and contracts, and instead opted to seize valuable Ovaherero and Nama grazing lands without compensation or consent, and with the use of indiscriminate violence. From 1884 to 1903, Germany and its agents unlawfully took over one-fourth (25%) of Ovaherero and Nama lands (originally over 50,000 square miles) and hundreds of thousands of livestock. As their land and livestock herding was the primary economic base of the Ovaherero and Nama peoples, as well as the foundation for Ovaherero and Nama political, cultural and social institutions, these unlawful takings and expropriations caused grave and irreparable harm.

6. Germany and its agents also subjected Ovaherero and Nama women and children to widespread and systematic rape, murdered Ovaherero and Nama men, women, and children, and systematically abused and enslaved Ovaherero and Nama men, women, and children for hard labor and other work without compensation.

7. After announcing that it would open concentration camps as part of its ruthless and lawless expropriation of the remainder of Ovaherero lands,

livestock, and property interests, and after decades of indiscriminate brutality and theft, Defendant began a systematic campaign of extermination of the Ovaherero people in January 1904. The Ovaherero peoples rose up in protest and, during some initial military successes, forced the German colonial authorities and German troops to retreat to fortified defensive positions.

8. Later in 1904, the Nama people also rose up in opposition to Defendant's crimes.

9. The German colonial authorities sent an urgent plea for help to Germany, requesting military support. Germany responded by sending a large expeditionary force, armed with rifles, cannons, and machine guns. Lieutenant-General Lothar von Trotha was selected to lead the German forces, primarily because he had a reputation for ruthlessness.

10. General von Trotha, acting under imperial Germany's authority, issued written orders directing that his troops kill every Ovaherero and Nama man, woman and child, without mercy, and to drive any who survived into the desert, where they were sure to die of hunger and dehydration. On October 2, 1904, for example, he wrote: "[E]very Herero, with or without a gun, with or without cattle, will be shot. I will no longer accept women and children...These are my words to the Herero people." He issued similar orders relating to the Nama peoples.

11. In addition to seeking revenge against the Ovaherero and Nama peoples for the humiliation that the German colonial forces had suffered at the hands of

poorly armed “savages,” the German authorities calculated that the extermination of these two powerful tribal peoples was the most efficient way of accomplishing their ultimate goal, namely, the absolute and unconditional expropriation of all Ovaherero and Nama lands and personal property of any real value.

12. The German troops carried out von Trotha’s orders with methodical efficiency. Approximately one hundred thousand people were killed during Germany’s reign of terror, with 80% of the Ovaherero and 50% of the Nama brutally annihilated. Following the orders of their commanders, many of the wounded or those that surrendered were murdered by German troops, including unarmed men, women and children who were lured into churches and other gathering places by German missionaries with the promise of amnesty.

13. Many more of those who survived the initial mass slaughter by German troops made it into the desert, only to die there of hunger and thirst. Those who survived the exodus were forced to settle in what is now Botswana, South Africa and other countries. Some even made it to the United States, where they joined the growing Ovaherero and Nama worldwide diaspora.

14. The remainder of the survivors were thrown into concentration camps under atrocious and sub-human conditions. The camps had an extraordinarily high death toll, and the survivors, who were well enough to stand, were forced to work as

forced/slave laborer. The surviving women were subjected to systematic rape and other abuses.

15. At Germany's most notorious concentration camp known as Shark Island, German authorities ordered the decapitation of approximately three hundred Ovaherero and Nama men. They then ordered that their severed heads be boiled in water, and Ovaherero and Nama women and girls were forced to manually scrape off strips of face, flesh, and cooked brains of their fathers and husbands using broken glass shards. In violation of international law, Defendant then took the polished skulls and shipped them by sea to Germany, where many still remain. These skulls were used for pseudo-scientific experimentation by German academics and racial theorists, who believed that their "experiments" supported the theory of Germanic superiority and, conversely, the inferiority of all Africans and people of color.

16. Some of the human remains that were wrongfully taken and transported to Germany were sold to the American Museum of Natural History in New York, where they remain today.

17. As a result of the Ovaherero and Nama Genocide, the Ovaherero and Nama peoples were stripped of all their valuable real, personal and intangible property, including but not limited to land, livestock, concession, taxation, and customs rights, precious gems and metals, human labor, body parts, and other property.

18. Defendant's violations of international law also left the Ovaherero and Nama sovereign states in ruins. Germany irreparably and without legal justification deprived the Ovaherero and Nama peoples of their sovereign status and crippled the sovereign polities of Hereroland and Great Namaqualand to such an extent that they were largely disbanded and broken up by German authorities. The Ovaherero and Nama sovereign entities were thereby forced into a much-reduced and limited quasi-sovereign status, which is where they remain under Namibian law, condemned for generations to perpetual and institutionalized poverty, lack of proper education, and social and cultural deprivation.¹ But for Defendant's illegal takings, Hereroland and Great Namaqualand would still stand today as sovereign nations.

19. Plaintiffs, therefore, bring this class action on behalf of all Ovaherero and Nama peoples worldwide for damages resulting from Defendant's taking and expropriation of their property, including their sovereign status, in violation of applicable international law during the period from 1885 through 1915 in southwestern Africa.

¹ See Manfred O. Hinz & Alex Garisib, 3 CUSTOMARY LAW ASCERTAINED: THE CUSTOMARY LAW OF THE NAMA, OVAHERERO, OVAMBANDERU, AND SAN COMMUNITIES OF NAMIBIA xv–xvii, 6–15 (University of Namibia 2016); Article 66 of the Constitution of Namibia; Traditional Authorities Act, Act 17 of 1995, amended by Act 8 of 1997 and Act 25 of 2000 (Namib.) (defining the quasi-sovereign competencies of Traditional Authorities); Community Courts Act § 13, Act No. 10 of 2003 (Namib.).

20. In recent years, Defendant finally began admitting that its actions constituted genocide, or at least its equivalent. German development minister, Heidemarie Wieczorek-Zeu, first apologized for the killings in 2004, describing the massacres as a “genocide” on a trip to Namibia, but her remarks were not adopted as official government policy.

21. In approximately 2015, German Foreign Ministry guidelines started referring to these events as a “genocide,” and in July 2016 the German government confirmed in writing to the Parliament that it was official German policy to consider this as a genocide.

22. Germany has entered negotiations with the Namibian government regarding this dark period in German and African history. Inexplicably, however, Germany has excluded Plaintiffs -- the only legitimate and recognized leaders of the Ovaherero and Nama peoples worldwide, as well as their organizations -- from participation in these negotiations, even though they were the victims of these atrocities. In so doing, Germany again violated international law, since it is a signatory to the U.N. Declaration on the Rights of Indigenous Peoples (“the U.N. Declaration”), adopted by the U.N. General Assembly on September 13, 2007, which was intended to acknowledge and protect the rights of indigenous peoples.²

² U.N. Declaration on the Rights of Indigenous Peoples, Arts. 11 and 18, G.A. Res. 61/295, U.N. Doc. A/61/L.67 and Add. 1 (Sept. 13, 2007). *See, infra*, at ¶¶ 291-292.

23. Despite the incalculable cultural, intellectual, religious and spiritual losses that the Ovaherero and Nama peoples have suffered, Germany systematically and categorically excluded the lawful representatives of the indigenous Ovaherero and Nama peoples from negotiations between Germany and Namibia, and steadfastly refused to even consider making any reparations or compensation to the Ovaherero and Nama peoples for the catastrophic losses that they suffered.

24. Plaintiffs, therefore, also bring this action seeking a Declaratory Judgment, pursuant to 28 U.S.C. § 2201, *et seq.*, that Defendant has wrongfully excluded Plaintiffs, as the lawful representatives of the Ovaherero and Nama peoples, from participating in discussions and negotiations regarding the subject matter of this Amended Complaint, in violation of Plaintiffs' third-party beneficiary rights under international law, including the U.N. Declaration, the right to self-determination, and the right to participate and speak for themselves regarding matters relating to the losses they have suffered.

PARTIES

25. Plaintiff **VEKUII RUKORO**, a citizen and resident of Namibia, is the Paramount Chief of the Ovaherero People and representative of the Ovaherero Traditional Authority, the recognized legal entity representing the overwhelming majority of the

Ovaherero people in Namibia and in the diaspora. As named Plaintiff, he brings this action on behalf of himself and all worldwide members of the Ovaherero people or direct descendants of the Ovaherero people who lived in Hereroland prior to its destruction by Defendant.

26. Plaintiff **JOHANNES ISAACK**, a citizen and resident of Namibia, is the Chief and Chairman of the Nama Traditional Authorities Association, the recognized legal entity representing the Nama people in Namibia and in the diaspora. As named Plaintiff, he brings this action on behalf of himself and all worldwide members of the Nama people or direct descendants of the Nama people who lived in Great Namaqualand prior to its destruction by Defendant.

27. Plaintiff the **ASSOCIATION OF THE OVAHERERO GENOCIDE IN THE USA INC.** (“the Association”) is a New York not-for-profit Corporation formed on September 10, 2010, which has had the longstanding purpose of seeking justice and compensation from Defendant for the Genocide of the Ovaherero and Nama peoples.

28. Plaintiff **BARNABAS VERAA KATUUO**, an officer of the Association and a member of the Ovaherero tribe, is a U.S. citizen and resident of Rockland County, New York. Mr. Katuuu brings this action on behalf of himself and all U.S. citizen members of the Ovaherero people or direct descendants of the Ovaherero people who lived in Hereroland prior to its destruction by Defendant.

29. Defendant **FEDERAL REPUBLIC OF GERMANY** (“Germany” or “Defendant”)³ is a sovereign state and a federal, parliamentary, representative democratic republic. According to the German Federal Government, which has adopted and concurred with the rulings of the German Federal Constitutional Court—the Federal Republic of Germany is not only the state *successor* to the 1871–1918 German Empire—also known as the *Kaiserreich* or the Second Reich—but rather the continuing body politic of the same entity, sharing an identical, unbroken legal status under German law and international law.⁴ Consequently, all rights and obligations of the German Empire are rights and obligations of the Federal Republic of Germany.

30. Defendant directed and benefited from the genocide of the Ovaherero and Nama peoples and the expropriation of Ovaherero and Nama land, livestock, concession, taxation, and customs rights, human labor, body parts, and other property without compensation in violation of international law.

31. Germany is a member of the United Nations and a party to the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), which was adopted by the General Assembly of the United Nations on December 9, 1948 and entered into force on January 12, 1951.

³ “Defendant” and “Germany” are used interchangeably to refer to the Federal Republic of Germany and the German Empire.

⁴ See Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court] 2 BvF 1/73 (July 31, 1973).

Nevertheless, for years Defendant denied that its mistreatment of the Ovaherero and Nama peoples constituted a genocide, even though the factual and historical record clearly reflected that Defendant's conduct falls squarely within the generally accepted and statutory definition of genocide.

32. The actions and omissions of Defendant's agents that resulted in or contributed to the takings in violation of international law are attributable to Defendant.

JURISDICTION and VENUE

33. This Court has subject matter jurisdiction over this matter under 28 U.S.C. § 1330(a), and personal jurisdiction over Defendant under 28 U.S.C. § 1330(b), in that Defendant is a foreign state and the takings exception to jurisdictional immunity pursuant to 28 U.S.C. § 1605(a)(3) applies. Under the jurisdictional provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601, *et seq.*, ("FSIA"), jurisdiction exists over this subject matter and over Defendant, because Plaintiffs' rights in property taken by Defendant from the Ovaherero and Nama peoples in violation of international law are at issue, and property exchanged for the taken property is present in the United States in connection with the numerous commercial activities carried on in the United States by Defendant and Defendant's agencies and instrumentalities. Moreover, under this exception, jurisdiction exists over this subject matter and over

Defendant, because this action is, in part, based upon Defendant's acts in Germany in connection with its commercial activities elsewhere that has caused a direct, material, and deleterious effect in the United States in general, and in New York in particular.

34. A genocide unquestionably was committed by Defendant's mass extermination and systematic expropriation of Ovaharero and Nama lands, cattle and other property as alleged herein and as conceded by Defendant. *See* paragraph 21, *supra*.⁵

35. Both the genocidal mass extermination and unlawful takings and expropriations of Ovaharero and Nama land, livestock, concession, taxation, and customs rights, human labor, body parts, and other property without compensation are violations of international law, 28 U.S.C. § 1605(a)(3). The unlawful taking of property without compensation in furtherance of a policy and practice of genocide is a well-recognized violation of international law.

36. The takings of property alleged herein constitute takings "in violation of international law"

⁵ *See Convention on the Prevention of the Crime of Genocide (Genocide Convention)*, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277 ("[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; [or] (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part...); *see also* 18 U.S.C. § 1091(a)(same definition of offense of genocide under U.S. domestic law).

under 28 U.S.C. § 1605(a)(3) considering their inseparable connection to the Ovaherero and Namaqua genocide. Defendant merged the twin goals of takings and genocide into a single policy, practice, and endeavor. The takings were themselves genocide, and the genocide was itself a taking.

37. Since the wrongful taking of Ovaherero and Nama properties was inextricably linked to the mass killings and genocide of these peoples, Plaintiffs' property-based claims fall squarely within the FSIA's expropriation exception. Such expropriations, therefore, constitute "tak[ings] in violation of international law."⁶

38. All of Defendant's acts, as alleged herein, constitute confiscatory and discriminatory acts of taking, including, but not limited to:

- a. all Imperial and Colonial governmental decrees, laws, ordinances, and regulations concerning the disposition of Ovaherero and Nama persons, liberty, and property;
- b. all acts of confiscation by Defendant's agents on Defendant's instruction, knowledge, and consent, which are attributable to Defendant, including all actions of Defendant's military that resulted in harm to the Ovaherero and Nama peoples, including, but not limited, the execution of prisoners, the rape of women and children, the pillaging and destruction of

⁶ 28 U.S.C. § 1605(a)(3).

- civilian property, and the illegal and discriminatory confiscation of Ovaherero and Nama property, liberty, and land;
- c. the Regulation of April 22, 1896 on the Jurisdiction over Natives in German South West Africa, all other Imperial and Colonial laws on jurisdiction over Hereroland and Great Namaqualand, and all judicial decrees, judgments, orders, injunctions, and writs issued by the Imperial Courts of Otjimbingwe, Swakopmund, Windhoek, Lüderitz Bay, Omaruru, and any other Imperial Courts in prosecutions against Ovaherero and Nama Defendants, as well as in civil cases involving Ovaherero or Nama parties;
 - d. all Imperial and Colonial governmental decrees, laws, ordinances, regulations—as well as contractual or administrative arrangements with private individuals, merchants, and companies—concerning the disposition of Ovaherero and Nama property that Defendant took in violation of international law, and the disposition of Ovaherero and Nama persons that Defendant enslaved in violation of international law;
 - e. all Imperial and Colonial governmental acts aiding and abetting private parties that were involved in the disposition of Ovaherero and Nama peoples or property;

- f. the Protectorate Law of March 15, 1888;
- g. the Imperial Extermination Order (Imperial District Office of Windhoek, Reference No. 3737, Oct. 2, 1904), calling for the extermination of the Ovaherero people;
- h. the Imperial Extermination Order against Nama (Apr. 22, 1905), calling for the extermination of the Nama people;
- i. the Imperial Decree of December 26, 1905, "Pertaining to the Sequestration of Property of Natives in the Protectorate of South West Africa," declaring the expropriation of all of Hereroland and portions of Great Namaqualand; and,
- j. the Imperial Decree of September 8, 1907, declaring the expropriation of the rest of Great Namaqualand.

39. These actions enumerated in paragraph 38, *supra*, qualify as "takings," because they are of a kind typically reserved to sovereigns, *i.e.*, governmental or military acts, and not normally exercised by commercial actors.

40. Defendant's takings violated international law as it existed in the period 1885–1915. Namely, the takings were unambiguous violations of i) customary

international law;⁷ ii) positive international law;⁸ and iii) Defendant's legal obligations as codified in its treaties.⁹

⁷ See, e.g., the jurisprudence of Hugo Grotius, Emer de Vattel, George Frederic de Martens, Henry Wheaton, and Francis Lieber.

⁸ See, the Second Paris Peace Agreement of 1815, the 1841 Quintuple Treaty, the Geneva Conventions of 1864, the Brussels Declaration of 1874, the General Act of the Berlin West Africa Conference of 1885, the 1889 German-Dutch Agreement, the 1890 Anti-Slavery Convention, the 1890 German-Belgian Agreement to Criminalize Trade in Girls, the Hague Conventions of 1899 and its Martens Clause, the 1904 Agreement on Administrative Regulation to Ensure Effective Protection Against Trade in Girls, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of July 6, 1906, the 1907 Hague Conventions and its Martens Clause, and others.

⁹ See e.g., Treaty with the Rehoboth Bastards of October 13, 1884; the Treaty with the Bethanien Nama of October 28, 1884; the Treaty with Jacob Isaak of Bersaba (Nama) of July 28, 1885; the Treaty with Manasse of Hoachanas (Nama) of September 2, 1885; the Treaty with Captain Hermanus von Wyk of the Rehoboth Bastards of September 15, 1885; the Treaty with Chief Kamaherero of the Ovaherero of October 21, 1885; the Treaty with the Ovaherero of Omaruru of November 3, 1885; the Treaty with Jan Hendriks of the Veldschoendrager Nama of August 21, 1890; the Treaty with William Christian of the Bondelszwart Nama of August 21, 1890; the Treaty with Eduard Lambert of the Khaua Nama of March 9, 1894; the Treaty with Simon Cooper of the Fransman Nama of March 19, 1894; the Treaty with Dietrich Goliath of Berseba (Nama) of July 7, 1894; the Treaty with David Vilander of the Vilander-Bastards of July 27, 1894; the Treaty with Hendrik Witbooi of the Nama of September 15, 1894; the Treaty with Samuel Maharero of the Ovaherero of December 6, 1894; the Treaties with the Ovaherero of Omururu of November 30, 1894; the Treaty with Samuel Maharero of the Ovaherero of December 6, 1894; the Treaty with David Zwaartbooi of the Zwaartbooi

41. For example, in Article 3 of Defendant's Treaty with Eduard Lambert of the Khaua Nama of March 9, 1894, Defendant promised "protection in the territory of the Khaua Hottentots, as soon as the tribe's new boundaries are calculated."¹⁰ The treaty was substantively and procedurally fraudulent, as Eduard Lambert signed the treaty under duress after Defendant hunted and executed his brother, the Khaua Nama leader Andreas Lambert. Notwithstanding this fact, Defendant breached the treaty in March 1896, when Germany waged war against the Khaua Nama, and ultimately hunted and killed the signatory to the contract, Eduard Lambert.

42. Defendant also breached the explicit terms of the Martens Clause of the 1899 Hague Convention—a codification of the existing "protection and empire of the principles" of customary international law—which states:

[I]n cases not included in the Regulations adopted... populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations,

Nama of January 19, 1895; the Treaty with Manasse Lambert of the Khaua Nama of February 4, 1895; the Treaty with Hermanus von Wyk of the Rehoboth Bastards of July 26, 1895; and the Treaty with Hendrik Witbooi of the Nama of November 16, 1895.

¹⁰ The term "Hottentots" was a commonly-used derogatory term referring to the Nama peoples.

from the laws of humanity, and the requirements of the public conscience.

43. As a further example, Defendant breached Article VI of the General Act of the Berlin West Africa Conference of 1885 (“Article VI”), under which Defendant was obligated to:

watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery, and especially the slave trade.¹¹

44. Thus, as early as 1884, Defendant obliged itself to the “necessity” and “duty” of preserving and assisting the Ovaherero and the Nama peoples.

¹¹ See also, Legislative Report accompanying the General Act of 1885 explaining purpose of Article VI:

“With regard to [native] populations, which, for the most part, ought, undoubtedly, not to be considered as placed without the pale of international law, but which in the present state of affairs are scarcely of themselves able to defend their own interests, the Conference has been obliged to assume the role of an unofficial guardian. The necessity of insuring the preservation of the natives, the duty of assisting them to attain a more elevated political and social state, the obligation of instructing them and of initiating them in the advantages of civilization, are unanimously recognized.”

Notwithstanding the fact that the Ovaherero and Nama peoples never asked for such “assist[ance],” Defendant breached its obligations by exterminating the same peoples it swore to protect, citing the “necessity” of economic conditions and the “duty” of their white race.

45. Defendant was particularly aware of its obligations under customary international law at the time, since several German scholars were among the most notable international law experts. For example, the 1868 writings of Heidelberg University Professor Johann Kaspar Bluntschli demonstrated how the principle of protecting civilian non-combatants was a central component of customary international law; he wrote: “The peaceful residents in enemy territory, who are not playing an active role in hostilities... are not to be considered or treated as enemies.”¹² Bluntschli understood this concept to stretch as far as “any unnecessary killing”:

Neither the military force nor the individual soldiers have the right to capriciously or pointlessly kill, wound, mistreat, torture, enslave, or sell any individuals, or to mistreat women or harm their purity.

This regulation applies generally: not simply to peaceful private persons, but also regarding

¹² Johann Caspar Bluntschli, *Das Moderne Völkerrecht* [Modern International Law] § 572, 319 (1868)

protection against enemy forces, although these rules are suspended during active battle... Killing without a battle, simply from bloodlust or hate, is also not permitted against enemy soldiers. There exists no *jus vitae ac necis* against the enemy.¹³

...Every unnecessary killing—even if an armed enemy—is unjust.¹⁴

46. The justification is simple for establishing principles of customary international law which prohibit the killing of civilian combatants:

By establishing human rights, the hostilities are pushed back to the narrowest zone possible, and it gives us much space as possible to a spirit of peace and mutual promotion of life.

47. Finally, according to Bluntschli, native peoples – such as the Ovaherero and Nama peoples – were entitled to precisely the same treatment as any other peoples:

¹³ *Id.* at § 574, 321

¹⁴ *Id.* at § 579, 323.

Wars of extermination and annihilation against peoples and tribes that are capable of life and culture are violations of international law.

...Simply because certain peoples are considered [uncivilized], they should still be treated humanely, and one may not simply deprive them of human rights. They are perhaps difficult to subject to a legal order, and teaching them the ways of civilization may perhaps be a thankless task that requires great effort and potentially meager results. However, it is nonetheless the job and indeed the obligation of civilized nations, to try and promote civilized conduct in even the wildest of tribes, and help them achieve the heights of human dignity. Never again is it permitted for states or soldiers to hunt for wild peoples like foxes and wolves.

48. Thus, during the years 1884–1915, Germany was undoubtedly familiar not only with the works of Professor Bluntschli, but also the entire corpus of customary international law dealing with human rights, the law of war, and the prohibition of genocide, rape, and brutality.

49. The 1902 writings of Franz von Liszt, Professor of Law at the University of Berlin, also confirm that the aforementioned prohibitions remained established at the very time and place of some of

Defendant's most egregious violations against international and natural law:

A party waging war may use only those methods that are necessary to destroy the opponent's resistance...

Imprisonment is permissible in war today only when it secures the life, health, and property of the prisoner...

After the end of hostilities, prisoners of war should be released...

[When occupying foreign territory], private property cannot be violated, except in the event of an emergency.

50. Defendant's property-based violations, which it interwove with its crimes against humanity, were also, independent of the genocide, violations of international law.

51. An acclaimed treatise published in 1836 declared the "modern rule" concerning the disposition of property belonging to the enemy. Unless acting in reprisal to a belligerent opponent's seizure of property,

a state violates customary international law if it seizes the property of the opponent:

[T]he modern rule of international usage [is] that the property of the enemy found within the territory of the belligerent state, or debts due to his subjects by the government or individuals, at the commencement of hostilities, are not liable to be seized and confiscated as prize of war.¹⁵

52. The “model rule” described above in paragraph 55 was eventually codified in the 1874 Brussels Declaration, to which Defendant was a party.

53. During the time when the takings occurred, state practice also confirms that Defendant’s takings were in violation of customary international law. For example, in the 1860s the United Kingdom condemned Belgium’s violations of “rights of humanity” in the Congo; and France, the United Kingdom, and Russia condemned the Ottoman Empire’s massacres against the Armenians in 1894–96, as “crimes against humanity and civilization.”¹⁶ Unafraid of double

¹⁵ Wheaton, Henry, *Elements of International Law*. Philadelphia: Carey, Lea & Blanchard (1836) (available on the Internet at <http://gallica.bnf.fr/ark:/12148/bpt6k935676/f1.image.r=.langEN>)(comparing the modern rule with that asserted by Chief Justice Marshall in *Brown v. United States*, 12 U.S. 110, 122–30 (1814)).

¹⁶ See A. Kämmerer und J. Föh, *Das Völkerrecht als Instrument der Wiedergutmachung?*, 42 *Archiv des Völkerrechts* 294, 314–15 (2004).

standards, Kaiser Wilhelm II also condemned the Ottoman Empire's actions.

54. This Court has supplemental jurisdiction under 28 U.S.C. § 1367 over claims brought under the common law and laws of the State of New York.

55. Venue properly lies in this Judicial District under 28 U.S.C. § 1391(f)(1), because a substantial part of the property that is the subject of this action is situated in the City and State of New York:

- a. A 7,000 square-foot townhouse, located at 119 E. 65th Street in the Borough of Manhattan;
- b. A 133,750 square-foot building, located at 871 First Avenue in the Borough of Manhattan;
- c. A 1,591 square-foot condo, located at 346 E. 49th Street in the Borough of Manhattan and associated easement; and,
- d. A 16,147 square-foot building, located at 1014 Fifth Avenue in the Borough of Manhattan.

56. This Court also has personal jurisdiction over the foreign Defendant pursuant to Fed. R. Civ. P. 4(k)(2).

57. Venue properly lies in this Judicial District pursuant to 28 U.S.C. §1391(b) and (c). Furthermore, there is no foreign independent or impartial forum in which to bring this action.

FACTUAL ALLEGATIONS

58. Imperial Germany first established its colony in southwestern Africa in 1883, and then signed a treaty with the Chief of the Ovaherero tribe, Kamaharero, on October 21, 1885. The treaty was signed on behalf of Imperial Germany by Heinrich Ernst Goring, the Colonial Governor and father of Nazi Luftwaffe commander Hermann Goring.

59. Germany's impetus to expand into Africa in the 1880s was fueled largely by the concept of "Lebensraum" ("living space") espoused by German geographer Friedrich Ratzel, which was based upon the misguided belief in German biological and racial supremacy, and that Germany and its "Volk ohne Raum" ("people without space") had an obligation to colonize other lands to create the extra "living space" needed to cure Germany's urban overcrowding. Although Adolph Hitler later expanded this concept with deadly efficiency during the Third Reich, it first took root in the Defendant's colonization of South West Africa.

A. Background and Context of the Takings

60. Defendant's takings in violation of international law arose from its failed conquest of Africa, its illegal occupation of Ovaherero and Nama lands, its development, encouragement, and adoption of theories of white supremacy, its illegal commercial

activities involving theft, exploitation, enslavement, and colonization, and the genocide that Defendant conceived, financed, directed, and executed against the Ovaherero and Nama peoples.

61. Before being virtually annihilated by German forces, the Ovaherero people collectively encompassed the Ovaherero of the highlands, the Ovambanderu of the Sandveld, and the Ovahimba of the Kaokoveld. They spoke the Otjiherero language with its dialects, including Ovaherero, Ovambanderu, Ovahimba, Ovatjimba, Ovayemba, and Vakwandu. Over the course of the 19th century, the Ovaherero people evolved from a confederation of chieftaincies into a unified sovereignty under the leadership of the Maherero dynasty. The region's arid climate prevented large-scale agriculture, and so the Ovaherero prospered as cattle herders. The Ovaherero held collective property and ownership rights over the land of Hereroland as a collective people. Ovaherero society—and, in particular, the advanced and highly formalized rules of inheritance—was governed by structured laws, which every Ovaherero youth was obligated to learn.

62. The Nama people, who resided in Great Namaqualand in Southwestern Africa and South Africa for many centuries, are a Khoikhoi-speaking people, and, like the Ovaherero, were a confederation of tribes across the southern portion of southwest Africa.

63. Like the Ovaherero, the Nama were prosperous cattle herders. Also, like the Ovaherero, over the course of 19th century, the Nama people evolved from a confederation of chieftaincies with some

degree of internal conflict into a unified sovereignty. By the start of the 20th century, the Nama population of Namaqualand had grown to approximately 20,000 people with cattle herds numbering approximately 100,000.

64. Between 1884 and 1892, Germany signed treaties they never intended to honor with both peoples and tried to turn the Ovaherero and Nama against each other. However, in 1892 the Ovaherero and Nama peoples reached lasting peace.

64. Today, the Ovaherero people are comprised of six traditional authorities:

- a) Kakurukouje Traditional Authority;
- b) Maharero Traditional Authority;
- c) Otjikaoko Traditional Authority;
- d) the Vita Royal House;
- e) Zeraua Traditional Authority; and,
- f) Ovambanderu Traditional Authority.

66. Today, the Nama people are comprised of ten traditional authorities:

- a) Afrikaner Traditional Authority;
- b) Blouwes Traditional Authority;
- c) Bondelszwart Traditional Authority;
- d) Kaikhaun Traditional Authority;

- e) Simon Kooper Traditional Authority;
- f) Soromas Traditional Authority;
- g) Swarzbooi Traditional Authority;
- h) Topnaar Traditional Authority;
- i) Vaalgras Traditional Authority; and,
- j) Witbooi Traditional Authority.

B. Germany Decides to Take African Property in Violation of International Law

67. Newly unified and seeking its “place in the sun,” Germany aimed to compete with other European empires that had established colonies in Africa and elsewhere. To that end, Defendant hosted the Berlin West Africa Conference from November 15, 1884 to February 26, 1885. In Articles VI and IX of the Conference’s General Act, Defendant and the other participants pledged to “support the native population [of Africa] and improve their moral and material situation,” and to end the slave-trade. Under the guise of humanitarianism, Germany began its racist, imperialist, and expropriative annexation of African territories, as negotiated with the leading European powers.

68. On April 30, 1885, Germany directed, authorized, invested in, and assisted in the founding of the *Deutsche Kolonialgesellschaft für Südwest Afrika* (German South West Africa Company), whose

leadership included German aristocracy, industrialists, and politicians.

C. Defendant and Its Agents Exploit and Violate the Rights of the Ovaherero and Nama Peoples with Fraud, Theft, Rape and Murder

69. Its purported claims to Africa now successfully negotiated with its fellow Europeans, Germany set off to compel the Ovaherero and Nama peoples into fraudulent treaties for the purpose of exploiting them and taking their land, people, and property. Defendant's acts in Southwestern Africa were conducted by, on the instruction of, and with the support of innumerable agents of Defendant, including the highest political officers: Friedrich Wilhelm Viktor Albert von Preußen, King of Prussia, who served as Defendant's agent as Kaiser of the German Empire from 1888–1918 ("Kaiser Wilhelm II"), and Count Bernhard Heinrich Martin Karl von Bülow, who served as Defendant's agent and Chancellor of the German Reich from 1900–09 ("Chancellor von Bülow"). Their official actions and omissions—like those of all of Defendant's agents—are attributable to Defendant.

70. Defendant dispatched Imperial Commissioner Göring to what Germany referred to as South West Africa.

71. Commissioner Göring and Chief Kamaherero entered into a "protection" treaty between Defendant and the Ovaherero people, dated October 21,

1885, in which Defendant promised the “absolute highest level of protection” to the Ovaherero people and promised that all Germans would respect the customs and laws of Hereroland, which belonged to the Ovaherero people. In exchange, the Ovaherero people gave Defendant certain mineral and easement rights and promised that German settlers and merchants could work in peace in Hereroland.

72. Defendant continually breached this treaty in spirit and letter through its official policies and practices throughout 1885–88, in which Defendant and its agents aided and abetted, permitted, and institutionalized the theft of Ovaherero cattle, the exploitation of mineral rights without just compensation, the abuse and injury of Ovaherero men and laborers, and the rape of Ovaherero women and children in numerous related and unrelated episodes.

73. In 1888–1890, Defendant continued these policies and practices, and continued to illegally enforce its draconian Imperial Criminal Code, in order to exploit the Ovaherero people to the maximum extent possible.

74. In 1889 Defendant’s agent Captain von François established Fort Wilhelmsfeste on the road connecting Swakopmund to the major Hereroland city of Otjimbingwe. He blocked the import of arms into Hereroland, thereby depriving the Ovaherero people of the ability to defend themselves.

75. Defendant’s treaties with the Ovaherero and Nama were procedurally and substantively

fraudulent, as Defendant never intended to comply with its treaty obligations. In 1884–85 Defendant signed such treaties with the Topnaars and the Red Nation Nama tribes, amongst others.

76. In response to a Ovaherero-Nama peace treaty entered into in November 1892, Defendant sent *Schutztruppe* reinforcements to “divide and conquer” the Ovaherero and Nama by trying to re-instigate war between these two peoples, and to implement Defendant’s policy of illegal takings.

77. On the night of April 12, 1893, Captain von François and his troops furtively encircled Hoornkrans and assumed fortified positions. Von François gave the firing orders at dawn. Within thirty minutes, sixteen thousand rounds of ammunition were fired at the sleeping Nama peoples of Hoornkrans. Under surprise attack, Chief Witbooi ordered his men to retreat to the far side of the valley, so as to draw German fire away from the women and children. But instead, Defendant’s agents ignored the men and concentrated on killing as many women and children as possible. Seventy-eight Nama women and children were killed.

78. Chief Witbooi’s 12-year-old son, Klein Hendrik—who was born with crippling partial paralysis—was wounded while fleeing. He was crawling unarmed in a river bed where a German soldier found him and executed him with a pointblank shot to the head.

79. One Witbooi tribesman, Petrus Jafta, witnessed the massacre from a hilltop. He testified under oath:

I and two other men got on a small hilltop and saw some women sitting a distance away. We called to them to get away, but they remained until the Germans passed. One of the soldiers shot one of these women. The others begged for their lives and asked the Germans to make slaves of them rather than kill them.... One woman was killed while her child clung to her screaming; a soldier shot the child through the head, blowing it to pieces. I saw the child shot. The soldier aimed at it... Many children were killed in the houses.

80. One German soldier who participated in the attack, wrote of the brutality:

On all sides terrible scenes were disclosed to us. Under and over the hanging rocks lay the corpses of seven Witbooi, who in their death agony, had crawled into the hollow, and their bodies lay pressed tightly together. In another place the body of a... woman obstructed the footpath, while two three-to-four-year-old children sat quietly playing besides their mother's corpse.

81. Chief Witbooi described the brutality of Defendant's agents in a letter to Captain van Wijk dated April 18, 1893:

[Von François] captured our place, and destroyed the place in the most terrible manner, as I had never imaged from a white civilized nation, which knows the laws and conduct of war, but he robbed me, and small children, which still lay at their mother's breast, and bigger children and women and children he shot them dead, and many corpses, which he had already shot dead, he placed in the grass houses which he lit and burnt the bodies to ash.

82. Defendant waged an intermittent war of brutality against the Nama people from 1893– 1895, during which time Defendant's agents and German settlers stole Nama cattle and other valuable property, including gemstones and precious minerals, abused, injured, and murdered Nama men, and raped Nama women and children.

83. Major-General Theodor Gotthilf Leutwein arrived in South West Africa in 1895. Defendant continued its campaign against the Nama, and, with its artillery and machine guns, forced Chief Witbooi's surrender.

84. As Governor Leutwein admitted, “divested of all ideals and talk of humanity, the aim of all colonization lies ultimately in profit.” In order to methodically expropriate the land and property rights of the Ovaherero and Nama, Defendant required a suitable local bureaucracy. With dates of establishment in parentheses, these expropriation offices included:

- a. the *Zentralbureau des kaiserlichen Gouvernements* (Central Office of the Imperial Government) (1884);
- b. *Kaiserliche Bezirksämter* (Imperial District Offices) in Swakopmund (1892), Windhoek (1893), Omaruru (1894), Karibib (1894), Okahandja (1894), Outjo (1897), Gobabis (1898), and Zessfontein (1901);
- c. *Kaiserliche Gerichte* (Imperial Courts) in Otjimbingwe (1885), Swakopmund (1885), Windhoek (1885), Lüderitz Bay (1906), and Omaruru (1909);
- d. the *Kaiserliches Hafenbauamt* (Imperial Harbor Construction Office) at Swakopmund (1896); and,
- e. the *Eingeborenenkommissariat* (Office of the Native Commissioner) in Windhoek (1900).

85. Seeking new lands for settlement in late 1895, Defendant identified the Mbandjeru Ovaherero tribe and the Khaua Nama tribe for conquest and expropriation. Defendant directed and aided and

abetted the theft of 12,000 head of cattle, among other valuable property. Conflict ensued. Defendant conquered both tribes by 1897 and executed Chiefs Nikodemus and Kahimemua.

86. Between 1884–1903, Defendant continually harmed and took the property of the Ovaherero and Nama peoples in violation of international law by placing German settlers on Ovaherero and Nama land, and aiding and abetting the settlers in the taking of their cattle, land, and other valuable property. The number of German settlers rose from 310 in 1891 to 2,998 in 1903.

87. By 1903 Defendant and its agents had seized over a quarter of Ovaherero and Nama lands (originally over 50,000 square miles).

88. Defendant intensified its expropriation efforts with (i) the April 10, 1898 Imperial Decree establishing reservations for forced relocation of the Ovaherero and Nama peoples; (ii) the seizure of land acquired to bisect Hereroland with a railway to Otavi, thereby expropriating lands 10–20 kilometers from the track in both directions; and (iii) the 1903 Credit Ordinance.

89. As a result of Defendant's takings and other violations, the Ovaherero and Nama herds had dwindled to just 50,000 head of cattle by 1903, down from their wealth of several hundreds of thousands of cattle in the 1880s. With their cattle gone, Ovaherero and Nama herders were forced into wage labor, slavery and servitude, which process was accelerated by

usurious and fraudulent loans that were foisted upon many of the Ovaherero and Nama herders by Defendant's agents and German banks and traders, all of which were supported and subsidized by Defendant. Under the 1903 Credit Ordinance, German creditors' claims against Ovaherero and Nama debtors were to prescribe after twelve months. With Defendant's direction, support, and aiding and abetting, armed German creditors responded by immediately descending upon impoverished Ovaherero and Nama debtors on horseback, enforcing their claims through theft of all remaining Ovaherero and Nama cattle and other valuable property.

90. In Hereroland, Lieutenant Ralph Zürn continued Defendant's policies and practices of expropriation. In November 1903 he had been appointed as commander of the fort at Okahandja, the central capital and metropolis of all Hereroland, and the home of Paramount Chief Maharero and his family. It was a holy place for all Ovaherero; the Maharero dynasty's ancestors were buried there, and it was there that Chief Maharero maintained his clan's holy fire—the *Okuruo*—which must remain lit for eternity under customary Ovaherero law.

91. Lieutenant Zürn and other German agents carried out a series of fraudulent and barbaric acts on the Ovaherero residents of Okahandja.

92. In December 1903, Zürn summoned Ovaherero leaders and demanded that they sign a contract handing over numerous tracts of ancestral land. When the leaders refused, they were physically

removed from Zürn's office, and Zürn subsequently forged their signatures. On December 8, 1903, Zürn announced these new northern borders to Hereroland.

93. Lieutenant Zürn and other Germany agents also dug up the holy graveyards of the Maharero dynasty and defiled the corpses of the royal clan's ancestors. This was a flagrant and severe violation of customary Ovaherero law.

D. Defendant's Campaign of Genocide against the Ovaherero

94. Throughout South West Africa, German settlers were able to establish lucrative plantations by exploiting the labor of the local indigenous Ovaherero and Nama. Since the German colonial authorities and the German settlers considered the indigenous peoples to be *Untermenschen* ("subhuman"), Ovaherero and Nama tribeswomen were subjected to virtually incessant rape and other abuses, and then their men were killed for attempting to defend them.

95. German settlers routinely stole the ancestral lands and cattle of the native Ovaherero and Nama, often facilitated by the predatory and confiscatory German bank lending practices enforced at gunpoint by the German colonial authorities.

96. In early January, false rumors had begun spreading regarding an Ovaherero uprising. German traders had spread the false rumors that the Ovaherero were buying goods on credit to stock up in preparation for an attack.

97. On January 10, 1904, one trader, Alex Niet, falsely reported to Lieutenant Zürn that he witnessed 300 armed Ovaherero poised to attack Okahandja. Zürn telegraphed Okahandja, and hid in his fort with the German settlers, traders, and newly arrived *Schutztruppe* reinforcements.

98. Lieutenant Zürn sent out numerous scouts over the next two days, all of whom returned with no indication of a threat. Nonetheless, the Germans had begun gossiping, spreading rumors, and preparing for what they ultimately desired: an opportunity to kill their African neighbors and take their property under the guise of an Ovaherero “revolt.”

99. On January 12, 1904, Germany began its war against the Ovaherero people. Lieutenant Zürn ordered his soldiers to open fire on any Ovaherero people who happened to be in the proximity of the fort.

100. The Ovaherero had been subjected to Defendant’s systematic policies and practices of expropriation and abuse, by which Defendant directed and aided and abetted in the murder of Ovaherero men, the theft of land and cattle without compensation, the threat of being removed to reservations under Defendant’s guard, and the incessant rape and sexual exploitation of Ovaherero women and children.

E. The Ovaherero Resistance

101. The Ovaherero did not want war. Lieutenant Zürn’s actions, however, forced the Ovaherero to defend themselves.

102. In early 1904, the Ovaherero surrounded the town of Okahandja and cut links to Windhoek, the colonial capital.

103. Under the explicit humanitarian directives of Chief Mahararo, the Ovaherero forces were directed not to harm any German woman, children, or missionaries, and no violence was to be conducted against the English, the Boers, or any other tribes. Fewer than 150 German settlers and soldiers, including fewer than five women and one child, lost their lives in the initial Ovaherero military response.

104. Following the attack, the settlers, the Colonial government, and the German pro-colonial classes of industrialists, politicians, and nationalists rallied for total war.

105. German troops began spreading out through Hereroland, taking defensive positions, and lynching any Ovaherero men they found.

106. Germany ultimately rejected the idea of mere enslavement of these native peoples. Instead, frustrated with Governor Leutwein's failures at the battle of Oviumbo and unwilling to accept anything short of absolute expropriation, the Kaiser replaced Leutwein with a new agent who would complete the expropriation with the requisite amount of violence: Lieutenant-General Adrien Dietrich Lothar von Trotha. General von Trotha served as Defendant's agent as Governor and Supreme Commander of "German South West Africa" from May 1904 until November 1905. Defendant instructed General von Trotha to "end the war by fair or foul means," and entrusted the command to him with "fullest confidence in [his] insight, energy, and experience."

107. On June 11, 1904, Lieutenant General von Trotha arrived with an expeditionary force of 14,000 troops.

108. Von Trotha made clear his intentions to crush the resistance and to annihilate the Ovaherero and Nama peoples, leaving the land free for fulfillment of the German dream of Lebensraum. Prior to the Battle of Waterberg on August 11-12, 1904, where his troops defeated the Ovaherero, General von Trotha issued the following proclamation:

I believe that the [Ovaherero] nation as such should be annihilated, or, if this was not possible by tactical measures, have to be expelled from the country...This will be possible if the water-holes from Grootfontein to Gobabis are occupied. The constant movement of our troops will enable us to find the small groups of nation who have moved backwards and destroy them gradually.

109. Von Trotha further wrote: "It is my intention to destroy the rebellious tribes with streams of blood and money." His men used the German word "Vernichtung," meaning "extermination."

110. By August 1904, over 60,000 Ovaherero people had gathered at Waterberg, including the elderly, handicapped, unarmed men, women, and children. They planned to surrender.

111. General von Trotha's troops descended upon Waterberg, encircling the Ovaherero camp with a battalion of 4,000 men, 1,500 rifles, hand grenades, thirty state-of-the-art artillery pieces, and twelve state-of-the-art machine guns, split into six divisions in a star-shaped formation. It was a deadly firing squad.

112. General von Trotha left one exit open to the Ovaherero: a valley leading to the Omaheke Desert to the east, which he used as a tactical barrier. The tens of thousands of Ovaherero men, women, and children that were not killed in the assault were forced to abandon their belongings and herds and escape into the desert. One German Officer described it: "The entire national wealth of the Herero was left by the wayside." The German troops carefully gathered up any valuables, which were expropriated by Defendant and its agents, and shipped them back to Germany.

113. Defendant continued its goals of annihilation, and pursued the Ovaherero men, women, and children mercilessly. Officers Ludwig von Estorff and Berthold von Deimling were deployed with their divisions in pursuit on August 13, 1904, cutting down Ovaherero men, women, and children that they encountered, even those unarmed and unable to offer resistance.

114. The Omaheke Desert is a vast sandveld with high desert temperatures, virtually no rainfall, sparse vegetation, sparse and limited sources of water, dried arroyos, and typically under 5 millimeters of rainfall during August and September. Its ecosystem does not support much life. Some of the Ovaherero,

including Chief Samuel Maharero, were able to survive the arduous trek across the desert to the British protectorate Bechuaunaland—today, Botswana—where they took refuge. Others fled to Ovamboland, and others to South Africa. But most of the Ovaherero, who entered the desert, perished.

115. In September, Defendant cordoned off the Omaheke desert with a 250-kilometer armed perimeter. General von Trotha wrote:

[We must drive the opponent] back into the desert should he not fight, where thirst and privation will complete his destruction.

116. Defendant's extermination and genocidal policies and practices were fully implemented at this point, since Germany had no intention of permitting the Ovaherero to surrender. Defendant's explicit goal was to annihilate them entirely as a people. General von Trotha wrote:

The sealing-off of the eastern border of the colony and pursuit of a policy of terror against every remaining Herero in the land will continue as long as I remain in the territory. The nation [of the Ovaherero] must perish. If we do not succeed in killing them with guns, then it must be achieved in this fashion.

117. Defendant, steeped in blood and thirsty for more, decided to commemorate and memorialize its genocide under color of law. Von Trotha issued Imperial Order No. 3737, dated October 2, 1904. It was an Extermination Order:¹⁷

I, the Great General of the German Soldiers,
send this letter to the Herero people.

The Herero people are no longer German subjects... The Herero people must now leave the country. If they refuse, I will force them to leave with my Big Cannon. Every Herero found inside the German border, with or without a gun or cattle, will be shot. I shall spare neither women nor children: send them back to their people or shoot them. These are my words to the Herero people.

118. Von Trotha gave orders that captured Ovaherero males were to be executed, while women and children were to be driven into the desert so that they would die of starvation and thirst. He argued that there was no need to make exceptions for Ovaherero women and children, since they would “infect German troops with their diseases.” Von Trotha further explained that his campaign to annihilate the

¹⁷ Von Trotha’s command became known as a “*Vernichtungsbefehl*,” i.e., an “extermination order.”

Ovaherero peoples “is and remains the beginning of a racial struggle.”

119. At one point, General von Trotha collected a large group of prisoners, including men, women, and children. He forced half of them to watch the lynching of the other half. He handed out so-called courtesy copies of his Extermination Order printed in Otjiherero and cast the survivors into the desert to distribute his message of doom.

120. Defendant sent patrols into the Omaheke and surrounding territories and rewarded its agents for the mass murder of the Ovaherero people. To ensure accurate reporting of how many Ovaherero men were murdered on such patrols, Defendant required its agents to cut off victims’ ears as evidence.

121. The Extermination Order gave a veneer of legal legitimacy to the extermination policies and practices that were already in place.

122. The extermination continued, and Defendant’s agents murdered any survivors they found, including men, women, and children who approached the perimeter seeking aid.

123. Private Adolf Fischer reported on the Omaheke’s effects on the Ovaherero people:

Whenever we dismounted, our feet would hit against the human bodies. There was a young woman with wilted breasts, her frozen face covered with flies and curled up next to her hip

an aborted birth. There was also an old woman, who had great difficulty walking. Eight or ten leg rings made from rough iron pearls— the sign of dignity and wealth—had eaten her flesh to the bone... There was a boy. He was still alive; staring into the night with a stupid grin from an empty mind... Whoever took part in the chase through the Sandveld lost his belief in righteousness on Earth.

124. Lieutenant Graf Schweinitz, who had also traveled the Omaheke, graphically described the total annihilation of the Ovaherero people in 1905:

There's a path that leads out of Onduru towards Omuramba. Alongside the path are human skulls, rib cages, and thousands of fallen cattle and other livestock. This is the path on which the Ovaherero fled.

In the thicker vegetation, where cattle dying of thirst cluttered for shade from the punishing sun, hundreds of cadavers lie around and on top of each other. In many places, holes of 15 to 20 meters were dug in a vain search for water. Everything suggests this was a march of death...

The cooking of the dead and the violent screams of insanity – they will echo forever in the hallowed silence of eternity.

125. Defendant's General Staff had knowledge of, directed, and supported these atrocities. Its official publication *Der Kampf* (The Fight) stated:

This bold enterprise shows up in the most brilliant light the ruthless energy of the German command in pursuing their beaten enemy. No pains, no sacrifices were spared in eliminating the last remnants of enemy resistance. Like a wounded beast the enemy was tracked down from one water-hole to the next, until finally he became the victim of his own environment. The arid Omaheke Desert was to complete what the German army had begun: The extermination of the Herero people.

126. Defendant's commander-in-chief, Kaiser Wilhelm II, was thrilled by the results achieved by his loyal General von Trotha. Kaiser Wilhelm II wrote to him:

You have entirely fulfilled my expectations when I named you commander of the colonial troops, and I take pleasure in expressing, once again, my utter gratitude for your accomplishments so far.

127. The rhetoric used by von Trotha to justify the extermination of the Ovaherero and Nama peoples

eerily presaged the language later used by Hitler to justify the mass extermination of the Jewish people as an “ethnic cleansing” necessary for the resurrection of a New Germany. Von Trotha saw the annihilation of the Ovaherero and Nama peoples as serving a higher purpose, as part of the establishment of a new world order. He said: “I destroy the African tribes with streams of blood... Only following this cleansing can something new emerge, which will remain.”

128. But in the winter of 1904, Chancellor von Bülow became concerned about what he considered to be major human rights violations. He believed that Defendant’s actions, conducted under color of law through the will of the German people, might tarnish the German people’s reputation for years, if not centuries. Chancellor von Bülow predicted that the genocide has the potential to “demolish Germany’s reputation among civilized nations and indulge foreign agitation.”

129. Defendant rescinded the Extermination Order in December 1904 and replaced it with an Enslavement Order. Nonetheless, the Extermination Order survived in spirit and policy. For example, the 250-kilometer armed perimeter blocking the Ovaherero people’s return from the desert was maintained until mid-1905. Most of the Ovaherero were already dead by then. Nonetheless, patrols against Ovaherero survivors in the Omaheke and elsewhere continued until 1911.

130. On December 1, 1905, Friedrich von Lindequist, who had replaced Leutwein as Civil Governor, issued an order that all surviving Ovaherero

surrender and report to shelters that Defendant established at Omburo and Otjihaenena, where they need not “fear being shot at.” By April 1906, several thousand Ovaherero survivors had arrived at these stations. From there, they were transported to the concentration camps at Omaruru and Windhoek for slave labor and death.

131. By May 1, 1906, Defendant’s agents had captured a total of 14,769 Ovaherero men, women, and children who had surrendered. They were promptly enslaved and relocated to concentration camps. Approximately half of them perished.

F. Defendant’s War and Genocide against the Nama

132. In the period 1884–1904, Defendant’s confiscatory policies and practices against the Ovaherero were implemented with careful precision against the Nama people as well. As with the Ovaherero, Defendant’s pre-1904 actions aimed at the goal of the absolute expropriation of all Nama land, livestock, and other property.

133. Defendant negotiated with the Nama during its war against the Ovaherero, biding its time until prepared to handle both fronts.

134. In August 1903, Defendant appointed Dr. Paul Rohrbach, the Commissioner for Settlement in Windhoek, to conduct an economic analysis of the costs

and benefits of exterminating the Nama people. Dr. Rohrbach found:

From the point of view of the economy of the country, the Hottentots are generally regarded, in the wider sense, as useless, and, in this respect, providing no justification for the preservation of this race.

135. In another analysis, Georg Wasserfall, the editor of the German South West Africa Newspaper, proposed exterminating the Nama peoples *instead* of the Ovaherero:

The Hereros should not be destroyed—the Witboois, yes—the reason being that the Hereros are needed as laborers, and the Witboois are an insignificant tribe.

136. Convinced that extermination, genocide, and total expropriation were required to secure the wealth of Great Namaqualand for itself, two companies of German soldiers and an artillery battery were sent to Great Namaqualand in April 1904 to begin staging its assault.

137. On May 25, 1904, an Imperial Officer in Keetmanshoop informed the Governor that a revolt was likely. He noted that several hundred lawsuits had been

brought in recent months against Nama debtors by German firms and traders in Keetmanshoop. Judgment creditors had been enforcing their fraudulent judgments against Nama judgment debtors by stealing the only possessions they had left: their cattle, gemstones and other valuables.

138. In July 1904, Chief Jacob Morenga of the Bondelszwart Nama tribe recognized the threat. He sought to liberate his people from Defendant's confiscatory, violent, and oppressive policies, practices, and takings. Morenga and a few colleagues began an uprising by robbing German farmers of their ammunition and arms.

139. In September 1904, a German force was sent to capture Morenga, but failed. Morenga soon commanded a guerilla force of 400 Bondelszwart soldiers.

140. In early October 1904, Chief Witbooi described Defendant's crimes in an official declaration of war sent to Governor Leutwein.

141. Defendant's plan and policy was to treat the Nama peoples with the same fate that met the Ovaherero. On October 24, 1904, General von Trotha returned to Windhoek from his ongoing genocide of the Ovaherero to assess the Nama situation. He placed Colonel Berthold von Deimling in command of the Nama war, provided for reinforcements of 4,000 men, and began construction of a railway into Great Namaqualand for logistical support. Colonel von

Deimling strategized the methods for destroying the Nama people:

We must not allow the Hottentotts to escape, rather we must encircle and destroy them before they do so.

142. In December 1904, Defendant's forces attacked the Witbooi Nama in their homeland of Rietmond, forcing them to escape and abandon their belongings, valuables and cattle.

143. In April 1905, General von Trotha took personal command over the Nama campaign. As his first order of business, General von Trotha set about drafting a new Extermination Order, using the Ovaherero Extermination Order as a template. He issued the Extermination Order to the Nama people in the city of Gibeon on April 22, 1905:

[T]hose few refusing to surrender will suffer the same fate suffered by the Herero people, who, in their blindness, believed that they could successfully wage war against the mighty German Emperor and the great German People. I ask you: Where are the Herero people today? Where are their chiefs today?

144. The Extermination Order made clear that the genocide would continue until each and every Nama man, woman, and child was either enslaved or murdered:

The Nama who chooses not to surrender and lets himself be seen in German territory will be shot until all are exterminated.

145. Most Nama tribes were forced into surrender by mid-1906. Defendant enslaved approximately 2,000 Nama men, women, and children that were taken prisoner during the war and the ensuing surrender. They were placed in concentration camps with the Ovaherero, and all of their land, livestock, and other property were expropriated.

G. Defendant's Concentration Camps

146. By the end of 1904, German settlers, merchants, farmers, the military, shipping companies, mining companies, and railroad companies were facing sharp labor shortages, leading to a decline in productivity and trade across all sectors. The labor shortage was due primarily to the fact that Defendant had begun killing their Ovaherero and Nama laborers.

147. To solve these labor issues, Defendant herded all surviving Ovaherero and Nama peoples into concentration camps, where they were made available

to colonists and private companies as slave laborers or exploited in medical experiments. The camps were established at Okahandja, Omaruru, Karibib, Keetmanshoop, Lüderitz Bay, Swakopmund, Windhoek, and elsewhere. Approximately 2,000 Nama people and 14,769 Ovaherero people—mostly women and children— were enslaved in the concentration camps.¹⁸

148. All prisoners were first divided into two categories: those who were fit to work and those who were not. For administrative purposes, pre-printed death certificates uniformly gave the cause of death as “death by exhaustion following privation.”

149. Defendant housed the inmates in dilapidated tents surrounded by walls, barbed wire, and guards. Defendant also permitted private concentration camps to be erected at the industrial facilities of firms that purchased slaves from Defendant. Ovaherero and Nama people of all ages and gender were treated uniformly and housed together without distinction. Those who surrendered and those who were captured received the same fate.

150. Under the belief that it owned the Ovaherero and Nama as property, Defendant used inmates as slave labor for public and private projects. Defendant transported men, women, and children slaves to line command posts, and then to Imperial

¹⁸ Defendant called the camps “*Konzentrationslager*” (Concentration Camps), as early as January 1905 in a telegram sent from Defendant’s Imperial Chancellery.

District Offices, where they were rented out by day or by month to settlers, merchants, farmers, the military, shipping companies, mining companies, and railroad companies. Records indicate that some lessors paid the District Offices fifty pfennigs per day or ten Reichsmark per month per leased slave.

151. Again, under the belief that it owned the Ovaherero and Nama as property, Defendant would also sell individuals as human merchandise. Some slaves were sold in bulk. Defendant benefited from the taxes, tariffs, customs, and duties that it charged for the export of human property. Receipts and records indicate that at least one such customs charge amounted to twenty Reichsmark per exported slave.\

152. The Ovaherero and Nama prisoners were subjected to relentless hard labor, such as hauling iron or dragging carts and wagons in the place of beasts of burden. Defendant typed out pre-printed death certificates for all such prisoners, with an accompanying space to enter the slave's identification number after the pre-printed cause of death: "death by exhaustion."

153. The Ovaherero and Nama had been accustomed to a varied diet of dairy, meat, and fruit. Due to the deprivation of food and absence of normal nutrition, the prisoners suffered numerous illnesses, including scurvy, bronchitis, and chicken pox. Pneumonia was also rampant. Despite these illnesses, Defendant's policies and practices were for the camp medical offices to leave the Ovaherero and Nama peoples untreated. According to the records of the medical offices, most of the ill had entered the camps in

reasonably good health and developed their illnesses at the camps.

154. The Ovaherero and Nama women and children faced the worst fate. They were given lower rations, and many starved to death. Defendant's agents sexually abused and raped the women and children, and, again, under the belief that it owned the Ovaherero and Nama as property, Defendant rented out the bodies of women and children to private individuals.

155. Life at the Swakopmund concentration camp was particularly painful for the Ovaherero and the Nama prisoners.

156. Missionary Dr. Heinrich Vedder lamented the inhumane conditions at Swakopmund, and of the high death rate due to exhaustion, starvation, and disease:

From early morning until late at night, on weekdays as well as on Sundays and holidays, they had to work under the clubs of tough overseers until they collapsed. Added to this, the food was extremely scarce. Rice without any necessary additions was not enough to support their bodies, already weakened by life in the field and used to hot sun of the interior, from the cold and restless exertion of all their powers in the prison conditions of Swakopmund. Like cattle hundreds were driven to death and like cattle they were buried.

157. Dr. Vedder, who had lived amongst the Ovaherero for many years, empathized with their suffering, fought for their redemption, and was bitter about Defendant's actions:

They suffered greatly from the cold in the coastal towns. Their clothing had long since been torn to tatters. Men and women went about in sacking, their only protection from the cold. Many got inflammation of the lungs and died. During the worst period an average of 30 died daily. It was the way the system worked. General von Trotha gave expression to this system in an article which he published in the *Swakopmunder Zeitung*: "The destruction of all rebellious native tribes is the aim of our efforts."

158. The sickest individuals, including children, the elderly, the handicapped, and pregnant women were forced into daily hard labor as slaves. Missionary Kuhlmann unsuccessfully asked the colonial government to exercise some humanity and only send healthy Ovaherero men out of the camps for hard labor, "because the others just die there."

159. In a letter to Deputy Governor Hans Tecklenburg dated May 29, 1905, Dr. Fuchs, the civilian District Commissioner of Swakopmund, presented the results of an investigation to colonial command. He and Dr. Sowade, his Chief Medical Officer, had become concerned about the camp conditions, and they had

researched slave mortality rates. They found that 10 percent of the slaves had died in the last two weeks of May 1905. Dr. Fuchs recommended immediate improvements in camp conditions:

The death-rate of natives in Swakopmund has undoubtedly risen enormously. The cause, and I agree with the Chief Medical Officer's view, is the defective accommodation, clothing and feeding of natives, particularly among prisoners of war, together with the raw unaccustomed climate, and the weak physical conditions of the prisoners brought here.... I do not think that these pitiful cases should be sent here to Swakopmund. They should be sent inland to recover under the control of the Government.

160. In a letter dated June 15, 1905, Dr. Sowade reported further to Defendant:

In Swakopmund there are over 1,000 Herero prisoners, men, women, and children. Most of those who arrive here are literally skin and bone.

161. Dr. Fuchs's report was read and circulated widely through command in Windhoek and the General Staff in Berlin. Dr. Fuchs's recommendations were categorically denied. The labor

market in the Swakopmund region was simply too weak to allow the slaves to recuperate. Defendant implemented policies that reflected its values: the needs of the weak, children, and elderly slaves were subordinate to the needs of local businesses that were hoping for streamlined operations and expanded profits. Deputy Governor Tecklenburg explained Defendant's decision:

What is happening in Swakopmund is also happening in Lüderitz Bay. There is a great demand for native labor. As the Hottentots are scarcely available, the Hereros come into question. Of course it is desirable that these should be strong and healthy in the interests of labor and also of humanity, but it can scarcely be avoided that also old and sick people and weak children should be sent to Swakopmund and Lüderitz Bay for whom everything appears to have been done. Instructions have been given to attend to these various points and to keep weak people back in Omaruru stations. It is difficult to send back the weak Hereros interned in Swakopmund as suggested by Dr. Fuchs because there are no replacements for them.

162. Admitting that some Ovaherero people would likely survive imprisonment, Deputy Governor Tecklenburg further believed the high death rates in

the camps were unequivocally in Defendant's economic interests:

The more the Herero people now feel the consequences of the uprising on their own bodies, the less the coming generations will feel inclined to rebel. Sure, the death of so many natives has a negative commercial impact, but the natural life- force of the Hereros will soon allow them to recover their numbers. The future generations, which could possibly be mixed with a bit of Damara blood, could thus be fed with an understanding of their inferiority to the white race.

163. That is, by feeding future generations of the Ovaherero with “an understanding of their inferiority to the white race,” Deputy Governor Tecklenburg sought to economically and politically impair the future generations of the entire Ovaherero people, including Plaintiffs and the Classes.¹⁹

164. The Lüderitz Bay concentration camp was located on Shark Island, a small island—and now peninsula—just off the coast. Here, Defendant practiced prison techniques that it later employed at similarly structured death facilities in the 1930s and 1940s.

¹⁹ “The Classes” are denominated by Plaintiffs in ¶ 316, *infra*.

165. The mortality rate from disease, exhaustion, and malnutrition at Shark Island and other concentration camps was in the range of 45–74 percent. Despite these harsh conditions, all Ovaherero men, women, and children who could stand were taken outside the camp every day as forced laborers, while the sick and dying were left without medical assistance. Shootings, hangings, and beatings of the forced laborers were widely reported by eyewitnesses, in the press, and in Defendant's well-maintained Imperial records. One eyewitness reported:

Cold—for the nights are often bitterly cold there—hunger, thirst, exposure, disease, and madness claimed scores of victims every day, and cartloads of their bodies were every day carted over to the back beach, buried in a few inches of sand at low tide, and as the tide came in the bodies were out, food for the sharks.

166. Defendant conducted medical experiments on live prisoners, for example, in the human-experiment laboratory of Dr. Eugen Fischer and Dr. Bofinger, who injected Ovaherero and Nama that were suffering from scurvy with poisons, including arsenic and opium. After the inmates inevitably died, the doctors autopsied the bodies and reported the results to Defendant.

167. Defendant's doctors also experimented with dead body parts from prisoners, including the

experiments of zoologist Dr. Leopold Schultzel, who was pleased by the ready availability of body parts:

I could make use of the victims and take parts from fresh native corpses, which made a welcome addition...

168. At Shark Island, 778 Ovaherero and Nama bodies were dissected in post-mortems for Defendant's medical research. Various German doctors were involved in these dissections, including Drs. Dansauer, Jungels, Mayer, and Zöllner.

169. Ovaherero and Nama skulls had been requested by the Pathological Institute in Berlin and the University of Breslau, including by Professor Klaatsch, for experimentation, display, and scientific research in the field of *Rassenlehre* (Race Theory), a field of scientific study in Germany that espoused the superiority of the white race. Anthropologist William Waldeyer in Berlin also requested skulls.

170. At Shark Island, Defendant decapitated an estimated three hundred Ovaherero men by axe, machete, or saw. Defendant then boiled the severed heads in water. Subsequently, Defendant equipped Ovaherero women and girls with glass shards, and forced them to strip the boiled heads clean of flesh. This routine required the women and girls to strip off the noses, faces, scalps, and neck tissue, and then remove the inner tissue, tongues, and brains, from the boiled

heads of their husbands and fathers, leaving only the polished skulls. Once so cleaned, Defendant packaged the skulls for international transport, and shipped them to Germany.²⁰

171. Defendant also decapitated at least seventeen Nama people. As with the Ovaherero, Defendant boiled the Nama heads, and forced Nama women and children to peel the boiled faces off in strips, using crude shards of glass. Defendant then packaged the skulls for international transport and shipped them to Germany.

172. Some heads of women and children were treated likewise, including the head of a one- year-old Nama girl. In late 1906, Dr. Bofinger decapitated the infant girl and removed and weighed her brain, before placing her head in preservatives, sealing it in a tin, and sending it for further examination by his colleague Christian Fetzner at the Institute of Pathology at the University of Berlin.

173. These barbaric acts were undertaken on the instruction of, with knowledge of, to the benefit of, and through the complicity of Defendant and Defendant's agents. Despite such knowledge and

²⁰ The details of the methods used to obtain these skulls were recorded in the "Health Report of the Imperial *Schutztruppe* for South West Africa during the Herero and Nama Rebellion during January 1, 1904 to March 31, 1907" (*Sanitätsbericht über die kaiserliche Schutztruppe für SWA während des Herero und Hottentottenaufstandes für die Zeit vom 1/1/04 – 31/3/07*) (1909), as well as the letter from the State Secretary of the Imperial Ministry of Colonies (*Reichs-Kolonialamt*) to the Imperial Governor in Windhoek, dated July 31, 1908.

complicity, Defendant and Defendant's agents continued to refer to the Ovaherero and Nama peoples as "savages."

174. Defendant also shipped the intact corpses of Ovaherero and Nama men, women, and children to Germany. Following their murders, often by hanging, corpses were placed in preservatives and sent to Germany for dissection. The scientific results of these dissections and the current whereabouts of the subjects' mortal remains are unknown.

175. Dr. Eugen Fischer, amongst others, performed the medical experiments on the remains of Ovaherero and Nama victims. He was a leading German race scientist, who later become Chancellor of the University of Berlin, where he taught medicine to and worked alongside Nazi racial theorists and doctors throughout the 1920s, 1930s, and 1940s.

176. When the Shark Island Concentration Camp and other camps were closed, the surviving Ovaherero and Nama were distributed as indentured servants or slaves to German settlers, merchants, farmers, the military, shipping companies, mining companies, and railroad companies. The Ovaherero and Nama were also prohibited from owning land or livestock, both of which were necessary for survival.

177. Of the approximately 14,769 Ovaherero and 2,000 Nama people enslaved in the concentration camps, a total of 7,682 died between October 1904 and March 1907, a mortality rate of approximately 50 percent.

H. Defendant's Takings in Violation of International Law

178. Defendant's direction, funding and support of, and aiding and abetting of the crimes alleged herein, including, but not limited to murder, genocide, rape, and destruction of the sovereign Ovaherero and Nama polities, comprises the context for Defendant's *property-based crimes*. Through and by the crimes alleged herein, Defendant took several discrete categories of property in violation of international law in which Plaintiffs and the Classes possess property rights, and profited from these takings, including Plaintiffs' (i) land rights; (ii) rights in personal property and livestock; (iii) concession rights, tax rights, customs rights, and precious metals; (iv) sovereignty-related property rights; (v) the tort and labor rights of Plaintiffs' family members; (vi) the skulls, flesh, brains, hair, and other mortal remains of Plaintiffs' family members; (vii) and the corpses of Plaintiffs' family members. Defendant's government during the time period in question, the German Empire—also known as the *Kaiserreich* or Second Reich—was originally forged by economic forces and served first and foremost its named purpose of *Wirtschaftskörper*, *i.e.*, an economic body. Economic motives governed the four constitutional conventions from 1867–71 that gave rise to the German Empire, and the state was founded for the goal of commercial, financial, and industrial development. In its unquenchable thirst for increasing profits, Defendant expropriated nearly every property interest that the Ovaherero and Nama peoples had.

**1. Defendant's Takings of Plaintiffs'
Property Rights in Land**

179. Defendant engaged in the genocide of the Ovaherero and Nama peoples with the active and explicit goal of thereby obtaining their land rights, and as such, Defendant's illegal takings of Ovaherero and Nama land were in violation of international law. Amongst its many takings of land, Defendant took Ovaherero land that encompassed the city of Windhoek. The expropriated land rights included, but were not limited to, the right to cultivate, develop, and sell and lease the land. From 1884– 1915, Defendant used the land rights that it had taken from the Ovaherero and Nama peoples in violation of international law, including but are not limited to, the lease and sale of such lands to private industrial, finance, and railway companies, the cultivation of such lands for domestic governmental use, and the erection of governmental and military facilities, offices, and camps.

180. According to records of the German Colonial authorities (Kolonial-Abteilung), most of the confiscated lands of the Ovaherero and Nama peoples were sold to white settlers, with the proceeds going to the German treasury.²¹ The German colonial authorities regulated the sale and lease of confiscated land, under guidelines stating that the sales should only be made to European settlers wishing to cultivate the lands.

²¹ Statement of Secretary Prince zu Hohenlohe-Langenburg, Reichstag, 11th term, 73rd session, 23 March 1906, Reichstagsprotokolle 1905/06 vol. 3, pp. 2230-1, 2239.

Former members of the German colonial military forces (Schutztruppe) were sold the expropriated lands by the German colonial authorities at a 50% discount.

181. As a result of these confiscations and expropriations without compensation, the Ovaherero and Nama peoples were left with no land to pasture livestock, notwithstanding that their livestock already had been taken from them. These native peoples could only remain on the land if they were working on farms now owned by German settlers. Defendant's declared intention was not only to take these native lands and distribute them to German settlers, but by confiscating the Ovaherero and Nama of their lands and livestock, they were also stripping them of all their political and economic power, as well as their means to resist. Plaintiffs are entitled to an accounting and the disgorgement of all revenues Defendant obtained through its illegal takings, plus interest, in an amount to be determined at trial.

2. Defendant's Takings of Plaintiffs' Property Rights in Personal Property and Livestock

182. Defendant engaged in the genocide of the Ovaherero and Nama peoples with the active and explicit goal of thereby taking the herds, livestock and personal property of the Ovaherero and Nama peoples. As such, Defendant's criminal theft of personal property and tens of thousands of cattle from the Ovaherero and Nama peoples constituted takings in

violation of international law. The property rights in livestock included the right to sell, slaughter, and milk the cattle, amongst others. Over the period from 1884–1915, Defendant used the cattle that it took in violation of international law to its benefit in manners including, but not limited to, the sale of such cattle to private ranchers, and the slaughter and milking of such cattle. By 1913 the Germans possessed approximately 205,643 head of cattle in South West Africa, much of which were taken from the Ovaherero and Nama.

183. Defendant's colonial administration obtained substantial income from well-documented auctions of cattle confiscated from the Ovaherero and Nama, and by redistributing some of the cattle to German settlers who had claims for compensation payments, the colonial authorities also achieved substantial savings, since Defendant did not have to make any cash payments regarding those claims.

184. At Hoornkrans on the morning of April 13, 1892, Defendant took personal property from the Nama people in violation of international law, including, but not limited to 212 stirrups, 74 horseshoes, 12 coffee pots, 12 coffee-grinders, 122 pieces of cutlery, 44 bits and bridles, 3 violins, and one pair of opera glasses.

185. At Hoornkrans on the morning of April 13, 1892, Defendant also took personal property from Chief Hendrik Witbooi in violation of international law, including, but not limited to his personal bible.

186. These takings of personal property are typical and exemplary of Defendants' taking and

stripping of all valuable personal property from the Ovaherero and Nama peoples, including diamonds, valuable coins, gold, silver, gemstones, ostrich feathers, copper products, and valuable jewelry.

187. Plaintiffs are entitled to an accounting and the disgorgement of all revenues Defendant obtained and savings Defendant realized through this illegal taking, plus interest, in an amount to be determined at trial. Plaintiffs are further entitled to the return of all personal property taken in violation of international law.

3. Defendant's Takings of Plaintiffs' Concession, Taxation, Customs Rights and Revenues; Additional Rights Taken to Precious Metals and Other Resources

188. Beyond the taking of land rights and personal property in violation of international law, Defendant also took various other related property rights of Plaintiffs in violation of international law. Over the course of Defendant's occupation of Hereroland and Great Namaqualand, Defendant sold and auctioned concession rights under color of law to private companies in return for concession fees; Defendant also exercised taxation rights and obtained taxation revenue, all of which were taken in violation of international law. It also exercised customs, duties, and

tariff rights and thereby obtained revenues, all of which were taken in violation of international law.

189. Through its annihilation of the Ovaherero and Nama political and sovereign entities, as well as its peoples, Defendant achieved unlawful governmental control over broad swaths of land that belonged to the Ovaherero and Nama peoples. By 1914, these territories included the entire coast of modern-day Namibia from the Orange River to the Cunene River, extending approximately 200–300 miles inland. By 1914 Defendant had sold a substantial portion of the land it had taken, and issued concession rights to private corporations, including, but not limited to the following companies:

- a. the German South West Africa Company, which claimed ownership over the bottom half of the Namibian coastline, extending inland by approximately 100 miles; as well as mineral rights over broad amounts of territory, including a territory of at least 500 square miles in Hereroland, centered around the Hereroland capital Okahandja, and other smaller territories to the south, including near Hoornkrans (the former headquarters of Paramount Chief Hendrik Witbooi of the Nama), along the Konipi river in the land of the Bethanien Nama, as well as in the land of the Red Nation Nama;
- b. the *Kaoko Land und Minengesellschaft* (Kaoko Land and Mining Company), which claimed ownership over much of the

- Kaokoveld Desert on the north coast of modern-day Namibia, extending inland by approximately 100 miles, as well as mineral rights in the northwestern desert near Guiarob and Otjtambi;
- c. the South West Africa Company, which claimed ownership over an area of at least 100 square miles outside the city limits of Otavi; as well as mineral rights in much of Amboland surrounding the Etoscha Pan in northern modern-day Namibia, *i.e.*, due east of the northern holdings of the Kaoko Land and Mining Company, and including the western stretches of the Omaheke Desert, which had hired Ovaherero labor prior to their genocide and enslavement for work at their copper mines, typically paying Ovaherero men 3 Reichsmark per month;
 - d. the *Otavi Minen- und Eisenbahngesellschaft* (Otavi Mining and Railway Company), which claimed land ownership over the city of Otavi, as well as mineral rights in numerous copper deposits near Otavi;
 - e. South African Territories Ltd., which claimed mineral rights in a broad portion of southern Great Namaqualand, including the land of the Bondelszwart Nama and the Veldschoendrager Nama; and,
 - f. the *Hanseatische Land- und Minengesellschaft* (Hanseatic Land and

Mining Company), which claimed mineral rights in two territories located in the mid-west of modern-day Namibia, including the city of Rehoboth and the surrounding river valleys and mountains of the Rehoboth region, as well as Aminias and the surrounding southern portions of the Umab Desert.

190. Defendant actively supported the industrialization and exploitation of the land following the genocides and by means of its takings. For example, Defendant subsidized the construction of railways with its Colonial Loan program, *e.g.*, through 175 million Reichsmark appropriated for railway construction on May 7, 1908, and an additional 76 million Reichsmark in 1910.

191. Defendant engaged in the genocide of the Ovaherero and Nama peoples with the goal of taking concession, taxation, and customs rights of the Ovaherero and Nama peoples in violation of international law. As such, the takings of such rights themselves constitute takings of property rights in violation of international law.

192. Prior to the expropriation of these rights, the Ovaherero and Nama peoples exercised and profited from these rights. For example, in 1890–94 Ovaherero Chief Manasse Tijisiseta of Omaruru—a political opponent of Paramount Chief Samuel Mahararo—charged mining concession fees, customs,

grazing fees, alcohol fees, and taxes, such as a highway wagon tax of 10 shillings and tax delinquency fines of £5. Chief Manasse collected concession fees and taxes from the Rheinisch Missionary of Omaruru, from settlers who wished to establish trading posts, from Boer trekkers who wished to work the land, and from mining companies that sought to speculate in the mountains outside Omaruru.

193. Defendant's unlawful expropriation of the Ovaherero and Nama peoples' concession, taxation, and customs rights resulted in substantial revenues.²² Defendant sought to squeeze more economic output from the colony through passage of the Law on Income and Expenditures of Protectorates of March 30, 1892. According to a 1910 report by the *Kolonialwirtschaftliches Komitee* (Colonial Economic Committee) with data obtained from the *Kaiserliches Statistisches Amt* (Imperial Ministry of Statistics), exports from the lands wrongfully taken from the Ovaherero and Nama peoples between 1885 and 1908, not including diamonds and gold, totaled in the multi-millions of Reichsmarks, with exports primarily in ostrich feathers, copper ore, wool, and hides.

²² For example, the government earned tax, concession, and export revenues, and obtained land from companies such as the Kaoko Land and Mining Company under the Land Tax Ordinance of March 19, 1909, supplemented by the Ordinance of October 12, 1910. In 1912, the Kaoko Land and Mining Company had a property tax liability of 270,455 Reichsmark, but due to liquidity problems, offered the government portions of its land in lieu of payment of back-taxes.

194. Another source of revenue from Defendant's use of concession, taxation, and customs rights was the industrial export of cattle, hides, artifacts, and ostrich feathers. Deputy Governor Hintrager recorded the value of cattle, hides, and ostrich feather exports from South West Africa in 1900 and between 1907–13 in Reichsmark:

Year	Cattle, hides, and ostrich feather exports in Reichsmark
1900	907,565
1907	333,485
1908	1,447,820
1909	1,980,616
1910	2,125,778
1911	1,785,151
1912	2,097,664
1913	3,463,830
Total	14,141,909

195. By taking the Ovaherero and Nama concession, taxation, and customs rights in their cattle, hides, and ostrich feathers through genocide in violation of international law, Defendant deprived the

Ovaherero and Nama peoples of the corresponding concession, taxation, and customs revenues. Defendant obtained revenues by selling the concession rights to private firms, by taxing all related revenues, and by charging customs, tariffs, and duties on the exported cattle, hides, and ostrich feathers. Assuming *arguendo* that Defendant obtained such revenues only in the amount of one-third the value of the exported cattle, hides, and ostrich feathers between 1900–13, revenues would total 4,713,969 Reichsmark, or about \$1 million dollars at the average conversion rate in that period.

196. The mining industry was the most important source of revenues from the expropriated concession, taxation, and customs rights. Defendant conducted its genocide pursuant to the explicit and practiced policy of taking these Ovaherero and Nama precious metal concession, taxation, and customs rights. During 1885–1907, German mining operations in Hereroland and Great Namaqualand already were producing revenues. As a result of Defendant's genocidal policies and practices, and its illegal taking and use of the property rights described herein, mining operations across the land boomed, and private mining firms exported great wealth in precious metals that were mined and taken from the expropriated lands.

197. German miners looted rich copper deposits in the Otavi and surrounding regions, and by 1913, the Otavi mines were producing 70,000 metric tons of copper per year. The Otavi Mining and Railway Company (Otavi Company) constructed a railway line from Swakopmund, through Otavi, to the Tsumeb

mines north of Otavi. Defendant owned the railway leading east to the Grootfontein mines. The Otavi Company first started laying railway track prior to the genocide and had to obtain permission to start laying the track from Paramount Chief Samuel Maharero. Defendant used threats of force to compel Chief Maharero to permit the company to lay the track. However, Chief Maharero refused to grant the Otavi Company any mineral rights, as the Ovaherero people had mined the rich Tsumeb mountains for centuries, using its copper for jewelry and spear heads. Following the genocide and taking of Ovaherero property, the Otavi Company benefitted from Defendants' expropriation of Ovaherero lands and mining operations by, with Defendant's permission, purchasing and renting enslaved Ovaherero and Nama men, women, and children for labor in these mining and other commercial operations.

198. Deputy Governor Hintrager recorded the value of copper exports from South West Africa between 1906–13 in Reichsmark

Year	Copper exports in Reichsmar
1906	46,877
1907	1,282,515
1908	6,296,000
1909	4,654,862

134a	
1910	5,697,208
1911	3,753,703
1912	6,523,258
1913	7,929,000
Total	36,183,423

199. By taking the Ovaherero and Nama copper deposit concession rights, taxation rights, and customs rights through genocidal acts in violation of international law, Defendant deprived the Ovaherero and Nama peoples of their corresponding concession, taxation, and customs revenues. Defendant obtained immense revenues by selling these concession rights to copper mining firms, by taxing the firms' profits, and by charging customs, tariffs, and duties on the exported copper. Assuming *arguendo* that Defendant obtained such revenues only in the amount of one-third the value of the exported copper ore between 1906–13, this would total 12,061,140 Reichsmark or about \$2.6 million dollars at the average conversion rate during those years.

200. Diamond dealers and speculators also saw success in their South West Africa operations over the course of Defendant's illegal occupation and confiscation of Ovaherero and Nama lands and diamond mining operations. These diamond operations increased significantly when additional diamond mining resources were discovered in 1908 in portions of the Namib

Desert that were traditionally owned by the Ovaherero and/or Nama. In violation of international law, Defendant's agent, Colonial Secretary Bernhard Dernburg, issued exclusive mining and concession rights to the German South West Africa Company on September 22, 1908, and established an official sales agency, the *Diamantenregie des südwestafrikanischen Schutzgebietes* (Diamond Agency for the South West African Protectorate), through which a consortium of German banks marketed and exported diamonds that were discovered on lands taken from the Ovaherero and Nama peoples.

201. Lucrative diamond mines were established at locations including, but not limited to, Pomona, Elisabethbucht, Oranjemund, Kolmanskup, and Lüderitz. While Ovaherero and Nama women and girls were being forced to peel off the boiled faces of their husbands and fathers on Shark Island, German diamond miners and their families were enjoying the luxuries of the casino, ice factory, ballroom, and bowling alley just ten miles away in Kolmanskop.

202. Deputy Governor Hintrager recorded the value of diamond exports from South West Africa between 1908–13 in carats and Reichsmark:

Year	Diamond exports in carats	Diamond exports in Reichsmark
1908	38,275	51,180

1909	483,266	15,435,522
1910	846,695	26,869,014
1911	773,308	23,034,146
1912	1,051,777	30,414,078
1913	1,500,000	58,910,000
Total	4,690,000	154,713,940

203. Thus Germany, aided and abetted by various private firms, stole vast treasures from the lands that were taken from the Ovaherero and Nama peoples in violation of international law, and Defendant thereby profited through the exercise of the concession, taxation, and customs rights that were taken from the Ovaherero and Nama peoples through genocide in violation of international law. By 1913 diamond production in South West Africa accounted for a quarter of the value of total global diamond exports.

204. By taking the Ovaherero and Nama diamond deposit concession, taxation, and customs rights through genocide in violation of international law, Defendant deprived the Ovaherero and Nama peoples of their corresponding concession, taxation, and customs revenues. Defendant obtained immense revenues by selling diamond deposit concession rights to the Diamond Agency for the South West African Protectorate, by taxing all diamond-related revenues, and by charging customs, tariffs, and duties on the exported diamonds. In one instance, for example,

Defendant and the German South West Africa Company entered into an agreement, under which the company opened its land (i.e., the land which rightfully belonged to the Ovaherero and Nama peoples) to public mining, entitling the company to a two percent duty on all exported diamonds. In return, Defendant imposed an export duty of one-third the value of exported diamonds. Assuming *arguendo* that Defendant obtained tax, concession, and export revenues in the amount of one-third of all diamond exports, then the figures above indicate that Defendant obtained such revenues in the amount of 51,571,308 Reichsmark between 1908–13, or about \$13 million dollars at the average conversion rate in that period.

205. Plaintiffs are entitled to an accounting and the disgorgement of all revenues Defendant obtained through these illegal takings, plus interest, in an amount to be determined at trial.

206. Finally, with the use of genocide, in violation of international law Defendant supported, directed, and aided and abetted in the taking of the gems, precious metals, cattle, hides, ostrich feathers, and other artifacts themselves that were located on and under the lands of the Ovaherero and Nama peoples in Hereroland and Great Namaqualand. Plaintiffs are entitled to an accounting of all precious gems and metals and other resources that Defendant took or aided and abetted in the taking of and are entitled to the return of all such precious gems, metals, and other resources, and disgorgement of all revenues Defendant

obtained through these illegal takings, plus interest, in an amount to be determined at trial.

4. Defendant Took Sovereignty Property Rights

207. Although Defendant failed to successfully annihilate the Ovaherero and Nama peoples, it succeeded in destroying the sovereign political entities of Hereroland and Great Namaqualand. Because Defendant took their respective sovereignties, the Ovaherero and Nama peoples lost their status as equals to Defendant and all other sovereign states, and lost attendant property rights.

208. Plaintiffs, therefore, also bring this action in their individual capacity and representative capacity as lawful heirs to the sovereign polities themselves, and the attendant property rights respectively. Under customary Ovaherero and Nama law—as in the United States—the sovereignty of Hereroland and Great Namaqualand resides in their respective *peoples*. As such, the property rights attendant to sovereignty are passed through intestacy to Plaintiffs and the Classes.

209. Defendant's policy and practice of aiding and abetting the rape of Ovaherero and Nama women and children actively contributed to the goal of taking the property rights attendant to sovereignty through sterilization. Diseased German rapists caused physical damage to the reproductive organs of the Ovaherero and Nama women and children and spread venereal

disease to Ovaherero and Nama women and children, rendering them sterile. The Ovaherero and Nama birth rates plummeted in the years following the genocide. This policy and practice sought to sterilize the Ovaherero and Nama peoples, in furtherance of annihilation, by preventing the birth of new generations.

210. The property rights attendant to sovereignty include, but are not limited to, the right to sovereign equality under international law; sovereign procedural and substantive rights through treaties, interstate organizations, and representation at the United Nations; and the rights, privileges, jurisdictional immunities, and attachment immunities of sovereign status.

211. By taking these intangible, invaluable property rights of sovereignty, Defendant realized enormous gains and savings by preventing its victims from pursuing legal recourse through channels that are otherwise open to sovereign polities, including, but not limited to, the League of Nations, the United Nations, the African Development Bank, the African Union, the South African Development Community, the Southern African Customs Union, and the International Court of Justice.

212. Plaintiffs are entitled to an accounting and the disgorgement of all such savings and revenues obtained through these illegal takings, plus interest, in an amount to be determined at trial.

5. Defendant Took Away Plaintiffs' Labor and Tort Rights and Claims, But Plaintiffs' Rights by Intestacy Remain

213. Through enslavement, Defendant took the labor rights and other natural and civil rights of the Ovaherero and Nama peoples in violation of international law, including, but not limited to their rights to payment for their labor, pensions, worker's compensation, unemployment compensation, overtime payment, hardship bonuses, and, as members of the Ovaherero and Nama peoples, their rights to life and liberty. By taking these valuable intangible property rights, Defendant consequently took the valuable labor claims, wrongful death claims, and other tort claims from the victims and their heirs.

214. Under customary Ovaherero law and Nama law, all legal rights and obligations of an individual are passed upon death by intestacy to familial and communal heirs; these property rights were and are held on a communal basis by the sovereignty that inhered in the Ovaherero people and Nama people respectively. Plaintiffs and the Classes are the sole, rightful, and legal heirs to the rights in property taken by Defendant from the Ovaherero and Nama peoples in violation of international law. Through inheritance, Plaintiffs and the Classes have assumed all legal rights and claims that accrued to the Ovaherero and Nama peoples in connection with Defendant's takings.

215. The disposition over one's labor and the fruits of one's labor is a property right that inheres in the laborer's person. Defendant engaged in the genocide of the Ovaherero and Nama peoples with the active and explicit goal of enslaving those peoples and taking their labor and the fruits of their labor without compensation in violation of international law. Defendant profited by taking the intangible property rights of self-determination of one's labor and freedom from enslavement. Defendant used these property rights to construct valuable railways, government-owned facilities, and docks, to earn rental income by renting out slaves to regional industry by day and by month, and by selling the enslaved Ovaherero and Nama people to individuals, private companies and slave traders for domestic labor or export.

216. The proceeds of these sales to individuals, companies, and slave traders went directly to Defendant's treasury, to be comingled with other monies and assets to be used for other purposes. In addition, Defendant derived substantial savings from the use of forced and/or slave laborers from these indigenous populations since they did not have to hire workers at prevailing wages and salaries to construct the Otavi railway and other railway projects, and to perform other necessary work on various civil administration projects undertaken by the German Colonial authorities.

217. In addition to lost wages, Plaintiffs also assert property rights in various tort claims, including, but not limited to, wrongful death claims, for the

wrongful taking of the lives of Ovaherero and Nama peoples, and thereafter depriving the Ovaherero and Nama peoples of a forum for their claims to be heard.

218. Plaintiffs are entitled to an accounting and disgorgement of all savings that Defendant realized through these illegal takings—*i.e.*, back wages, payment of pensions and other labor benefits, as well as wrongful death and other tort claims, that are due to all former Ovaherero and Nama slaves—plus interest, in an amount to be determined at trial.

6. Defendant's Taking of Skulls, Flesh, Brains, Hair, and Other Body Parts and Mortal Remains

219. Defendant decapitated approximately 311 Ovaherero and Nama people, and as described above, forced women and girls to scrape the faces and flesh off the boiled heads. Defendant engaged in the genocide of the Ovaherero and Nama peoples, for among other purposes, to conduct experiments with their body parts. To that end, Defendant took the skulls in violation of international law. As a necessary step to accomplish Defendant's dastardly objective, Defendant also took the faces, flesh, and brains of the Ovaherero and Nama men in violation of international law.

220. Defendant profited from these takings through its scientific and medical research. Regardless of whether Defendant's pseudo-scientific research resulted in any genuine scientific or medical

discoveries, Defendant's publicly funded research institutions received an economic benefit.

221. After years of denial, in 2011 Defendant's Museum of Medical History at the Charité in Berlin returned twenty skulls of Ovaherero and Nama people to Namibia. These included eleven Nama and nine Herero skulls, which had belonged to four women, fifteen men, and a boy.

222. Numerous skulls and body parts of the Ovaherero and Nama peoples remain in Defendant's possession. Defendant has returned some, but not all such skulls, body parts, and other mortal remains. Defendant's publicly funded research institutions continue to discover the skulls, body parts, and other mortal remains of Ovaherero and Nama peoples.

223. In April 2017, Professor Philipp Osten, the Museum Director of the Museum of Medical History ("MMH") at the Medical School of Hamburg-Eppendorf, announced that seventy-three skulls were newly discovered, which the Museum had purchased between 1917–33.

224. The MMH's inventory books detail the origins of all such purchases. For example, the books identify Object No. 832 as the skull that belonged to an Ovaherero man. The jaw is missing, and the back of the skull is somewhat broken. It was purchased for the Museum by J. Flemming on August 1, 1924.

225. Hamburg University Professor Jürgen Zimmerer²³ recently began a diligent and searching effort to determine the origins of all human body parts collected from Defendant's colonies. Professor Zimmerer and a team of several doctoral students are in the process of analyzing the origins of approximately 5,000 objects from Africa, including skulls, body parts, and other mortal remains.

226. Plaintiffs have property rights to the skulls referenced herein, as well as all other skulls, body parts, and other mortal remains of Ovaherero and Nama people in Defendant's possession. Plaintiffs are entitled to the return of all such skulls, body parts, and other mortal remains taken in violation of international law, an accounting and disgorgement of medical and scientific research revenues derived from the above described mortal remains, plus interest, in an amount to be determined at trial.

227. Plaintiffs are also entitled to an accounting of all medical discoveries, academic findings, and scientific conclusions drawn from the research and experiments conducted by Defendant's agents on the skulls, body parts, and other mortal remains of the Ovaherero and Nama peoples.

²³ Professor of History at the University of Hamburg, Germany, and President of the International Network of Genocide Scholars.

7. Defendant Took and Dissected the Bodies of Plaintiffs' Family Members

228. Defendant murdered Ovaherero and Nama men, women, and children by hanging, placed their bodies in preservatives, and shipped their bodies to Germany for dissection by zoologists and racial theorists. These were takings of property in violation of international law.

229. Under traditional Ovaherero law, Nama law, and New York law, the disposition over an individual's body following death is a property right that inheres in the decedent's lawful heirs— not in the decedent's murderers. Defendant's profited by committing these murderous takings.

230. Defendant also exhumed the bodies of Plaintiffs' holy ancestors, which rested in sanctified cemeteries, including the bodies of the royal Maherero clan. Defendant took and shipped those bodies to Germany.

231. Defendant profited from these murderous takings through its scientific and medical research. The scientific results of these dissections and the current whereabouts of the subjects' dissected bodies are unknown. It is irrelevant whether the dissections led to scientific or medical discoveries, as the mere opportunity to engage in such dissections and experiments conferred a benefit on Defendant's publicly funded research institutions.

232. Plaintiffs have the right to bury or determine the disposition of the dissected bodies of their family members. Plaintiffs are entitled to the return of all bodies taken in violation of international law, an accounting and disgorgement of all revenues Defendant obtained through these egregious takings, plus interest, in an amount to be determined at trial.

233. Plaintiffs are entitled to an accounting of all medical discoveries, academic findings, and scientific conclusions drawn from the research, dissections, and experiments conducted by Defendant's agents on the bodies of the Ovaherero and Nama peoples.

8. The Location of Defendant's Takings

234. Hereroland and Great Namaqualand stood as sovereign equals to Defendant. The acts comprising the takings alleged herein did not occur within Defendant's sovereign territory. Mislabeling the area that belonged to the Ovaherero and Nama peoples as "German South West Africa" does not confer de jure or de facto sovereignty on that territory of South West Africa. Defendant's takings occurred in Hereroland (also known as Damaraland), Great Namaqualand, the Omaheke Desert, portions of Amboland and the Kaokoveld Desert, and surrounding territories.

235. In the alternative, Plaintiffs allege that the territories in which Defendant committed the acts comprising its takings in violation of international law were not under the control of any sovereign state, and

that the acts comprising Defendant's takings were acts of piracy in *terrae nullius* with a status under international law analogous to that of international waters.

I. Damages to the Ovaherero and Nama Peoples

236. Prior to the Ovaherero genocide, approximately 100,000 Ovaherero people lived in Hereroland. Following the genocide, Defendant had decimated the Ovaherero population such that only approximately 14,769 Ovaherero survived in Southwest Africa, and a few thousand lived in exile.

237. Prior to the Namaqua genocide, approximately 20,000 Nama people lived in Great Namaqualand. Following the genocide, only approximately 10,000 survived. A 1911 census found an Ovaherero population of 15,130, and a Nama population of 9,781. The death count includes the approximately 7,700 enslaved persons that Defendant killed in concentration camps.

238. Defendant left the surviving Ovaherero and Nama peoples destitute, enslaved, hiding in the mountains, and in exile. Their families, culture, wealth, wellbeing, and societies were irreparably harmed. From 1907 until Defendant lost its purported "colony" to the British in 1915, Defendant continued its policies of takings, slavery, exploitation, theft, and murder.

239. Before releasing the slaves from the concentration camps in 1908, Defendant passed a series

of “Native Ordinances” on August 18, 1907 that further expropriated property from the Ovaherero and Nama. First, under the Vagrancy Ordinance, any Ovaherero or Nama man or woman unable to prove the source of his or her livelihood was punished by flogging or imprisonment. Second, under the Husbandry Ordinance, the Ovaherero and Nama were prohibited from engaging in animal husbandry, which had been their livelihood for hundreds of years. Third, under the Identification Ordinance, all Ovaherero and Nama over the age of six were required to wear a chain around their neck at all times, to which a metal disc was attached with unique identification numbers kept in Defendant’s central registries and intended to keep track of allocated labor. The ordinance compelled all Ovaherero and Nama individuals to register their comings and goings.

240. To ensure that the Bondelszwart Nama tribe was kept in a state of intergenerational impoverished servitude, Defendant developed a resettlement plan, under which the Bondelszwart Nama of the south would be transported to Grootfontein in the north near Otavi, where they would be in an unfamiliar place without means of survival. Deputy Governor Oskar Hintrager described this plan on December 22, 1908:

My view is that in the interest of the Empire and of the Protectorate we must not indulge in silly humanitarian sentiments, but practice a utilitarian policy... the Bondels now in locations

must be deported to Grootfontein in the north where they will constitute no threat. This should be done by force, and the sooner the better.

241. Defendant also subjected the Ovaherero and Nama peoples to the illegal, discriminatory criminal jurisdiction of Imperial Courts. In such courts, Defendant continued to illegally try and punish thousands of Ovaherero and Nama people, almost exclusively for nonviolent offenses such as vagrancy or insubordination. For example, on one occasion, Ovaherero and Nama women were put to work as slaves on the railway line being constructed from Lüderitz to the town of Aus. Those that resisted this labor were prosecuted and punished, such as the three Ovaherero women identified at their criminal trials as Anna,²⁴ Justine,²⁵ and Johanna,²⁶ who were convicted at the Imperial Court in Lüderitz Bay. Indeed, that particular Imperial Court was opened in 1906 for the exclusive purpose of punishing under color of law Ovaherero and Nama peoples during their captivity at Shark Island.

²⁴ Namibian National Archives Windhoek, Records of the Imperial District Office of Lüderitz Bay at 220, Criminal Case No. 49 (Imperial Court of Lüderitz Bay).

²⁵ Namibian National Archives Windhoek, Records of the Imperial District Office of Lüderitz Bay at 221, Criminal Case No. 85 (Imperial Court of Lüderitz Bay).

²⁶ Namibian National Archives Windhoek, Records of the Imperial District Office of Lüderitz Bay at 220, Criminal Case No. 81 (Imperial Court of Lüderitz Bay).

242. Imperial criminal law was governed by the Imperial Decree of November 8, 1896, which established the punishments of flogging, birching, fines, imprisonment with hard labor, imprisonment in irons, and death. Corporal punishment had been abolished in Germany itself since 1871. The Ovaherero and Nama were routinely and discriminatorily convicted²⁷ and punished for nonviolent crimes such as “dereliction of duty,” “indolence,” and “insubordination.” Imperial law permitted slave- owners to flog slaves without trial and without an Imperial officer present.

243. The well-preserved Imperial records show the number of officially recorded floggings and birchings following conviction. These numbers do not include the rampant occurrence of extrajudicial floggings, birchings, and other punishments:

Year	Floggings and Birchings
1901–02	257
1902–03	473
1903–04	340
1904–05	187

²⁷ As early as the 1890s, the discriminatory Imperial Rules of Evidence prescribed that a German’s testimony legally and factually outweighs the cumulative unanimous testimony of up to six Africans.

1905–06	294
1906–07	336
1907–08	534
1908–09	703
1909–10	928
1910–11	1,262
1911–12	1,655

244. Floggings did not just inflict pain, but also caused permanent injury or death. Flogging was often conducted with the use of the sjambok—a heavy hippopotamus hide whip—which ripped apart the flesh of the person being flogged. For example, in 1912, a German farmer, Ludwig Cramer, flogged his Ovaherero slave Maria with the full knowledge and consent of Defendant’s officers and agents. Her injuries were severe, as described by a doctor she visited:

From the lower edge of the shoulder blades right to the loins, an absence of skin 20 by 18 centimeters in size covered with putrefying skin, except at the edges, which had granulated for a distance of one centimeter. Under the mortified skin exuded stinking matter, and some fly maggots were also visible. The edges were sharply defined:

On the right shoulder-blade were four to five deep lengthwise furrows, to the extent of a palm's breadth. On the right shoulder an absence of skin in extent 12 by 8 centimeters, also covered with putrefying skin, malodorous matter exuding under it. On the left shoulder an injury the size of a 5 Mark piece in the same condition. On the upper lip, forehead, in front diagonally across the breast, were older weals as if blows from a stick.

The statement of the injured person that she received the wounds through a [flogging] agrees with the conditions found.

The woman is not yet out of danger.

245. The mortality rate in Ovaherero and Nama communities reached dangerous levels in the years following the genocide. Because Defendant had taken their herds, the Ovaherero and Nama were deprived of the dairy-based diet they had thrived on for centuries, and as a result, scurvy took many lives. Malnourishment, poverty, lack of access to clean drinking water, and disease led to high mortality and infant mortality rates in Ovaherero and Nama communities.

246. Defendant's takings caused a stagnant birth rate in the Ovaherero and Nama communities. As reported in the *Deutsche Kolonialzeitung* (German Colonial News) in 1908, many Ovaherero and Nama women and girls had become sterile from the incessant rape by Defendant's agents who carried venereal diseases. Defendant's actions and takings also compelled many pregnant Ovaherero and Nama women to perform abortions on themselves, as they feared raising children in the hell that Defendant created.

247. Through its takings and murders, Defendant also destroyed the repositories of Ovaherero and Nama knowledge, culture, and practice, and interrupted the mechanisms for institutional transmission of such knowledge, culture, and practice. Over previous centuries and millennia, the Ovaherero and Nama peoples had refined expertise in fields as diverse as geology, animal husbandry, mythology, astronomy, fashion, trade, engineering, art, military tactics, storytelling, zoology, masonry, dance, hunting and trapping, philosophy, botany, forging and blacksmithing, tobacco farming, medicine and surgery, mountaineering, sports, jewelry, poetry, gardening, ivory-, bronze-, and iron-working, road building, bureaucracy and government, drama and comedy, wagon making, pharmaceuticals and homeopathy, ornithology, shoemaking, pottery, dye working, law, irrigation, fortification, ranching, religion and mysticism, celestial navigation, dairy processing, river and aquifer management, veterinary science, transhumance, weapon-making, court administration, marriage and burial ceremonies, writing and literature,

brewing, education, equestrianism, ecology and forestry, archery, mining, well drilling, architecture, tailoring, marksmanship, carpentry and woodworking, horticulture, weaving, mercantilism, culinary arts and vegetarianism, music, and bridge building. As lasting and stable societies, they had refined these rich traditions. Defendant's actions cut the transmission lines for this knowledge, much of which has been irreparably lost, thereby injuring Plaintiffs and Plaintiffs' classes and/or subclasses.

248. Defendant implemented its policy of exterminating the Ovaherero and Nama peoples from the face of the earth. Defendant failed, despite its efforts. The resilient Ovaherero and Nama peoples have endured, retaining what remains of their proud cultures and identities, and now live on as Ovaherero and Nama peoples in Namibia and in the diaspora worldwide.

J. Defendant's Use of the Property

249. Upon realization of the benefits achieved by its takings of Ovaherero and Nama property in violation of international law, Defendant commingled these fungible values within its general Imperial treasury and departmental treasuries of various Imperial ministries, agencies, and instrumentalities ("Defendant's commingled funds").

250. Defendant's Imperial Government retained complete control over the budget of its colonial authorities in South West Africa ("the colonial

budget”). The process relating to the colonial budget was complex, with the colonial authorities first making a proposal, which after being considered and approved by the German Government and the Reichsschatzamt, was submitted to the Parliament for adoption as law. The German Government was directly responsible for the financial administration of South West Africa, at least until a reform act was passed in 1909, which gave some degree of financial administrative control to the colonial authorities.

251. The German Empire received substantial financial benefit from the land and other property confiscations and forced labor. Contributing substantially to the colonial budget and the German treasury was the income generated and expenses saved through, *inter alia*, the use or sale of confiscated land or cattle; the use or sale of confiscated land or cattle for compensating white settlers; the use of forced labor for the purposes of the colonial administration or military forces (Schutztruppe); or the allocation and/or rental of prisoners and forced laborers to commercial enterprises.

252. Defendant benefited directly from the income generated by the takings and expenses saved in the territories of the Ovaherero and Nama that were unlawfully seized and incorporated into a territory Germany labeled “German South West Africa.”

253. A significant portion of the wealth Defendant amassed during its “colonial experiment” in southwestern Africa was derived from its taking of property from the Ovaherero and Nama peoples.

Germany became one of the wealthiest nations on earth, while as a consequence of Defendant's takings, Plaintiffs still languish in relative poverty and deprivation.

254. The German economy expanded rapidly during the colonial period starting in approximately 1884, and by 1900, the German Empire was the largest economy in Europe. After World War II, and beginning in the 1950s, Germany again experienced an "Economic Miracle" (*Wirtschaftswunder*) and continuing over the course of the remaining 20th Century and thereafter. Defendant evolved into an economic and political superpower, with the world's fourth-largest nominal GDP, the highest trade surplus of \$310 billion, and third-largest annual exports of \$1.3 trillion dollars.

255. Economists have hailed Defendant as the fastest-growing developed economy worldwide, in light of its continued stunning economic growth. As the economic powerhouse of the European Union, Defendant plays a leading economic and geopolitical role globally as a member of the G8 and G20 groups of nations and the North Atlantic Treaty Organization and is indisputably regarded as a global leader in commerce, industry, trade, and innovation.

256. In comparison, the Ovaherero and Nama peoples, having been deprived of their sovereignty and wealth by Defendant as alleged herein, continue to experience a state of socioeconomic stagnation with many of its peoples living in relative poverty both in Namibia and in the diaspora. Namibia is currently one of the most unequal societies on the planet: wealth,

land, and privilege are overwhelmingly held by the German-speaking White Namibian descendants of German settlers. For example, in 1998 the average incomes of Otjiherero- and Khoikhoi-speaking households in Namibia were respectively only 10.1 percent and 7.9 percent of the average income of German-speaking White Namibian households. While many Ovaherero and Nama individuals have made great strides, the majority of the Ovaherero and Nama communities live in poverty, exposed without aid to the hardships of unemployment, poor schools and secondary educational opportunities, depressed healthcare capacities and an HIV/AIDS epidemic, juvenile crime and delinquency, political oppression and few opportunities for political representation, challenging economic prospects, and a PTSD- and mental health crisis related to the intergenerational trauma that Defendant caused.

257. Many Ovaherero and Nama people are religious, with a large number practicing Christianity, and a small but growing Muslim population among the Nama. Christianity was introduced to the Ovaherero and Nama peoples through the German Rheinisch Missionary, which had arrived several decades before Defendant in South West Africa. Like many Germans, a great number of Ovaherero and Nama people live today as pious and devout Lutherans.

K. Defendant's New York Property that It Exchanged for the Property Taken in Violation of International Law

258. A portion of Defendant's enormous wealth is attributable to, was exchanged for, and can be traced from the property it took from the Ovaherero and Nama peoples in violation of international law. Defendant has invested this wealth worldwide with a particularly large investment in the city and state of New York. Defendant's investments in New York City constitute property exchanged for the property taken in violation of international law and which were derived from a portion of Defendant's commingled funds. This property is present in New York City in connection with commercial activities carried on in the United States by Defendant.

259. Defendant's properties in New York are used in connection with Defendant's commercial activities, and include, but are not limited to, the following real estate:

- a. A 7,040 square-foot townhouse, located at 119 E. 65th Street in the Borough of Manhattan (the "65th Street Property");
- b. A 133,750 square-foot building, located at 871 First Avenue in the Borough of Manhattan (the "First Avenue Property");

- c. A 1,591 square-foot condo, located at 346 E. 49th Street in the Borough of Manhattan (the “49th Street Condo”) and associated easement; and,
- d. A 16,147 square-foot building, located at 1014 Fifth Avenue in the Borough of Manhattan (the “Haunted Castle”).

260. The 65th Street Property is a four-unit, four-story townhouse, built in 1910, zoned for commercial use, and identified as Block 1400, Lot 9.

261. Since its purchase, now, and in the future, the 65th Street Property was, is, and will be used in connection with Defendant’s commercial activities, including, but not limited to:

- a. the performance and existence of contractual obligations related to the housing of German officials and employees in New York City;
- b. the performance and existence of contractual obligations related to contracts for maintenance, restoration, cleaning, and other services provided by contractors located in New York City;
- c. for example, such commercial activities include a maintenance and restoration “General Construction” project conducted by acclaimed architect, Frederick Schwartz for

the contract price of \$2,310,000, filed with the New York City Department of Buildings on April 1, 2009;

- d. Defendant's long-standing commercial activities in New York City and the United States in support of cultural propagation, German-language programs, and other programs to develop American interest in the German people, language, culture, and country with the ultimate goal of commercial growth through cultural growth;
- e. the performance and existence of contractual obligations under insurance contracts with domestic insurance providers related to property insurance, fire insurance, and other insurance coverage regarding the 65th Street Property; and,
- f. the possible future sale of the 65th Street Property.

262. The First Avenue Property, located at Block 1341, Lot 28 in the Borough of Manhattan, was purchased as an empty lot by Deed of Sale on April 15, 1996. Defendant thereafter constructed the high-rise on the First Avenue Property in the 1990s. The property is zoned for residential and commercial use, and houses Defendant's Mission to the United Nations, its Consulate General, and commercial offices of the German Academic Exchange Service (*Deutscher*

Akademischer Austauschdienst, also known as “DAAD”).

263. Since its purchase, now, and in the future, the First Avenue Property was, is, and will be in connection with Defendant’s commercial activities, including, but not limited to:

- a. the performance and existence of contractual obligations related to the housing of German officials, employees, and visitors to New York City;
- b. the performance and existence of contractual obligations related to contracts for maintenance, restoration, cleaning, and other services provided by contractors located in New York City;
- c. Defendant’s long-standing commercial activities in New York City and the United States in support of cultural propagation, German-language programs, and other programs to develop American interest in the German people, language, culture, and country with the ultimate goal of commercial growth through cultural growth;
- d. the performance and existence of contractual obligations under insurance contracts with domestic insurance providers related to property insurance, fire insurance, and other

insurance coverage regarding the First Avenue Property;

- e. the possible future sale of the First Avenue Property; and,
- f. the performance and existence of contractual obligations related to the DAAD, its commercial affiliates and employees, and its cultural, scientific, and academic partners, including both individuals and organizations.

264. The 49th Street Condo is composed of a Commercial Unit and Residential Unit, identified as Block 1341, Lots 1701 and 1702 respectively in the Borough of Manhattan. Defendant owns only the “Commercial Unit.” Defendant also owns an easement (“49th Street Easement”) that Defendant maintains for commercial and maintenance purposes in relation to the Commercial Unit. The 49th Street Easement was purchased by Easement Agreement on November 26, 1996.

265. The 49th Street Condo and the 49th Street Easement were, are, and will be in connection with Defendant’s commercial activities, including, but not limited to:

- a. the performance and existence of contractual obligations related to the housing of German officials, employees, and visitors to New York City;

- b. the performance and existence of contractual obligations related to contracts for maintenance, restoration, cleaning, and other services provided by contractors located in New York City;
- c. Defendant's long-standing commercial activities in New York City and the United States in support of cultural propagation, German-language programs, and other programs to develop American interest in the German people, language, culture, and country with the ultimate goal of commercial growth through cultural growth;
- d. the performance and existence of contractual obligations under insurance contracts with domestic insurance providers related to property insurance, fire insurance, and other insurance coverage regarding the 49th Street Condo and 49th Street Easement; and,
- e. the possible future sale of the 49th Street Condo and 49th Street Easement.

266. The Fifth Avenue Property, referred to by German media as the "Haunted Castle" (*Spukschloss*), is located at Block 1494, Lot 72. The Haunted Castle was built in 1905–06, by James W. Gerard, former Justice on the Supreme Court of the State of New York, and American Ambassador to Defendant prior to and during the First World War. It is an ornate six-story townhouse located directly across

the street from the New York Metropolitan Museum of Art.

267. Defendant purchased the Haunted Castle in the early 1950s. Since then, the Haunted Castle has served many purposes, including, but not limited to residential and commercial space for cultural attachés, programs, and installations such as the Goethe Institute. Renowned German thinkers, writers, and artists have visited and resided there, including, but not limited to, Hannah Arendt, Uwe Johnson, Günter Grass, Rainer-Werner Fassbinder, Volker Schlöndorff, Wim Wenders, and Jürgen Habermas.

268. The Goethe Institute was housed in the Haunted Castle between 1957 and 2010. In 2016 Defendant announced that the Haunted Castle will now be used as a permanent “German Academy of Art” in connection with a variety of commercial activities. During both time periods and in the future, the Haunted Castle was, is, and will be used in connection with Defendant’s commercial activities, including, but not limited to:

- a. the performance and existence of contractual obligations related to the housing of German officials, employees, and visitors to New York City; and,
- b. the performance and existence of contractual obligations related to contracts for maintenance, restoration, cleaning, and other

services provided by contractors located in New York City.

269. For example, such commercial activities at the Haunted Castle include, but are not limited to:

- a. Defendant's recent contract with H2 Consulting PE P.C. for "General Construction" maintenance and restoration work for the contract price of \$10,000, filed with the New York City Department of Buildings on May 29, 2017;
- b. Defendant's contract with Walter M. Schlegel PE for boiler repair and maintenance work for the contract price of \$11,000, filed with the New York City Department of Buildings on May 22, 1991;
- c. Defendant's long-standing commercial activities in New York City and the United States in support of cultural propagation, German-language programs, and other programs to develop American interest in the German people, language, culture, and country with the ultimate goal of commercial growth through cultural growth;
- d. the performance and existence of contractual obligations under insurance contracts with domestic insurance providers related to property insurance, fire insurance, and other

insurance coverage regarding the Haunted Castle;

- e. the possible future sale of the Haunted Castle; and,
- f. the performance and existence of contractual obligations related to commercial and cultural exhibitions in New York City, including, but not limited to, Max Bechman's art exhibit in 1968, Rainer Werner Fassbinder's video installation in 1973, Rirkrit Tiravanija's art exhibit in 1992, Nam June Paik's art exhibit in 1999, Candida Höfer's art exhibit in 2004, and the October 2010 "Hotel Savoy" art installation by director Dominic Huber—an interactive theater experience, in which theatergoers wandered through the Haunted Castle's "spooky" set design.

270. The Haunted Castle is currently valued at over \$50 million.

L. Germany Finally Acknowledges the Genocide, But Refuses to Include the Ovaherero and Nama Leaders in Discussions Relating Thereto

271. In 1985, the United Nations' Whitaker Report classified the massacres as an attempt to exterminate the Ovaherero and Nama peoples of South-

West Africa, and therefore the earliest cases of genocide in the 20th century.

272. In 1998, German President Roman Herzog visited Namibia and met Ovaherero leaders. Chief Munjuku Nguvauva demanded a public apology and compensation, but Herzog stopped short of an apology, only expressing “regret.”

273. On August 16, 2004, at the 100th anniversary of the start of the genocide, a member of the German government, Heidemarie Wieczorek-Zeul, Germany’s Minister for Economic Development and Cooperation, apologized and expressed grief about the genocide:

We Germans accept our historic and moral responsibility, and the guilt incurred by Germans at that time... The atrocities committed at that time would have been termed genocide.

274. However, the German government quickly made it clear that her speech could not be interpreted as an “official apology” by Germany or a basis for the payment of any compensation, reparations or restitution.

275. Minister Wieczorek-Zeul also has explained that Defendant’s 2004 admission of liability was tied to the equally implicit admission that “there exists a continuing injury against the living

descendants.”²⁸ In other words, Minister Wieczorek-Zeul and other prominent present and former members of the German government have admitted that the Plaintiffs, who are the living descendants of the Ovaherero and Nama peoples subjected to the genocide and unlawful takings, suffer a continuing intergenerational injury due to, among other things, the expropriation of land, all personal wealth and valuables, and the absence of adequate educational and social institutional supports by which the Ovaherero and Nama could have continued to thrive but for those takings.

276. Former German ambassador to Namibia, Wolfgang Massing, stated in 2005:

If Germany were to admit that it was genocide, then the case for reparations will find basis in merit.

277. It was not until October 2011, however, after three years of talks, twenty skulls were returned to Namibia for burial, and additional human remains were returned in 2014. However, the skulls returned in 2011 were not returned for purposes of burial, but rather to be preserved as physical evidence of the horrific crimes committed by Defendant. These human

²⁸ Forward by Heidemarie Wieczorek-Zeul in Reinhart Kößler & Henning Melber, *Völkermord – und Was Dann?* 9 (Brandes & Apsel 2017) (“...eine fortdauernde Verletzung der Nachfahren der Opfer.”).

remains are not the last of the remains in Defendant's possession.

278. Beginning in 2015, German Foreign Ministry guidelines began referring to the killings as a "genocide." At or around the same time, Defendant acknowledged the "Armenian genocide" as a genocide for the first time. The Armenian genocide, like the Ovaherero/Nama genocide, was marked by large-scale genocidal expropriation. In September 1915, the Ottoman parliament passed the "Temporary Law of Expropriation and Confiscation," taking all property and land of the Armenians. In connection with the Armenian genocide, Bundestag President Norbert Lammert²⁹ stated:

[A]nyone who refers to the Turkish massacre of Armenians in 1915 as genocide must also acknowledge that atrocities committed by German imperial troops a decade before in what is now Namibia should also be described as such.

279. Minister Wiczorek-Zeul also stated:

There were tens of thousands of Herero and Nama victims, not only through fighting but also illness and the targeted killing through allowing

²⁹ President of the Bundestag from 2005 to 2017.

people to die of thirst and hunger... Others died in concentration camps and in slave labor.”

280. Like the Ovaherero and Nama peoples, the Armenians died through numerous causes, including, but not limited to targeting killings, thirst, and hunger, whether in concentration camps or slave labor. Thus, since Germany considers the Ottoman/Turkish treatment of the Armenians to be a genocide, it must acknowledge that the same or similar actions it took against the Ovaherero and Nama were genocidal.

281. At a press conference held on July 10, 2015, the spokesperson for the German Foreign Office, Dr. Martin Schafer, stated the German Government’s official position on the war of extermination in South West Africa is that “[t]he war of extermination in Namibia from 1904 to 1908 was a war crime and genocide.”

282. In its June 22, 2016 response to questions from members of the Bundestag (German Parliament), the German Government acknowledged that the statements made on July 10, 2015 by Dr. Schafer on behalf of the German Foreign Office “reflect the position of the Federal Government.”³⁰

283. The current President of Germany and the former Foreign Minister Frank-Walter Steinmeier also admitted in 2015 that its actions in South West

³⁰ See Bundestag printed paper no: 18-8859 of 22.06.2016.

Africa amounted to a “war of annihilation and constitute a war crime and genocide.” This followed a formal declaration by the German federal government, apologizing for the “genocide.”

284. On numerous occasions, Defendant, through formal channels, made admissions to the world and the Plaintiff class members that Defendant’s actions amounted to genocide.

285. Defendant admitted its commission of genocide in legislative proceedings and its ongoing discussions with Namibia and has benefited politically from making this admission. Defendant’s admission of genocidal conduct constitutes both an admission of jurisdiction and an admission of liability.

286. Nevertheless, despite its admission that what the atrocities it had committed amounted to a genocide, the German government has continued to refuse to negotiate directly with the leaders and representatives of the Ovaherero and Nama communities, even though those are the two specific communities who were targeted for extermination.

27. The exclusion of Plaintiffs from these discussions by Germany amounts to yet another “taking” and attempt to strip the Ovaherero and Nama people of their valuable intangible property rights recognized under international law, including the right to make claims and be heard before an impartial and fair tribunal.

M. Defendant Excludes the Ovaherero and Nama in Talks with Non-Party Namibia

288. Defendant has sought to negotiate with Namibia, a non-party to the dispute, concerning the claims described herein. These negotiations—including the prospect of settlement through payment, investment, or other tangible or intangible aid—constitute “commercial activity.”

289. Despite the incalculable economic, cultural, intellectual, and spiritual losses that the Ovaherero and Nama peoples have suffered, Defendant has systematically and categorically excluded the lawful representatives of the indigenous Ovaherero and Nama peoples from negotiations between Defendant and Namibia and has steadfastly refused to even consider compensating the Ovaherero and Nama peoples for the losses it inflicted upon them.

290. Defendant’s acts violate the Ovaherero and Nama people’s rights under international law to raise its claims and be heard before an impartial tribunal.

291. Defendant’s acts also violate its obligations under the U.N. Declaration on the Rights of Indigenous Peoples, which explicitly provides, at Article 11 (2):

States shall provide redress through effective mechanisms, which may include restitution,

developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

292. In addition, Article 18 of the U.N. Declaration provides as follows:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.

291. The Ovaherero and Nama peoples hereby demand that they be given the right to exercise their rights to redress as third-party beneficiaries under the Declaration.

294. Defendant's exclusion and violation of the U.N. Declaration continues the racist, imperialist policies manifested at the 1884–85 at the Berlin West Africa Conference. In 1884, Defendant—in a typical manifestation of its xenophobic folly—did not view the Ovaherero and Nama peoples as “sovereign equals,” but rather as belonging to a lesser, uncivilized object

race lacking agency over its people or fate. In 2018, Defendant continues to refuse to include the Ovaherero and Nama peoples in its discussions with Namibia, again treating the Ovaherero and Nama peoples as lesser, uncivilized objects without “sovereign equality” to the supposed grandeur of Defendant’s “Federal Republic.” Defendant ignores, objectifies, and marginalizes the Ovaherero and Nama peoples now as it did in 1884 in Berlin.

N. Defendant’s Acts Have a Direct Effect in the United States

1. U.S. Plaintiffs and Ovaherero and Nama Communities in New York and Elsewhere in the U.S.

295. Many descendants of the Ovaherero and Nama peoples and lawful claimants as Plaintiff class members have emigrated from Namibia, and now call the United States their home as U.S. Citizens, lawful residents, and patriotic Americans. There are approximately 140 Ovaherero class members in the New York metropolitan area alone, most of whom are members of the Plaintiff Association. Other members of the Classes reside throughout the United States and are active in various organizations dedicated to the preservation of Ovaherero and Nama culture, and educational and outreach programs regarding the Ovaherero/Nama Genocide.

296. Defendant's unlawful takings in connection with the genocide, as well as its refusal to negotiate with Ovaherero and Nama representatives in violation of the U.N. Declaration, has had a direct and proximate effect on class members residing in the United States. They were deprived of their property and other financial and economic resources, as well as educational and cultural opportunities that would have been available to them but for Defendant's genocide and unlawful takings, were forced to flee their homeland, deprived of their citizenship rights in their own indigenous sovereign countries, and forced to make a new start in other countries, including the United States.

2. Human Remains from the Genocide Discovered in New York

297. In September 2017, the American Museum of Natural History ("AMNH") in New York City confirmed to Plaintiffs that it was in possession of Namibian human remains, which related to the 1904-1908 German genocide of the Ovaherero and Nama peoples.

298. The human remains were originally collected by Professor Felix von Luschan, a German anthropologist and ethnologist at the Museum for Ethnology in Berlin from 1885-1910. He was also a member of the German Society for Racial Hygiene. Over the span of many years, von Luschan built up two

large collections containing thousands of specimens: one for the Berlin museum and one in his own private possession. Both collections contained skulls and skeletons of Namibians that had been shipped from Africa to Berlin during the German colonial period.

299. According to Dr. Holger Stoecker, a historian at Humboldt University in Berlin familiar with the collection, after von Luschan's death in 1924, his widow sold his private collection to the AMNH in New York. Upon information and belief, Felix Warburg, the German-born New York banker, donated the money for the transfer of the collection from Berlin to New York.

300. Of the eight human remains from Namibia at the AMNH, at least two appear to be genocide victims, including one from Shark Island, the notorious German concentration camp located at Luderitz Bay, and one from Windhoek, where the German colonial authorities also maintained a concentration camp for the Ovaherero and Nama prisoners.

301. The discovery of Namibian and Ovaherero remains at the AMNH shows that the Genocide of the Ovaherero and Nama peoples in the early part of the 20th Century involved not only the mass killing of Ovaherero and Nama men, women and children, and the confiscation of their lands and livestock, but also involved the desecration of their remains. Hundreds of skulls and skeletons were carted away to Berlin by German scientists and researchers. These desecrated remains were used extensively in pseudo-scientific experiments to support racist theories that speciously

claimed that African races were inferior to the German peoples.

3. Discovery of Copy of “Blue Book” in New York Public Library

302. Plaintiffs have discovered that a rare copy of the “Blue Book,” published in 1918, is located at the New York Public Library’s main branch on Fifth Avenue in Manhattan. The book, “Union of South Africa – Report On the Natives of South-West Africa And Their Treatment By Germany,” was prepared by South African officials in Windhoek, and published in the United Kingdom by His Majesty’s Stationery Office (HMSO) and presented to both Houses of Parliament that year.³¹

303. This Blue Book is an invaluable record which includes testimony to the atrocities from genocide survivors. The presence of a Blue Book copy in New York is extraordinary since between the two World Wars Great Britain considered Germany briefly as an ally and attempted to suppress records of Germany’s genocide of the indigenous peoples of South West Africa by, among other things, destroying all copies of the Blue Book. The copy located at the New York Public Library is one of the few surviving copies.

³¹ After World War I the administration of South West Africa was transferred to the United Kingdom and South Africa.

4. New York Is A Center For Ovaherero/Nama Genocide Research

304. New York has become one of the leading research and conference centers for the study of the Ovaherero/Nama genocide. The AMNH has had a series of meetings with Plaintiffs and members of the Ovaherero and Nama communities regarding human remains from the German genocide in the Museum's possession, and there are ongoing discussions relating to the possible establishment of a permanent online Ovaherero/Nama Genocide exhibition (which would include human remains and artifacts).

305. In addition, the Schomburg Center for Research in Black Culture, located at 515 Malcolm X Blvd in Manhattan, in association with the Plaintiff Association, has undertaken research and held a recent conference, "The First Genocide of the 20th Century," chaired by Dr. Ngondi Kamatuka, who himself is a descendent of the Ovaherero/Nama Genocide and now a U.S. citizen.

306. Columbia University has sponsored an ongoing research program and another major educational conference focused on the German south west African genocide, bringing together leaders and members of the Ovaherero and Nama communities with photojournalists and documentary film makers based in New York, who have documented the lasting and continuing impact that the Defendant's genocide has had on the descendants of these victims both in Africa and in the United States. The Holocaust Studies and

Human Rights Program of Cardozo Law School, Yeshiva University, has also committed some of its resources to this project.

307. The Ovaherero/Nama Genocide has been given significant attention by the Holocaust Memorial and Education Center, Glen Cove, New York, which sponsored an international conference, research and educational program, and has hosted the filming of a public television program and series with WLIW21 and WNET.

308. In short, the Ovaherero and Nama communities in New York have a wide range of historical, educational and cultural ties with numerous not-for-profits, museums, cultural/educational entities and multimedia programs in the New York area.

O. Plaintiffs' Injuries

309. Under customary Ovaherero law and Nama law, the rights of a decedent are passed by intestacy, and property that inhered in the Ovaherero people and Nama people respectively is held on a communal basis by the sovereignty. Plaintiffs and the Classes are the heirs to the rights in property taken by Defendant from the Ovaherero and Nama peoples in violation of international law.

310. In the alternative, Plaintiffs Paramount Chief Rukoro of the Ovaherero and Chief Isaack of the Nama are the sole, rightful, and legal representatives of the continuing bodies politic of the Ovaherero people

and Nama people respectively, and thereby represent bodies that are not legal *successors* to the Ovaherero people and the Nama people of 1884–1915, but rather are one and the same with an identical, unbroken legal status. As such, the claims and rights asserted herein were never inherited, but have inhered since their origins in the bodies politic represented by Plaintiffs.

311. Further, in the alternative, Plaintiffs and the Classes have suffered the injuries alleged herein directly and proximately, in that Defendant engaged in a lawless course of conduct to annihilate not only the Hereroland and Great Namaqualand polities in their entirety, but also to annihilate the existence of the Ovaherero and Nama peoples *qua* peoples—including all descendants. The genocide and takings led to intergenerational impoverishment that has lasted for over one-hundred years.

312. Plaintiffs and the Classes have been directly and proximately injured by Defendant, as set forth *supra*, and as described below.

1. Economic Injuries

313. Defendant deprived Plaintiffs and the Classes of their valuable rights in the land, cattle, minerals and precious metals, concession, taxation, and customs revenues, the fruit of the labor of family members and their associated pension rights, as well as other property. Defendant's actions have caused Plaintiffs and the Classes to incur exorbitant medical

and disability expenses; to lose wages; to find unsatisfactory replacement property; and, to incur the costs of funerals and burials; all totaling an amount to be proven at trial.

2. Non-Economic Injury

314. Defendant's taking of the skulls, body parts, and bodies deprived Plaintiffs and the Classes of the mortal remains of their family members. Defendant's genocidal conduct and mass murder subjected Plaintiffs and the Classes to a loss of consortium, mental anguish, pain and suffering, disfigurement, reputational injury, and spiritual injuries sustained by Defendant's destruction of the sovereign polities of Hereroland and Great Namaqualand. Defendant also injured Plaintiffs and the Classes by destroying the institutional mechanisms for transmission of the peoples' knowledges, traditions, and practices, and thereby depriving Plaintiffs and the Classes with those knowledges, traditions, and practices. The amount of these damages will be proven at trial.

3. Punitive Damages

315. In light of Defendant's malice, ill will, and blatant disregard for human dignity and human rights, Plaintiffs assert the right to punitive damages in an

amount sufficient to punish Defendant for its flagrant violations of international law and to deter any such future conduct.

CLASS ACTION ALLEGATIONS

316. Plaintiffs are U.S. citizens and aliens who bring this action on behalf of themselves and all other U.S. (the “U.S. Class”) and non-U.S. citizens (“the non-U.S. Class”) who are, or who are direct descendants of, members of the Ovaherero and Nama indigenous peoples (“the Classes”).

317. Neither the members of U.S. Class, the members of the non-U.S. Class, nor the ancestral members of the Ovaherero and Nama indigenous peoples are or were Defendant’s citizens. Any and all citizens of Defendant are excluded from the Classes.

318. This action may be properly maintained as a Class action pursuant to Rule 23, Federal Rules of Civil Procedure. This action may be properly maintained as a Class action pursuant to Fed. R. Civ. P. 23(b)(1) in that the prosecution of separate actions by or against individual members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests. This action may be properly maintained as a Class action pursuant to Fed. R. Civ. P. 23(b)(2) as

the parties opposing the Class have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

A. Predominance of Common Questions

319. There are also questions of law and fact common to the Class which predominate over questions affecting individual members, including:

(a) Did the German colonial authorities design and implement an intentional policy and practice to exterminate the Ovaherero and Nama people?

(b) Did the German colonial authorities systematically expropriate, and aid and abet the expropriation, of Ovaherero and Nama land, personal property, livestock, concession, taxation, and customs rights, human labor, body parts, and other property?

(c) Did the German colonial authorities implement, aid and abet, and authorize a policy and practice of systematic rape of Ovaherero and Nama women?

(d) Did the German colonial authorities implement, aid and abet and authorize a policy

and practice of forcing Ovaherero and Nama into involuntary servitude and forced/slave labor?

(e) Did the German colonial authorities incarcerate the surviving Ovaherero and Nama people in concentration camps under inhumane and sub-human conditions, without adequate food, water, clothing, shelter, medical care and other basic requirements and tools for survival, at Shark Island and other concentration camps?

(f) Did German authorities permit and aid and abet the pseudoscientific medical experimentation on Ovaherero and Nama corpses and skulls in a misguided and ghoulish effort to establish that indigenous Africans were Untermensch (inferior or sub-human) and that the German “race” was superior?

(g) To that end, did Defendant force Ovaherero and Nama women and girls to use glass shards to manually scrape the flesh, face, and scalp off of the boiled heads of their husbands and fathers?

(h) Did Defendant’s takings violate international law?

(i) Has German intentionally marginalized and excluded Ovaherero and Nama leadership and representatives from any negotiations regarding the genocide and wrongful expropriation of their property, in violation of the U.N. Declaration of the Rights of Indigenous Peoples?

B. Superiority

320. Defendant's takings treated the Ovaherero and Nama as classes to be uniformly annihilated, and for their land to be uniformly expropriated according to Defendant's desire. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Plaintiffs and Plaintiff class members have all suffered and will continue to suffer economic harm and damage as a result of Defendant's unlawful and wrongful conduct, which was directed towards the Ovaherero and Nama peoples as a whole, rather than specifically or uniquely against any individual.

321. Defendant has acted uniformly with respect to Plaintiffs and the Classes. Absent a class action, most class members would likely find the cost of litigating their claims prohibitively high and would thus have no effective remedy at law or equity. Most Plaintiff class members are impoverished with limited access to lawyers and courts. Because of the relatively small size of each individual class member's claim, it is likely that only a few class members would be able to afford to seek legal redress for Defendant's misconduct. Absent a class action, Plaintiff class members will continue to incur damages, and they will remain without effective remedy.

322. Class treatment in this Court will conserve the resources of the courts and the litigants, and will promote consistency and efficiency of adjudication by providing common answers to the

common questions of law that predominate in this action.

323. Class-wide relief and judicial supervision under Rule 23 assures fair, constituent, and equitable treatment and protection of all Plaintiff class members, and uniformity and consistency in Defendant's discharge of its legal obligation to make restitution and pay damages.

C. Typicality

324. The claims of the named Plaintiffs are typical of the members of the Classes and they will be able to fairly and adequately protect the interests of the Classes. The named Plaintiffs have no interests antagonistic to the interests of other members of the Classes.

D. Numerosity

325. While the exact number of Class members is unknown to Plaintiffs currently, it is estimated that the Classes are so numerous that joinder of individual members herein is impracticable.

E. Adequacy

326. Plaintiffs will fairly and adequately protect the interests of the members of the Classes and

have retained competent counsel, experienced in class action litigation and litigation involving international human rights, takings of private property, and complex civil litigation. Plaintiffs are members of the Classes and do not have interests antagonistic to or in conflict with the other members of the Classes.

COUNT I

(Violations of International Law Under the Alien Tort Statute, 28 U.S.C. § 1350, Federal Common Law and The Law of Nations)

327. Plaintiffs repeat and reallege the foregoing paragraphs of this Complaint as though fully set forth herein.

328. Germany's horrific mistreatment of the Ovaherero and Nama during the colonial period, including but not limited to the mass killings intended to exterminate the Ovaherero and Nama peoples, the systematic rape and abuse of Ovaherero and Nama women, the taking and expropriation of lands, cattle and other property without compensation and in furtherance of Germany's genocidal policies, the herding of Ovaherero and Nama survivors into concentration camps, the exploitation of surviving Ovaherero and Nama as forced/slave laborers, and the use of Ovaherero and Nama corpses and skulls for pseudoscientific experimentation and public display, constituted genocide under international law.

329. In addition, Germany, as the purported governmental authority during the colonial period, is liable for aiding and abetting German settlers and residents of then-South West Africa in the confiscation of lands, cattle and other property from the Ovaherero and Nama in violation of international law, the systematic rape of Ovaherero and Nama women by said German civilian and military personnel, and the unlawful use of Ovaherero and Nama as forced/slave laborers.

330. Germany is also liable to Plaintiffs and the Classes for its violations of the U.N. Declaration of the Rights of Indigenous Peoples, in that it has refused to recognize that the lawful representatives of the indigenous Ovaherero and Nama peoples have a right to participate in negotiations relating to the genocidal policies and practices of the German Imperial authorities during the colonial period, refusal to recognize the right to self-determination of the Ovaherero and Nama, and the refusal to even consider the issue of reparations and compensation to the Ovaherero and Nama for the catastrophic abuses that they were forced to endure.

331. Germany is liable to the non-U.S. Plaintiffs and the non-U.S. Class for damages under the Alien Tort Statute, 28 U.S.C. §1350, in an amount to be determined at trial.

332. Germany is liable to the U.S. Plaintiffs and the U.S. Class for these violations of international law under federal common law, which incorporates

international law, in an amount to be determined at trial.

COUNT II
(Conversion of Land, Livestock and Other Property)

333. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Complaint as though fully set forth herein.

334. Germany's confiscation and unlawful taking of the lands, cattle and other property of the Ovaherero and Nama peoples without compensation constituted a conversion under common law and New York state law.

335. Germany's aiding and abetting of the confiscation and unlawful taking of the lands, cattle and other property of the Ovaherero and Nama peoples without compensation by German nationals and others during the colonial period constituted a conversion under common law and New York state law.

336. As a result, Plaintiffs and all Ovaherero and Nama members of the Classes were deprived of their property, its use and enjoyments, and any interest and provides which could have been earned thereon.

337. Germany is liable to the Plaintiffs and the Classes for such damages in an amount to be determined at trial.

338. Plaintiffs and the Classes are also entitled to the return of the assets and property that was looted and confiscated directly by the Defendant, or which was aided and abetted by the Defendant, in an amount to be determined at trial.

COUNT III
(Conversion of the Concession, Taxation, and
Customs Rights)

339. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Amended Complaint as though fully set forth herein.

340. Germany's taking of the concession, taxation, and customs rights of the Ovaherero and Nama peoples without compensation constitutes a conversion under New York law.

341. Germany's aiding and abetting of taking of the concession, taxation, and customs rights of the Ovaherero and Nama peoples without compensation by private parties constitutes a conversion under common law and New York law.

342. As a result, Plaintiffs and the Classes have been deprived of their concession, taxation, and customs rights, its use and enjoyments, and any interest that would have been earned thereon.

343. Germany is liable to Plaintiffs and the Classes for damages in an amount to be determined at trial.

COUNT IV
(Conversion of Precious Metals and Gems and Other
Resources)

344. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Amended Complaint as though fully set forth herein.

345. Germany's taking of the precious metals, precious gems, and other natural resources of the Ovaherero and Nama peoples without compensation constitutes a conversion under New York law.

346. Germany's aiding and abetting of taking of the precious metals, precious gems, and other natural resources of the Ovaherero and Nama peoples without compensation by private parties constitutes a conversion under common law and New York law.

347. As a result, Plaintiffs and the Classes have been deprived of their rights in the precious metals, precious gems, and other natural resources, its use and enjoyments, and any interest that would have been earned thereon.

348. Germany is liable to Plaintiffs and the Classes for damages in an amount to be determined at trial.

349. Plaintiffs and the Classes are also entitled to the return of all precious metals, precious gems, and other natural resources confiscated directly by Defendant, or which was aided and abetted by

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Defendant, and which are owned by Defendant, in an amount to be determined at trial.

COUNT V

**(Conversion of the Wages of the Ovaherero and
Nama Peoples)**

350. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Amended Complaint as though fully set forth herein.

351. Germany's taking of the wages of the Ovaherero and Nama peoples without compensation constitutes a conversion under New York law.

352. Germany's aiding and abetting of taking of the wages of the Ovaherero and Nama peoples without compensation by private parties constitutes a conversion under common law and New York law.

353. As a result, Plaintiffs and the Classes have been deprived of their rights in the back-pay of wages, its use and enjoyments, and any interest that would have been earned thereon.

354. Germany is liable to Plaintiffs and the Classes for damages in an amount to be determined at trial.

COUNT VI
(Conversion of Labor and Pension Rights)

355. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Amended Complaint as though fully set forth herein.

356. Germany's taking of the labor and pension rights of the Ovaherero and Nama peoples without compensation constitutes a conversion under New York law.

357. Germany's aiding and abetting of taking of the labor and pension rights of the Ovaherero and Nama peoples without compensation by private parties constitutes a conversion under common law and New York law.

358. As a result, Plaintiffs and the Classes have been deprived of their rights in the labor and pension rights, and its use and enjoyments.

359. Germany is liable to Plaintiffs and the Classes for damages in an amount to be determined at trial.

COUNT VII
(Conversion of Skulls, Body Parts, and Mortal
Remains)

360. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Amended Complaint as though fully set forth herein.

361. Germany's taking of the skulls, body parts, and other mortal remains of the Ovaherero and Nama peoples without compensation constitutes a conversion under New York law.

362. Germany's aiding and abetting of taking of the skulls, body parts, and other mortal remains of the Ovaherero and Nama peoples without compensation by private parties constitutes a conversion under common law and New York law.

363. As a result, Plaintiffs and the Classes have been deprived of their rights in the skulls, body parts, and other mortal remains, and its use and enjoyments.

364. Germany is liable to Plaintiffs and the Classes for damages in an amount to be determined at trial.

365. Plaintiffs and the Classes are also entitled to the return of all skulls, body parts, and other mortal remains confiscated directly by Defendant, or which was aided and abetted by Defendant, and which are owned by Defendant, in an amount to be determined at trial.

COUNT VIII
(Conversion of Sovereignty Property Rights)

366. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Amended Complaint as though fully set forth herein.

367. Germany's taking of the property rights of the Ovaherero and Nama nations without compensation constitutes a conversion under New York law.

368. Germany's aiding and abetting of taking of the property rights of the Ovaherero and Nama nations without compensation by private parties constitutes a conversion under common law and New York law.

369. As a result, Plaintiffs and the Classes have been deprived of their property rights of the Ovaherero and Nama nations, and their use and enjoyment.

370. Germany is liable to Plaintiffs and the Classes for damages in an amount to be determined at trial.

COUNT IX
(Unjust Enrichment)

371. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Complaint as though fully set forth herein.

372. By its seizure, use and retention of the property looted from the Plaintiffs and Class members, through its aiding and abetting of others to convert Plaintiffs' property, and by its refusal and failure to return said looted assets to their rightful owners, Defendant improperly deprived Plaintiffs and other Class members of their property.

373. Plaintiffs and the Classes are therefore entitled to recover damages in an amount to be determined at trial.

COUNT X
(Accounting)

374. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Complaint as though fully set forth herein.

375. Plaintiffs and the Classes are entitled to an accounting from Germany for the losses that they suffered for the confiscation of their lands, cattle and other properties in violation of international law.

COUNT XI
(Constructive Trust)

376. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Amended Complaint as though fully set forth herein.

377. Plaintiffs and the Classes are entitled to establishment of a constructive trust, as Defendant cannot in good conscience retain the beneficial interests of its takings, and equity compels Defendant to serve as trustee to Plaintiffs.

COUNT XII
(Declaratory Judgment)

378. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Complaint as though fully set forth herein.

379. Plaintiffs and the Classes are entitled to an Order, pursuant to Title 28, United States Code, Section 2201, declaring that Defendant's aforesaid intentional and unlawful actions have caused and continue to cause Plaintiffs and the Classes damages as a direct and proximate result of Germany's refusal to respect Plaintiffs' rights, among other things, (i) as the legitimate successors to sovereign nations; (ii) as successors to the rights of the Ovaherero and Nama peoples; (iii) as successors to the rights of generations of victims to damages and restorative justice; and (iv)

as the sole and lawful persons, and indispensable parties, to all discussions and negotiations regarding the issues presented herein.

380. Plaintiffs and the Classes also are entitled to an Order, pursuant to Title 28, United States Code, Section 2201, declaring that Defendant's exclusion of Plaintiffs, as the legitimate and lawful representatives of the Ovaherero and Nama indigenous peoples, from current negotiations regarding the subject matter of this Complaint, is a violation of Plaintiffs' rights under international law, including the U.N. Declaration on the Rights of Indigenous People.

381. Pursuant to 28 U.S.C. § 2201, there exists a real, immediate and urgent need for Plaintiffs to obtain a declaration of the rights and legal relations between them and the Defendant.

382. In the absence of such a declaration of rights and legal relationship between the parties, Defendant will continue to deprive and obstruct Plaintiff's rights to damages and restorative justice.

JURY TRIAL DEMAND

383. Plaintiffs demand a jury trial on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court designate Plaintiffs as the named representatives of the Classes, designate any appropriate subclasses, under applicable provisions of Fed. R. Civ. P. 23, and that the Court enter judgment in their favor and against Defendant, as follows:

- (a) Certify this as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;
- (b) Order that the undersigned attorneys are designated as class counsel;
- (c) Adjudge and decree that Defendant's conduct as described herein was in violation of international law, federal statutory and federal common law, and the law of New York State;
- (d) Enjoin and restrain Defendant from continuing to exclude Plaintiffs and other lawful representatives of the Ovaherero and Nama people from participation in discussions and negotiations regarding the subject matter of this Complaint, in violation of Plaintiffs' rights under the U.N. Declaration on the Rights of Indigenous People to self-determination for all indigenous peoples and their right to participate and speak for themselves regarding all matters relating to the losses that they have suffered;
- (e) Award damages to the Plaintiffs and the Non-U.S. Class under the Alien Tort Statute,

and to both Classes under international law, federal common law, and New York law, including conversion and unjust enrichment, for the damages sustained by Plaintiffs and the Classes as a result of Defendant's violations, including its violation of the Genocide Convention and the U.N. Declaration on the Rights of Indigenous Peoples;

- (f) Award damages to the Plaintiffs and the Classes for all common and state law violations, including the conversions and unjust enrichment;
- (g) Direct that Defendant conduct an accounting of the value of the land, personal property, livestock, concession, taxation, and customs rights, human labor, body parts, and other property rights taken from the Ovaherero and Nama peoples;
- (h) Order that a Constructive Trust be established with regard to the value of all land, personal property, livestock, concession, taxation, and customs rights, human labor, body parts, and other property rights that were taken, and the profits derived therefrom;
- (i) Award Plaintiffs and the Classes punitive damages in an amount sufficient to punish Defendant for its flagrant and outrageous

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violations of international law and to deter such future conduct;

- (j) Award Plaintiffs the costs of bringing this action, pre- and post-judgment interest on any amounts awarded, reasonable attorneys' fees; and,
- (k) Grant such other and further relief as this Court deems just and proper.

Dated: New York, New York

February 14, 2018

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/s/

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VEKUII RUKORO, Paramount
Chief of the Ovaherero People
and Representative of the
Ovaherero Traditional Authority;
JOHANNES ISAACK, Chief
and
Chairman of the Nama
Traditional Authorities
Association; THE
ASSOCIATION OF THE
OVAHERERO GENOCIDE IN
THE USA INC.; and
BARNABAS VERAA
KATUUO, Individually and as an
Officer of The Association of the
Ovaherero Genocide in the USA,
Inc., on behalf of themselves and
all other Ovaherero and Nama
indigenous peoples,

Civ. No. 17-0062-
LTS

Plaintiffs,

-against-

FEDERAL REPUBLIC OF
GERMANY,

Defendant.

PLAINTIFFS' MOTION FOR LEAVE TO FILE
SUPPLEMENTAL DECLARATION OF

**MICHAEL J. LOCKMAN OR, IN THE
ALTERNATIVE, PLAINTIFFS' MOTION FOR
LEAVE TO FILE A SECOND AMENDED
COMPLAINT**

Upon the annexed Declaration of Kenneth F. McCallion, dated October 25, 2018, and upon all the pleadings and proceedings heretofore had herein, Plaintiffs respectfully move for leave to file the accompanying Supplemental Declaration of Michael J. Lockman, dated October 21, 2018, with exhibits A through D ("Lockman Supplemental Declaration"), in further opposition to Germany's Motion to Dismiss. In the alternative, Plaintiffs seek leave to file the accompanying Second Amended Complaint (filed with a redlined version showing the proposed changes and additions to Plaintiffs' Amended Complaint), which incorporates additional factual assertions based upon Plaintiffs' continuing research and investigation, and as set forth in the accompanying Lockman Supplemental Declaration.

As set forth in the accompanying Declaration of Kenneth F. McCallion, dated October 25, 2018, Plaintiffs believe that the Lockman Supplemental Declaration sets out important facts concerning the jurisdictional issues before this Court, especially the issues as to where the Ovaherero and Nama human remains were located in Germany prior to their sale and transport to the American Museum of Natural History ("AMNH"), and as to how those human remains now located at the AMNH relate to Germany's commercial activities in this country and elsewhere.

At oral argument, the Court inquired "how [Plaintiffs] connected [the human remains] with the commercial activity of Germany in this country?" and

“[h]ow is it business?” Trans. of Argument at 15, 17 (July 31, 2018). Plaintiffs’ counsel responded to the Court’s inquiry based upon the evidence available to Plaintiffs at that time; however, Plaintiffs now have additional relevant information on these issues based upon their continuing research, which Plaintiffs strongly believe should be incorporated in the record and considered by the Court.

Leave to file a supplemental declaration “rests entirely on the court’s discretion.” *Marsh v. Johnson*, 263 F. Supp. 2d 49, 53–54 (D.D.C. 2003) (admitting supplemental declarations given the broad inquiry on a motion to dismiss for lack of subject matter jurisdiction); *Paduano v. Express Scripts, Inc.*, 55 F. Supp. 3d 400, 411 (E.D.N.Y. 2014) (permitting filing of late supplemental declaration “in its discretion”); *Dial A Car, Inc. v. Transp., Inc.*, 1994 WL 902774, at *1 (D.D.C. Sept. 8, 1994) (decision to consider “supplemental material... in connection with a motion to dismiss” is “wholly within the discretion of the court”) (Friedman, J.) *aff’d*, 82 F.3d 484, 489 & n.4 (D.C. Cir. 1996). Because the subject matter jurisdiction inquiry goes to the court’s power of adjudication, and thus is a broad inquiry, in which Court has “considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction,” *APWU v. Potter*, 343 F.3d 619, 627 (2d Cir. 2003), in the absence of prejudice, leave to file a supplemental declaration of facts going directly to the question of subject matter jurisdiction should be freely given. *See Marsh*, 263 F. Supp. 2d at 53–54.

Leave to file a Second Amended Complaint—which Plaintiffs are seeking only in the alternative—is also, of course, a matter completely within the Court’s sound discretion.

Plaintiffs' counsel certifies that it has met and conferred telephonically and via email with defendants' counsel regarding this matter, and has made a good-faith effort to informally resolve the issues raised in this motion.

WHEREFORE, Plaintiffs respectfully request leave to file the Supplemental Declaration of Michael J. Lockman in the form attached hereto, or in the alternative, leave to file a Second Amended Complaint or such other relief as this Court deems just and proper.

Dated: New York, New York
October 25, 2018

McCALLION & ASSOCIATES LLP

_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on October _____, 2018, I electronically filed this document with the Clerk of the Court using CM/ECF. I also certify that this document is being served today on counsel of record identified below on the Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notice of Electronic Filing.

Dated: New York, New York
October 25, 2018

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VEKUII RUKORO, Paramount
Chief of the Ovaherero People
and Representative of the
Ovaherero Traditional Authority;
JOHANNES ISAACK, Chief
and
Chairman of the Nama
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ASSOCIATION OF THE
OVAHERERO GENOCIDE IN
THE USA INC.; and
BARNABAS VERAA
KATUUO, Individually and as an
Officer of The Association of the
Ovaherero Genocide in the USA,
Inc., on behalf of themselves and
all other Ovaherero and Nama
indigenous peoples,

Plaintiffs,

-against-

FEDERAL REPUBLIC OF
GERMANY,

Defendant.

Civ. No. 17-0062

**[PROPOSED]
SECOND
AMENDED
CLASS ACTION
COMPLAINT**

**Jury Trial
Demanded**

Dated: New York, New York

October 25, 2018

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Plaintiffs, by and through their undersigned attorneys, bring this Second Amended Class Action Complaint against Defendant Federal Republic of Germany as follows:

SUMMARY OF THE COMPLAINT

INTRODUCTION

1. Plaintiffs bring this action in their individual and representative capacity on behalf of all the Ovaherero and Nama peoples for damages resulting from the horrific genocide and unlawful taking of property in violation of international law by the German colonial authorities during the 1885 to 1909 period in southwestern Africa, part of which was formerly referred to by Germany as German South West Africa and is now Namibia.

2. Plaintiffs also bring this action to, among other things, enjoin and restrain the Federal Republic of Germany from continuing to exclude Plaintiffs from participation in discussions and negotiations regarding the subject matter of this Complaint, in violation of Plaintiffs' rights under international law, including the U.N. Declaration on the Rights of Indigenous People to self-determination for all indigenous peoples and their right to participate and speak for themselves regarding all matters relating to the losses that they have suffered.

3. Germany's express written policy to exterminate the Ovaherero and Nama indigenous peoples in southwestern Africa during the 1904–1908

period was Germany's first genocide of the twentieth century. In many ways, Germany's genocidal policies and practices towards the Ovaherero and Nama peoples, including the use of mass exterminations, concentration camps and mistreatment of a targeted population as a "sub-human" group, was a precursor to Germany's later effort to exterminate European Jewry. Indeed, some of the architects and key participants of Hitler's "Final Solution" learned their barbaric practices during the period of the Ovaherero and Nama Genocide. Even the German "brown shirts" that the Nazis wore in the 1920s and 1930s were "holdovers" from the earlier genocide.

4. When German colonial authorities arrived in southwest Africa around 1885, they established contact with the Ovaherero and Nama peoples, who owned the land and had their own highly advanced sovereign governmental structures and customs. They called their country Hereroland (also known as Damaraland), and Great Namaqualand. They also owned portions of the Omaheke Desert, and the Amboland and Kaokoveld deserts, as well as surrounding territories, much of which Germany later wrongfully claimed to be "German South West Africa." For purposes of this Second Amended Complaint, "South West Africa" is defined as the geographic territory under the present sovereign control of the Republic of Namibia ("Namibia") and includes the traditional sovereign territories of the Ovaherero and Nama peoples that were wrongfully taken from them both during and following the Ovaherero and Nama Genocide of 1904-1908.

5. At first, Germany entered into various written treaties and contracts with the Ovaherero and Nama leadership, giving Germany and German colonists the right to settle in certain limited areas. However, Germany soon broke these treaties and contracts, and instead opted to seize valuable Ovaherero and Nama grazing lands without compensation or consent, and with the use of indiscriminate violence. From 1884 to 1903, Germany and its agents unlawfully took over one-fourth (25%) of Ovaherero and Nama lands (originally over 50,000 square miles) and hundreds of thousands of livestock. As their land and livestock herding was the primary economic base of the Ovaherero and Nama peoples, as well as the foundation for Ovaherero and Nama political, cultural and social institutions, these unlawful takings and expropriations caused grave and irreparable harm.

6. Germany and its agents also subjected Ovaherero and Nama women and children to widespread and systematic rape, murdered Ovaherero and Nama men, women, and children, and systematically abused and enslaved Ovaherero and Nama men, women, and children for hard labor and other work without compensation.

7. After announcing that it would open concentration camps as part of its ruthless and lawless expropriation of the remainder of Ovaherero lands, livestock, and property interests, and after decades of indiscriminate brutality and theft, Defendant waged war against the Ovaherero people beginning in January

1904. The Ovaherero peoples rose up in protest and, during some initial military successes, forced the German colonial authorities and German troops to retreat to fortified defensive positions.

8. Later in 1904, the Nama people also rose up in opposition to Defendant's crimes.

9. The German colonial authorities sent an urgent plea for help to Germany, requesting military support. Germany responded by sending a large expeditionary force, armed with rifles, cannons, and machine guns. Lieutenant-General Lothar von Trotha was selected to lead the German forces, primarily because he had a reputation for ruthlessness.

10. General von Trotha, acting under imperial Germany's authority, issued written orders directing that his troops kill every Ovaherero and Nama man, woman and child, without mercy, and to drive any who survived into the desert, where they were sure to die of hunger and dehydration. On October 2, 1904, for example, he wrote: "[E]very Herero, with or without a gun, with or without cattle, will be shot. I will no longer accept women and children...These are my words to the Herero people." He issued similar orders relating to the Nama peoples.

11. In addition to seeking revenge against the Ovaherero and Nama peoples for the humiliation that the German colonial forces had suffered at the hands of poorly armed "savages," the German authorities calculated that the extermination of these two powerful tribal peoples was the most efficient way of

accomplishing their ultimate goal, namely, the absolute and unconditional expropriation of all Ovaherero and Nama lands and personal property of any real value.

12. The German troops carried out von Trotha's orders with methodical efficiency. Approximately one hundred thousand people were killed during Germany's reign of terror, with 80% of the Ovaherero and 50% of the Nama brutally annihilated. Following the orders of their commanders, many of the wounded or those that surrendered were murdered by German troops, including unarmed men, women and children who were lured into churches and other gathering places by German missionaries with the promise of amnesty.

13. Many more of those who survived the initial mass slaughter by German troops made it into the desert, only to die there of hunger and thirst. Those who survived the exodus were forced to settle in what is now Botswana, South Africa and other countries. Some even made it to the United States, where they joined the growing Ovaherero and Nama worldwide diaspora.

14. The remainder of the survivors were thrown into concentration camps under atrocious and sub-human conditions. The camps had an extraordinarily high death toll, and the survivors, who were well enough to stand, were forced to work as slave laborers. The surviving women were subjected to systematic rape and other abuses.

15. At Germany's most notorious concentration camp, Shark Island at Lüderitz Bay, Ovaherero and Nama men, women, and children were decapitated, their severed heads boiled in water, and women and girls were forced to manually scrape off strips of face, flesh, and cooked brains of their fathers and husbands using broken glass shards. In violation of international law, Defendant then took the polished skulls and shipped them by sea to Germany, where many still remain. These skulls were used for pseudo-scientific experimentation by German academics and racial theorists, who believed that their "experiments" supported the theory of white supremacy and Germanic superiority and, conversely, the inferiority of Africans and people of color.

16. Some of the human remains that were wrongfully taken and transported to Germany were sold to the American Museum of Natural History in New York, where they remain today.

17. As a result of the Ovaherero and Nama Genocide, the Ovaherero and Nama peoples were stripped of almost all their valuable real, personal and intangible property, including but not limited to land, livestock, concession, taxation, and customs rights, precious gems and metals, human labor, body parts, and other property.

18. Defendant's violations of international law also left the Ovaherero and Nama sovereign states in ruins. Germany irreparably and without legal justification deprived the Ovaherero and Nama peoples of their sovereign status and crippled the sovereign

polities of Hereroland and Great Namaqualand to such an extent that they were largely disbanded and broken up by German authorities. The Ovaherero and Nama sovereign entities were thereby forced into a much-reduced and limited quasi-sovereign status, which is where they remain under Namibian law, condemned for generations to perpetual and institutionalized poverty, lack of proper education, and social and cultural deprivation.¹ But for Defendant's illegal takings, Hereroland and Great Namaqualand would still stand today as sovereign nations.

19. Plaintiffs, therefore, bring this class action on behalf of all Ovaherero and Nama peoples worldwide for damages resulting from Defendant's taking and expropriation of their property, including their sovereign status, in violation of applicable international law during the period from 1885 through 1915 in southwestern Africa.

20. In recent years, Defendant finally began admitting that its actions constituted genocide, or at least its equivalent. German development minister, Heidemarie Wieczorek-Zeu, first apologized for the killings in 2004, describing the massacres as a

¹ See Manfred O. Hinz & Alex Garisib, 3 CUSTOMARY LAW ASCERTAINED: THE CUSTOMARY LAW OF THE NAMA, OVAHERERO, OVAMBANDERU, AND SAN COMMUNITIES OF NAMIBIA xv–xvii, 6–15 (University of Namibia 2016); Article 66 of the Constitution of Namibia; Traditional Authorities Act, Act 17 of 1995, amended by Act 8 of 1997 and Act 25 of 2000 (Namib.) (defining the quasi-sovereign competencies of Traditional Authorities); Community Courts Act § 13, Act No. 10 of 2003 (Namib.).

“genocide” on a trip to Namibia, but her remarks were not adopted as official government policy.

21. In approximately 2015, German Foreign Ministry guidelines started referring to these events as a “genocide,” and in July 2016 the German government confirmed in writing to the Parliament that it was official German policy to consider this as a genocide.

22. Germany has entered negotiations with the Namibian government regarding this dark period in German and African history. Inexplicably, however, Germany has excluded Plaintiffs—the only legitimate and recognized leaders of the Ovaherero and Nama peoples worldwide, as well as their organizations—from participation in these negotiations, even though they were the victims of these atrocities. In so doing, Germany again violated international law, since it is a signatory to the U.N. Declaration on the Rights of Indigenous Peoples (“the U.N. Declaration”), adopted by the U.N. General Assembly on September 13, 2007, which was intended to acknowledge and protect the rights of indigenous peoples.²

23. Despite the incalculable cultural, intellectual, religious and spiritual losses that the Ovaherero and Nama peoples have suffered, Germany systematically and categorically excluded the lawful representatives of the indigenous Ovaherero and Nama peoples from negotiations between Germany and

² U.N. Declaration on the Rights of Indigenous Peoples, Arts. 11 and 18, G.A. Res. 61/295, U.N. Doc. A/61/L.67 and Add. 1 (Sept. 13, 2007). *See, infra*, at ¶¶ 294-296.

Namibia, and steadfastly refused to even consider making any reparations or compensation to the Ovaherero and Nama peoples for the catastrophic losses that they suffered.

24. Plaintiffs, therefore, also bring this action seeking a Declaratory Judgment, pursuant to 28 U.S.C. § 2201, *et seq.*, that Defendant has wrongfully excluded Plaintiffs, as the lawful representatives of the Ovaherero and Nama peoples, from participating in discussions and negotiations regarding the subject matter of this Second Amended Complaint, in violation of Plaintiffs' third-party beneficiary rights under international law, including the U.N. Declaration, the right to self-determination, and the right to participate and speak for themselves regarding matters relating to the losses they have suffered.

PARTIES

25. Plaintiff **VEKUII RUKORO**, a citizen and resident of Namibia, is the Paramount Chief of the Ovaherero People and representative of the Ovaherero Traditional Authority, the recognized legal entity representing the overwhelming majority of the Ovaherero people in Namibia and in the diaspora. As named Plaintiff, he brings this action on behalf of himself and all worldwide members of the Ovaherero people, including the Ovatjimba, the Ovambanderu, and others, or direct descendants of the Ovaherero people

who lived in Hereroland prior to its destruction by Defendant.

26. Plaintiff **JOHANNES ISAACK**, a citizen and resident of Namibia, is the Chief and Chairman of the Nama Traditional Authorities Association, the recognized legal entity representing the Nama Traditional Authorities and Nama peoples in Namibia and in the diaspora. As named Plaintiff, he brings this action on behalf of himself and all worldwide members of the Nama peoples or direct descendants of the Nama peoples who lived in Great Namaqualand prior to its destruction by Defendant.

27. Plaintiff the **ASSOCIATION OF THE OVAHERERO GENOCIDE IN THE USA INC.** (“the Association”) is a New York not-for-profit Corporation formed on September 10, 2010, which has had the longstanding purpose of seeking justice and compensation from Defendant for the Genocide of the Ovaherero and Nama peoples.

28. Plaintiff **BARNABAS VERAA KATUUO**, an officer of the Association and a member of t³he Ovaherero tribe, is a U.S. citizen and resident of Rockland County, New York. Mr. Katuuu brings this action on behalf of himself and all U.S. citizen members of the Ovaherero people or direct descendants of the Ovaherero people who lived in Hereroland prior to its destruction by Defendant.

³ “Defendant” and “Germany” are used interchangeably to refer to the Federal Republic of Germany and the German Empire.

29. Defendant **FEDERAL REPUBLIC OF GERMANY** (“Germany” or “Defendant”) is a sovereign state and a federal, parliamentary, representative democratic republic. According to the German Federal Government, which has adopted and concurred with the rulings of the German Federal Constitutional Court—the Federal Republic of Germany is not only the state *successor* to the 1871–1918 German Empire—also known as the *Kaiserreich* or the Second Reich—but rather the continuing body politic of the same entity, sharing an identical, unbroken legal status under German law and international law.⁴ Consequently, all rights and obligations of the German Empire are rights and obligations of the Federal Republic of Germany.

30. Defendant directed and benefited from the genocide of the Ovaherero and Nama peoples and the expropriation of Ovaherero and Nama land, livestock, concession, taxation, and customs rights, human labor, body parts, and other property without compensation in violation of international law.

31. Germany is a member of the United Nations and a party to the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), which was adopted by the General Assembly of the United Nations on December 9, 1948, and entered into force on January 12, 1951. Nevertheless, for years Defendant denied that its mistreatment of the Ovaherero and Nama peoples

⁴ See Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court] 2 BvF 1/73 (July 31, 1973).

constituted a genocide, even though the factual and historical record clearly reflected that Defendant's conduct falls squarely within the generally accepted and statutory definition of genocide.

32. The actions and omissions of Defendant's agents that resulted in or contributed to the takings in violation of international law are attributable to Defendant.

JURISDICTION and VENUE

33. This Court has subject matter jurisdiction over this matter under 28 U.S.C. § 1330(a), and personal jurisdiction over Defendant under 28 U.S.C. § 1330(b), in that Defendant is a foreign state and the takings exception to jurisdictional immunity pursuant to 28 U.S.C. § 1605(a)(3) applies. Under the jurisdictional provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601, *et seq.*, ("FSIA"), jurisdiction exists over this subject matter and over Defendant, because Plaintiffs' rights in property taken by Defendant from the Ovaherero and Nama peoples in violation of international law are at issue, and property exchanged for the taken property is present in the United States in connection with the numerous commercial activities carried on in the United States by Defendant and Defendant's agencies and instrumentalities. Moreover, under this exception, jurisdiction exists over this subject matter and over Defendant, because this action is, in part, based upon Defendant's acts in Germany in connection with its

commercial activities elsewhere that has caused a direct, material, and deleterious effect in the United States in general, and in New York in particular.

34. A genocide unquestionably was committed by Defendant's mass extermination and systematic expropriation of Ovaharero and Nama lands, cattle and other property as alleged herein and as conceded by Defendant. *See* paragraph 21, *supra*.⁵

35. Both the genocidal mass extermination and unlawful takings and expropriations of Ovaharero and Nama land, livestock, concession, taxation, and customs rights, human labor, body parts, and other property without compensation are violations of international law, 28 U.S.C. § 1605(a)(3). The unlawful taking of property without compensation in furtherance of a policy and practice of genocide is a well-recognized violation of international law.

36. The takings of property alleged herein constitute takings "in violation of international law" under 28 U.S.C. § 1605(a)(3) considering their inseparable connection to the Ovaherero and Namaqua

⁵ *See Convention on the Prevention of the Crime of Genocide (Genocide Convention)*, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277 ("[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; [or] (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part...); *see also* 18 U.S.C. § 1091(a)(same definition of offense of genocide under U.S. domestic law).

genocide. Defendant merged the twin goals of takings and genocide into a single policy, practice, and endeavor. The takings were themselves genocide, and the genocide was itself a taking.

37. In particular, the human remains of Ovaherero and Nama peoples at the American Museum of Natural History independently provide this Court with subject-matter jurisdiction, because they constitute “property taken in violation of international law” as described herein, because of their integral, substantive relationships to commercial activity undertaken by Germany both in the United States and elsewhere “having substantial contact with” the United States. *See* 28 U.S. § 1603(e).

38. Since the wrongful taking of Ovaherero and Nama properties was inextricably linked to the mass killings and genocide of these peoples, Plaintiffs’ property-based claims fall squarely within the FSIA’s expropriation exception for “tak[ings] in violation of international law.”⁶

39. All of Defendant’s acts, as alleged herein, constitute confiscatory and discriminatory acts of taking, including, but not limited to:

- a. all Imperial and Colonial governmental decrees, laws, ordinances, and regulations concerning the disposition of Ovaherero and Nama persons, liberty, and property;

⁶ 28 U.S.C. § 1605(a)(3).

- b. all acts of confiscation by Defendant's agents on Defendant's instruction, knowledge, and consent, which are attributable to Defendant, including all actions of Defendant's military that resulted in harm to the Ovaherero and Nama peoples, including, but not limited, the execution of prisoners, the rape of women and children, the pillaging and destruction of civilian property, and the illegal and discriminatory confiscation of Ovaherero and Nama property, liberty, and land;
- c. the Regulation of April 22, 1896 on the Jurisdiction over Natives in German South West Africa, all other Imperial and Colonial laws on jurisdiction over Hereroland and Great Namaqualand, and all judicial decrees, judgments, orders, injunctions, and writs issued by the Imperial Courts of Otjimbingwe, Swakopmund, Windhoek, Lüderitz Bay, Omaruru, and any other Imperial Courts in prosecutions against Ovaherero and Nama Defendants, as well as in civil cases involving Ovaherero or Nama parties;
- d. all Imperial and Colonial governmental decrees, laws, ordinances, regulations—as well as contractual or administrative arrangements with private individuals, merchants, and companies—concerning the disposition of Ovaherero and Nama property that Defendant took in violation of

international law, and the disposition of Ovaherero and Nama persons that Defendant enslaved in violation of international law;

- e. all Imperial and Colonial governmental acts aiding and abetting private parties that were involved in the disposition of Ovaherero and Nama peoples or property, including the taking and aiding and abetting the taking of body parts of Ovaherero and Nama peoples;
- f. the Protectorate Law of March 15, 1888;
- g. the Imperial Extermination Order (Imperial District Office of Windhoek, Reference No. 3737, Oct. 2, 1904), calling for the extermination of the Ovaherero people;
- h. the Imperial Extermination Order against Nama (Apr. 22, 1905), calling for the extermination of the Nama people;
- i. the Imperial Decree of December 26, 1905, "Pertaining to the Sequestration of Property of Natives in the Protectorate of South West Africa," declaring the expropriation of all of Hereroland and portions of Great Namaqualand; and
- j. the Imperial Decree of September 8, 1907, declaring the expropriation of the rest of Great Namaqualand.

40. These actions enumerated in paragraph 38, *supra*, qualify as “takings,” because they are of a kind typically reserved to sovereigns, *i.e.*, governmental or military acts, and not normally exercised by commercial actors.

41. Defendant’s takings violated international law as it existed in the period 1885–1915. Namely, the takings were unambiguous violations of i) customary international law;⁷ ii) positive international law;⁸ and iii) Defendant’s legal obligations as codified in its treaties.⁹

⁷ See, *e.g.*, the jurisprudence of Hugo Grotius, Emer de Vattel, George Frederic de Martens, Henry Wheaton, and Francis Lieber.

⁸ See, the Second Paris Peace Agreement of 1815, the 1841 Quintuple Treaty, the Geneva Conventions of 1864, the Brussels Declaration of 1874, the General Act of the Berlin West Africa Conference of 1885, the 1889 German-Dutch Agreement, the 1890 Anti-Slavery Convention, the 1890 German-Belgian Agreement to Criminalize Trade in Girls, the Hague Conventions of 1899 and its Martens Clause, the 1904 Agreement on Administrative Regulation to Ensure Effective Protection Against Trade in Girls, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of July 6, 1906, the 1907 Hague Conventions and its Martens Clause, and others.

⁹ See *e.g.*, Treaty with the Rehoboth Bastards of October 13, 1884; the Treaty with the Bethanien Nama of October 28, 1884; the Treaty with Jacob Isaak of Bersaba (Nama) of July 28, 1885; the Treaty with Manasse of Hoachanas (Nama) of September 2, 1885; the Treaty with Captain Hermanus von Wyk of the Rehoboth Bastards of September 15, 1885; the Treaty with Chief Kamaherero of the Ovaherero of October 21, 1885; the Treaty with the Ovaherero of Omaruru of November 3, 1885; the Treaty with Jan Hendriks of the Veldschoendrager Nama of August 21, 1890; the Treaty with William Christian of the Bondelszwart Nama of

42. For example, in Article 3 of Defendant's Treaty with Eduard Lambert of the Khaua Nama of March 9, 1894, Defendant promised "protection in the territory of the Khaua Hottentots, as soon as the tribe's new boundaries are calculated."¹⁰ The treaty was substantively and procedurally fraudulent, as Eduard Lambert signed the treaty under duress after Defendant hunted and executed his brother, the Khaua Nama leader Andreas Lambert. Notwithstanding this fact, Defendant breached the treaty in March 1896, when Germany waged war against the Khaua Nama, and ultimately hunted and killed the signatory to the contract, Eduard Lambert.

43. Defendant also breached the explicit terms of the Martens Clause of the 1899 Hague Convention—a codification of the existing "protection

August 21, 1890; the Treaty with Eduard Lambert of the Khaua Nama of March 9, 1894; the Treaty with Simon Cooper of the Fransman Nama of March 19, 1894; the Treaty with Dietrich Goliath of Berseba (Nama) of July 7, 1894; the Treaty with David Vilander of the Vilander-Bastards of July 27, 1894; the Treaty with Hendrik Witbooi of the Nama of September 15, 1894; the Treaty with Samuel Maharero of the Ovaherero of December 6, 1894; the Treaties with the Ovaherero of Omururu of November 30, 1894; the Treaty with Samuel Maharero of the Ovaherero of December 6, 1894; the Treaty with David Zwaartbooi of the Zwaartbooi Nama of January 19, 1895; the Treaty with Manasse Lambert of the Khaua Nama of February 4, 1895; the Treaty with Hermanus von Wyk of the Rehoboth Bastards of July 26, 1895; and the Treaty with Hendrik Witbooi of the Nama of November 16, 1895.

¹⁰ The term "Hottentots" was a commonly-used derogatory term referring to the Nama peoples.

and empire of the principles” of customary international law—which states:

[I]n cases not included in the Regulations adopted... populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

44. As a further example, Defendant breached Article VI of the General Act of the Berlin West Africa Conference of 1885 (“Article VI”), under which Defendant was obligated to:

watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery, and especially the slave trade.

45. The Legislative Report accompanying the General Act of 1885 explains the purpose of Article VI, and affirms that the Ovaherero and Nama are, “undoubtedly, not to be considered as placed without the pale of international law”:

With regard to [native] populations, which, for the most part, ought, undoubtedly, not to be considered as placed without the pale of international law, but which in the present state of affairs are scarcely of themselves able to defend their own interests, the Conference has been obliged to assume the role of an unofficial guardian. The necessity of insuring the preservation of the natives, the duty of assisting them to attain a more elevated political and social state, the obligation of instructing them and of initiating them in the advantages of civilization, are unanimously recognized.

46. Thus, as early as 1884, Defendant obliged itself to the “necessity” and “duty” of preserving and assisting the Ovaherero and the Nama peoples. Notwithstanding the fact that the Ovaherero and Nama peoples never asked for such “assist[ance],” Defendant breached its obligations by exterminating the same peoples it swore to protect, citing the “necessity” of economic conditions and the “duty” of their white race.

47. Defendant was particularly aware of its obligations under customary international law at the time, since several German scholars were among the most notable international law experts. For example, the 1868 writings of Heidelberg University Professor Johann Kaspar Bluntschli demonstrated how the principle of protecting civilian non-combatants was a central component of customary international law; he wrote: “The peaceful residents in enemy territory, who

are not playing an active role in hostilities... are not to be considered or treated as enemies.”¹¹ Bluntschli understood this concept to stretch as far as “any unnecessary killing”:

Neither the military force nor the individual soldiers have the right to capriciously or pointlessly kill, wound, mistreat, torture, enslave, or sell any individuals, or to mistreat women or harm their purity.

This regulation applies generally: not simply to peaceful private persons, but also regarding protection against enemy forces, although these rules are suspended during active battle... Killing without a battle, simply from bloodlust or hate, is also not permitted against enemy soldiers. There exists no *jus vitae ac necis* against the enemy.¹²

...Every unnecessary killing—even if an armed enemy—is unjust.¹³

¹¹ Johann Caspar Bluntschli, *Das Moderne Völkerrecht* [Modern International Law] § 572, 319 (1868)

¹² *Id.* at § 574, 321

¹³ *Id.* at § 579, 323.

48. The justification is simple for establishing principles of customary international law which prohibit the killing of civilian combatants:

By establishing human rights, the hostilities are pushed back to the narrowest zone possible, and it gives us much space as possible to a spirit of peace and mutual promotion of life.

49. Finally, according to Bluntschli, native peoples – such as the Ovaherero and Nama peoples – were entitled to precisely the same treatment as any other peoples:

Wars of extermination and annihilation against peoples and tribes that are capable of life and culture are violations of international law.

...Simply because certain peoples are considered [uncivilized], they should still be treated humanely, and one may not simply deprive them of human rights. They are perhaps difficult to subject to a legal order, and teaching them the ways of civilization may perhaps be a thankless task that requires great effort and potentially meager results. However, it is nonetheless the job and indeed the obligation of civilized nations, to try and promote civilized conduct in even the

wildest of tribes, and help them achieve the heights of human dignity. Never again is it permitted for states or soldiers to hunt for wild peoples like foxes and wolves.

50. Thus, during the years 1884–1915, Germany was undoubtedly familiar not only with the works of Professor Bluntschli, but also the entire corpus of customary international law dealing with human rights, the law of war, and the prohibition of genocide, rape, and brutality.

51. The 1902 writings of Franz von Liszt, Professor of Law at the University of Berlin, also confirm that the aforementioned prohibitions remained established at the very time and place of some of Defendant's most egregious violations against international and natural law:

A party waging war may use only those methods that are necessary to destroy the opponent's resistance...

Imprisonment is permissible in war today only when it secures the life, health, and property of the prisoner...

After the end of hostilities, prisoners of war should be released...

[When occupying foreign territory], private property cannot be violated, except in the event of an emergency.

52. Defendant's property-based violations, which it interwove with its crimes against humanity, were also, independent of the genocide, violations of international law.

53. An acclaimed treatise published in 1836 declared the "modern rule" concerning the disposition of property belonging to the enemy. Unless acting in reprisal to a belligerent opponent's seizure of property, a state violates customary international law if it seizes the property of the opponent:

[T]he modern rule of international usage [is] that the property of the enemy found within the territory of the belligerent state, or debts due to his subjects by the government or individuals, at the commencement of hostilities, are not liable to be seized and confiscated as prize of war.¹⁴

¹⁴ Wheaton, Henry, *Elements of International Law*. Philadelphia: Carey, Lea & Blanchard (1836) (available on the Internet at <http://gallica.bnf.fr/ark:/12148/bpt6k935676/f1.image.r=.langEN>)(comparing the modern rule with that asserted by Chief Justice Marshall in *Brown v. United States*, 12 U.S. 110, 122–30 (1814)).

54. The “model rule” described above in paragraph 55 was eventually codified in the 1874 Brussels Declaration, to which Defendant was a party.

55. During the time when the takings occurred, state practice also confirms that Defendant’s takings were in violation of customary international law. For example, in the 1860s the United Kingdom condemned Belgium’s violations of “rights of humanity” in the Congo; and France, the United Kingdom, and Russia condemned the Ottoman Empire’s massacres against the Armenians in 1894–96, as “crimes against humanity and civilization.”¹⁵ Unafraid of double standards, Kaiser Wilhelm II also condemned the Ottoman Empire’s actions.

56. This Court has supplemental jurisdiction under 28 U.S.C. § 1367 over claims brought under the common law and laws of the State of New York.

57. Venue properly lies in this Judicial District under 28 U.S.C. § 1391(f)(1), because a substantial part of the property that is the subject of this action is situated in the City and State of New York:

- a. A 7,000 square-foot townhouse, located at 119 E. 65th Street in the Borough of Manhattan;
- b. A 133,750 square-foot building, located at 871 First Avenue in the Borough of Manhattan;

¹⁵ See A. Kämmerer und J. Föh, *Das Völkerrecht als Instrument der Wiedergutmachung?*, 42 Archiv des Völkerrechts 294, 314–15 (2004).

- c. A 1,591 square-foot condo, located at 346 E. 49th Street in the Borough of Manhattan and associated easement;
- d. A 16,147 square-foot building, located at 1014 Fifth Avenue in the Borough of Manhattan;
and
- e. The Herero and Nama human remains at the American Museum of Natural History.

58. This Court also has personal jurisdiction over the foreign Defendant pursuant to Fed. R. Civ. P. 4(k)(2).

59. Venue properly lies in this Judicial District pursuant to 28 U.S.C. §1391(b) and (c). Furthermore, there is no foreign independent or impartial forum in which to bring this action.

FACTUAL ALLEGATIONS

60. Imperial Germany first established its Protectorate in southwestern Africa in 1884, and then signed a treaty with the Chief of the Ovaherero tribe, Kamaharero, on October 21, 1885. The treaty was signed on behalf of Imperial Germany by Heinrich Ernst Goring, the Colonial Governor and father of Nazi Luftwaffe commander Hermann Goring.

61. Germany's impetus to expand into Africa in the 1880s was fueled largely by the concept of

“Lebensraum” (“living space”) espoused by German geographer Friedrich Ratzel, which was based upon the misguided belief in German biological and racial supremacy, and that Germany and its “Volk ohne Raum” (“people without space”) had an obligation to colonize other lands to create the extra “living space” needed to cure Germany’s urban overcrowding. Although Adolph Hitler later expanded this concept with deadly efficiency during the Third Reich, it first took root in the Defendant’s colonization of South West Africa.

A. Background and Context of the Takings

62. Defendant’s takings in violation of international law arose from its failed conquest of Africa, its illegal occupation of Ovaherero and Nama lands, its development, encouragement, and adoption of theories of white supremacy, its illegal commercial activities involving theft, exploitation, enslavement, and colonization, and the genocide that Defendant conceived, financed, directed, and executed against the Ovaherero and Nama peoples.

63. Before being virtually annihilated by German forces, the Ovaherero people collectively encompassed the Ovaherero of the highlands, the Ovambanderu of the Sandveld, and the Ovahimba of the Kaokoveld. They spoke the Otjiherero language with its dialects, including Ovaherero, Ovambanderu, Ovahimba, Ovatjimba, Ovayemba, and Vakwandu. Over the course of the 19th century, the Ovaherero people

evolved from a confederation of chieftaincies into a unified sovereignty under the leadership of the Maherero dynasty. The region's arid climate prevented large-scale agriculture, and so the Ovaherero prospered as cattle herders. The Ovaherero held collective property and ownership rights over the land of Hereroland as a collective people. Ovaherero society—and, in particular, the advanced and highly formalized rules of inheritance—was governed by structured laws, which every Ovaherero youth was obligated to learn.

64. The Nama people, who resided in Great Namaqualand in Southwestern Africa and South Africa for many centuries, are a Khoikhoi-speaking people, and, like the Ovaherero, were a confederation of tribes across the southern portion of southwest Africa.

65. Like the Ovaherero, the Nama were prosperous cattle herders. Also, like the Ovaherero, over the course of 19th century, the Nama people evolved from a confederation of chieftaincies with some degree of internal conflict into a unified sovereignty. By the start of the 20th century, the Nama population of Namaqualand had grown to approximately 20,000 people with cattle herds numbering approximately 100,000.

66. Between 1884 and 1892, Germany signed treaties they never intended to honor with both peoples and tried to turn the Ovaherero and Nama against each other. However, in 1892 the Ovaherero and Nama peoples reached lasting peace.

67. Today, the Ovaherero people are comprised of six traditional authorities:

- a) Kakurukouje Traditional Authority;
- b) Maharero Traditional Authority;
- c) Otjikaoko Traditional Authority;
- d) the Vita Royal House;
- e) Zeraua Traditional Authority; and,
- f) Ovambanderu Traditional Authority.

68. Today, the Nama people are comprised of ten traditional authorities:

- a) Afrikaner Traditional Authority;
- b) Blouwes Traditional Authority;
- c) Bondelszwart Traditional Authority;
- d) Kaikhaun Traditional Authority;
- e) Simon Kooper Traditional Authority;
- f) Soromas Traditional Authority;
- g) Swarzbooi Traditional Authority;
- h) Topnaar Traditional Authority;
- i) Vaalgras Traditional Authority; and,
- j) Witbooi Traditional Authority.

B. Germany Decides to Take African Property in Violation of International Law

69. Newly unified and seeking its “place in the sun,” Germany aimed to compete with other European empires that had established Protectorates in Africa and elsewhere. To that end, Defendant hosted the Berlin West Africa Conference from November 15, 1884 to February 26, 1885. In Articles VI and IX of the Conference’s General Act, Defendant and the other participants pledged to “support the native population [of Africa] and improve their moral and material situation,” and to end the slave-trade. Under the guise of humanitarianism, Germany began its racist, imperialist, and expropriative annexation of African territories, as negotiated with the leading European powers.

70. On April 30, 1885, Germany directed, authorized, invested in, and assisted in the founding of the *Deutsche Kolonialgesellschaft für Südwest Afrika* (German South West Africa Company), whose leadership included German aristocracy, industrialists, and politicians.

C. Defendant and Its Agents Exploit and Violate the Rights of the Ovaherero and Nama Peoples with Fraud, Theft, Rape and Murder

71. Its purported claims to Africa now successfully negotiated with its fellow Europeans, Germany set off to compel the Ovaherero and Nama

peoples into fraudulent treaties for the purpose of exploiting them and taking their land, people, and property. Defendant's acts in Southwestern Africa were conducted by, on the instruction of, and with the support of innumerable agents of Defendant, including the highest political officers: Friedrich Wilhelm Viktor Albert von Preußen, King of Prussia, who served as Defendant's agent as Kaiser of the German Empire from 1888–1918 ("Kaiser Wilhelm II"), and Count Bernhard Heinrich Martin Karl von Bülow, who served as Defendant's agent and Chancellor of the German Reich from 1900–09 ("Chancellor von Bülow"). Their official actions and omissions—like those of all of Defendant's agents—are attributable to Defendant.

72. Defendant dispatched Imperial Commissioner Göring to what Germany referred to as South West Africa.

73. Commissioner Göring and Chief Kamaherero entered into a "protection" treaty between Defendant and the Ovaherero people, dated October 21, 1885, in which Defendant promised the "absolute highest level of protection" to the Ovaherero people and promised that all Germans would respect the customs and laws of Hereroland, which belonged to the Ovaherero people. In exchange, the Ovaherero people gave Defendant certain mineral and easement rights and promised that German settlers and merchants could work in peace in Hereroland.

74. Defendant continually breached this treaty in spirit and letter through its official policies and practices throughout 1885–88, in which Defendant

and its agents aided and abetted, permitted, and institutionalized the theft of Ovaherero cattle, the exploitation of mineral rights without just compensation, the abuse and injury of Ovaherero men and laborers, and the rape of Ovaherero women and children in numerous related and unrelated episodes.

75. In 1888–1890, Defendant continued these policies and practices, and continued to illegally enforce its draconian Imperial Criminal Code, in order to exploit the Ovaherero people to the maximum extent possible.

76. In 1889 Defendant's agent Captain von François established Fort Wilhelmsfeste on the road connecting Swakopmund to the major Hereroland city of Otjimbingwe. He blocked the import of arms into Hereroland, thereby depriving the Ovaherero people of the ability to defend themselves.

77. Defendant's treaties with the Ovaherero and Nama were procedurally and substantively fraudulent, as Defendant never intended to comply with its treaty obligations. In 1884–85 Defendant signed such treaties with the Topnaars and the Red Nation Nama tribes, amongst others.

78. In response to a Ovaherero-Nama peace treaty entered into in November 1892, Defendant sent *Schutztruppe* reinforcements to “divide and conquer” the Ovaherero and Nama by trying to re-instigate war between these two peoples, and to implement Defendant's policy of illegal takings.

79. On the night of April 12, 1893, Captain von François troops furtively encircled Hoornkrans and assumed fortified positions. Von François gave the firing orders at dawn. Within thirty minutes, sixteen thousand rounds of ammunition were fired at the sleeping Nama peoples of Hoornkrans. Under surprise attack, Chief Witbooi ordered his men to retreat to the far side of the valley, so as to draw German fire away from the women and children. But instead, Defendant's agents ignored the men and concentrated on killing as many women and children as possible. Seventy-eight Nama women and children were killed.

80. Chief Witbooi's 12-year-old son, Klein Hendrik—who was born with crippling partial paralysis—was wounded while fleeing. He was crawling unarmed in a river bed where a German soldier found him and executed him with a pointblank shot to the head.

81. One Witbooi tribesman, Petrus Jafta, witnessed the massacre from a hilltop. He testified under oath:

I and two other men got on a small hilltop and saw some women sitting a distance away. We called to them to get away, but they remained until the Germans passed. One of the soldiers shot one of these women. The others begged for their lives and asked the Germans to make slaves of them rather than kill them.... One woman was killed while her child clung to her

screaming; a soldier shot the child through the head, blowing it to pieces. I saw the child shot. The soldier aimed at it... Many children were killed in the houses.

82. One German soldier who participated in the attack, wrote of the brutality:

On all sides terrible scenes were disclosed to us. Under and over the hanging rocks lay the corpses of seven Witbooi, who in their death agony, had crawled into the hollow, and their bodies lay pressed tightly together. In another place the body of a... woman obstructed the footpath, while two three-to-four-year-old children sat quietly playing besides their mother's corpse.

83. Chief Witbooi described the brutality of Defendant's agents in a letter to Captain van Wijk dated April 18, 1893:

[Von François] captured our place, and destroyed the place in the most terrible manner, as I had never imagined from a white civilized nation, which knows the laws and conduct of war, but he robbed me, and small children, which still lay at their mother's breast, and bigger children and women and children he shot them dead, and many corpses, which he had already

shot dead, he placed in the grass houses which he lit and burnt the bodies to ash.

84. Defendant waged an intermittent war of brutality against Nama peoples from 1893–1895, during which time Defendant's agents and German settlers stole Nama cattle and other valuable property, including gemstones and precious minerals, abused, injured, and murdered Nama men, and raped Nama women and children.

85. Major-General Theodor Gotthilf Leutwein arrived in South West Africa in 1895. Defendant continued its campaign against the Nama, and, with its artillery and machine guns, forced Chief Witbooi's surrender.

86. As Governor Leutwein admitted, "divested of all ideals and talk of humanity, the aim of all colonization lies ultimately in profit." In order to methodically expropriate the land and property rights of the Ovaherero and Nama, Defendant required a suitable local bureaucracy. With dates of establishment in parentheses, these expropriation offices included:

- a. the *Zentralbureau des kaiserlichen Gouvernements* (Central Office of the Imperial Government) (1884);
- b. *Kaiserliche Bezirksämter* (Imperial District Offices) in Swakopmund (1892), Windhoek (1893), Omaruru (1894), Karibib (1894),

Okahandja (1894), Outjo (1897), Gobabis (1898), and Zessfontein (1901);

- c. *Kaiserliche Gerichte* (Imperial Courts) in Otjimbingwe (1885), Swakopmund (1885), Windhoek (1885), Lüderitz Bay (1906), and Omaruru (1909);
- d. the *Kaiserliches Hafenbauamt* (Imperial Harbor Construction Office) at Swakopmund (1896); and,
- e the *Eingeborenenkommissariat* (Office of the Native Commissioner) in Windhoek (1900).

87. Seeking new lands for settlement in late 1895, Defendant identified the Mbandjeru Ovaherero tribe and the Khaua Nama tribe for conquest and expropriation. Defendant directed and aided and abetted the theft of 12,000 head of cattle, among other valuable property. Conflict ensued. Defendant conquered both tribes by 1897 and executed Chiefs Nikodemus and Kahimemua.

88. Between 1884–1903, Defendant continually harmed and took the property of the Ovaherero and Nama peoples in violation of international law by placing German settlers on Ovaherero and Nama land, and aiding and abetting the settlers in the taking of their cattle, land, and other valuable property. The number of German settlers rose from 310 in 1891 to 2,998 in 1903.

89. By 1903 Defendant and its agents had seized over a quarter of Ovaherero and Nama lands (originally over 50,000 square miles).

90. Defendant intensified its expropriation efforts with (i) the April 10, 1898 Imperial Decree establishing reservations for forced relocation of the Ovaherero and Nama peoples; (ii) the seizure of land acquired to bisect Hereroland with a railway to Otavi, thereby expropriating lands 10–20 kilometers from the track in both directions; and (iii) the 1903 Credit Ordinance.

91. As a result of Defendant's takings and other violations, the Ovaherero and Nama herds had dwindled to just 50,000 head of cattle by 1903, down from their wealth of several hundreds of thousands of cattle in the 1880s. With their cattle gone, Ovaherero and Nama herders were forced into wage labor, slavery and servitude, which process was accelerated by usurious and fraudulent loans that were foisted upon many of the Ovaherero and Nama herders by Defendant's agents and German banks and traders, all of which were supported and subsidized by Defendant. Under the 1903 Credit Ordinance, German creditors' claims against Ovaherero and Nama debtors were to prescribe after twelve months. With Defendant's direction, support, and aiding and abetting, armed German creditors responded by immediately descending upon impoverished Ovaherero and Nama debtors on horseback, enforcing their claims through theft of all remaining Ovaherero and Nama cattle and other valuable property.

92. In Hereroland, Lieutenant Ralph Zürn continued Defendant's policies and practices of expropriation. In November 1903 he had been appointed as commander of the fort at Okahandja, the central capital and metropolis of all Hereroland, and the home of Paramount Chief Maharero and his family. It was a holy place for all Ovaherero; the Maharero dynasty's ancestors were buried there, and it was there that Chief Maharero maintained his clan's holy fire—the *Okuruo*—which must remain lit for eternity under customary Ovaherero law.

93. Lieutenant Zürn and other German agents carried out a series of fraudulent and barbaric acts on the Ovaherero residents of Okahandja.

94. In December 1903, Zürn summoned Ovaherero leaders and demanded that they sign a contract handing over numerous tracts of ancestral land. When the leaders refused, they were physically removed from Zürn's office, and Zürn subsequently forged their signatures. On December 8, 1903, Zürn announced these new northern borders to Hereroland.

95. Lieutenant Zürn and other Germany agents also dug up the holy graveyards of the Maharero dynasty, and defiled the corpses of the royal clan's ancestors. This was a flagrant and severe violation of customary Ovaherero law.

D. Defendant's Campaign of Genocide against the Ovaherero

96. Throughout South West Africa, German settlers were able to establish lucrative plantations by exploiting the labor of the local indigenous Ovaherero and Nama. Since the German colonial authorities and the German settlers considered the indigenous peoples to be *Untermenschen* ("subhuman"), Ovaherero and Nama tribeswomen were subjected to virtually incessant rape and other abuses, and then their men were killed for attempting to defend them.

97. German settlers routinely stole the ancestral lands and cattle of the native Ovaherero and Nama, often facilitated by the predatory and confiscatory German bank lending practices enforced at gunpoint by the German colonial authorities.

98. In early January, false rumors had begun spreading regarding an Ovaherero uprising. German traders had spread the false rumors that the Ovaherero were buying goods on credit to stock up in preparation for an attack.

99. On January 10, 1904, one trader, Alex Niet, falsely reported to Lieutenant Zürn that he witnessed 300 armed Ovaherero poised to attack Okahandja. Zürn telegraphed Okahandja, and hid in his fort with the German settlers, traders, and newly arrived *Schutztruppe* reinforcements.

100. Lieutenant Zürn sent out numerous scouts over the next two days, all of whom returned with no indication of a threat. Nonetheless, the Germans had begun gossiping, spreading rumors, and preparing for what they ultimately desired: an

opportunity to kill their African neighbors and take their property under the guise of an Ovaherero “revolt.”

101. On January 12, 1904, Germany began its war against the Ovaherero people. Lieutenant Zürn ordered his soldiers to open fire on any Ovaherero people who happened to be in the proximity of the fort.

102. The Ovaherero had been subjected to Defendant’s systematic policies and practices of expropriation and abuse, by which Defendant directed and aided and abetted in the murder of Ovaherero men, the theft of land and cattle without compensation, the threat of being removed to reservations under Defendant’s guard, and the incessant rape and sexual exploitation of Ovaherero women and children.

E. The Ovaherero Resistance

103. The Ovaherero did not want war. Lieutenant Zürn’s actions, however, forced the Ovaherero to defend themselves.

104. In early 1904, the Ovaherero surrounded the town of Okahandja and cut links to Windhoek, the colonial capital.

105. Under the explicit humanitarian directives of Chief Mahararo, the Ovaherero forces were directed not to harm any German woman, children, or missionaries, and no violence was to be conducted against the English, the Boers, or any other

tribes. Fewer than 150 German settlers and soldiers, including fewer than five women and one child, lost their lives in the initial Ovaherero military response.

106. Following the attack, the settlers, the Colonial government, and the German pro-colonial classes of industrialists, politicians, and nationalists rallied for total war.

107. German troops began spreading out through Hereroland, taking defensive positions, and lynching any Ovaherero men they found.

108. Germany ultimately rejected the idea of mere enslavement of these native peoples. Instead, frustrated with Governor Leutwein's failures at the battle of Oviumbo and unwilling to accept anything short of absolute expropriation, the Kaiser replaced Leutwein with a new agent who would complete the expropriation with the requisite amount of violence: Lieutenant-General Adrien Dietrich Lothar von Trotha. General von Trotha served as Defendant's agent as Governor and Supreme Commander of "German South West Africa" from May 1904 until November 1905. Defendant instructed General von Trotha to "end the war by fair or foul means," and entrusted the command to him with "fullest confidence in [his] insight, energy, and experience."

109. On June 11, 1904, Lieutenant General von Trotha arrived with an expeditionary force of 14,000 troops.

110. Von Trotha made clear his intentions to crush the resistance and to annihilate the Ovaherero

and Nama peoples, leaving the land free for fulfillment of the German dream of Lebensraum. Prior to the Battle of Waterberg on August 11–12, 1904, where his troops defeated the Ovaherero, General von Trotha issued the following proclamation:

I believe that the [Ovaherero] nation as such should be annihilated, or, if this was not possible by tactical measures, have to be expelled from the country...This will be possible if the water-holes from Grootfontein to Gobabis are occupied. The constant movement of our troops will enable us to find the small groups of nation who have moved backwards and destroy them gradually.

111. Von Trotha further wrote: “It is my intention to destroy the rebellious tribes with streams of blood and money.” His men used the German word “Vernichtung,” meaning “extermination.”

112. By August 1904, over 60,000 Ovaherero people had gathered at Waterberg, including the elderly, handicapped, unarmed men, women, and children. They planned to surrender.

113. General von Trotha’s troops descended upon Waterberg, encircling the Ovaherero camp with a battalion of 4,000 men, 1,500 rifles, hand grenades, thirty state-of-the-art artillery pieces, and twelve state-of-the-art machine guns, split into six divisions in a star-shaped formation. It was a deadly firing squad.

114. General von Trotha left one exit open to the Ovaherero: a valley leading to the Omaheke Desert to the east, which he used as a tactical barrier. The tens of thousands of Ovaherero men, women, and children that were not killed in the assault were forced to abandon their belongings and herds and escape into the desert. One German Officer described it: “The entire national wealth of the Herero was left by the wayside.” The German troops carefully gathered up any valuables, which were expropriated by Defendant and its agents, and shipped back to Germany.

115. Defendant continued its goals of annihilation, and pursued the Ovaherero men, women, and children mercilessly. Officers Ludwig von Estorff and Berthold von Deimling were deployed with their divisions in pursuit on August 13, 1904, cutting down Ovaherero men, women, and children that they encountered, even those unarmed and unable to offer resistance.

116. The Omaheke Desert is a vast sandveld with high desert temperatures, virtually no rainfall, sparse vegetation, sparse and limited sources of water, dried arroyos, and typically under 5 millimeters of rainfall during August and September. Its ecosystem does not support much life. Some of the Ovaherero, including Chief Samuel Maharero, were able to survive the arduous trek across the desert to the British protectorate Bechuaunaland—today, Botswana—where they took refuge. Others fled to Ovamboland, and others to South Africa. But most of the Ovaherero, who entered the desert, perished.

117. In September, Defendant cordoned off the Omaheke desert with a 250-kilometer armed perimeter. General von Trotha wrote:

[We must drive the opponent] back into the desert should he not fight, where thirst and privation will complete his destruction.

118. Defendant's extermination and genocidal policies and practices were fully implemented at this point, since Germany had no intention of permitting the Ovaherero to surrender. Defendant's explicit goal was to annihilate them entirely as a people. General von Trotha wrote:

The sealing-off of the eastern border of the colony and pursuit of a policy of terror against every remaining Herero in the land will continue as long as I remain in the territory. The nation [of the Ovaherero] must perish. If we do not succeed in killing them with guns, then it must be achieved in this fashion.

119. Von Trotha issued Imperial Order No. 3737, dated October 2, 1904. It was an Extermination Order:¹⁶

¹⁶ Von Trotha's command became known as a

I, the Great General of the German Soldiers,
send this letter to the Herero people.

The Herero people are no longer German subjects... The Herero people must now leave the country. If they refuse, I will force them to leave with my Big Cannon. Every Herero found inside the German border, with or without a gun or cattle, will be shot. I shall spare neither women nor children: send them back to their people or shoot them. These are my words to the Herero people.

120. Von Trotha gave orders that captured Ovaherero males were to be executed, while women and children were to be driven into the desert so that they would die of starvation and thirst. He argued that there was no need to make exceptions for Ovaherero women and children, since they would “infect German troops with their diseases.” Von Trotha further explained that his campaign to annihilate the Ovaherero peoples “is and remains the beginning of a racial struggle.”

121. At one point, General von Trotha collected a large group of prisoners, including men, women, and children. He forced half of them to watch

“*Vernichtungsbefehl*,” i.e., an “extermination order.”

the lynching of the other half. He handed out so-called courtesy copies of his Extermination Order printed in Otjiherero and cast the survivors into the desert to distribute his message of doom.

122. Defendant sent patrols into the Omaheke and surrounding territories and rewarded its agents for the mass murder of the Ovaherero people. To ensure accurate reporting of how many Ovaherero men were murdered on such patrols, Defendant required its agents to cut off victims' ears as evidence.

123. The Extermination Order gave a veneer of legal legitimacy to the extermination policies and practices that were already in place.

124. The extermination continued, and Defendant's agents murdered any survivors they found, including men, women, and children who approached the perimeter seeking aid.

125. Private Adolf Fischer reported on the Omaheke's effects on the Ovaherero people:

Whenever we dismounted, our feet would hit against the human bodies. There was a young woman with wilted breasts, her frozen face covered with flies and curled up next to her hip an aborted birth. There was also an old woman, who had great difficulty walking. Eight or ten leg rings made from rough iron pearls—the sign of dignity and wealth—had eaten her flesh to the bone... There was a boy. He was still alive;

staring into the night with a stupid grin from an empty mind... Whoever took part in the chase through the Sandveld lost his belief in righteousness on Earth.

126. Lieutenant Graf Schweinitz, who had also traveled the Omaheke, graphically described the total annihilation of the Ovaherero people in 1905:

There's a path that leads out of Onduru towards Omuramba. Alongside the path are human skulls, rib cages, and thousands of fallen cattle and other livestock. This is the path on which the Ovaherero fled.

In the thicker vegetation, where cattle dying of thirst cluttered for shade from the punishing sun, hundreds of cadavers lie around and on top of each other. In many places, holes of 15 to 20 meters were dug in a vain search for water. Everything suggests this was a march of death...

The cooking of the dead and the violent screams of insanity – they will echo forever in the hallowed silence of eternity.

127. Defendant's General Staff had knowledge of, directed, and supported these atrocities. Its official publication *Der Kampf* (The Fight) stated:

This bold enterprise shows up in the most brilliant light the ruthless energy of the German command in pursuing their beaten enemy. No pains, no sacrifices were spared in eliminating the last remnants of enemy resistance. Like a wounded beast the enemy was tracked down from one water-hole to the next, until finally he became the victim of his own environment. The arid Omaheke Desert was to complete what the German army had begun: The extermination of the Herero people.

128. Defendant's commander-in-chief, Kaiser Wilhelm II, was thrilled by the results achieved by his loyal General von Trotha. Kaiser Wilhelm II wrote to him:

You have entirely fulfilled my expectations when I named you commander of the colonial troops, and I take pleasure in expressing, once again, my utter gratitude for your accomplishments so far.

129. The rhetoric used by von Trotha to justify the extermination of the Ovaherero and Nama peoples eerily presaged the language later used by Hitler to justify the mass extermination of the Jewish people as an "ethnic cleansing" necessary for the resurrection of a New Germany. Von Trotha saw the annihilation of the Ovaherero and Nama peoples as serving a higher

purpose, as part of the establishment of a new world order. He said: "I destroy the African tribes with streams of blood... Only following this cleansing can something new emerge, which will remain."

130. But in the winter of 1904, Chancellor von Bülow became concerned about what he considered to be major human rights violations. He believed that Defendant's actions, conducted under color of law through the will of the German people, might tarnish the German people's reputation for years, if not centuries. Chancellor von Bülow predicted that the genocide has the potential to "demolish Germany's reputation among civilized nations and indulge foreign agitation."

131. Defendant rescinded the Extermination Order in December 1904 and replaced it with an Enslavement Order. Nonetheless, the Extermination Order survived in spirit and policy. For example, the 250-kilometer armed perimeter blocking the Ovaherero people's return from the desert was maintained until mid-1905. Most of the Ovaherero were already dead by then. Nonetheless, patrols against Ovaherero survivors in the Omaheke and elsewhere continued until 1911.

132. Trotha explained his actions to Bülow by letter dated Jan. 6, 1905:

When I took over command, Governor Leutwein gave me a finished proclamation to the Herero, ready for printing,... which promised them clemency if they admitted their wrongdoing and

came back remorsefully. I immediately declared that I opposed on principle handling the uprising in this way, and that in my opinion, such treatment contradicted the intentions of *His Majesty*. Nothing further happened.

133. According to Paul Rohrbach, Commissioner for Settlement in Windhoek from 1903–06, Germany conducted a “so-called Extermination Program— extermination not only in the natural militaristic sense, *i.e.*, extermination or destruction of the enemy’s power of resistance, but rather intended as actual eradication of the tribes,” and the subsequent enslavement of the Ovaherero and Nama explicitly intended to exterminate national identity by “dissolving all tribal organizations, and transforming the natives from members of once divided nations into a single as homogenous as possible servant class.”

134. On December 1, 1905, Friedrich von Lindequist, who had replaced Leutwein as Civil Governor, issued an order that all surviving Ovaherero surrender and report to shelters that Defendant established at Omburo and Otjihaenena, where they need not “fear being shot at.” By April 1906, several thousand Ovaherero survivors had arrived at these stations. From there, they were transported to the concentration camps at Omaruru and Windhoek for slave labor and death.

135. By May 1, 1906, Defendant’s agents had captured a total of 14,769 Ovaherero men, women, and

children who had surrendered. They were promptly enslaved and relocated to concentration camps. Approximately half of them perished.

F. Defendant's War and Genocide against the Nama

136. In the period 1884–1904, Defendant's confiscatory policies and practices against the Ovaherero were implemented with careful precision against the Nama people as well. As with the Ovaherero, Defendant's pre-1904 actions aimed at the goal of the absolute expropriation of all Nama land, livestock, and other property.

137. Defendant negotiated with the Nama during its war against the Ovaherero, biding its time until prepared to handle both fronts.

138. In August 1903, Defendant appointed Rohrbach to conduct an economic analysis of the costs and benefits of exterminating the Nama people. He found:

From the point of view of the economy of the country, the Hottentots are generally regarded, in the wider sense, as useless, and, in this respect, providing no justification for the preservation of this race.

139. In another analysis, Georg Wasserfall, the editor of the German South West Africa Newspaper, proposed exterminating the Nama peoples *instead* of the Ovaherero:

The Hereros should not be destroyed—the Witboois, yes—the reason being that the Hereros are needed as laborers, and the Witboois are an insignificant tribe.

140. Convinced that extermination, genocide, and total expropriation were required to secure the wealth of Great Namaqualand for itself, two companies of German soldiers and an artillery battery were sent to Great Namaqualand in April 1904 to begin staging its assault.

141. On May 25, 1904, an Imperial Officer in Keetmanshoop informed the Governor that a revolt was likely. He noted that several hundred lawsuits had been brought in recent months against Nama debtors by German firms and traders in Keetmanshoop. Judgment creditors had been enforcing their fraudulent judgments against Nama judgment debtors by stealing the only possessions they had left: their cattle, gemstones and other valuables.

142. In July 1904, Chief Jacob Morenga of the Bondelszwart Nama tribe recognized the threat. He sought to liberate his people from Defendant's confiscatory, violent, and oppressive policies, practices,

and takings. Morenga and a few colleagues began an uprising by robbing German farmers of their ammunition and arms.

143. In September 1904, a German force was sent to capture Morenga, but failed. Morenga soon commanded a guerilla force of 400 Bondelszwart soldiers.

144. In early October 1904, Chief Witbooi described Defendant's crimes in an official declaration of war sent to Governor Leutwein.

145. Defendant's plan and policy was to treat the Nama peoples with the same fate that met the Ovaherero. On October 24, 1904, General von Trotha returned to Windhoek from his ongoing genocide of the Ovaherero to assess the Nama situation. He placed Colonel Berthold von Deimling in command of the Nama war, provided for reinforcements of 4,000 men, and began construction of a railway into Great Namaqualand for logistical support. Colonel von Deimling strategized the methods for destroying the Nama people:

We must not allow the Hottentotts to escape, rather we must encircle and destroy them before they do so.

146. In December 1904, Defendant's forces attacked the Witbooi Nama in their homeland of

Rietmond, forcing them to escape and abandon their belongings, valuables and cattle.

147. In April 1905, General von Trotha took personal command over the Nama campaign. As his first order of business, General von Trotha set about drafting a new Extermination Order, using the Ovaherero Extermination Order as a template. He issued the Extermination Order to the Nama people in the city of Gibeon on April 22, 1905:

[T]hose few refusing to surrender will suffer the same fate suffered by the Herero people, who, in their blindness, believed that they could successfully wage war against the mighty German Emperor and the great German People. I ask you: Where are the Herero people today? Where are their chiefs today?

148. The Extermination Order made clear that the genocide would continue until each and every Nama man, woman, and child was either enslaved or murdered:

The Nama who chooses not to surrender and lets himself be seen in German territory will be shot until all are exterminated.

149. Most Nama tribes were forced into surrender by mid-1906. Defendant enslaved approximately 2,000 Nama men, women, and children that were taken prisoner during the war and the ensuing surrender. They were placed in concentration camps with the Ovaherero, and all of their land, livestock, and other property were expropriated.

G. Defendant's Concentration Camps

150. By the end of 1904, German settlers, merchants, farmers, the military, shipping companies, mining companies, and railroad companies were facing sharp labor shortages, leading to a decline in productivity and trade across all sectors. The labor shortage was due primarily to the fact that Defendant had begun killing their Ovaherero and Nama laborers.

151. To solve these labor issues, Defendant herded all surviving Ovaherero and Nama peoples into concentration camps, where they were made available to colonists and private companies as slave laborers or exploited in medical experiments. The camps were established at Okahandja, Omaruru, Karibib, Keetmanshoop, Lüderitz Bay, Swakopmund, Windhoek, and elsewhere. Approximately 2,000 Nama people and 14,769 Ovaherero people—mostly women and children— were enslaved in the concentration camps.¹⁷

¹⁷ Defendant called the camps "*Konzentrationslager*" (Concentration Camps), as early as January 1905 in a telegram

152. All prisoners were first divided into two categories: those who were fit to work and those who were not. For administrative purposes, pre-printed death certificates uniformly gave the cause of death as “death by exhaustion following privation.”

153. Defendant housed the inmates in dilapidated tents surrounded by walls, barbed wire, and guards. Defendant also permitted private concentration camps to be erected at the industrial facilities of firms that purchased slaves from Defendant. Ovaherero and Nama people of all ages and gender were treated uniformly and housed together without distinction. Those who surrendered and those who were captured received the same fate.

154. Under the belief that it owned the Ovaherero and Nama as property, Defendant used inmates as slave labor for public and private projects. Defendant transported men, women, and children slaves to line command posts, and then to Imperial District Offices, where they were rented out by day or by month to settlers, merchants, farmers, the military, shipping companies, mining companies, and railroad companies. Records indicate that some lessors paid the District Offices fifty pfennigs per day or ten Reichsmark per month per leased slave.

155. Again, under the belief that it owned the Ovaherero and Nama as property, Defendant would also sell individuals as human merchandise. Some slaves were sold in bulk. Defendant benefited from the

sent from Defendant's Imperial Chancellery.

taxes, tariffs, customs, and duties that it charged for the export of human property. Receipts and records indicate that at least one such customs charge amounted to twenty Reichsmark per exported slave.

156. The Ovaherero and Nama prisoners were subjected to relentless hard labor, such as hauling iron or dragging carts and wagons in the place of beasts of burden. Defendant typed out pre-printed death certificates for all such prisoners, with an accompanying space to enter the slave's identification number after the pre-printed cause of death: "death by exhaustion."

157. The Ovaherero and Nama had been accustomed to a varied diet of dairy, meat, and fruit. Due to the deprivation of food and absence of normal nutrition, the prisoners suffered numerous illnesses, including scurvy, bronchitis, and chicken pox. Pneumonia was also rampant. Despite these illnesses, Defendant's policies and practices were for the camp Medical Offices to leave the Ovaherero and Nama peoples untreated. According to the records of the Medical Offices, most of the ill had entered the camps in reasonably good health and developed their illnesses at the camps.

158. The Ovaherero and Nama women and children faced the worst fate. They were given lower rations, and many starved to death. Defendant's agents sexually abused and raped the women and children, and, again, under the belief that it owned the Ovaherero and Nama as property, Defendant rented out the bodies of women and children to private individuals.

159. Life at the Swakopmund concentration camp was particularly painful for the Ovaherero and the Nama prisoners.

160. Missionary Dr. Heinrich Vedder lamented the inhumane conditions at Swakopmund, and of the high death rate due to exhaustion, starvation, and disease:

From early morning until late at night, on weekdays as well as on Sundays and holidays, they had to work under the clubs of tough overseers until they collapsed. Added to this, the food was extremely scarce. Rice without any necessary additions was not enough to support their bodies, already weakened by life in the field and used to hot sun of the interior, from the cold and restless exertion of all their powers in the prison conditions of Swakopmund. Like cattle hundreds were driven to death and like cattle they were buried.

161. Dr. Vedder, who had lived amongst the Ovaherero for many years, empathized with their suffering, fought for their redemption, and was bitter about Defendant's actions:

They suffered greatly from the cold in the coastal towns. Their clothing had long since been torn to tatters. Men and women went about in

sacking, their only protection from the cold. Many got inflammation of the lungs and died. During the worst period an average of 30 died daily. It was the way the system worked. General von Trotha gave expression to this system in an article which he published in the *Swakopmunder Zeitung*: "The destruction of all rebellious native tribes is the aim of our efforts."

162. The sickest individuals, including children, the elderly, the handicapped, and pregnant women were forced into daily hard labor as slaves. Missionary Kuhlmann unsuccessfully asked the colonial government to exercise some humanity and only send healthy Ovaherero men out of the camps for hard labor, "because the others just die there."

163. In a letter to Deputy Governor Hans Tecklenburg dated May 29, 1905, Dr. Fuchs, the civilian District Commissioner of Swakopmund, presented the results of an investigation to colonial command. He and Dr. Sowade, his Chief Medical Officer, had become concerned about the camp conditions, and they had researched slave mortality rates. They found that 10 percent of the slaves had died in the last two weeks of May 1905. Dr. Fuchs recommended immediate improvements in camp conditions:

The death-rate of natives in Swakopmund has undoubtedly risen enormously. The cause, and I agree with the Chief Medical Officer's view, is the defective accommodation, clothing and

feeding of natives, particularly among prisoners of war, together with the raw unaccustomed climate, and the weak physical conditions of the prisoners brought here.... I do not think that these pitiful cases should be sent here to Swakopmund. They should be sent inland to recover under the control of the Government.

164. In a letter dated June 15, 1905, Dr. Sowade reported further to Defendant:

In Swakopmund there are over 1,000 Herero prisoners, men, women, and children. Most of those who arrive here are literally skin and bone.

165. Dr. Fuchs's report was read and circulated widely through command in Windhoek and the General Staff in Berlin. Dr. Fuchs's recommendations were categorically denied. The labor market in the Swakopmund region was simply too weak to allow the slaves to recuperate. Defendant implemented policies that reflected its values: the needs of the weak, children, and elderly slaves were subordinate to the needs of local businesses that were hoping for streamlined operations and expanded profits. Deputy Governor Tecklenburg explained Defendant's decision:

What is happening in Swakopmund is also happening in Lüderitz Bay. There is a great demand for native labor. As the Hottentots are scarcely available, the Hereros come into question. Of course it is desirable that these should be strong and healthy in the interests of labor and also of humanity, but it can scarcely be avoided that also old and sick people and weak children should be sent to Swakopmund and Lüderitz Bay for whom everything appears to have been done. Instructions have been given to attend to these various points and to keep weak people back in Omaruru stations. It is difficult to send back the weak Hereros interned in Swakopmund as suggested by Dr. Fuchs because there are no replacements for them.

166. Admitting that some Ovaherero people would likely survive imprisonment, Deputy Governor Tecklenburg further believed the high death rates in the camps were unequivocally in Defendant's economic interests:

The more the Herero people now feel the consequences of the uprising on their own bodies, the less the coming generations will feel inclined to rebel. Sure, the death of so many natives has a negative commercial impact, but the natural life- force of the Hereros will soon allow them to recover their numbers. The future

generations, which could possibly be mixed with a bit of Damara blood, could thus be fed with an understanding of their inferiority to the white race.

167. That is, by feeding future generations of the Ovaherero with “an understanding of their inferiority to the white race,” Deputy Governor Tecklenburg sought to economically and politically impair the future generations of the entire Ovaherero people, including Plaintiffs and the Classes.¹⁸

168. The Lüderitz Bay concentration camp was located on Shark Island, a small island—and now peninsula—just off the coast. Here, Defendant practiced prison techniques that it later employed at similarly structured death facilities in the 1930s and 1940s.

169. The mortality rate from disease, exhaustion, and malnutrition at Shark Island and other concentration camps was in the range of 45–74 percent. Despite these harsh conditions, all Ovaherero men, women, and children who could stand were taken outside the camp every day as forced laborers, while the sick and dying were left without medical assistance. Shootings, hangings, and beatings of the forced laborers were widely reported by eyewitnesses, in the press, and in Defendant’s well-maintained Imperial records. One eyewitness reported:

¹⁸ “The Classes” are denominated by Plaintiffs in ¶ 334, *et seq.*, *infra*.

Cold—for the nights are often bitterly cold there—hunger, thirst, exposure, disease, and madness claimed scores of victims every day, and cartloads of their bodies were every day carted over to the back beach, buried in a few inches of sand at low tide, and as the tide came in the bodies were out, food for the sharks.

170. Defendant conducted medical experiments on live prisoners, for example, in the human-experiment laboratory of Dr. Eugen Fischer and Dr. Bofinger, who injected Ovaherero and Nama that were suffering from scurvy with poisons, including arsenic and opium. After the inmates inevitably died, the doctors autopsied the bodies and reported the results to Defendant.

171. Defendant's doctors also experimented with dead body parts from prisoners, including the experiments of zoologist Dr. Leonhard Schultze, who was pleased by the ready availability of body parts:

I could make use of the victims and take parts from fresh native corpses, which made a welcome addition...

172. At Shark Island, 778 Ovaherero and Nama bodies were dissected in post-mortems for

Defendant's medical research. Various German doctors were involved in these dissections, including Drs. Dansauer, Jungels, Mayer, and Zöllner.

173. Ovaherero and Nama skulls had been requested by the Pathological Institute in Berlin and the University of Breslau, including by Professor Klaatsch, for experimentation, display, and scientific research in the field of *Rassenlehre* (Race Theory), a field of scientific study in Germany that espoused the superiority of the white race. Anthropologist William Waldeyer in Berlin also requested skulls.

174. At Shark Island, Defendant decapitated Herero and Nama men, women, and children by axe, machete, or saw, and boiled the severed heads in water. Subsequently, Defendant equipped women and girls with glass shards, and forced them to strip the boiled heads clean of flesh. This routine required the women and girls to strip off the noses, faces, scalps, and neck tissue, and then remove the inner tissue, tongues, and brains, from the boiled heads of their husbands and fathers, leaving only the polished skulls. Once so cleaned, Defendant packaged the skulls for international transport, and shipped them to Germany.¹⁹

¹⁹ The details of the methods used to obtain these skulls were recorded in the "Health Report of the Imperial *Schutztruppe* for South West Africa during the Herero and Nama Rebellion during January 1, 1904 to March 31, 1907" (*Sanitätsbericht über die kaiserliche Schutztruppe für SWA während des Herero und Hottentottenaufstandes für die Zeit vom 1/1/04 – 31/3/07*) (1909), as well as the letter from the State Secretary of the Imperial

175. Defendant also decapitated at least seventeen Nama people. As with the Ovaherero, Defendant boiled the Nama heads, and forced Nama women and children to peel the boiled faces off in strips, using crude shards of glass. Defendant then packaged the skulls for international transport and shipped them to Germany.

176. Some heads of women and children were treated likewise, including the head of a one- year-old Nama girl. In late 1906, Dr. Bofinger decapitated the infant girl and removed and weighed her brain, before placing her head in preservatives, sealing it in a tin, and sending it for further examination by his colleague Christian Fetzner at the Institute of Pathology at the University of Berlin.

177. These barbaric acts were undertaken on the instruction of, with knowledge of, to the benefit of, and through the complicity of Defendant and Defendant's agents. Despite such knowledge and complicity, Defendant and Defendant's agents continued to refer to the Ovaherero and Nama peoples as "savages."

178. Defendant also shipped the intact corpses of Ovaherero and Nama men, women, and children to Germany. Following their murders, often by hanging, corpses were placed in preservatives and sent to Germany for dissection. The scientific results of these

Ministry of Colonies (*Reichs-Kolonialamt*) to the Imperial Governor in Windhoek, dated July 31, 1908.

dissections and the current whereabouts of the subjects' mortal remains are unknown.

179. Dr. Eugen Fischer, amongst others, performed the medical experiments on the remains of Ovaherero and Nama victims. He was a leading German race scientist, who later become Chancellor of the University of Berlin, where he taught medicine to and worked alongside Nazi racial theorists and doctors throughout the 1920s, 1930s, and 1940s.

180. When the Shark Island Concentration Camp and other camps were closed, the surviving Ovaherero and Nama were distributed as indentured servants or slaves to German settlers, merchants, farmers, the military, shipping companies, mining companies, and railroad companies. The Ovaherero and Nama were also prohibited from owning land or livestock, both of which were necessary for survival.

181. Of the approximately 14,769 Ovaherero and 2,000 Nama people enslaved in the concentration camps, a total of 7,682 died between October 1904 and March 1907, a mortality rate of approximately 50 percent.

H. Defendant's Takings in Violation of International Law

182. Defendant's direction, funding and support of, and aiding and abetting of the crimes alleged herein, including, but not limited to murder, genocide, rape, and destruction of the sovereign

Ovaherero and Nama polities, comprises the context for Defendant's *property-based crimes*. Through and by the crimes alleged herein, Defendant took several discrete categories of property in violation of international law in which Plaintiffs and the Classes possess property rights, and profited from these takings, including Plaintiffs' (i) land rights; (ii) rights in personal property and livestock; (iii) concession rights, tax rights, customs rights, and precious metals; (iv) sovereignty-related property rights; (v) the tort and labor rights of Plaintiffs' family members; (vi) the skulls, flesh, brains, hair, and other mortal remains of Plaintiffs' family members; (vii) and the corpses of Plaintiffs' family members. Defendant's government during the time period in question, the German Empire—also known as the *Kaiserreich* or Second Reich—was originally forged by economic forces and served first and foremost its named purpose of *Wirtschaftskörper*, *i.e.*, an economic body. Economic motives governed the four constitutional conventions from 1867–71 that gave rise to the German Empire, and the state was founded for the goal of commercial, financial, and industrial development. In its unquenchable thirst for increasing profits, Defendant expropriated nearly every property interest that the Ovaherero and Nama peoples had.

1. Defendant's Takings of Plaintiffs' Property Rights in Land

183. Defendant engaged in the genocide of the Ovaherero and Nama peoples with the active and

explicit goal of thereby obtaining their land rights, and as such, Defendant's illegal takings of Ovaherero and Nama land were in violation of international law. Amongst its many takings of land, Defendant took Ovaherero land that encompassed the city of Windhoek. The expropriated land rights included, but were not limited to, the right to cultivate, develop, and sell and lease the land. From 1884–1915, Defendant used the land rights that it had taken from the Ovaherero and Nama peoples in violation of international law, to include, but are not limited to, the lease and sale of such lands to private industrial, finance, and railway companies, the cultivation of such lands for domestic governmental use, and the erection of governmental and military facilities, offices, and camps.

184. According to records of the German Colonial authorities, most of the confiscated lands of the Ovaherero and Nama peoples were sold to white settlers, with the proceeds going to the German treasury.²⁰ The German colonial authorities regulated the sale and lease of confiscated land, under guidelines stating that the sales should only be made to European settlers wishing to cultivate the lands. Former members of the German colonial military forces (Schutztruppe) were sold the expropriated lands by the German colonial authorities at a 50% discount.

185. As a result of these confiscations and expropriations without compensation, the Ovaherero

²⁰ Statement of Secretary Prince zu Hohenlohe-Langenburg, Reichtag, 11th term, 73rd session, 23 March 1906, Reichstagsprotokolle 1905/06 vol. 3, pp. 2230-1, 2239.

and Nama peoples were left with no land to pasture livestock, notwithstanding that their livestock already had been taken from them. These native peoples could only remain on the land if they were working on farms now owned by German settlers. Defendant's declared intention was not only to take these native lands and distribute them to German settlers, but by confiscating the Ovaherero and Nama of their lands and livestock, they were also stripping them of all their political and economic power, as well as their means to resist. Plaintiffs are entitled to an accounting and the disgorgement of all revenues Defendant obtained through its illegal takings, plus interest, in an amount to be determined at trial.

2. Defendant's Takings of Plaintiffs' Property Rights in Personal Property and Livestock

186. Defendant engaged in the genocide of the Ovaherero and Nama peoples with the active and explicit goal of thereby taking the herds, livestock and personal property of the Ovaherero and Nama peoples. As such, Defendant's criminal theft of personal property and tens of thousands of cattle from the Ovaherero and Nama peoples constituted takings in violation of international law. The property rights in livestock included the right to sell, slaughter, and milk the cattle, amongst others. Over the period from 1884–1915, Defendant used the cattle that it took in violation of international law to its benefit in manners including,

but not limited to, the sale of such cattle to private ranchers, and the slaughter and milking of such cattle. By 1913 the Germans possessed approximately 205,643 head of cattle in South West Africa, much of which were taken from the Ovaherero and Nama.

187. Defendant's colonial administration obtained substantial income from well-documented auctions of cattle confiscated from the Ovaherero and Nama, and by redistributing some of the cattle to German settlers who had claims for compensation payments, the colonial authorities also achieved substantial savings, since Defendant did not have to make any cash payments regarding those claims.

188. At Hoornkrans on the morning of April 13, 1893, Defendant took personal property from the Nama people in violation of international law, including, but not limited to 212 stirrups, 74 horseshoes, 12 coffee pots, 12 coffee-grinders, 122 pieces of cutlery, 44 bits and bridles, 3 violins, and one pair of opera glasses.

189. At Hoornkrans on the morning of April 13, 1893, Defendant also took personal property from Chief Hendrik Witbooi in violation of international law, including, but not limited to his personal bible.

190. These takings of personal property are typical and exemplary of Defendants' taking and stripping of all valuable personal property from the Ovaherero and Nama peoples, including diamonds, valuable coins, gold, silver, gemstones, ostrich feathers, copper products, and valuable jewelry.

191. Plaintiffs are entitled to an accounting and the disgorgement of all revenues Defendant obtained and savings Defendant realized through this illegal taking, plus interest, in an amount to be determined at trial. Plaintiffs are further entitled to the return of all personal property taken in violation of international law.

3. Defendant's Takings of Plaintiffs' Concession, Taxation, Customs Rights and Revenues; Additional Rights Taken to Precious Metals and Other Resources

192. Beyond the taking of land rights and personal property in violation of international law, Defendant also took various other related property rights of Plaintiffs in violation of international law. Over the course of Defendant's occupation of Hereroland and Great Namaqualand, Defendant sold and auctioned concession rights under color of law to private companies in return for concession fees; exercised taxation rights and obtained taxation revenue, all of which were taken in violation of international law. It also exercised customs, duties, and tariff rights and thereby obtained revenues, all of which were taken in violation of international law.

193. Through its annihilation of the Ovaherero and Nama political and sovereign entities, as well as its peoples, Defendant achieved unlawful governmental control over broad swaths of land that belonged to the

Ovaherero and Nama peoples. By 1914, these territories included the entire coast of modern-day Namibia from the Orange River to the Cunene River, extending approximately 200–300 miles inland. By 1914 Defendant had sold a substantial portion of the land it had taken, and issued concession rights to private corporations, including, but not limited to the following companies:

- a. the German South West Africa Company, which claimed ownership over the bottom half of the Namibian coastline, extending inland by approximately 100 miles; as well as mineral rights over broad amounts of territory, including a territory of at least 500 square miles in Hereroland, centered around the Hereroland capital Okahandja, and other smaller territories to the south, including near Hoornkrans (the former headquarters of Paramount Chief Hendrik Witbooi of the Nama), along the Konipi river in the land of the Bethanien Nama, as well as in the land of the Red Nation Nama;
- b. the *Kaoko Land und Minengesellschaft* (Kaoko Land and Mining Company), which claimed ownership over much of the Kaokoveld Desert on the north coast of modern-day Namibia, extending inland by approximately 100 miles, as well as mineral rights in the northwestern desert near Guiarob and Otjtambi;

- c. the South West Africa Company, which claimed ownership over an area of at least 100 square miles outside the city limits of Otavi; as well as mineral rights in much of Amboland surrounding the Etoscha Pan in northern modern-day Namibia, *i.e.*, due east of the northern holdings of the Kaoko Land and Mining Company, and including the western stretches of the Omaheke Desert, which had hired Ovaherero labor prior to their genocide and enslavement for work at their copper mines, typically paying Ovaherero men 3 Reichsmark per month;
- d. the *Otavi Minen- und Eisenbahngesellschaft* (Otavi Mining and Railway Company), which claimed land ownership over the city of Otavi, as well as mineral rights in numerous copper deposits near Otavi;
- e. South African Territories Ltd., which claimed mineral rights in a broad portion of southern Great Namaqualand, including the land of the Bondelszwart Nama and the Veldschoendrager Nama; and,
- f. the *Hanseatische Land- und Minengesellschaft* (Hanseatic Land and Mining Company), which claimed mineral rights in two territories located in the mid-west of modern-day Namibia, including the city of Rehoboth and the surrounding river valleys and mountains of the Rehoboth region, as well as Aminias and the

surrounding southern portions of the Umab Desert.

194. Defendant actively supported the industrialization and exploitation of the land following the genocides and by means of its takings. For example, Defendant subsidized the construction of railways with its Colonial Loan program, *e.g.*, through 175 million Reichsmark appropriated for railway construction on May 7, 1908, and an additional 76 million Reichsmark in 1910.

195. Defendant engaged in the genocide of the Ovaherero and Nama peoples with the goal of taking concession, taxation, and customs rights of the Ovaherero and Nama peoples in violation of international law. As such, the takings of such rights themselves constitute takings of property rights in violation of international law.

196. Prior to the expropriation of these rights, the Ovaherero and Nama peoples exercised and profited from these rights. For example, in 1890–94 Ovaherero Chief Manasse Tijisiseta of Omaruru—a political opponent of Paramount Chief Samuel Mahararo—charged mining concession fees, customs, grazing fees, alcohol fees, and taxes, such as a highway wagon tax of 10 shillings and tax delinquency fines of £5. Chief Manasse collected concession fees and taxes from the Rheinisch Missionary of Omaruru, from settlers who wished to establish trading posts, from Boer trekkers who wished to work the land, and from

mining companies that sought to speculate in the mountains outside Omararu.

197. Defendant's unlawful expropriation of the Ovaherero and Nama peoples' concession, taxation, and customs rights resulted in substantial revenues.²¹ Defendant sought to squeeze more economic output from the Protectorate through passage of the Law on Income and Expenditures of Protectorates of March 30, 1892. According to a 1910 report by the *Kolonialwirtschaftliches Komitee* (Colonial Economic Committee) with data obtained from the *Kaiserliches Statistisches Amt* (Imperial Ministry of Statistics), exports from the lands wrongfully taken from the Ovaherero and Nama peoples between 1885 and 1908, not including diamonds and gold, totaled in the multi-millions of Reichsmarks, with exports primarily in ostrich feathers, copper ore, wool, and hides.

198. Another source of revenue from Defendant's use of concession, taxation, and customs rights was the industrial export of cattle, hides, artifacts, and ostrich feathers. Deputy Governor Hintrager recorded the value of cattle, hides, and ostrich feather exports from South West Africa in 1900 and between 1907–13 in Reichsmark:

²¹ For example, the government earned tax, concession, and export revenues, and obtained land from companies such as the Kaoko Land and Mining Company under the Land Tax Ordinance of March 19, 1909, supplemented by the Ordinance of October 12, 1910. In 1912, the Kaoko Land and Mining Company had a property tax liability of 270,455 Reichsmark, but due to liquidity problems, offered the government portions of its land in lieu of payment of back-taxes.

Year	Cattle, hides, and ostrich feather exports in Reichsmark
1900	907,565
1907	333,485
1908	1,447,820
1909	1,980,616
1910	2,125,778
1911	1,785,151
1912	2,097,664
1913	3,463,830
Total	14,141,909

199. By taking the Ovaherero and Nama concession, taxation, and customs rights in their cattle, hides, and ostrich feathers through genocide in violation of international law, Defendant deprived the Ovaherero and Nama peoples of the corresponding concession, taxation, and customs revenues. Defendant obtained revenues by selling the concession rights to private firms, by taxing all related revenues, and by charging customs, tariffs, and duties on the exported cattle, hides, and ostrich feathers. Assuming *arguendo* that Defendant obtained such revenues only in the amount of one-third the value of the exported cattle, hides, and ostrich feathers between 1900–13, revenues would total 4,713,969 Reichsmark, or about \$1 million dollars at the average conversion rate in that period.

200. The mining industry was the most important source of revenues from the expropriated concession, taxation, and customs rights. Defendant conducted its genocide pursuant to the explicit and practiced policy of taking these Ovaherero and Nama precious metal concession, taxation, and customs rights. During 1885–1907, German mining operations in Hereroland and Great Namaqualand already were producing revenues. As a result of Defendant’s genocidal policies and practices, and its illegal taking and use of the property rights described herein, mining operations across the land boomed, and private mining firms exported great wealth in precious metals that were mined and taken from the expropriated lands.

201. German miners looted rich copper deposits in the Otavi and surrounding regions, and by 1913, the Otavi mines were producing 70,000 metric tons of copper per year. The Otavi Mining and Railway Company (Otavi Company) constructed a railway line from Swakopmund, through Otavi, to the Tsumeb mines north of Otavi. Defendant owned the railway leading east to the Grootfontein mines. The Otavi Company first started laying railway track prior to the genocide and had to obtain permission to start laying the track from Paramount Chief Samuel Maharero. Defendant used threats of force to compel Chief Maharero to permit the company to lay the track. However, Chief Maharero refused to grant the Otavi Company any mineral rights, as the Ovaherero people had mined the rich Tsumeb mountains for centuries, using its copper for jewelry and spear heads. Following the genocide and taking of Ovaherero property, the

Otavi Company benefitted from Defendants' expropriation of Ovaherero lands and mining operations by, with Defendant's permission, purchasing and renting enslaved Ovaherero and Nama men, women, and children for labor in these mining and other commercial operations.

202. Deputy Governor Hintrager recorded the value of copper exports from South West Africa between 1906–13 in Reichsmark:

Year	Copper exports in Reichsmark
1906	46,877
1907	1,282,515
1908	6,296,000
1909	4,654,862
1910	5,697,208
1911	3,753,703
1912	6,523,258
1913	7,929,000
Total	36,183,423

203. By taking the Ovaherero and Nama copper deposit concession rights, taxation rights, and customs rights through genocidal acts in violation of international law, Defendant deprived the Ovaherero and Nama peoples of their corresponding concession, taxation, and customs revenues. Defendant obtained immense revenues by selling these concession rights to copper mining firms, by taxing the firms' profits, and by charging customs, tariffs, and duties on the exported

copper. Assuming *arguendo* that Defendant obtained such revenues only in the amount of one-third the value of the exported copper ore between 1906–13, this would total 12,061,140 Reichsmark or about \$2.6 million dollars at the average conversion rate during those years.

204. Diamond dealers and speculators also saw success in their South West Africa operations over the course of Defendant's illegal occupation and confiscation of Ovaherero and Nama lands and diamond mining operations. These diamond operations increased significantly when additional diamond mining resources were discovered in 1908 in portions of the Namib Desert that were traditionally owned by the Ovaherero and/or Nama. In violation of international law, Defendant's agent, Colonial Secretary Bernhard Dernburg, issued exclusive mining and concession rights to the German South West Africa Company on September 22, 1908, and established an official sales agency, the *Diamantenregie des südwestafrikanischen Schutzgebietes* (Diamond Agency for the South West African Protectorate), through which a consortium of German banks marketed and exported diamonds that were discovered on lands taken from the Ovaherero and Nama peoples.

205. Lucrative diamond mines were established at locations including, but not limited to, Pomona, Elisabethbucht, Oranjemund, Kolmanskup, and Lüderitz. While Ovaherero and Nama women and girls were being forced to peel off the boiled faces of their husbands and fathers on Shark Island, German

diamond miners and their families were enjoying the luxuries of the casino, ice factory, ballroom, and bowling alley just ten miles away in Kolmsanskop.

206. Deputy Governor Hintrager recorded the value of diamond exports from South West Africa between 1908–13 in carats and Reichsmark:

Year	Diamond exports in carats	Diamond exports in Reichsmark
1908	38,275	51,180
1909	483,266	15,435,522
1910	846,695	26,869,014
1911	773,308	23,034,146
1912	1,051,777	30,414,078
1913	1,500,000	58,910,000
Total	4,690,000	154,713,940

207. Thus Germany, aided and abetted by various private firms, stole vast treasures from the lands that were taken from the Ovaherero and Nama peoples in violation of international law, and Defendant thereby profited through the exercise of the concession, taxation, and customs rights that were taken from the Ovaherero and Nama peoples through genocide in violation of international law. By 1913 diamond production in South West Africa accounted for a quarter of the value of total global diamond exports.

208. By taking the Ovaherero and Nama diamond deposit concession, taxation, and customs

rights through genocide in violation of international law, Defendant deprived the Ovaherero and Nama peoples of their corresponding concession, taxation, and customs revenues. Defendant obtained immense revenues by selling diamond deposit concession rights to the Diamond Agency for the South West African Protectorate, by taxing all diamond-related revenues, and by charging customs, tariffs, and duties on the exported diamonds. In one instance, for example, Defendant and the German South West Africa Company entered into an agreement, under which the company opened its land (i.e., the land which rightfully belonged to the Ovaherero and Nama peoples) to public mining, entitling the company to a two percent duty on all exported diamonds. In return, Defendant imposed an export duty of one-third the value of exported diamonds. Assuming *arguendo* that Defendant obtained tax, concession, and export revenues in the amount of one-third of all diamond exports, then the figures above indicate that Defendant obtained such revenues in the amount of 51,571,308 Reichsmark between 1908–13, or about \$13 million dollars at the average conversion rate in that period.

209. Plaintiffs are entitled to an accounting and the disgorgement of all revenues Defendant obtained through these illegal takings, plus interest, in an amount to be determined at trial.

210. Finally, with the use of genocide, in violation of international law Defendant supported, directed, and aided and abetted in the taking of the gems, precious metals, cattle, hides, ostrich feathers,

and other artifacts themselves that were located on and under the lands of the Ovaherero and Nama peoples in Hereroland and Great Namaqualand. Plaintiffs are entitled to an accounting of all precious gems and metals and other resources that Defendant took or aided and abetted in the taking of and are entitled to the return of all such precious gems, metals, and other resources, and disgorgement of all revenues Defendant obtained through these illegal takings, plus interest, in an amount to be determined at trial.

4. Defendant Took Sovereignty Property Rights

211. Although Defendant failed to successfully annihilate the Ovaherero and Nama peoples, it succeeded in destroying the sovereign political entities of Hereroland and Great Namaqualand. Because Defendant took their respective sovereignties, the Ovaherero and Nama peoples lost their status as equals to Defendant and all other sovereign states, and lost attendant property rights.

212. Plaintiffs, therefore, also bring this action in their individual capacity and representative capacity as lawful heirs to the sovereign polities themselves, and the attendant property rights respectively. Under customary Ovaherero and Nama law—as in the United States—the sovereignty of Hereroland and Great Namaqualand resides in their respective *peoples*. As

such, the property rights attendant to sovereignty are passed through intestacy to Plaintiffs and the Classes.

213. Defendant's policy and practice of aiding and abetting the rape of Ovaherero and Nama women and children actively contributed to the goal of taking the property rights attendant to sovereignty through sterilization. Diseased German rapists caused physical damage to the reproductive organs of the Ovaherero and Nama women and children and spread venereal disease to Ovaherero and Nama women and children, rendering them sterile. The Ovaherero and Nama birth rates plummeted in the years following the genocide. This policy and practice sought to sterilize the Ovaherero and Nama peoples, in furtherance of annihilation, by preventing the birth of new generations.

214. The property rights attendant to sovereignty include, but are not limited to, the right to sovereign equality under international law; sovereign procedural and substantive rights through treaties, interstate organizations, and representation at the United Nations; and the rights, privileges, jurisdictional immunities, and attachment immunities of sovereign status.

215. By taking these intangible, invaluable property rights of sovereignty, Defendant realized enormous gains and savings by preventing its victims from pursuing legal recourse through channels that are otherwise open to sovereign polities, including, but not limited to, the League of Nations, the United Nations, the African Development Bank, the African Union, the

South African Development Community, the Southern African Customs Union, and the International Court of Justice.

216. Plaintiffs are entitled to an accounting and the disgorgement of all such savings and revenues obtained through these illegal takings, plus interest, in an amount to be determined at trial.

5. Defendant Took Away Plaintiffs' Labor and Tort Rights and Claims, But Plaintiffs' Rights by Intestacy Remain

217. Through enslavement, Defendant took the labor rights and other natural and civil rights of the Ovaherero and Nama peoples in violation of international law, including, but not limited to their rights to payment for their labor, pensions, worker's compensation, unemployment compensation, overtime payment, hardship bonuses, and, as members of the Ovaherero and Nama peoples, their rights to life and liberty. By taking these valuable intangible property rights, Defendant consequently took the valuable labor claims, wrongful death claims, and other tort claims from the victims and their heirs.

218. Under customary Ovaherero law and Nama law, all legal rights and obligations of an individual are passed upon death by intestacy to familial and communal heirs; these property rights were and are held on a communal basis by the

sovereignty that inhered in the Ovaherero people and Nama people respectively. Plaintiffs and the Classes are the sole, rightful, and legal heirs to the rights in property taken by Defendant from the Ovaherero and Nama peoples in violation of international law. Through inheritance, Plaintiffs and the Classes have assumed all legal rights and claims that accrued to the Ovaherero and Nama peoples in connection with Defendant's takings.

219. The disposition over one's labor and the fruits of one's labor is a property right that inheres in the laborer's person. Defendant engaged in the genocide of the Ovaherero and Nama peoples with the active and explicit goal of enslaving those peoples and taking their labor and the fruits of their labor without compensation in violation of international law. Defendant profited by taking the intangible property rights of self-determination of one's labor and freedom from enslavement. Defendant used these property rights to construct valuable railways, government-owned facilities, and docks, to earn rental income by renting out slaves to regional industry by day and by month, and by selling the enslaved Ovaherero and Nama people to individuals, private companies and slave traders for domestic labor or export.

220. The proceeds of these sales to individuals, companies, and slave traders went directly to Defendant's treasury, to be comingled with other monies and assets to be used for other purposes. In addition, Defendant derived substantial savings from the use of forced and/or slave laborers from these

indigenous populations since they did not have to hire workers at prevailing wages and salaries to construct the Otavi railway and other railway projects, and to perform other necessary work on various civil administration projects undertaken by the German Colonial authorities.

221. In addition to lost wages, Plaintiffs also assert property rights in various tort claims, including, but not limited to, wrongful death claims, for the wrongful taking of the lives of Ovaherero and Nama peoples, and thereafter depriving the Ovaherero and Nama peoples of a forum for their claims to be heard.

222. Plaintiffs are entitled to an accounting and disgorgement of all savings that Defendant realized through these illegal takings—*i.e.*, back wages, payment of pensions and other labor benefits, as well as wrongful death and other tort claims, that are due to all former Ovaherero and Nama slaves—plus interest, in an amount to be determined at trial.

6. Defendant's Taking of Skulls, Flesh, Brains, Hair, and Other Body Parts and Mortal Remains

223. Defendant decapitated Herero and Nama people, and as described above, forced women and girls to scrape the faces and flesh off the boiled heads. Defendant engaged in the genocide of the Ovaherero and Nama peoples, for among other purposes, to conduct experiments with their body parts. To that

end, Defendant took the skulls in violation of international law. As a necessary step to accomplish Defendant's dastardly objective, Defendant also took the faces, flesh, and brains of the Ovaherero and Nama men in violation of international law.

224. Defendant profited from these takings through its scientific and medical research. Regardless of whether Defendant's pseudo-scientific research resulted in any genuine scientific or medical discoveries, Defendant's publicly funded research institutions received an economic benefit.

225. After years of denial, in 2011 Defendant's Museum of Medical History at the Charité in Berlin returned twenty skulls of Ovaherero and Nama people to Namibia. These included eleven Nama and nine Herero skulls, which had belonged to four women, fifteen men, and a boy. In March 2014, the remains of a total of thirty-eight Herero, Nama, and other Namibian individuals, were repatriated by the Charité and the University of Freiburg. And in August 2018, the human remains of twenty-seven Herero, Nama, and other Namibian individuals, were repatriated by the Charité.

226. Numerous skulls and body parts of the Ovaherero and Nama peoples remain in Defendant's possession. Defendant has returned some, but not all such skulls, body parts, and other mortal remains. Defendant's publicly funded research institutions continue to discover the skulls, body parts, and other mortal remains of Ovaherero and Nama peoples.

227. In April 2017, Professor Philipp Osten, the Museum Director of the Museum of Medical History (“MMH”) at the Medical School of Hamburg-Eppendorf, announced that seventy- three skulls were newly discovered, which the Museum had purchased between 1917–33.

228. The MMH’s inventory books detail the origins of all such purchases. For example, the books identify Object No. 832 as the skull that belonged to an Ovaherero man. The jaw is missing, and the back of the skull is somewhat broken. It was purchased for the Museum by J. Flemming on August 1, 1924.

229. Hamburg University Professor Jürgen Zimmerer²² recently began a diligent and searching effort to determine the origins of all human body parts collected from Defendant’s Protectorates. Professor Zimmerer and a team of several doctoral students are in the process of analyzing the origins of approximately 5,000 objects from Africa, including skulls, body parts, and other mortal remains.

230. Plaintiffs have property rights to the skulls referenced herein, as well as all other skulls, body parts, and other mortal remains of Ovaherero and Nama people in Defendant’s possession. Plaintiffs are entitled to the return of all such skulls, body parts, and other mortal remains taken in violation of international law, an accounting and disgorgement of medical and scientific research revenues derived from the above

²² Professor of History at the University of Hamburg, Germany, and President of the International Network of Genocide Scholars.

described mortal remains, plus interest, in an amount to be determined at trial.

231. Plaintiffs are also entitled to an accounting of all medical discoveries, academic findings, and scientific conclusions drawn from the research and experiments conducted by Defendant's agents on the skulls, body parts, and other mortal remains of the Ovaherero and Nama peoples.

7. Defendant Took and Dissected the Bodies of Plaintiffs' Family Members

232. Defendant murdered Ovaherero and Nama men, women, and children by hanging, placed their bodies in preservatives, and shipped their bodies to Germany for dissection by zoologists and racial theorists. These were takings of property in violation of international law.

233. Under traditional Ovaherero law, Nama law, and New York law, the disposition over an individual's body following death is a property right that inheres in the decedent's lawful heirs—not in the decedent's murderers. Defendant's profited by committing these murderous takings.

234. Defendant also exhumed the bodies of Plaintiffs' holy ancestors, which rested in sanctified cemeteries, including the bodies of the royal Maherero clan. Defendant took and shipped those bodies to Germany.

235. Defendant profited from these murderous takings through its scientific and medical research. The scientific results of these dissections and the current whereabouts of the subjects' dissected bodies are unknown. It is irrelevant whether the dissections led to scientific or medical discoveries, as the mere opportunity to engage in such dissections and experiments conferred a benefit on Defendant's publicly funded research institutions.

236. Plaintiffs have the right to bury or determine the disposition of the dissected bodies of their family members. Plaintiffs are entitled to the return of all bodies taken in violation of international law, an accounting and disgorgement of all revenues Defendant obtained through these egregious takings, plus interest, in an amount to be determined at trial.

237. Plaintiffs are entitled to an accounting of all medical discoveries, academic findings, and scientific conclusions drawn from the research, dissections, and experiments conducted by Defendant's agents on the bodies of the Ovaherero and Nama peoples.

8. The Location of Defendant's Takings

238. Hereroland and Great Namaqualand stood as sovereign equals to Defendant. The acts comprising the takings alleged herein did not occur within Defendant's sovereign territory. Mislabeling the area that belonged to the Ovaherero and Nama peoples as "German South West Africa" does not confer de jure

or de facto sovereignty on that territory of South West Africa. Defendant's takings occurred in Hereroland (also known as Damaraland), Great Namaqualand, the Omaheke Desert, portions of Amboland and the Kaokoveld Desert, and surrounding territories.

I. Damages to the Ovaherero and Nama Peoples

239. Prior to the Ovaherero genocide, approximately 100,000 Ovaherero people lived in Hereroland. Following the genocide, Defendant had decimated the Ovaherero population such that only approximately 14,769 Ovaherero survived in Southwest Africa, and a few thousand lived in exile.

240. Prior to the Namaqua genocide, approximately 20,000 Nama people lived in Great Namaqualand. Following the genocide, only approximately 10,000 survived. A 1911 census found an Ovaherero population of 15,130, and a Nama population of 9,781. The death count includes the approximately 7,700 enslaved persons that Defendant killed in concentration camps.

241. Defendant left the surviving Ovaherero and Nama peoples destitute, enslaved, hiding in the mountains, and in exile. Their families, culture, wealth, wellbeing, and societies were irreparably harmed. From 1907 until Defendant lost its purported "colony" to the British in 1915, Defendant continued its policies of takings, slavery, exploitation, theft, and murder.

242. Before releasing the slaves from the concentration camps in 1908, Defendant passed a series of “Native Ordinances” on August 18, 1907 that further expropriated property from the Ovaherero and Nama. First, under the Vagrancy Ordinance, any Ovaherero or Nama man or woman unable to prove the source of his or her livelihood was punished by flogging or imprisonment. Second, under the Husbandry Ordinance, the Ovaherero and Nama were prohibited from engaging in animal husbandry, which had been their sole form of livelihood for hundreds of years. Third, under the Identification Ordinance, all Ovaherero and Nama over the age of six were required to wear a chain around their neck at all times, to which a metal disc was attached with unique identification numbers kept in Defendant’s central registries and intended to keep track of allocated labor. The ordinance compelled all Ovaherero and Nama individuals to register their comings and goings.

243. To ensure that the Bondelszwart Nama tribe was kept in a state of intergenerational impoverished servitude, Defendant developed a resettlement plan, under which the Bondelszwart Nama of the south would be transported to Grootfontein in the north near Otavi, where they would be in an unfamiliar place without means of survival. Deputy Governor Oskar Hintrager described this plan on December 22, 1908:

My view is that in the interest of the Empire and of the Protectorate we must not indulge in silly

humanitarian sentiments, but practice a utilitarian policy... the Bondels now in locations must be deported to Grootfontein in the north where they will constitute no threat. This should be done by force, and the sooner the better.

244. Defendant also subjected the Ovaherero and Nama peoples to the illegal, discriminatory criminal jurisdiction of Imperial Courts. In such courts, Defendant continued to illegally try and punish thousands of Ovaherero and Nama people, almost exclusively for nonviolent offenses such as vagrancy or insubordination. For example, on one occasion, Ovaherero and Nama women were put to work as slaves on the railway line being constructed from Lüderitz to the town of Aus. Those that resisted this labor were prosecuted and punished, such as the three Ovaherero women identified at their criminal trials as Anna,²³ Justine,²⁴ and Johanna,²⁵ who were convicted at the Imperial Court in Lüderitz Bay. Indeed, that particular Imperial Court was opened in 1906 for the

²³ Namibian National Archives Windhoek, Records of the Imperial District Office of Lüderitz Bay at 220, Criminal Case No. 49 (Imperial Court of Lüderitz Bay).

²⁴ Namibian National Archives Windhoek, Records of the Imperial District Office of Lüderitz Bay at 221, Criminal Case No. 85 (Imperial Court of Lüderitz Bay).

²⁵ Namibian National Archives Windhoek, Records of the Imperial District Office of Lüderitz Bay at 220, Criminal Case No. 81 (Imperial Court of Lüderitz Bay).

exclusive purpose of punishing under color of law Ovaherero and Nama peoples during their captivity at Shark Island.

245. Imperial criminal law was governed by the Imperial Decree of November 8, 1896, which established the punishments of flogging, birching, fines, imprisonment with hard labor, imprisonment in irons, and death. Corporal punishment had been abolished in Germany itself since 1871. The Ovaherero and Nama were routinely and discriminatorily convicted²⁶ and punished for nonviolent crimes such as “dereliction of duty,” “indolence,” and “insubordination.” Imperial law permitted slave-owners to flog slaves without trial and without an Imperial officer present.

246. The well-preserved Imperial records show the number of officially recorded floggings and birchings following conviction. These numbers do not include the rampant occurrence of extrajudicial floggings, birchings, and other punishments:

Year	Floggings and Birchings
1901–02	257
1902–03	473
1903–04	340

²⁶ As early as the 1890s, the discriminatory Imperial Rules of Evidence prescribed that a German’s testimony legally and factually outweighs the cumulative unanimous testimony of up to six Africans.

1904–05	187
1905–06	294
1906–07	336
1907–08	534
1908–09	703
1909–10	928
1910–11	1,262
1911–12	1,655

247. Floggings did not just inflict pain, but also caused permanent injury or death. Flogging was often conducted with the use of the sjambok—a heavy hippopotamus hide whip—which ripped apart the flesh of the person being flogged. For example, in 1912, a German farmer, Ludwig Cramer, flogged his Ovaherero slave Maria with the full knowledge and consent of Defendant’s officers and agents. Her injuries were severe, as described by a doctor she visited:

From the lower edge of the shoulder blades right to the loins, an absence of skin 20 by 18 centimeters in size covered with putrefying skin, except at the edges, which had granulated for a distance of one centimeter. Under the mortified skin exuded stinking matter, and some fly maggots were also visible. The edges were sharply defined:

On the right shoulder-blade were four to five deep lengthwise furrows, to the extent of a

palm's breadth. On the right shoulder an absence of skin in extent 12 by 8 centimeters, also covered with putrefying skin, malodorous matter exuding under it. On the left shoulder an injury the size of a 5 Mark piece in the same condition. On the upper lip, forehead, in front diagonally across the breast, were older weals as if blows from a stick.

The statement of the injured person that she received the wounds through a [flogging] agrees with the conditions found.

The woman is not yet out of danger.

248. The mortality rate in Ovaherero and Nama communities reached dangerous levels in the years following the genocide. Because Defendant had taken their herds, the Ovaherero and Nama were deprived of the dairy-based diet they had thrived on for centuries, and as a result, scurvy took many lives. Malnourishment, poverty, lack of access to clean drinking water, and disease led to high mortality and infant mortality rates in Ovaherero and Nama communities.

249. Defendant's takings caused a stagnant birth rate in the Ovaherero and Nama communities. As reported in the *Deutsche Kolonialzeitung* (German Colonial News) in 1908, many Ovaherero and Nama

women and girls had become sterile from the incessant rape by Defendant's agents who carried venereal diseases. Defendant's actions and takings also compelled many pregnant Ovaherero and Nama women to perform abortions on themselves, as they feared raising children in the hell that Defendant created.

250. Through its takings and murders, Defendant also destroyed the repositories of Ovaherero and Nama knowledge, culture, and practice, and interrupted the mechanisms for institutional transmission of such knowledge, culture, and practice. Over previous centuries and millennia, the Ovaherero and Nama peoples had refined expertise in fields as diverse as geology, animal husbandry, mythology, astronomy, fashion, trade, engineering, art, military tactics, storytelling, zoology, masonry, dance, hunting and trapping, philosophy, botany, forging and blacksmithing, tobacco farming, medicine and surgery, mountaineering, sports, jewelry, poetry, gardening, ivory-, bronze-, and iron-working, road building, bureaucracy and government, drama and comedy, wagon making, pharmaceuticals and homeopathy, ornithology, shoemaking, pottery, dye working, law, irrigation, fortification, ranching, religion and mysticism, celestial navigation, dairy processing, river and aquifer management, veterinary science, transhumance, weapon-making, court administration, marriage and burial ceremonies, writing and literature, brewing, education, equestrianism, ecology and forestry, archery, mining, well drilling, architecture, tailoring, marksmanship, carpentry and woodworking, horticulture, weaving, mercantilism, culinary arts and

vegetarianism, music, and bridge building. As lasting and stable societies, they had refined these rich traditions. Defendant's actions cut the transmission lines for this knowledge, much of which has been irreparably lost, thereby injuring Plaintiffs and Plaintiffs' classes and/or subclasses.

251. Defendant implemented its policy of exterminating the Ovaherero and Nama peoples from the face of the earth. Defendant failed, despite its efforts. The resilient Ovaherero and Nama peoples have endured, retaining what remains of their proud cultures and identities, and now live on as Ovaherero and Nama peoples in Namibia and in the diaspora worldwide.

J. Defendant's Use of the Property

252. Upon realization of the benefits achieved by its takings of Ovaherero and Nama property in violation of international law, Defendant commingled these fungible values within its general Imperial treasury and departmental treasuries of various Imperial ministries, agencies, and instrumentalities ("Defendant's commingled funds").

253. Defendant's Imperial Government retained complete control over the budget of its colonial authorities in South West Africa ("the colonial budget"). The process relating to the colonial budget was complex, with the colonial authorities first making a proposal, which after being considered and approved by the German Government and the Reichsschatzamt,

was submitted to the Parliament for adoption as law. The German Government was directly responsible for the financial administration of South West Africa, at least until a reform act was passed in 1909, which gave some degree of financial administrative control to the colonial authorities.

254. The German Empire received substantial financial benefit from the land and other property confiscations and forced labor. Contributing substantially to the colonial budget and the German treasury was the income generated and expenses saved through, *inter alia*, the use or sale of confiscated land or cattle; the use or sale of confiscated land or cattle for compensating white settlers; the use of forced labor for the purposes of the colonial administration or military forces (Schutztruppe); or the allocation and/or rental of prisoners and forced laborers to commercial enterprises.

255. Defendant benefited directly from the income generated by the takings and expenses saved in the territories of the Ovaherero and Nama that were unlawfully seized and incorporated into a territory Germany labeled “German South West Africa.”

256. A significant portion of the wealth Defendant amassed during its “colonial experiment” in southwestern Africa was derived from its taking of property from the Ovaherero and Nama peoples. Germany became one of the wealthiest nations on earth, while as a consequence of Defendant’s takings, Plaintiffs still languish in relative poverty and deprivation.

257. The German economy expanded rapidly during the colonial period starting in approximately 1884, and by 1900, the German Empire was the largest economy in Europe. After World War II, and beginning in the 1950s, Germany again experienced an “Economic Miracle” (*Wirtschaftswunder*) and continuing over the course of the remaining 20th Century and thereafter. Defendant evolved into an economic and political superpower, with the world’s fourth-largest nominal GDP, the highest trade surplus of \$310 billion, and third-largest annual exports of \$1.3 trillion dollars.

258. Economists have hailed Defendant as the fastest-growing developed economy worldwide, in light of its continued stunning economic growth. As the economic powerhouse of the European Union, Defendant plays a leading economic and geopolitical role globally as a member of the G8 and G20 groups of nations and the North Atlantic Treaty Organization and is indisputably regarded as a global leader in commerce, industry, trade, and innovation.

259. In comparison, the Ovaherero and Nama peoples, having been deprived of their sovereignty and wealth by Defendant as alleged herein, continue to experience a state of socioeconomic stagnation with many of its peoples living in relative poverty both in Namibia and in the diaspora. Namibia is currently one of the most unequal societies on the planet: wealth, land, and privilege are overwhelmingly held by the German-speaking White Namibian descendants of German settlers. For example, in 1998 the average incomes of Otjiherero- and Khoikhoi-speaking

households in Namibia were respectively only 10.1 percent and 7.9 percent of the average income of German- speaking White Namibian households. While many Ovaherero and Nama individuals have made great strides, the majority of the Ovaherero and Nama communities live in poverty, exposed without aid to the hardships of unemployment, poor schools and secondary educational opportunities, depressed healthcare capacities and an HIV/AIDS epidemic, juvenile crime and delinquency, political oppression and few opportunities for political representation, challenging economic prospects, and a PTSD- and mental health crisis related to the intergenerational trauma that Defendant caused.

260. Many Ovaherero and Nama people are religious, with a large number practicing traditional belief systems, Christianity, and a small but growing Muslim population among the Nama. Christianity was introduced to the Ovaherero and Nama peoples through the German Rheinisch Missionary, which had arrived several decades before Defendant in South West Africa. Like many Germans, a great number of Ovaherero and Nama people live today as pious and devout Lutherans.

K. Defendant's New York Property that It Exchanged for the Property Taken in Violation of International Law

261. A portion of Defendant's enormous wealth is attributable to, was exchanged for, and can be traced from the property it took from the Ovaherero and

Nama peoples in violation of international law. Defendant has invested this wealth worldwide with a particularly large investment in the city and state of New York. Defendant's investments in New York City constitute property exchanged for the property taken in violation of international law and which were derived from a portion of Defendant's commingled funds. This property is present in New York City in connection with commercial activities carried on in the United States by Defendant.

262. Defendant's properties in New York are used in connection with Defendant's commercial activities, and include, but are not limited to, the following real estate:

- a. A 7,040 square-foot townhouse, located at 119 E. 65th Street in the Borough of Manhattan (the "65th Street Property");
- b. A 133,750 square-foot building, located at 871 First Avenue in the Borough of Manhattan (the "First Avenue Property");
- c. A 1,591 square-foot condo, located at 346 E. 49th Street in the Borough of Manhattan (the "49th Street Condo") and associated easement; and,
- d. A 16,147 square-foot building, located at 1014 Fifth Avenue in the Borough of Manhattan (the "Haunted Castle").

263. The 65th Street Property is a four-unit, four-story townhouse, built in 1910, zoned for commercial use, and identified as Block 1400, Lot 9.

264. Since its purchase, now, and in the future, the 65th Street Property was, is, and will be used in connection with Defendant's commercial activities, including, but not limited to:

- a. the performance and existence of contractual obligations related to the housing of German officials and employees in New York City;
- b. the performance and existence of contractual obligations related to contracts for maintenance, restoration, cleaning, and other services provided by contractors located in New York City;
- c. for example, such commercial activities include a maintenance and restoration "General Construction" project conducted by acclaimed architect, Frederick Schwartz for the contract price of \$2,310,000, filed with the New York City Department of Buildings on April 1, 2009;
- d. Defendant's long-standing commercial activities in New York City and the United States in support of cultural propagation, German-language programs, and other programs to develop American interest in the German people, language, culture, and country with the ultimate goal of commercial growth through cultural growth;

- e. the performance and existence of contractual obligations under insurance contracts with domestic insurance providers related to property insurance, fire insurance, and other insurance coverage regarding the 65th Street Property; and,
- f. the possible future sale of the 65th Street Property.

265. The First Avenue Property, located at Block 1341, Lot 28 in the Borough of Manhattan, was purchased as an empty lot by Deed of Sale on April 15, 1996. Defendant thereafter constructed the high-rise on the First Avenue Property in the 1990s. The property is zoned for residential and commercial use, and houses Defendant's Mission to the United Nations, its Consulate General, and commercial offices of the German Academic Exchange Service (*Deutscher Akademischer Austauschdienst*, also known as "DAAD").

266. Since its purchase, now, and in the future, the First Avenue Property was, is, and will be in connection with Defendant's commercial activities, including, but not limited to:

- a. the performance and existence of contractual obligations related to the housing of German officials, employees, and visitors to New York City;

- b. the performance and existence of contractual obligations related to contracts for maintenance, restoration, cleaning, and other services provided by contractors located in New York City;
- c. Defendant's long-standing commercial activities in New York City and the United States in support of cultural propagation, German-language programs, and other programs to develop American interest in the German people, language, culture, and country with the ultimate goal of commercial growth through cultural growth;
- d. the performance and existence of contractual obligations under insurance contracts with domestic insurance providers related to property insurance, fire insurance, and other insurance coverage regarding the First Avenue Property;
- e. the possible future sale of the First Avenue Property; and,
- f. the performance and existence of contractual obligations related to the DAAD, its commercial affiliates and employees, and its cultural, scientific, and academic partners, including both individuals and organizations.

267. The 49th Street Condo is composed of a Commercial Unit and Residential Unit, identified as

Block 1341, Lots 1701 and 1702 respectively in the Borough of Manhattan. Defendant owns only the “Commercial Unit.” Defendant also owns an easement (“49th Street Easement”) that Defendant maintains for commercial and maintenance purposes in relation to the Commercial Unit. The 49th Street Easement was purchased by Easement Agreement on November 26, 1996.

268. The 49th Street Condo and the 49th Street Easement were, are, and will be in connection with Defendant’s commercial activities, including, but not limited to:

- a. the performance and existence of contractual obligations related to the housing of German officials, employees, and visitors to New York City;
- b. the performance and existence of contractual obligations related to contracts for maintenance, restoration, cleaning, and other services provided by contractors located in New York City;
- c. Defendant’s long-standing commercial activities in New York City and the United States in support of cultural propagation, German-language programs, and other programs to develop American interest in the German people, language, culture, and country with the ultimate goal of commercial growth through cultural growth;

- d. the performance and existence of contractual obligations under insurance contracts with domestic insurance providers related to property insurance, fire insurance, and other insurance coverage regarding the 49th Street Condo and 49th Street Easement; and,
- e. the possible future sale of the 49th Street Condo and 49th Street Easement.

269. The Fifth Avenue Property, referred to by German media as the “Haunted Castle” (*Spukschloss*), is located at Block 1494, Lot 72. The Haunted Castle was built in 1905–06, by James W. Gerard, former Justice on the Supreme Court of the State of New York, and American Ambassador to Defendant prior to and during the First World War. It is an ornate six-story townhouse located directly across the street from the New York Metropolitan Museum of Art.

270. Defendant purchased the Haunted Castle in the early 1950s. Since then, the Haunted Castle has served many purposes, including, but not limited to residential and commercial space for cultural attachés, programs, and installations such as the Goethe Institute. Renowned German thinkers, writers, and artists have visited and resided there, including, but not limited to, Hannah Arendt, Uwe Johnson, Günter Grass, Rainer-Werner Fassbinder, Volker Schlöndorff, Wim Wenders, and Jürgen Habermas.

271. The Goethe Institute was housed in the Haunted Castle between 1957 and 2010. In 2016 Defendant announced that the Haunted Castle will now be used as a permanent “German Academy of Art” in connection with a variety of commercial activities. During both time periods and in the future, the Haunted Castle was, is, and will be used in connection with Defendant’s commercial activities, including, but not limited to:

- a. the performance and existence of contractual obligations related to the housing of German officials, employees, and visitors to New York City; and,
- b. the performance and existence of contractual obligations related to contracts for maintenance, restoration, cleaning, and other services provided by contractors located in New York City.

272. For example, such commercial activities at the Haunted Castle include, but are not limited to:

- a. Defendant’s recent contract with H2 Consulting PE P.C. for “General Construction” maintenance and restoration work for the contract price of \$10,000, filed with the New York City Department of Buildings on May 29, 2017;
- b. Defendant’s contract with Walter M. Schlegel PE for boiler repair and maintenance work for the contract price of \$11,000, filed with

the New York City Department of Buildings
on May 22, 1991;

- c. Defendant's long-standing commercial activities in New York City and the United States in support of cultural propagation, German-language programs, and other programs to develop American interest in the German people, language, culture, and country with the ultimate goal of commercial growth through cultural growth;
- d. the performance and existence of contractual obligations under insurance contracts with domestic insurance providers related to property insurance, fire insurance, and other insurance coverage regarding the Haunted Castle;
- e. the possible future sale of the Haunted Castle; and,
- f. the performance and existence of contractual obligations related to commercial and cultural exhibitions in New York City, including, but not limited to, Max Bechman's art exhibit in 1968, Rainer Werner Fassbinder's video installation in 1973, Rirkrit Tiravanija's art exhibit in 1992, Nam June Paik's art exhibit in 1999, Candida Höfer's art exhibit in 2004, and the October 2010 "Hotel Savoy" art installation by director Dominic Huber—an interactive theater experience, in which

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theatergoers wandered through the Haunted Castle's "spooky" set design.

273. The Haunted Castle is currently valued at over \$50 million.

**L. Germany Finally Acknowledges the Genocide,
But Refuses to Include the Ovaherero and
Nama Leaders in Discussions Relating
Thereto**

274. In 1985, the United Nations' Whitaker Report classified the massacres as an attempt to exterminate the Ovaherero and Nama peoples of South-West Africa, and therefore the earliest cases of genocide in the 20th century.

275. In 1998, German President Roman Herzog visited Namibia and met Ovaherero leaders. Chief Munjuku Nguvauva demanded a public apology and compensation, but Herzog stopped short of an apology, only expressing "regret."

276. On August 16, 2004, at the 100th anniversary of the start of the genocide, a member of the German government, Heidemarie Wieczorek-Zeul, Germany's Minister for Economic Development and Cooperation, apologized and expressed grief about the genocide:

We Germans accept our historic and moral responsibility, and the guilt incurred by Germans at that time... The atrocities committed at that time would have been termed genocide.

277. However, the German government quickly made it clear that her speech could not be interpreted as an “official apology” by Germany or a basis for the payment of any compensation, reparations or restitution.

278. Minister Wieczorek-Zeul also has explained that Defendant’s 2004 admission of liability was tied to the equally implicit admission that “there exists a continuing injury against the living descendants.”²⁷ In other words, Minister Wieczorek-Zeul and other prominent present and former members of the German government have admitted that the Plaintiffs, who are the living descendants of the Ovaherero and Nama peoples subjected to the genocide and unlawful takings, suffer a continuing intergenerational injury due to, among other things, the expropriation of land, all personal wealth and valuables, and the absence of adequate educational and social institutional supports by which the Ovaherero and Nama could have continued to thrive but for those takings.

279. Former German ambassador to Namibia, Wolfgang Massing, stated in 2005:

²⁷ Forward by Heidemarie Wieczorek-Zeul in Reinhart Kößler & Henning Melber, *Völkermord – und Was Dann?* 9 (Brandes & Apsel 2017) (“... eine fortdauernde Verletzung der Nachfahren der Opfer.”).

If Germany were to admit that it was genocide, then the case for reparations will find basis in merit.

280. It was not until October 2011, however, after three years of talks, twenty skulls were returned to Namibia for burial, and additional human remains were returned in 2014. However, the skulls returned in 2011 were not returned for purposes of burial, but rather to be preserved as physical evidence of the horrific crimes committed by Defendant. These human remains are not the last of the remains in Defendant's possession.

281. Beginning in 2015, German Foreign Ministry guidelines began referring to the killings as a "genocide." At or around the same time, Defendant acknowledged the "Armenian genocide" as a genocide for the first time. The Armenian genocide, like the Ovaherero>Nama genocide, was marked by large-scale genocidal expropriation. In September 1915, the Ottoman parliament passed the "Temporary Law of Expropriation and Confiscation," taking all property and land of the Armenians. In connection with the Armenian genocide, Bundestag President Norbert Lammert²⁸ stated:

[A]nyone who refers to the Turkish massacre of Armenians in 1915 as genocide must also

²⁸ President of the Bundestag from 2005 to 2017.

acknowledge that atrocities committed by German imperial troops a decade before in what is now Namibia should also be described as such.

282. Minister Wieczorek-Zeul also stated:

There were tens of thousands of Herero and Nama victims, not only through fighting but also illness and the targeted killing through allowing people to die of thirst and hunger... Others died in concentration camps and in slave labor.”

283. Like the Ovaherero and Nama peoples, the Armenians died through numerous causes, including, but not limited to targeting killings, thirst, and hunger, whether in concentration camps or slave labor. Thus, since Germany considers the Ottoman/Turkish treatment of the Armenians to be a genocide, it must acknowledge that the same or similar actions it took against the Ovaherero and Nama were genocidal.

284. At a press conference held on July 10, 2015, the spokesperson for the German Foreign Office, Dr. Martin Schafer, stated the German Government’s official position on the war of extermination in South West Africa is that “[t]he war of extermination in Namibia from 1904 to 1908 was a war crime and genocide.”

285. In its June 22, 2016 response to questions from members of the Bundestag (German Parliament), the German Government acknowledged that the statements made on July 10, 2015 by Dr. Shafer on behalf of the German Foreign Office “reflect the position of the Federal Government.”²⁹

286. The current President of Germany and the former Foreign Minister Frank-Walter Steinmeier also admitted in 2015 that its actions in South West Africa amounted to a “war of annihilation and constitute a war crime and genocide.” This followed a formal declaration by the German federal government, apologizing for the “genocide.”

287. On numerous occasions, Defendant, through formal channels, made admissions to the world and the Plaintiff class members that Defendant’s actions amounted to genocide.

288. Defendant admitted its commission of genocide in legislative proceedings and its ongoing discussions with Namibia and has benefited politically from making this admission. Defendant’s admission of genocidal conduct constitutes both an admission of jurisdiction and an admission of liability.

289. Nevertheless, despite its admission that what the atrocities it had committed amounted to a genocide, the German government has continued to refuse to negotiate directly with the leaders and representatives of the Ovaherero and Nama

²⁹ See Bundestag Paper No. 18-8859 (June 22, 2016).

communities, even though those are the two specific communities who were targeted for extermination.

290. The exclusion of Plaintiffs from these discussions by Germany amounts to yet another “taking” and attempt to strip the Ovaherero and Nama people of their valuable intangible property rights recognized under international law, including the right to make claims and be heard before an impartial and fair tribunal.

M. Defendant Excludes the Ovaherero and Nama in Talks with Non-Party Namibia

291. Defendant has sought to negotiate with Namibia, a non-party to the dispute, concerning the claims described herein. These negotiations—including the prospect of settlement through payment, investment, or other tangible or intangible aid—constitute “commercial activity.”

292. Despite the incalculable economic, cultural, intellectual, and spiritual losses that the Ovaherero and Nama peoples have suffered, Defendant has systematically and categorically excluded the lawful representatives of the indigenous Ovaherero and Nama peoples from negotiations between Defendant and Namibia and has steadfastly refused to even consider compensating the Ovaherero and Nama peoples for the losses it inflicted upon them.

293. Defendant’s acts violate the Ovaherero and Nama people’s rights under international law to

raise its claims and be heard before an impartial tribunal.

294. Defendant's acts also violate its obligations under the U.N. Declaration on the Rights of Indigenous Peoples, which explicitly provides, at Article 11 (2):

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

295. In addition, Article 18 of the U.N. Declaration provides as follows:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.

296. The Ovaherero and Nama peoples hereby demand that they be given the right to exercise their

rights to redress as third-party beneficiaries under the Declaration.

297. Defendant's exclusion and violation of the U.N. Declaration continues the racist, imperialist policies manifested at the 1884–85 at the Berlin West Africa Conference. In 1884, Defendant—in a typical manifestation of its xenophobic folly—did not view the Ovaherero and Nama peoples as “sovereign equals,” but rather as belonging to a lesser, uncivilized object race lacking agency over its people or fate. In 2018, Defendant continues to refuse to include the Ovaherero and Nama peoples in its discussions with Namibia, again treating the Ovaherero and Nama peoples as lesser, uncivilized objects without “sovereign equality.” Defendant ignores, objectifies, and marginalizes the Ovaherero and Nama peoples now as it did in 1884 in Berlin.

N. Defendant's Acts Have a Direct Effect in the United States, and Jurisdiction Exists on the Basis of the Human Remains at the American Museum of Natural History

1. U.S. Plaintiffs and Ovaherero and Nama Communities in New York and Elsewhere in the U.S.

298. Many descendants of the Ovaherero and Nama peoples and lawful claimants as Plaintiff class members have emigrated from Namibia, and now call

the United States their home as U.S. Citizens, lawful residents, and patriotic Americans. There are approximately 140 Ovaherero class members in the New York metropolitan area alone, most of whom are members of the Plaintiff Association. Other members of the Classes reside throughout the United States and are active in various organizations dedicated to the preservation of Ovaherero and Nama culture, and educational and outreach programs regarding the Ovaherero/Nama Genocide.

299. Defendant's unlawful takings in connection with the genocide, as well as its refusal to negotiate with Ovaherero and Nama representatives in violation of the U.N. Declaration, has had a direct and proximate effect on class members residing in the United States. They were deprived of their property and other financial and economic resources, as well as educational and cultural opportunities that would have been available to them but for Defendant's genocide and unlawful takings, were forced to flee their homeland, deprived of their citizenship rights in their own indigenous sovereign countries, and forced to make a new start in other countries, including the United States.

2. Human Remains from the Genocide Discovered in New York

300. In September 2017, the American Museum of Natural History (“AMNH”) in New York City confirmed to Plaintiffs that it was in possession of Namibian human remains, which related to the 1904-1908 German genocide of the Ovaherero and Nama peoples.

301. This is a collection of Herero, Nama, and other human remains, books, and materials, which is the so-called “Teaching Collection” (*Lehrmittelsammlung*), assembled by Felix von Luschan over decades of employment at the Royal Museum of Ethnology (*Museum für Völkerkunde*) (the “Museum”), and the Friedrich Wilhelm University (now Humboldt University), both which were Imperial arms and institutions in Berlin. Luschan began working at the Museum in 1886, became Director of the Africa and Oceania collections in 1904, and co-founded the Berlin Society for Race Hygiene in 1905. In 1909, he rose to Director of Anthropology at the Museum and sole administrator of the Museum’s human remains collections. He was named Privy Councillor to the Kaiser in 1911.

302. As of its sale in 1924, the Teaching Collection was an “[a]natomical collection comprising 5,000 human crania, 200 complete skeletons, study collection, and private library.”³⁰ The Teaching Collection was one of many human remains collections under Luschan’s administration at the Museum, and was used for instruction in anthropology, craniology,

³⁰ See Accession Card and Accession Record, Decl. of Barnabas Veraa Katuuo, at ¶ 8 & Exhibits 1–2 (Dkt. 45-2).

and related sciences at the Museum and University. Luschan described it as containing commercially acquired items:

In question are two, formally different collections, the official anthropological collection of the Royal Museum of Ethnology, and my special so-called Teaching Collection that serves instructional purposes at the University. Unfortunately, the former has no fixed budget, so that it generally depends on gifts. Thus, everything that is donated in terms of skulls, skeletons, soft tissue, *etc.*, naturally goes to this collection, while in contrast, such things that cost money, are normally acquired for the Teaching Collection. For the latter, there is always the necessary money available. In other words,... if one wants to donate, it goes to the one, and if one wants to sell, it goes to the other.

303. The Teaching Collection was collected, stored, maintained, used, and studied at the Museum of Ethnology. According to Luschan himself in 1913, the “12,000 skulls and many precious skeletons” at the Museum were the product of the Kaiser’s “most energetic lordly patronage” and “imperial subsidies” bestowed “in such rich amounts”:

In boxes and crates at the Museum of Ethnology, we have stored already approximately 12,000 skulls and many hundred precious skeletons, so that also this collection awaits only the Resurrection, to then immediately stand as the greatest and most valuable collection of its type in the entire world.

304. As integral parts of the Teaching Collection, the Herero and Nama remains are here in connection with Germany's role as market player in the international commercial trade in human remains through its acquisition, collection, transport, display, trade, and sale of human remains in support of anthropological, craniological, and ethnological research, having substantial contact with the United States.

305. Germany aggressively recruited and trained amateurs, soldiers, and sailors to commercially trade and traffic human remains, and published guides to stimulate collection. Starting in the 1870s, the Museum published guides for such collection, including Luschan's specific instructions in 1896 for collection in Africa. The German Navy long served Germany's commercial collecting. In 1874, the Museum and the Navy agreed that the HMS *Gazelle* would acquire "everything collectible" from ports, with officers onboard serving as "intermediary" and agent. For example, in 1897, the Museum placed 1,000 Reichsmark with the HMS *Seagull*, and Luschan gave ethnography

lessons to officers functioning as the Museum's purchasing agents.

306. Germany also gave the Museum a right of first refusal on imported human remains. Under a *Bundesrat* Directive of 1889, all anthropological items acquired overseas while on Imperial business were required to first be offered for sale to the Museum. The Directive was amended in 1896 to formally bridge collecting and military operations by including military personnel within its ambit. Alongside the Directive, Luschan and other Museum agents built additional collection networks through colleagues on-site. Germany succeeded in dominating the human remains market, and by 1900, the Berlin museum possessed the largest anthropology collection in the world. Museum Director Bastian identified the institutional benefits derived from German colonial military enterprises:

From military expeditions undertaken for colonial political purposes, the ethnological collections of the royal museums have been valuably enriched.... In punitive expeditions, the property of the guilty, instead of being destroyed, is preserved for the scientific study... of wild tribes.

307. The Empire's collection activities spanned the globe and the Museum of Ethnology targeted indigenous peoples of the United States for commercial collection. In so doing, Germany's commercial acts in the global trade in human remains, conducted through

agents, sailors, soldiers, officers, and museum and university staff, had and continues to have substantial contact with the United States in general, and Native Americans in particular.

308. German scientists and institutions sought and obtained human remains of people from Alaska, Arizona, California, Hawaii, Idaho, Kentucky, Louisiana, Missouri, Nebraska, Nevada, New York, and Oregon. As was the case for Africa, the Museum's success in collecting American human remains was accomplished only by "energetic lordly patronage."

309. The Museum harvested, purchased, and traded human remains in the United States. In an 1878 trade with the American National Museum (the Smithsonian), the Museum of Ethnology acquired 273 objects including preserved American muscle tissues and human bones and other remains, mostly from California. By 1881, the Museum had obtained archaeological items from Paiute people and from Arizona.

310. And in 1881, the Museum engaged Johann A. Jacobsen as agent to the Museum for commercial activity in the United States. The Museum sent Jacobsen to San Francisco; he arrived in August 1881, and then traveled to Arizona and Pacific Northwest, harvesting and buying remains and other objects. Jacobsen then went to Alaska in June 1882, harvesting and buying remains and objects, before returning to California in September 1883, and from there sent 1,000 objects including human remains to Berlin.

311. Luschan obtained three skulls of Mohawk people from New York for the Museum, which he placed in the Teaching Collection alongside Herero and Nama remains.³¹ He also obtained for the Museum's "S" Collection the skulls of two Californians, "S 608" and "S 609." Ultimately, American remains in Berlin were not just studied, but also displayed, such as in the Museum's Hall VII in 1905, where the Museum showcased the remains of Inuit and Yu'pik people, Tlingit people from Portland, scalps of Sioux people, contents of California graves, and human remains from Tularosa, New Mexico. The Museum also held the skulls of a Paiute person from Nevada, a Coeur d'Alene person, a person from Oregon, and a Ponca person from Nebraska.

312. The Museum of Ethnology actively traded, including with American museums and traders. The Museum's trading relations with the AMNH were so firm, that by 1911, the AMNH President named the Berlin Museum of Ethnology as "[a]mong the chief institutions from which exchanges are in active progress."³² The Museum's America Department also

³¹ See Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Possession of the American Museum of Natural History, New York, NY, 66 FED. REG. 20330, 20330 (Mar. 30, 2001). ("[O]fficials of the [AMNH] have determined... there is a relationship of shared group identity that can be reasonably traced between these Native American human remains and the St. Regis Band of Mohawk Indians of New York.").

³² *Report of the President*, 43rd Annual Report of the American Museum of Natural History 25 (1911).

conducted many transatlantic trades, including, *e.g.*, with the National Museum (Smithsonian) in 1874 and 1878, with George J. Engelmann in St. Louis in 1881, the Milwaukee Public Museum in 1898, the University of Pennsylvania Museum of Archaeology and Anthropology in 1898, the AMNH, the Field Museum in Chicago in 1908, the Heye Museum in New York in 1912, and with the Stolper Galleries and Alan Lapiner in New York in 1965 and 1967.

313. The “substantial contact” that German commercial activity enjoyed with the United States included a visit from Luschan himself. Luschan and Mrs. Luschan arrived in Hawaii in mid- September 1914. While there, Luschan exhumed the human remains of eighty-three Hawaiian people at Awalua, Lanai, and other human remains from Oahu, on behalf of the Bernice Pauahi Bishop Museum, which kept the remains he unearthed.³³ The Luschans arrived in San Francisco in October, and traveled throughout the U.S., lecturing at universities on race and heredity, including a series at the University of Illinois at Champaign-Urbana, and in December 1914, the Luschans arrived in Morningside Heights, New York City, and moved into Columbia University’s posh “Kaiser Wilhelm Professor” apartment.

314. In coordination with Boas, acting in his official capacities at the AMNH, the Luschans dedicated their time in the U.S. to a study of African-American men and women, and Luschan’s monograph

³³ *Cf. Visit of Noted Scientist*, HAWAIIAN ALMANAC AND ANNUAL 144 (1914).

was ultimately published in late-1915 as a Special Print by the *Colonial Review*, intended as an introduction to African-American ethnology, race, culture, and demography.³⁴ Upon arriving in New York, Luschán had written to Booker T. Washington and W.E.B. DuBois, announcing “I would like to study some problems of heredity,” requesting their aid in conducting an “exact pedigree of some hundred coloured families” to obtain “anthropometric and other data,” and proposing, “if possible, measuring and describing every single available member of such families.”³⁵ With help from Washington, the AMNH, and other benefactors, the Luscháns traveled to Tennessee, Missouri, Mississippi, Louisiana, Alabama, and Virginia, where they undertook “pedigree” and anthropometric studies on some 100 African-American families and 350 individuals, alongside other studies, such as measuring the fingers and nostrils of schoolchildren, and coding their skin color. In March 1915, Luschán reported to Boas that he gathered “valuable research,” and in April, before returning to Germany, he deposited this valuable data, research, and analysis with Boas at the AMNH.

315. Luschán also engaged in collection activity while here. In Louisiana, Luschán met anatomist Professor Robert B. Bean at Tulane. By

³⁴ See generally FELIX VON LUSCHAN, DIE NEGER IN DEN VEREINIGTEN STAATEN [THE NEGROS IN THE UNITED STATES] (1915).

³⁵ See, e.g., Letter, Luschán to DuBois (Jan. 7, 1915), <http://credo.library.umass.edu/view/full/mums312-b009-i090>.

agreement reached between the two men, Bean shipped the remains of African-American people from Louisiana to the Museum of Ethnology via the German Consulate in New York City, which thereby commercially trafficked in preserved ears, heads, brains, and other soft tissue of African-American men and women.³⁶

316. Of the eight human remains from Namibia at the AMNH, at least two appear to be genocide victims, including one from Shark Island, the notorious German concentration camp located at Luderitz Bay, and one from Windhoek, where the German colonial authorities also maintained a concentration camp for the Ovaherero and Nama prisoners. Regardless, because they are inextricably intertwined with Germany's takings through genocide and violations of international law, all of the Herero and Nama human remains acquired placed by Luschan and the Museum in the Teaching Collection constitute "property taken in violation of international law."

317. Luschan died in February 1924. The Teaching Collection was then sold to the AMNH, and the purchase price of \$41,500 was paid on the AMNH's behalf by New York philanthropist Felix Warburg.³⁷

³⁶ John David Smith, *Felix von Luschan's Trip to America 1914–1915*, in Peter Ruggendorfer & Hubert D. Szemethy, eds., *FELIX VON LUSCHAN: LEBEN UND WIRKEN EINES UNIVERSALGELEHRTEN* [FELIX VON LUSCHAN: LIFE AND WORKS OF A UNIVERSAL SCHOLAR] 141, 152 (2009).

³⁷ See Accession Card and Accession Record, Decl. of Barnabas Veraa Katuuo, at ¶ 8 & Exhibits 1–2 (Dkt. 45-2).

This transaction's commercial nature is confirmed by a notice from the National Park Service ("NPS"): "Felix Warburg purchased these remains from Professor von Luschan and, in 1924, donated them to the American Museum of Natural History."³⁸ Although this NPS Notice was slightly incorrect—in that Warburg could not have purchased the Teaching Collection from Luschan, who had died earlier in 1924—the Notice is accurate to the extent that it confirms that the acquisition by Warburg and donation to the AMNH involved a commercial transaction, which must have necessarily involved the custodian of that Collection, *i.e.*, the Royal Museum of Ethnology in Berlin.

318. The Museum's commercial involvement with the transfer of the Teaching Collection from the Royal Museum in Berlin to the AMNH in New York is also confirmed by experts Beate Kunst and Ulrich Creutz, who reported that, upon Luschan's death in February 1924, "although Emma von Luschan wanted to keep her husband's Teaching Collection as heir, she did not receive a positive decision [and] the objects were eventually sold in the U.S."³⁹

³⁸ Notice: Inventory Completion for Native American Human Remains and Associated Funerary Objects in Possession of the American Museum of Natural History, New York, 66 FED. REG. 20330, 20330 (Mar. 30, 2001).

³⁹ Beate Kunst & Ulrich Creutz, *Anthropologische Sammlungen in Berlin* [*Anthropological Collections in Berlin*], in Stoecker, *et al.*, eds., SAMMELN, ERFORSCHEN, ZURÜCKGEBEN? MENSCHLICHE GEBEINE AUS DER KOLONIALZEIT IN AKADEMISCHEN UND MUSEALEN SAMMLUNGEN [COLLECT, RESEARCH, GIVE BACK? HUMAN REMAINS FROM THE COLONIAL ERA IN ACADEMIC AND MUSEUM

309. The Herero and Nama human remains discovered at the AMNH independently provide this Court with subject-matter jurisdiction under 28 U.S.C. § 1605(a)(3), (i) because they are here in connection with the Museum of Ethnology’s longstanding commercial relationship with the AMNH and other American traders and institutions; (ii) because as integral parts of the Teaching Collection, they are here in connection with Germany’s targeting of American human remains and its commercial activities in support thereof, including the acquisition and placing of three Mohawk skulls right alongside the Herero and Nama remains in the Teaching Collection; (iii) because as integral parts of the Teaching Collection, they are here in connection with Germany’s worldwide engagement in the bone trade including Jacobsen’s engagement for the Museum on American soil; (iv) because as integral parts of the Teaching Collection, they are here in connection with logistical functions provided by the German Consulate in New York City in the bone trade, such as its commercial trafficking of African-American human remains in coordination with Luschan; and (v) because as integral parts of the Teaching Collection, they are here in connection with Germany’s commercial activities that are still “substantial[lly] contact[ing]” the United States today, *see* 28 U.S.C. § 1603(e), driving American indigenous advocates, representatives, and leaders across the Atlantic to take part in repatriation activities. These are just some of the many substantive connections between the Herero and Nama human

remains in New York and Germany's activities both in the United States and elsewhere "having substantial contact with" the United States.

3. Discovery of Copy of "Blue Book" in New York Public Library

320. Plaintiffs have discovered that a rare copy of the "Blue Book," published in 1918, is located at the New York Public Library's main branch on Fifth Avenue in Manhattan. The book, "Union of South Africa – Report On the Natives of South-West Africa And Their Treatment By Germany," was prepared by South African officials in Windhoek, and published in the United Kingdom by His Majesty's Stationery Office (HMSO) and presented to both Houses of Parliament that year.⁴⁰

321. This Blue Book is an invaluable record which includes testimony to the atrocities from genocide survivors. The presence of a Blue Book copy in New York is extraordinary since between the two World Wars Great Britain considered Germany briefly as an ally and attempted to suppress records of Germany's genocide of the indigenous peoples of South West Africa by, among other things, destroying all copies of the Blue Book. The copy located at the New York Public Library is one of the few surviving copies.

⁴⁰ After World War I, South Africa administered South West Africa as a Mandate.

4. New York Is A Center For Ovaherero/Nama Genocide Research

322. New York has become one of the leading research and conference centers for the study of the Ovaherero/Nama genocide. The AMNH has had a series of meetings with Plaintiffs and members of the Ovaherero and Nama communities regarding human remains from the German genocide in the Museum's possession, and there are ongoing discussions relating to the possible establishment of a permanent online Ovaherero/Nama Genocide exhibition (which would include human remains and artifacts).

323. In addition, the Schomburg Center for Research in Black Culture, located at 515 Malcolm X Blvd in Manhattan, in association with the Plaintiff Association, has undertaken research and held a recent conference, "The First Genocide of the 20th Century," chaired by Dr. Ngondi Kamatuka, who himself is a descendent of the Ovaherero/Nama Genocide and now a U.S. citizen.

324. Columbia University has sponsored an ongoing research program and another major educational conference focused on the German south west African genocide, bringing together leaders and members of the Ovaherero and Nama communities with photojournalists and documentary film makers based in New York, who have documented the lasting and continuing impact that the Defendant's genocide has had on the descendants of these victims both in Africa

and in the United States. The Holocaust Studies and Human Rights Program of Cardozo Law School, Yeshiva University, has also committed some of its resources to this project.

325 The Ovaherero>Nama Genocide has been given significant attention by the Holocaust Memorial and Education Center, Glen Cove, New York, which sponsored an international conference, research and educational program, and has hosted the filming of a public television program and series with WLIW21 and WNET.

326 In short, the Ovaherero and Nama communities in New York have a wide range of historical, educational and cultural ties with numerous not-for-profits, museums, cultural/educational entities and multimedia programs in the New York area.

O. Plaintiffs' Injuries

327. Under customary Ovaherero law and Nama law, the rights of a decedent are passed by intestacy, and property that inhered in the Ovaherero people and Nama people respectively is held on a communal basis by the sovereignty. Plaintiffs and the Classes are the heirs to the rights in property taken by Defendant from the Ovaherero and Nama peoples in violation of international law.

328. In the alternative, Plaintiffs Paramount Chief Rukoro of the Ovaherero and Chief Isaack of the Nama are the sole, rightful, and legal representatives of

the continuing bodies politic of the Ovaherero people and Nama people respectively, and thereby represent bodies that are not legal *successors* to the Ovaherero people and the Nama people of 1884–1915, but rather are one and the same with an identical, unbroken legal status. As such, the claims and rights asserted herein were never inherited, but have inhered since their origins in the bodies politic represented by Plaintiffs.

329. Further, in the alternative, Plaintiffs and the Classes have suffered the injuries alleged herein directly and proximately, in that Defendant engaged in a lawless course of conduct to annihilate not only the Hereroland and Great Namaqualand polities in their entirety, but also to annihilate the existence of the Ovaherero and Nama peoples *qua* peoples—including all descendants. The genocide and takings led to intergenerational impoverishment that has lasted for over one-hundred years.

330. Plaintiffs and the Classes have been directly and proximately injured by Defendant, as set forth *supra*, and as described below.

1. Economic Injuries

331. Defendant deprived Plaintiffs and the Classes of their valuable rights in the land, cattle, minerals and precious metals, concession, taxation, and customs revenues, the fruit of the labor of family members and their associated pension rights, as well as other property. Defendant's actions have caused

Plaintiffs and the Classes to incur exorbitant medical and disability expenses; to lose wages; to find unsatisfactory replacement property; and, to incur the costs of funerals and burials; all totaling an amount to be proven at trial.

2. Non-Economic Injury

332. Defendant's taking of the skulls, body parts, and bodies deprived Plaintiffs and the Classes of the mortal remains of their family members. Defendant's genocidal conduct and mass murder subjected Plaintiffs and the Classes to a loss of consortium, mental anguish, pain and suffering, disfigurement, reputational injury, and spiritual injuries sustained by Defendant's destruction of the sovereign polities of Hereroland and Great Namaqualand. Defendant also injured Plaintiffs and the Classes by destroying the institutional mechanisms for transmission of the peoples' knowledges, traditions, and practices, and thereby depriving Plaintiffs and the Classes with those knowledges, traditions, and practices. The amount of these damages will be proven at trial.

3. Punitive Damages

333. In light of Defendant's malice, ill will, and blatant disregard for human dignity and human rights, Plaintiffs assert the right to punitive damages in an amount sufficient to punish Defendant for its flagrant violations of international law and to deter any such future conduct.

CLASS ACTION ALLEGATIONS

334. Plaintiffs are U.S. citizens and aliens who bring this action on behalf of themselves and all other U.S. (the "U.S. Class") and non-U.S. citizens ("the non-U.S. Class") who are, or who are direct descendants of, members of the Ovaherero and Nama indigenous peoples ("the Classes").

335. Neither the members of U.S. Class, the members of the non-U.S. Class, nor the ancestral members of the Ovaherero and Nama indigenous peoples are or were Defendant's citizens. Any and all citizens of Defendant are excluded from the Classes.

336. This action may be properly maintained as a Class action pursuant to Rule 23, Federal Rules of Civil Procedure. This action may be properly maintained as a Class action pursuant to Fed. R. Civ. P. 23(b)(1) in that the prosecution of separate actions by or against individual members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudication or

substantially impair or impede their ability to protect their interests. This action may be properly maintained as a Class action pursuant to Fed. R. Civ. P. 23(b)(2) as the parties opposing the Class have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

A. Predominance of Common Questions

337. There are also questions of law and fact common to the Class which predominate over questions affecting individual members, including:

- (a) Did the German colonial authorities design and implement an intentional policy and practice to exterminate the Ovaherero and Nama people?
- (b) Did the German colonial authorities systematically expropriate, and aid and abet the expropriation, of Ovaherero and Nama land, personal property, livestock, concession, taxation, and customs rights, human labor, body parts, and other property?
- (c) Did the German colonial authorities implement, aid and abet, and authorize a policy and practice of systematic rape of Ovaherero and Nama women?

- (d) Did the German colonial authorities implement, aid and abet and authorize a policy and practice of forcing Ovaherero and Nama into involuntary servitude and forced/slave labor?
- (e) Did the German colonial authorities incarcerate the surviving Ovaherero and Nama people in concentration camps under inhumane and sub-human conditions, without adequate food, water, clothing, shelter, medical care and other basic requirements and tools for survival, at Shark Island and other concentration camps?
- (f) Did German authorities permit and aid and abet the pseudoscientific medical experimentation on Ovaherero and Nama corpses and skulls in a misguided and ghoulis effort to establish that indigenous Africans were Untermensch (inferior or sub-human) and that the German “race” was superior?
- (g) To that end, did Defendant force Ovaherero and Nama women and girls to use glass shards to manually scrape the flesh, face, and scalp off of the boiled heads of their husbands and fathers?
- (h) Did Defendant’s takings violate international law?
- (i) Has German intentionally marginalized and excluded Ovaherero and Nama leadership

and representatives from any negotiations regarding the genocide and wrongful expropriation of their property, in violation of the U.N. Declaration of the Rights of Indigenous Peoples?

B. Superiority

338. Defendant's takings treated the Ovaherero and Nama as classes to be uniformly annihilated, and for their land to be uniformly expropriated according to Defendant's desire. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Plaintiffs and Plaintiff class members have all suffered and will continue to suffer economic harm and damage as a result of Defendant's unlawful and wrongful conduct, which was directed towards the Ovaherero and Nama peoples as a whole, rather than specifically or uniquely against any individual.

339. Defendant has acted uniformly with respect to Plaintiffs and the Classes. Absent a class action, most class members would likely find the cost of litigating their claims prohibitively high and would thus have no effective remedy at law or equity. Most Plaintiff class members are impoverished with limited access to lawyers and courts. Because of the relatively small size of each individual class member's claim, it is likely that only a few class members would be able to afford to seek legal redress for Defendant's misconduct. Absent a class action, Plaintiff class members will

continue to incur damages, and they will remain without effective remedy.

340. Class treatment in this Court will conserve the resources of the courts and the litigants, and will promote consistency and efficiency of adjudication by providing common answers to the common questions of law that predominate in this action.

341. Class-wide relief and judicial supervision under Rule 23 assures fair, constituent, and equitable treatment and protection of all Plaintiff class members, and uniformity and consistency in Defendant's discharge of its legal obligation to make restitution and pay damages.

C. Typicality

342. The claims of the named Plaintiffs are typical of the members of the Classes and they will be able to fairly and adequately protect the interests of the Classes. The named Plaintiffs have no interests antagonistic to the interests of other members of the Classes.

D. Numerosity

343. While the exact number of Class members is unknown to Plaintiffs currently, it is estimated that

the Classes are so numerous that joinder of individual members herein is impracticable.

E. Adequacy

344. Plaintiffs will fairly and adequately protect the interests of the members of the Classes and have retained competent counsel, experienced in class action litigation and litigation involving international human rights, takings of private property, and complex civil litigation. Plaintiffs are members of the Classes and do not have interests antagonistic to or in conflict with the other members of the Classes.

COUNT I

(Violations of International Law Under the Alien
Tort Statute, 28 U.S.C. § 1350, Federal Common
Law and The Law of Nations)

345. Plaintiffs repeat and reallege the foregoing paragraphs of this Complaint as though fully set forth herein.

346. Germany's horrific mistreatment of the Ovaherero and Nama during the colonial period, including but not limited to the mass killings intended to exterminate the Ovaherero and Nama peoples, the systematic rape and abuse of Ovaherero and Nama women, the taking and expropriation of lands, cattle and other property without compensation and in furtherance of Germany's genocidal policies, the herding of Ovaherero and Nama survivors into concentration camps, the exploitation of surviving Ovaherero and Nama as forced/slave laborers, and the use of Ovaherero and Nama corpses and skulls for pseudoscientific experimentation and public display, constituted genocide under international law.

347. In addition, Germany, as the governmental authority during the colonial period, is liable for aiding and abetting German settlers and residents of then-South West Africa in the confiscation of lands, cattle and other property from the Ovaherero and Nama in violation of international law, the systematic rape of Ovaherero and Nama women by said

German civilian and military personnel, and the unlawful use of Ovaherero and Nama as forced/slave laborers.

348. Germany is also liable to Plaintiffs and the Classes for its violations of the U.N. Declaration of the Rights of Indigenous Peoples, in that it has refused to recognize that the lawful representatives of the indigenous Ovaherero and Nama peoples have a right to participate in negotiations relating to the genocidal policies and practices of the German Imperial authorities during the colonial period, refusal to recognize the right to self-determination of the Ovaherero and Nama, and the refusal to even consider the issue of reparations and compensation to the Ovaherero and Nama for the catastrophic abuses that they were forced to endure.

349. Germany is liable to the non-U.S. Plaintiffs and the non-U.S. Class for damages under the Alien Tort Statute, 28 U.S.C. §1350, in an amount to be determined at trial.

350. Germany is liable to the U.S. Plaintiffs and the U.S. Class for these violations of international law under federal common law, which incorporates international law, in an amount to be determined at trial.

COUNT II
(Conversion and Expropriation of Land, Livestock
and Other Property)

351. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Complaint as though fully set forth herein.

352. Germany's confiscation and unlawful taking of the lands, cattle and other property of the Ovaherero and Nama peoples without compensation constituted a conversion under common law and New York state law.

353. Germany's aiding and abetting of the confiscation and unlawful taking of the lands, cattle and other property of the Ovaherero and Nama peoples without compensation by German nationals and others during the colonial period constituted a conversion under common law and New York state law.

354. As a result, Plaintiffs and all Ovaherero and Nama members of the Classes were deprived of their property, its use and enjoyments, and any interest and provides which could have been earned thereon.

355. Germany is liable to the Plaintiffs and the Classes for such damages in an amount to be determined at trial.

356. Plaintiffs and the Classes are also entitled to the return of the assets and property that was looted and confiscated directly by the Defendant, or which was aided and abetted by the Defendant, in an amount to be determined at trial.

COUNT III

**(Conversion and Expropriation of the Concession,
Taxation, and Customs Rights)**

357. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Second Amended Complaint as though fully set forth herein.

358. Germany's taking of the concession, taxation, and customs rights of the Ovaherero and Nama peoples without compensation constitutes a conversion under New York law.

359. Germany's aiding and abetting of taking of the concession, taxation, and customs rights of the Ovaherero and Nama peoples without compensation by private parties constitutes a conversion under common law and New York law.

360. As a result, Plaintiffs and the Classes have been deprived of their concession, taxation, and customs rights, its use and enjoyments, and any interest that would have been earned thereon.

361. Germany is liable to Plaintiffs and the Classes for damages in an amount to be determined at trial.

COUNT IV

**(Conversion and Expropriation of Precious Metals
and Gems and Other Resources)**

362. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Second Amended Complaint as though fully set forth herein.

363. Germany's taking of the precious metals, precious gems, and other natural resources of the Ovaherero and Nama peoples without compensation constitutes a conversion under New York law.

364. Germany's aiding and abetting of taking of the precious metals, precious gems, and other natural resources of the Ovaherero and Nama peoples without compensation by private parties constitutes a conversion under common law and New York law.

365. As a result, Plaintiffs and the Classes have been deprived of their rights in the precious metals, precious gems, and other natural resources, its use and enjoyments, and any interest that would have been earned thereon.

366. Germany is liable to Plaintiffs and the Classes for damages in an amount to be determined at trial.

367. Plaintiffs and the Classes are also entitled to the return of all precious metals, precious gems, and other natural resources confiscated directly by Defendant, or which was aided and abetted by Defendant, and which are owned by Defendant, in an amount to be determined at trial.

COUNT V

**(Conversion and Expropriation of the Wages of the
Ovaherero and Nama Peoples)**

368. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Second Amended Complaint as though fully set forth herein.

369. Germany's taking of the wages of the Ovaherero and Nama peoples without compensation constitutes a conversion under New York law.

370. Germany's aiding and abetting of taking of the wages of the Ovaherero and Nama peoples without compensation by private parties constitutes a conversion under common law and New York law.

371. As a result, Plaintiffs and the Classes have been deprived of their rights in the back-pay of wages, its use and enjoyments, and any interest that would have been earned thereon.

372. Germany is liable to Plaintiffs and the Classes for damages in an amount to be determined at trial.

COUNT VI
(Conversion and Expropriation of Labor and
Pension Rights)

373. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Second Amended Complaint as though fully set forth herein.

374. Germany's taking of the labor and pension rights of the Ovaherero and Nama peoples without compensation constitutes a conversion under New York law.

375. Germany's aiding and abetting of taking of the labor and pension rights of the Ovaherero and Nama peoples without compensation by private parties constitutes a conversion under common law and New York law.

376. As a result, Plaintiffs and the Classes have been deprived of their rights in the labor and pension rights, and its use and enjoyments.

377. Germany is liable to Plaintiffs and the Classes for damages in an amount to be determined at trial.

COUNT VII
(Conversion and Expropriation of Skulls, Body
Parts, and Mortal Remains)

378. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Second Amended Complaint as though fully set forth herein.

379. Germany's taking of the skulls, body parts, and other mortal remains of the Ovaherero and Nama peoples without compensation constitutes a conversion under New York law.

380. Germany's aiding and abetting of taking of the skulls, body parts, and other mortal remains of the Ovaherero and Nama peoples without compensation by private parties constitutes a conversion under common law and New York law.

381. As a result, Plaintiffs and the Classes have been deprived of their rights in the skulls, body parts, and other mortal remains, and its use and enjoyments.

382. Germany is liable to Plaintiffs and the Classes for damages in an amount to be determined at trial.

383. Plaintiffs and the Classes are also entitled to the return of all skulls, body parts, and other mortal remains confiscated directly by Defendant, or which was aided and abetted by Defendant, and which are

owned by Defendant, in an amount to be determined at trial.

COUNT VIII

(Conversion and Expropriation of Sovereignty Property Rights)

384. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Second Amended Complaint as though fully set forth herein.

385. Germany's taking of the property rights of the Ovaherero and Nama nations without compensation constitutes a conversion under New York law.

386. Germany's aiding and abetting of taking of the property rights of the Ovaherero and Nama nations without compensation by private parties constitutes a conversion under common law and New York law.

387. As a result, Plaintiffs and the Classes have been deprived of their property rights of the Ovaherero and Nama nations, and their use and enjoyment.

388. Germany is liable to Plaintiffs and the Classes for damages in an amount to be determined at trial.

COUNT IX
(Unjust Enrichment)

389. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Complaint as though fully set forth herein.

390. By its seizure, use and retention of the property looted from the Plaintiffs and Class members, through its aiding and abetting of others to convert Plaintiffs' property, and by its refusal and failure to return said looted assets to their rightful owners, Defendant improperly deprived Plaintiffs and other Class members of their property.

391. Plaintiffs and the Classes are therefore entitled to recover damages in an amount to be determined at trial.

COUNT X
(Accounting)

392. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Complaint as though fully set forth herein.

393. Plaintiffs and the Classes are entitled to an accounting from Germany for the losses that they suffered for the confiscation of their lands, cattle and other properties in violation of international law.

COUNT XI
(Constructive Trust)

394. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Second Amended Complaint as though fully set forth herein.

395. Plaintiffs and the Classes are entitled to establishment of a constructive trust, as Defendant cannot in good conscience retain the beneficial interests of its takings, and equity compels Defendant to serve as trustee to Plaintiffs.

COUNT XII
(Declaratory Judgment)

396. Plaintiffs repeat and reallege the allegations set forth in the foregoing paragraphs of this Complaint as though fully set forth herein.

397. Plaintiffs and the Classes are entitled to an Order, pursuant to Title 28, United States Code, Section 2201, declaring that Defendant's aforesaid intentional and unlawful actions have caused and continue to cause Plaintiffs and the Classes damages as a direct and proximate result of Germany's refusal to respect Plaintiffs' rights, among other things, (i) as the legitimate successors to sovereign nations; (ii) as successors to the rights of the Ovaherero and Nama peoples; (iii) as successors to the rights of generations

of victims to damages and restorative justice; and (iv) as the sole and lawful persons, and indispensable parties, to all discussions and negotiations regarding the issues presented herein.

398. Plaintiffs and the Classes also are entitled to an Order, pursuant to Title 28, United States Code, Section 2201, declaring that Defendant's exclusion of Plaintiffs, as the legitimate and lawful representatives of the Ovaherero and Nama indigenous peoples, from current negotiations regarding the subject matter of this Complaint, is a violation of Plaintiffs' rights under international law, including the U.N. Declaration on the Rights of Indigenous People.

399. Pursuant to 28 U.S.C. § 2201, there exists a real, immediate and urgent need for Plaintiffs to obtain a declaration of the rights and legal relations between them and the Defendant.

400. In the absence of such a declaration of rights and legal relationship between the parties, Defendant will continue to deprive and obstruct Plaintiff's rights to damages and restorative justice.

JURY TRIAL DEMAND

401. Plaintiffs demand a jury trial on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court designate Plaintiffs as the named representatives of the Classes, designate any appropriate subclasses, under applicable provisions of Fed. R. Civ. P. 23, and that the Court enter judgment in their favor and against Defendant, as follows:

- (a) Certify this as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;
- (b) Order that the undersigned attorneys are designated as class counsel;
- (c) Adjudge and decree that Defendant's conduct as described herein was in violation of international law, federal statutory and federal common law, and the law of New York State;
- (d) Enjoin and restrain Defendant from continuing to exclude Plaintiffs and other lawful representatives of the Ovaherero and Nama people from participation in discussions and negotiations regarding the subject matter of this Complaint, in violation of Plaintiffs' rights under the U.N. Declaration on the Rights of Indigenous People to self-determination for all indigenous peoples and their right to participate and speak for themselves

regarding all matters relating to the losses that they have suffered;

- (e) Award damages to the Plaintiffs and the Non-U.S. Class under the Alien Tort Statute, and to both Classes under international law, federal common law, and New York law, including conversion and unjust enrichment, for the damages sustained by Plaintiffs and the Classes as a result of Defendant's violations, including its violation of the Genocide Convention and the U.N. Declaration on the Rights of Indigenous Peoples;
- (f) Award damages to the Plaintiffs and the Classes for all common and state law violations, including the Conversions and Unjust Enrichment;
- (g) Direct that Defendant conduct an accounting of the value of the land, personal property, livestock, concession, taxation, and customs rights, human labor, body parts, and other property rights taken from the Ovaherero and Nama peoples;
- (h) Order that a Constructive Trust be established with regard to the value of all land, personal property, livestock, concession, taxation, and customs rights, human labor, body parts, and other property rights that were taken, and the profits derived therefrom;

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- (i) Award Plaintiffs and the Classes punitive damages in an amount sufficient to punish Defendant for its flagrant and outrageous violations of international law and to deter such future conduct;
- (j) Award Plaintiffs the costs of bringing this action, pre- and post-judgment interest on any amounts awarded, reasonable attorneys' fees; and,
- (k) Grant such other and further relief as this Court deems just and proper.

Dated: New York, New York

October 25, 2018

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LLP

/s/

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VEKUII RUKORO, Paramount
Chief of the Ovaherero People
and Representative of the
Ovaherero Traditional
Authority; JOHANNES
ISAACK, Chief and

Chairman of the Nama
Traditional Authorities
Association, THE
ASSOCIATION OF THE
OVAHERERO GENOCIDE IN
THE USA INC.; and
BARNABAS VERAA
KATUUO, Individually and as
an Officer of The Association of
the Ovaherero Genocide in the
USA, Inc., on behalf of
themselves and all other
Ovaherero and Nama indigenous
peoples,

Plaintiffs,

-against-

Civ. No. 17-0062-
LTS

**SUPPLEMENTAL
DECLARATION
OF MICHAEL J.
LOCKMAN**

FEDERAL REPUBLIC OF
GERMANY,

Defendant.

MICHAEL J. LOCKMAN declares as follows under penalties of perjury:

1. I submit this Supplemental Declaration in support of Plaintiffs' Opposition to Defendant's Motion to Dismiss. I am an attorney licensed to practice law in New York and I am fluent in German, with five years experience as a German-English translator. The translations of German materials herein are true and authentic.

2. In my Declaration of April 24, 2018, I declared that while working for McCallion & Associates LLP in 2017, I had learned about Germany's commercial activities related to bone collection.¹ Plaintiffs and their counsel first became aware of the presence of human remains at the American Museum of Natural History ("AMNH") relating to this case in or about September 2017; however, as of the filing of their opposition papers to Germany's Motion to Dismiss and

¹ Lockman Decl. at ¶ 10 (Dkt. No. 45-6).

the date of oral argument on July 31, 2018, Plaintiffs' investigation of the facts concerning the Ovaherero and Nama human remains at the AMNH was still ongoing, especially as to the larger question of how these remains related to Germany's commercial activities in the purchase, sale and study of the human remains of indigenous peoples, including the Ovaherero and Nama. In that regard, Plaintiffs encountered difficulties and delays in gaining access to primary research documents relating to the relevant issues, including restrictions placed on our research by the AMNH administration. As a result, it took me and others working with me several months since July 2018 to complete the research required to write this supplemental factual declaration regarding the AMNH human remains in the general context of Germany's commercial activities.

3. Set forth below are the additional facts that have been gathered that, we believe, are relevant to Germany's argument that the Court lacks the power to exercise jurisdiction over these types of claims on this unique set of facts.

4. **The Teaching Collection.** The collection of Herero, Nama, and other human remains, books, and materials at the American Museum of Natural History ("AMNH") is the so-called "Teaching Collection" ("*Lehrmittelsammlung*"), assembled by Felix von Luschan over decades of employment at the Royal Museum of Ethnology (*Museum für Völkerkunde*) (the "Museum"), and the Friedrich Wilhelm University (now Humboldt University), both which were Imperial arms and institutions in Berlin. Luschan began working at

the Museum in 1886, became Director of the Africa and Oceania collections in 1904,² and co-founded the Berlin Society for Race Hygiene in 1905.³ In 1909, he rose to Director of Anthropology at the Museum and sole administrator of the Museum's human remains collections. He was named Privy Councillor to the Kaiser in 1911.⁴

5. The Teaching Collection was sent from the Museum of Ethnology to the AMNH in New York in 1924: as the AMNH accession records note, it is an “[a]natomical collection comprising 5,000 human crania, 200 complete skeletons, study collection, and private library.”⁵ The Teaching Collection was one of many

² See *Luschan, Felix von*, in 5 AUSTRIAN BIOGRAPHICAL LEXICON 1815–1950 372 (1972); Beate Kunst & Ulrich Creutz, *Anthropologische Sammlungen in Berlin* [Anthropological Collections in Berlin], in Stoecker, *et al.*, eds., SAMMELN, ERFORSCHEN, ZURÜCKGEBEN? MENSCHLICHE GEBEINE AUS DER KOLONIALZEIT IN AKADEMISCHEN UND MUSEALEN SAMMLUNGEN [COLLECT, RESEARCH, GIVE BACK? HUMAN REMAINS FROM THE COLONIAL ERA IN ACADEMIC AND MUSEUM COLLECTIONS] 84, 89–90 (2013).

³ Maria Six-Hohenbalken, *Felix von Luschans Beiträge zur Ethnologie* [Felix von Luschan's Contributions to Ethnology], in Peter Ruggendorfer & Hubert D. Szemethy, eds., FELIX VON LUSCHAN: LEBEN UND WIRKEN EINES UNIVERSALGELEHRTEN [FELIX VON LUSCHAN: LIFE AND WORKS OF A UNIVERSAL SCHOLAR] 17, 19 (2009); *see also* Kunst & Creutz, *supra* note 2, at 89.

⁴ *Curriculum Vitae*, in Ruggendorfer & Szemethy, *supra* note 3, 17, 19

⁵ See Katuu Declaration, Pls' Opp. to Mot. to Dismiss, Exs. 1 & 2 (Dkt. No. 45-2).

human remains collections under Luschan's administration at the Museum,⁶ and was used for instruction in anthropology, craniology, and related sciences at the Museum and University.⁷ Luschan described it as containing commercially acquired items:

In question are two, formally different collections, the official anthropological collection of the Royal Museum of Ethnology, and my special so-called Teaching Collection that serves instructional purposes at the University. Unfortunately, the former has no fixed budget, so that it generally depends on gifts. Thus, everything that is donated in terms of skulls, skeletons, soft tissue, *etc.*, naturally goes to this collection, while in contrast, such things that cost money, are normally acquired for the Teaching Collection. For the latter, there is always the necessary money available. In other words,... if one wants to donate, it goes to the one, and if one wants to sell, it goes to the other.⁸

⁶ Kunst & Creutz, *supra* note 2, at 92.

⁷ See Felix von Luschan, *Ziele und Wege eines modernen Museum für Völkerkunde* [*Goals and Methods of a Modern Ethnological Museum*], 88 GLOBUS: ILLUSTRIRTE ZEITS. FÜR LÄNDER- UND VÖLKERKUNDE [GLOBUS: ILLUSTRATED JOURNAL FOR GEOGRAPHY AND ETHNOLOGY] 238, 240 (1905) (describing teaching collections).

⁸ Kunst & Creutz, *supra* note 2, at 92 (quoting Letter, Luschan to Oberlehrer Quantz (Oct. 13, 1906)).

6. The Teaching Collection was collected, stored, maintained, used, and studied at the Museum of Ethnology.⁹ According to Luschan himself in 1913, the “12,000 skulls and many precious skeletons” at the Museum were the product of the Kaiser’s “most energetic lordly patronage” and “imperial subsidies” bestowed “in such rich amounts”:

In boxes and crates at the Museum of Ethnology, we have stored already approximately 12,000 skulls and many hundred precious skeletons, so that also this collection awaits only the Resurrection, to then immediately stand as the greatest and most valuable collection of its type in the entire world.¹⁰

⁹ See, e.g., Heinrich Friedländer, *Die Bissarten und einige andere anthropologische Eigenschaften bei 1500 Berlinern*, [*The Bite Types and Some Other Anthropological Characteristics in 1,500 Berliners*], 20 VIERTELJAHRSSCHRIFT FÜR ZAHNHEILKUNDE [DENTISTRY QUARTERLY] 425, 441 (1904) (reporting on material analysis of objects in the Teaching Collection at the Museum of Ethnology).

¹⁰ Felix von Luschan, *Der Kaiser und die Wissenschaft* [*The Kaiser and Science*], in UNSER KAISER, FÜNFUNDZWANZIG JAHRE DER REGIERUNG KAISER WILHELM II. 1888–1913 [OUR KAISER: TWENTY-FIVE YEARS OF THE REIGN OF KAISER WILHELM II 1888–1913] 259, 278 (1913). See also ANDREW ZIMMERMAN, ANTHROPOLOGY AND ANTIHUMANISM IN IMPERIAL GERMANY 7 (2001) (“[W]ithout imperialism, anthropologists never would have had access to... body parts.”).

7. As integral parts of the Teaching Collection, the Herero and Nama remains are here in connection with Germany's role as market player in the international commercial trade in human remains through its acquisition, collection, transport, display, trade, and sale of human remains in support of anthropological, craniological, and ethnological research, having substantial contact with the United States. Ultimately, the Museum of Ethnology could not have obtained its vast collections without Imperial underwriting, logistics, and ownership. By Luschan's own account, it was through the Kaiser and the Imperial treasury by which he undertook his collection activities, and by which the Museum held its holdings.¹¹

8. Germany aggressively recruited and trained amateurs, soldiers, and sailors to commercially trade and traffic human remains, and published guides to stimulate collection. Starting in the 1870s, the Museum published guides for such collection, including Luschan's specific instructions in 1896 for collection in Africa.¹² As Luschan noted in a 1902 speech (a translation of which is attached hereto as Exhibit A),

¹¹ Luschan, *The Kaiser and Science*, *supra* note 10, at 278.

¹² Kristin Weber, *Objekte als Spiegel kolonialer Beziehungen: Das Sammeln von Ethnographica zur Zeit der deutschen kolonialen Expansion in Ostafrika* [Objects as the Mirror of Colonial Relations: The Collecting of Ethnographica at the Time of German Colonial Expansion in East Africa] *11 (1884–1914) (Thesis 2013), available at http://www.no-humboldt21.de/wp-content/uploads/2013/11/WK1_kant11.pdf (citing Felix von Luschan, *Instruktion für ethnographische Beobachtungen und Sammlungen in Deutsch-Ostafrika* [Instructions for Ethnological Observation and Collecting in German East Africa] (1896).

the Museum distributed “thousands” of “Ethnographic Observation and Collection” pamphlets to recruit agents to take, purchase, trade, and traffic in human remains.¹³

9. The German Navy long served Germany’s commercial collecting. In 1874, the Museum and the Navy agreed that the HMS *Gazelle* would acquire “everything collectible” from ports, with officers onboard serving as “intermediary” and agent.¹⁴ By the 1890s, the Museum’s and Navy’s relationship had so strengthened that “[t]he Navy’s collecting duties developed from an occasional activity for officers during their leisure time to an *integral part of its operations*.”¹⁵ For example, in 1897, the Museum placed 1,000 Reichsmark with the HMS *Seagull*, and Luschan gave ethnography lessons to officers functioning as the Museum’s purchasing agents.¹⁶

¹³ See Felix von Luschan, Speech, *Ziele und Wege der Völkerkunde in den deutschen Schutzgebieten* [Goals and Methods of Ethnology in the German Protectorates] (Oct. 11, 1902), in SPECIAL PRINT FROM THE PROCEEDINGS OF THE 1902 GERMAN COLONIAL CONGRESS 163 (1902), Exhibit A hereto. Again in 1906, Luschan published instructions for “scientific observation” for amateurs while traveling. Felix von Luschan, *Anthropology, Ethnography, and Prehistory, in 2 INTRODUCTION TO SCIENTIFIC OBSERVATIONS DURING TRAVELS 1* (G. von Neumayer, ed. 1906).

¹⁴ ZIMMERMAN, *supra* note 10, at 155.

¹⁵ ZIMMERMAN, *supra* note 10, at 156 (emphasis added).

¹⁶ *Id.* at 155 (citing Luschan’s Letters to Admiral von Knorr (Aug. 7, 1897) and Lt. Kuthe (Jan. 9, 1899)).

10. Germany also gave the Museum a right of first refusal on imported human remains. Under a *Bundesrat* Directive of 1889,¹⁷ all anthropological items acquired overseas while on Imperial business were required to first be offered for sale to the Museum.¹⁸ “The Berlin Museum of Ethnology thus sat, like a spider, at the center of a web of collectors spanning the globe.”¹⁹ The Directive was amended in 1896 to formally bridge collecting and military operations by including military personnel within its ambit.²⁰ Alongside the Directive, Luschan and other Museum agents built additional collection networks through colleagues on-site.²¹

11. Germany succeeded in dominating the human remains market, and by 1900, “the Berlin museum possessed the largest anthropology collection

¹⁷ *Anweisung betreffend die Behandlung der aus den Deutschen Schutzgebieten eingehenden wissenschaftlichen Sendungen* [Directive Concerning the Treatment of Scientific Shipments Received from the German Protectorates] (Aug. 3, 1889) (Ger.). The Directive also provided for state funding for the Museum’s collections. Weber, *supra* note 12, at 11.

¹⁸ ZIMMERMAN, *supra* note 10, at 153. See also *Runderlass, betr. die ethnographischen und naturwissenschaftlichen Sammlungen der in den Schutzgebieten befindlichen Beamten und Militärpersonen* [Circular Concerning Ethnographic and Natural Scientific Collecting by Officers and Military Persons in the Protectorates], KOLONIALBLATT [COLONIAL GAZETTE] 669 (1896).

¹⁹ ZIMMERMAN, *supra* note 10, at 153.

²⁰ Weber, *supra* note 12, at 11.

²¹ *Id.*

in the world.”²² Museum Director Bastian identified the institutional benefits derived from German colonial military enterprises:

From military expeditions undertaken for colonial political purposes, the ethnological collections of the royal museums have been valuably enriched.... In punitive expeditions, the property of the guilty, instead of being destroyed, is preserved for the scientific study... of wild tribes.²³

12. In this way, the Museum “explicitly supported” military assistance, and all that it implied with regard to the methods by which the German military collected human remains:

[T]hat ethnological collecting in the context of colonial expansion and power consolidation was taking place under everything other than “labor conditions,” was also known by the ethnologists in Berlin, who approvingly accepted and indeed explicitly supported collecting during military operations. This is made clear in the collection policies by the expansion of the *Bundesrat*

²² ZIMMERMAN, *supra* note 10, at 155.

²³ *Id.* at 156 (quoting Bastian to General Administrator of the Royal Museum (July 21, 1900).

decision in the year 1896 to members of the *Schutztruppe* and Officers and the resulting affiliated inclusion of military operations.²⁴

13. By 1902, Luschan had begun warning of a radical urgency requiring immediate, large-scale collecting.²⁵ As conditions in the Protectorates were “now changing almost from one day to the next under the influence of the white man,” he instructed his colleagues: “[S]natch quickly, before it becomes forever too late.”²⁶ Luschan broadcast his message by distribution of thousands of “Ethnographic Observation and Collection” pamphlets for amateurs, as manuals and recruiting tools for the taking, purchase, trading, or selling of artifacts and human remains.²⁷

14. In April 1905, Lieutenant Ralph Zürn donated a Herero skull to the Museum. Luschan wanted more, and he inquired further by letter to Zürn:

²⁴ Weber, *supra* note 12, at 12.

²⁵ See Marion Melk-Koch, *Felix von Luschan als Curator* [*Felix von Luschan as a Curator*], in Ruggendorfer & Szemethy, *supra* note 3, 81, 89–91.

²⁶ Luschan, Speech, *supra* note 13, at 163, Exhibit A. See also Melk-Koch, *supra* note 25, at 91 (“[F]or ethnology, if anything is to happen, it must happen in the coming decades and by our generation or never at all.”) (quoting Letter, Luschan to the General Administration of Royal Museums (Oct. 12, 1903)).

²⁷ See Luschan, *supra* note 13, at 165–66, Exhibit A.

The skull you gave us corresponds so little to the picture of the Herero skull type that we have thus far been able to make from our insufficient and inferior material, that it would be desirable to secure as soon as possible a larger collection of Herero skulls for scientific investigation.... If you are aware of any possible way in which we might acquire a larger number of Herero skulls...²⁸

Zürn relayed this to a colleague in Swakopmund and responded optimistically to Luschan:

I hope that my requests will have success, since in the concentration camps, taking and preserving the skulls of Herero prisoners of war will be more readily possible than in the country, where there is always a danger of offending the ritual feelings of the natives.²⁹

²⁸ ZIMMERMAN, *supra* note 10, at 244–45 (quoting Luschan to Oberleutenant Ralf Zürn (Apr. 15, 1905)).

²⁹ *Id.* (quoting Zürn to Luschan (June 25, 1905)). Zürn's grave-robbing in 1903 "as an easy source of additional income," OLUSOGA & CASPER W. ERICHSEN, *THE KAISER'S HOLOCAUST* 128 (2010), was a key factor in sparking the Ovaherero-German conflict. *See* Amended Complaint ¶ 93; OLUSOGA & ERICHSEN, *supra*, at 128 (citing LUDWIG CONRADT, *MEMORIES FROM TWENTY YEARS TRADING AND FARMING IN GERMAN SOUTH WEST AFRICA* 250 (1905)). Considering a professor's request for "Herero and Bushman skulls," the S. African Mandate Admin. Office noted:

15. Responding to requests by Luschan and others, state resources were deployed to collect human remains. Exhibit B hereto shows two images of soldiers loading skulls for transit,³⁰ both of which are reproductions of a photograph said to have been taken by the customs shed at the Swakopmund concentration camp in 1905 or 1906.³¹ The top image is the retouched photograph printed on a contemporary postcard, with back caption: “Loading the Herero skulls designated for German museums and universities.”³² The bottom image is a traced illustration with minor differences,³³ printed in a book by *Schutztruppe* Officer Bernd Kroemer with caption:

“The desecration of their graves by the Germans was one of the main causes of the revolt of 1904.” Werner Hillebrecht, *Probleme der archivalischen Überlieferung* [Problems in Archival Transmission], in Stoecker, *et al.*, *supra* note 2, 279, 285 ((quoting Letter, G.J. Waters to J.H. Hofmeyr-Koen (Apr. 19, 1921)).

³⁰ LEONOR FABER-JONKER, MORE THAN JUST AN OBJECT: A MATERIAL ANALYSIS OF THE RETURN AND RETENTION OF NAMIBIAN SKULLS FROM GERMANY 57 (2018); Joachim Zeller, “*Ombepera i koza – Die Kälte tötet mich*”: *Zur Geschichte des Konzentrationslager in Swakopmund (1904–1908)*, [“*Ombepera i koza – the Cold Kills Me*”: *History of the Concentration Camp in Swakopmund (1904–1908)*], in J. Zimmerer & J. Zeller, eds., VÖLKERMORD IN DEUTSCH-SÜDWESTAFRIKA: DER KOLONIALKRIEG IN NAMIBIA UND SEINE FOLGEN [GENOCIDE IN GERMAN SOUTH WEST AFRICA: THE COLONIAL WAR IN NAMIBIA AND ITS CONSEQUENCES] 64, 77 (2016).

³¹ Zeller, *supra* note 30, at 77.

³² FABER-JONKER, *supra* note 30, at 57, 55–62.

³³ *Id.* at 56–58.

A chest of Herero skulls was recently sent by troops from German South West Africa to the Pathological Institute in Berlin, where they will be subjected to scientific measurements. The skulls, from which Herero women have removed the flesh with the aid of glass shards to make suitable for shipment, come from Hereros who have been hanged or who have fallen.³⁴

16. With the emergence of a concentration camp network, “an industry had developed around the supply of body parts.”³⁵ By 1906, thousands of Ovaherero and Nama people filled the concentration and work camp networks, including two-thousand Nama people brought on September 9, 1906 to the Shark Island concentration camp in Lüderitz Bay, joining thousands of Ovaherero prisoners starving there.³⁶ The prisoners at Shark Island were worked to death, beaten to death, starved, used as subjects for experiments, and exposed to the elements in an arbitrary and discriminatory

³⁴ BERND KROEMER, MEINE KRIEGS-ERLEBNISSE IN DEUTSCH-SÜDWEST-AFRIKA, VON EINEM OFFIZIER DER SCHUTZTRUPPE [WAR EXPERIENCES IN GERMAN SOUTH WEST AFRICA, BY A *SCHUTZTRUPPE* OFFICER] 114 (1907); ZIMMERMAN, *supra* note 10, at 245 n.25; *see also* JAN-BART GEWALD, HERERO HEROES: A SOCIO-POLITICAL HISTORY OF NAMIBIA 189–90 n.256 (1999).

³⁵ OLUSOGA & ERICHSEN, *supra* note 29, at 224.

³⁶ *See id.* at 207–16.

fashion resulting in a death rate ranging up to 70 percent.³⁷

17. Many Herero and Nama human remains were taken by *Schutztruppe* Medical Officer Dr. Hugo Bofinger at Lüderitz Bay (*Lüderitzbucht*), Head of the Natives Sick Station and Laboratory, Field Hospital XII, Shark Island.³⁸ He was a scurvy researcher,³⁹ and incorrectly diagnosed prisoners with the disease on the “false premise that scurvy was a contagious condition,” and experimented, injecting prisoners with arsenic and opium, and analyzing the effects by “opening up the dead bodies.”⁴⁰ But evidence shows the Ovaherero and Nama at Shark Island were dying of malnutrition, exposure, and hard labor, not scurvy.⁴¹ Prisoners recalled that anyone who entered Bofinger’s hospital

³⁷ Just a few months after they were brought to Shark Island, by mid-February 1907, a reported 70 percent of the Nama had died as a result of Imperial policies resulting in starvation, thirst, overexposure to the cold, and death by exhaustion, beatings, and arbitrary abuse of power. *Id.* at 216.

³⁸ See Katrin Koel, *et al.*, Charité Human Remains Project, Charité Berlin, *Documentation Recording the Results of Examinations Carried Out on the Twenty Skulls from Namibia (Nine Herero, Eleven Nama) to Determine Their Provenance: Provenance Analysis Specimen A 817 (Nama)* at *4 (Sept. 30, 2011).

³⁹ See, e.g., Hugo Bofinger, *Einige Mitteilungen über Skorbut* [Some News about Scurvy], 39 DEUTSCHE MILITÄRÄRZTLICHE ZEITSCHRIFT [GERMAN MILITARY MEDICAL JOURNAL] 569 (1910).

⁴⁰ See OLUSOGA & ERICHSEN, *supra* note 29, at 224–26.

⁴¹ *Id.*

“will not come out alive.”⁴² It is estimated that 778 Herero and Nama bodies were dissected at Shark Island in Lüderitz Bay in 1906 alone.⁴³

18. Paul Bartels, a state scientist at the Anatomical Institute of the Charité in Berlin, part of the Imperial Friedrich Wilhelm University, had requested and received numerous human remains from Bofinger and others, and placed these in the Institute’s so-called Bartels Collection,⁴⁴ containing the twenty-five preserved heads and fifty-three preserved larynxes of Ovaherero and Nama people, and other human remains.⁴⁵ Bofinger often provided remains through middlemen, such as military engineer Felix Wagenführ.⁴⁶ Most heads were opened on site, brains removed for study or preservation,⁴⁷ and packed in tins with formaldehyde.⁴⁸

⁴² *Id.* at 226 (quoting Missionary Laaf, in ARCHIVES OF THE EVANGELICAL LUTHERAN CHURCH IN NAMIBIA RMS Vol. 16, *History of the Lüderitz Bay Congregation*, 28–29).

⁴³ See GEWALD, *supra* note 34, at 189 n.256 (1999).

⁴⁴ Koel, *et al.*, *Specimen A 817 (Nama)*, *supra* note 38, at * 5.

⁴⁵ See *id.* at * 11 n.6.

⁴⁶ FABER-JONKER, *supra* note 30, at 109; See Koel, *et al.*, Charité Human Remains Project, Charité Universitätsmedizin Berlin, *Documentation Recording the Results of Examinations Carried Out on the Twenty Skulls from Namibia (Nine Herero, Eleven Nama) to Determine Their Provenance: Provenance Analysis Specimen A 802 (Herero)* at * 5 & n.15 (Sept. 30, 2011).

⁴⁷ Christian Fetzer, *Rassenanatomischen Untersuchungen an 17 Hottentottenköpfen* [Racial-Anatomical Studies on 17 Nama Heads], 16 ZEITSCHRIFT FÜR MORPHOLOGIE UND

19. Wilhelm Waldeyer, Director of the Charité's Anatomical Institute, was a brain scholar with publications including *On Some Anthropologically Remarkable Findings in Negro Brains* (1894), and *Topography of the Brain* (1901), which he followed with *The Brains of South West African Peoples* (1906).⁴⁹ He obtained Herero and Nama brains through Imperial sources:

Upon my request, through the intercession of the Medical Department of the Royal Ministry of War, the Medical Officers and Senior Medical Officers Drs. Dansauer, Jungels, Mayer, and Zöllner, who are active at the field hospitals in our colony German South West Africa, sent the

ANTHROPOLOGIE [J. FOR MORPHOLOGY AND ANTHRO.] 95, 95 (1913).

⁴⁸ FABER-JONKER, *supra* note 30, at 63 & nn. 208–11. Bofinger also sealed the head of a one-year-old Nama infant girl in a tin with preservatives and shipped it to Christian Fetzner, one of Bartels's students. OLUSOGA & ERICHSEN, *supra* note 29, at 224–25.

⁴⁹ Wilhelm Waldeyer, *Gehirne Südwestafrikanischer Völker* [*The Brains of South West African Peoples*], 11 SESSION REPORTS OF THE ROYAL PRUSSIAN ACADEMY OF SCIENCE IN BERLIN] 3 (1906); WILHELM WALDEYER, TOPOGRAPHIE DES GEHIRNS [TOPOGRAPHY OF THE BRAIN] (1901); Wilhelm Waldeyer, *Über einige anthropologisch bemerkenswerthe Befunde an Negerhirnen* [*On Some Anthropologically Remarkable Findings in Negro Brains*], SESSION REPORTS OF THE ROYAL PRUSSIAN ACADEMY OF SCIENCE IN BERLIN 1213 (1894).

Anatomical Institute in Berlin a number of brains of natives, who died in the hospitals; the Institute also obtained some such brains from Dr. Leonhard Schultze, Assistant Professor at the University of Jena, who just happily ended a one- and-a-half-year research trip in that region. Dr. Schultze was supported hereby for natural research and travel by funds from the Humboldt Foundation.... All brains were removed from the respective skulls in workmanlike fashion and most were excellently preserved (in formaldehyde and alcohol); the majority arrived here in immaculate form. I do not forget the men, who subjected themselves to the efforts to procure these valuable specimens in the name of this Institute!⁵⁰

⁵⁰ *Id.* at 3. Per Waldeyer, nine brains belonged to these Hereros, identified by name and brain weight (“fresh”): Hucko, a Herero man, 1265 grams; Katjirito, a Herero man, 18-years-old, 1450 grams; Karirombo, a Herero boy from the Captainship of Samuel Maharero, 12-years-old, 1354 grams; August, a Herero man, 22-years-old, 1390 grams; Simon, a Herero man, 17-years-old, 1470 grams; Kanakanyara, a Herero man, 21-years-old, 1210 grams; a Herero man, name unknown, 24-years-old, 1250 grams; a Herero woman, name unknown, 26-years-old, 1164 grams; a Herero woman, name unknown, 30-years-old, 1162 grams. *Id.* at 3–4. As to other sources of these brains, on January 26, 1905, Heinrich Meyer described in his diary an “autopsy of the skull and brain of the Herero man shot yesterday for Anatomy in Berlin (Prof. Dr. Waldeyer),” and, in May 1905, “preparations” sent to Waldeyer of two Herero men who were hanged. Andreas Winkelmann, *Die Anatomische Sammlung der Berliner Universität und ihre anthropologischen Bestände* [The Anatomical Collection of the University of Berlin and its Anthropological Inventory], in Stoecker, *et al.*, *supra* note 2, 69, 79 n.43 (quoting FRIEDRICH

20. As Waldeyer described, he also acquired brains from Leonhard Schultze, who was on a research trip with colleagues in Hereroland and Great Namaqualand, with Imperial funding and support.⁵¹ Schultze also later published his study of Nama and San people in *On the Bodies of the Hottentots and Bushmen*

ZÖLLNER, ALS ARZT IN DEUTSCH-SÜDWEST [AS A DOCTOR IN THE GERMAN SOUTH WEST] (1939), Heinrich Meyer, and Larissa Förster)).

⁵¹ See CARSTEN GRÄBEL, DIE ERFORSCHUNG DER KOLONIEN: EXPEDITIONEN UND KOLONIALE WISSENSKULTUR DEUTSCHER GEOGRAPHEN 1884–1919 [EXPLORING THE COLONIES: EXPEDITIONS AND COLONIAL KNOWLEDGE CULTURE OF GERMAN GEOGRAPHERS 1884–1919] 185–87 (2015). First, Schultze's trip and takings were funded by the Humboldt Foundation (*Humboldt Stiftung*), managed by the Royal Prussian Academy of Sciences under Wilhelm II as King of Prussia, who supplemented the Foundation's budget, whereby the Foundation Chairman responsible for disbursing funds to Schultze was Waldeyer himself, Director of the Anatomical Institute of the Charité, *i.e.*, the public institutional beneficiary of Schultze's trip through acquisition of human brains. See Wilhelm Waldeyer, *Humboldt Stiftung: Bericht des Vorsitzendes des Curatoriums Hrn. Waldeyer* [*Humboldt Foundation: Report of the Chairman of the Curatorium Mr. Waldeyer*], SESSION REPORTS OF THE ROYAL PRUSSIAN ACADEMY OF SCIENCES 102 (1906) (describing payments to Schultze); *Humboldt Stiftung: Bericht des Vorsitzendes des Curatoriums* [*Humboldt Foundation: Report of the Chairman of the Curatorium*] SESSION REPORTS OF THE ROYAL PRUSSIAN ACADEMY OF SCIENCES 64 (1896). Second, Schultze's takings were financed directly by the German Foreign Office (*Auswärtiges Amt*) with Africa Funds (*Afrikafonds*). See LEONHARD SCHULTZE, DIE FISCHEREI AN DER WESTKÜSTE SÜD-AFRIKAS [THE FISHERIES ON THE WEST COAST OF SOUTH AFRICA] 1 (1909).

in 1928,⁵² and in this connection wrote: “I could make use of the victims and take parts from fresh native corpses, which made a welcome addition to the study of the living body (imprisoned *Hottentots* were often available to me).”⁵³

21. Study of the human remains taken by Bofinger and Schultze resulted in the publication of numerous articles found in the Columbia University library and other libraries and research centers in New York and elsewhere, illustrating the nature of the institutional and scientific demand for and use of the remains, and contextualizing the commercial

⁵² Leonhard Schultze, *Zur Kenntnis des Körpers der Hottentotten und Buschmänner* [*On the Bodies of the Hottentots and Bushmen*], 5 ZOOL. UND ANTHROPOL. ERGEBNISSE EINER FORSCHUNGSREISE IM WESTLICHEN UND ZENTRALEN SÜDAFRIKA AUSGEFÜHRT IN DEN JAHREN 1903–1905 [ZOOLOGICAL AND ANTHROPOLOGICAL RESULTS OF A RESEARCH TRIP IN WESTERN AND CENTRAL SOUTH AFRICA IN THE YEARS 1903–1905] 145 (1928).

⁵³ Leonhard Schultze, *Introduction*, 3 ZOOLOGICAL AND ANTHROPOLOGICAL RESULTS OF A RESEARCH TRIP IN WESTERN AND CENTRAL SOUTH AFRICA IN THE YEARS 1903–1905 v, viii (1908). Schultze’s *On the Bodies*, *supra* note 52, presents his study of Nama and San people in mid- and late-1905, identifying them by name, age, place of birth, and tribe, with individual anthropometric measurements of seventy prisoners in and around Keetmanshoop. *Id* at 145, 148–50. Schultze’s studies would have been impossible without Germany’s interning of prisoners, and from July to October 1905, Schultze was attached to Trotha’s unit in Namaqualand. Schultze, *Introduction*, *supra*, at vi.

significance of the human remains taken in violation of international law, including these:

- A treatise by Sergio Sergi,⁵⁴ located at Columbia University (Call No. B302.968 Sch82; F) and at the AMNH (Call Nos. QL336.S3 and DT732.S3), studies nine preserved brains of Herero men and women, six Herero skulls, and the preserved brain of a Nama woman;
- An article by Heinrich von Eggeling,⁵⁵ which

⁵⁴ Sergio Sergi, *Cerebra Hererica* [*The Herero Brain*] (*with Preface by W. Waldeyer*), *with appendices: Crani di Herero* [*Herero Skulls*], and *Due cervelli di Ovambo ed un cervello di Ottentotta* [*Two Ovambo Brains and a Hottentot Brain*], in 3 (*Erste Lieferung*) ZOOLOGISCHE UND ANTHROPOLOGISCHE ERGEBNISSE EINER FORSCHUNGSREISE IM WESTLICHEN UND ZENTRALEN SÜDAFRIKA AUSGEFÜHRT IN DEN JAHREN 1903–05 MIT UNTERSTÜTZUNG DER KGL. PREUSSISCHEN AKADEMIE DER WISSENSCHAFTEN ZU BERLIN [ZOOLOGICAL AND ANTHROLOGICAL RESULTS OF A RESEARCH TRIP IN WESTERN AND CENTRAL SOUTH AFRICA CONDUCTED IN 1903–05 WITH THE SUPPORT OF THE ROYAL PRUSSIAN ACADEMY OF SCIENCES IN BERLIN] 1 (1909).

⁵⁵ Heinrich von Eggeling, *Anatomische Untersuchungen an den Köpfen von vier Hereros, einem Hereround einem Hottentottenkind* [*Anatomic Examinations of the Heads of Four Hereros, one Herero Child, and one Hottentot Child*], in 3 ZOOLOGICAL AND ANTHROLOGICAL RESULTS OF A RESEARCH TRIP IN WESTERN AND CENTRAL SOUTH AFRICA CONDUCTED IN 1903–05 WITH THE SUPPORT OF

is also located at Columbia University (Call No. B302.968 Sch82; F) and at the AMNH (Call Nos. Q1336.S3 and DT732.S3), studies four preserved heads of Herero men and women, and the preserved bodies of a Herero baby girl and a Nama newborn girl;

- An article by Elie Groyssmann,⁵⁶ located at Columbia University (Call No. B302.968 Sch82;F) and the AMNH (Call Nos. QL336.S3 and DT732.S3), studies the body musculature of the Herero girl whose facial musculature was studied by Eggeling;
- An article by Paul Bartels,⁵⁷ located in Columbia University's Biodiversity Heritage Library, studies the plica semilunaris of the eyes of the preserved heads of eight Herero men, women, and children, and seventeen Nama men, women, and children;

THE ROYAL PRUSSIAN ACADEMY OF SCIENCES IN BERLIN 323 (1909).

⁵⁶ Elie Groyssmann, *Das Muskelsystem eines Hererokindes mit Berücksichtigung der Innervation* [*The Muscle System of a Herero Child with Consideration of Innervation*], in 3 ZOOLOGICAL AND ANTHROLOGICAL RESULTS OF A RESEARCH TRIP IN WESTERN AND CENTRAL SOUTH AFRICA CONDUCTED IN 1903–05 WITH THE SUPPORT OF THE ROYAL PRUSSIAN ACADEMY OF SCIENCES IN BERLIN 349 (1909).

⁵⁷ Paul Bartels, *Histologisch-anthropologische Untersuchungen der Plica semilunaris bei Herero und Hottentotten* [*Histological-Anthropological Examinations of the Plica Semilunaris in the Herero and Hottentots*], 78 ARCHIV FÜR MIKROSKOPISCHE ANATOMIE [ARCHIVE FOR MICROSCOPIC ANATOMY 529 (1911).

- An article by Christian Fetzter,⁵⁸ located at Columbia University (Call No. 591.4 Y3) and at the State University of New York at Stony Brook (Call No. QM1.Z4), studies the musculature of preserved heads of seventeen Nama men, women and children;
- An article by Heinrich F.B. Zeidler,⁵⁹ located at Columbia University (Call No. 591.4 Y3) and State University of New York at Stony Brook (Call No. QM1.Z4), studies the facial musculature of the preserved heads of four Herero men and one woman;
- Another article by Heinrich F.B. Zeidler,⁶⁰ located at Columbia University (Call No. 591.4 Y3) and Stony Brook (Call No. QM1.Z4), studies the facial musculature of the preserved heads of a Nama baby girl, a Herero child of unknown gender, and a Herero boy; *and*

⁵⁸ Christian Fetzter, *Rassenanatomische Untersuchungen an 17 Hottentottenköpfen* [*Racial-Anatomical Examinations of 17 Hottentot Heads*], 16 ZEITSCHRIFT FÜR MORPHOLOGIE UND ANTHROPOLOGIE [JOURNAL FOR MORPHOLOGY AND ANTHROPOLOGY] 95 (1913).

⁵⁹ Heinrich F.B. Zeidler, *Beiträge zur Anthropologie der Herero* [*Contributions to the Anthropology of the Herero*], 17 ZEITSCHRIFT FÜR MORPHOLOGIE UND ANTHROPOLOGIE [JOURNAL FOR MORPHOLOGY AND ANTHROPOLOGY] 185 (1914).

⁶⁰ Heinrich F.B. Zeidler, *Beiträge zur Anthropologie der Gesichtsweichteile der Neger* [*Contributions to the Anthropology of the Soft Facial Tissue of the Neger*], 21 ZEITSCHRIFT FÜR MORPHOLOGIE UND ANTHROPOLOGIE [JOURNAL FOR MORPHOLOGY AND ANTHROPOLOGY] 153 (1920).

- An article by Werner Grabert,⁶¹ located at Columbia University (Call No. 591.4 Y3) and Stony Brook (Call No. QM1.Z4), studies the preserved larynxes of thirty-eight Nama men, women and children, of twelve Herero men, women and children, and of three newborn Herero babies, as part of the Bartels Collection.

22. Zeidler's illustrations of his subject material,⁶² are attached as Exhibits C and D.

23. **Substantial Contact with the United States.** The Empire's collection activities "span[ned] the globe,"⁶³ and the Museum of Ethnology targeted indigenous peoples of the United States for commercial collection. In so doing, Germany's commercial acts in the global trade in human remains, conducted through agents, sailors, soldiers, officers, and museum and university staff, had and continues to have substantial contact with the United States in general, and Native Americans in particular. German scientists and institutions sought and obtained human remains of indigenous people from Alaska, Arizona, California,

⁶¹ Werner Grabert, *Anthropologische Untersuchungen an Herero- und Hottentotten-Kehlköpfen* [Anthropological Examinations on Herero and Hottentot Larynxes], 16 ZEITSCHRIFT FÜR MORPHOLOGIE UND ANTHROPOLOGIE [JOURNAL FOR MORPHOLOGY AND ANTHROPOLOGY] 65 (1913).

⁶² See Zeidler, *supra* notes 59–60.

⁶³ ZIMMERMAN, ANTHROPOLOGY AND ANTIHUMANISM, *supra* note 10, at 153.

Idaho, Kentucky, Louisiana, Missouri, Nebraska, Nevada, New York, Oregon, and Hawaii, where Luschan personally exhumed eighty-three bodies. As was the case for Africa, the Museum's success in collecting American human remains was accomplished only by "energetic lordly patronage."⁶⁴

24. The Museum of Ethnology harvested, purchased, and traded human remains in the United States. In an 1878 trade with the American National Museum (the Smithsonian), the Museum of Ethnology acquired 273 objects including preserved American muscle tissues and human bones and other remains, mostly from California.⁶⁵ And by 1881, the Museum had obtained archaeological items from Paiute people and from Arizona.⁶⁶ And in the same year, 1881, the Museum engaged Johann A. Jacobsen as agent to the Museum for commercial activity in the United States. The Museum sent Jacobsen to San Francisco; he arrived in August 1881, and then traveled to Arizona

⁶⁴ Luschan, *The Kaiser and Science*, *supra* note 10, at 278.

⁶⁵ BEATRIX HOFFMANN, DAS MUSEUMSOBJEKT ALS TAUSCH- UND HANDELSGEGENSTAND: ZUM BEDEUTUNGSWANDEL MUSEALER OBJEKTE IM KONTEXT DER VERÄUSSERUNGEN AUS DEM SAMMLUNGSBESTAND DES MUSEUMS FÜR VÖLKERKUNDE BERLIN [MUSEUM OBJECTS AS EXCHANGE AND TRADE OBJECTS: ON TRANSFORMATIVE MEANING OF MUSEUM OBJECTS AS TO SALES FROM THE COLLECTION INVENTORY OF THE BERLIN MUSEUM OF ETHNOLOGY] 234 (2012).

⁶⁶ *Id.* at 235.

and Pacific Northwest, harvesting and buying remains and other objects. Jacobsen then went to Alaska in June 1882, harvesting and buying remains and objects, before returning to California in September 1883, and from there sent 1,000 objects including human remains to Berlin.⁶⁷ Luschan, for his part, obtained three skulls of Mohawk people from New York, which he placed in the Teaching Collection alongside Herero and Nama remains.⁶⁸ He also obtained for the Museum's "S" Collection the skulls of two Californians, "S 608" and "S 609."⁶⁹ Ultimately, American remains in Berlin were not just studied, but also displayed, such as in the Museum's Hall VII in 1905, where the Museum showcased the remains of Inuit and Yu'pik people,⁷⁰ Tlingit people from Portland,⁷¹ scalps of Sioux people,

⁶⁷ *Id.* at 67–68.

⁶⁸ See Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Possession of the American Museum of Natural History, New York, NY, 66 FED. REG. 20330, 20330 (Mar. 30, 2001). (“[O]fficials of the American Museum of Natural History have determined... there is a relationship of shared group identity that can be reasonably traced between these Native American human remains and the St. Regis Band of Mohawk Indians of New York.”).

⁶⁹ See Friedlaender, *supra* note 9, at 441. And in 1901 and 1912, the Museum obtained anthropological items from Hopi people from Arizona, and people from Kentucky. HOFFMANN, *supra* note 65, at 81.

⁷⁰ ROYAL MUSEUMS OF BERLIN, FÜHRER DURCH DAS MUSEUM FÜR VÖLKERKUNDE [GUIDE THROUGH THE MUSEUM OF ETHNOLOGY] 113 (12th ed. 1905).

contents of California graves, and human remains from Tularosa, New Mexico.⁷²

25. American craniology was also the area of expertise of German scientist Rudolf Virchow, who, in 1889 analyzed the remains of twenty-eight Californian men and women exhumed and sent to Berlin by Paul Schumacher, where they were held by Virchow and, later, the Museum.⁷³ Franz Boas at the AMNH had put together a “comprehensive” skeleton and skull collection, and the AMNH sold objects to Virchow,⁷⁴ whose collections later fell under the Luschan’s

⁷¹ GUIDE THROUGH THE MUSEUM OF ETHNOLOGY, *supra* note 70, at 117. These had been acquired for the Museum by Arthur Krause, Aurel Krause, and Paul Schulze in the U.S. *Id.*

⁷² *Id.* at 122–24.

⁷³ Rudolf Virchow, *Beitrag zur Craniologie der Insulaner von der Westküste Nordamerikas* [Contribution to the Craniology of the Islanders on the West Coast of North America], 21 ZEITSCHRIFT FÜR ETHNOLOGIE [JOURNAL OF ETHNOLOGY] 382, 382 (1889); Paul Schumacher, *Die Gräber und Hinterlassenschaft der Urvölker an der californische Küste* [Graves and Burials of Prehistoric Peoples on the California Coast], 10 ZEITSCHRIFT FÜR ETHNOLOGIE [JOURNAL OF ETHNOLOGY] 183, 183–92 (1878). Schumacher had also taken bodies from California for the Smithsonian and the AMNH. Virchow, *supra*, at 383–92.

⁷⁴ Anja Laukötter, *Gefühle im Feld: Die “Sammelwut” der Anthropologen in Bezug auf Körperteile und das Konzept der “Rasse” um die Jahrhundertwende* [Feelings in the Field: the “Collection Rage” of Anthropologists for Body Parts and the Fin-De-Siecle Concept of “Race”], in Stoecker, *et al.*, *supra* note 6, 24, 31.

administration. Boas had worked at the Berlin Museum of Ethnology in the 1880s as an Assistant, and maintained close contact, even after moving to the United States.⁷⁵ Because of Boas's and Bastian's "good contact with American museums and collectors," numerous objects from the United States were compiled for Berlin by American scientists including Clark Wissler and Frank Cushing within the scope of trades.⁷⁶ Virchow's work culminated in *Crania Ethnica Americana: a Choice Collection of American Skulls*,⁷⁷ published in 1892, showcasing "crania of American aborigines preserved in the Museums in Berlin," prefaced by a "chapter on American craniography"⁷⁸ to position the skulls within "the ethnic law of hereditary development."⁷⁹ Virchow analyzed the skulls not only of

⁷⁵ HOFFMANN, *supra* note 65, at 65.

⁷⁶ See Ethnological Museum, *North American Ethnology* (visited Sept. 11, 2018), *online at* www.smb.museum/en/museums-institutions/ethnologisches-museum/collection-research/about-the-collection.html.

⁷⁷ RUDOLF VIRCHOW, *CRANIA ETHNICA AMERICANA: EINE AUERLESENE SAMMLUNG AMERIKANISCHER*

SCHÄDELN [*CRANIA ETHNICA AMERICANA: A CHOICE COLLECTION OF AMERICAN SKULLS*] (1892).

⁷⁸ See *Notice of New Books: Crania Ethnica Americana*, 27 JOURNAL OF ANATOMY AND PHYSIOLOGY, NORMAL AND PATHOLOGICAL 565 (1893).

⁷⁹ Daniel G. Brinton, *Book Reviews: Crania Ethnica Americana*, 20 SCIENCE 278, 279 (1892). Virchow had already presented the skull tables at the 1888 American Studies Congress in Berlin; here he expanded his analysis to "treat the most convoluted questions of American ethnology using excellent material." *Discussions:*

Californians, but also skulls of a Paiute person from Nevada, a Coeur d'Alene person,⁸⁰ a person from Oregon, and a Ponca person from Nebraska.⁸¹ Virchow's American skull collections later came under Luschan's administration at the Museum.

26. The Museum of Ethnology actively traded, including with American museums and traders. The Museum's trading relations with the AMNH were so firm, that by 1911, the AMNH President named the Berlin Museum of Ethnology as "[a]mong the chief institutions from which exchanges are in active progress."⁸² The Museum's America Department also conducted many transatlantic trades, including, *e.g.*, with the National Museum (Smithsonian) in 1874 and 1878,⁸³ with George J. Engelmann in St. Louis in 1881,

Crania Ethnica Americana, 24 ZEITSCHRIFT FÜR ETHNOLOGIE [JOURNAL OF ETHNOLOGY] 241, 242 (1892).

⁸⁰ See *Crania Ethnica Americana*, 17 GEOGRAPHISCHES JAHRBUCH [GEOGRAPHIC YEARBOOK] 412 (1894).

⁸¹ See VIRCHOW, *CRANIA ETHNICA AMERICANA*, *supra* note 77, Tables XVIII, XX. Virchow wove American skulls into previously developed theories, such as those expressed in *On Some Characteristics of the Skulls of the Lower Races of Man* (1874), where he advances the view that "frontal projections" of the temporal bone deform the development of brain functions: a "mark of lower, but not necessarily of the lowest races." Arthur E.R. Boak, *Rudolf Virchow: Anthropologist and Archaeologist*, 13 SCI. MONTHLY 40, 42 (1921).

⁸² *Report of the President*, 43rd Annual Report of the American Museum of Natural History 25 (1911).

⁸³ See HOFFMANN, *supra* note 65, at 225–26. The Smithsonian, for its part, had amassed over "11,000 racial crania and skeletons

the Milwaukee Public Museum in 1898, the University of Pennsylvania Museum of Archaeology and Anthropology in 1898, the AMNH,⁸⁴ the Field Museum in Chicago in 1908, the Heye Museum in New York in 1912, and with the Stolper Galleries and Alan Lapiner in New York in 1965 and 1967.⁸⁵

27. The “substantial contact” that German commercial activity enjoyed with the United States included a visit from Luschan himself. Luschan and Mrs. Luschan arrived in Hawaii in mid-September 1914.⁸⁶ While there, Luschan exhumed the human remains of eighty- three Hawaiian people at Awalua, Lanai, and other human remains from Oahu,⁸⁷ on behalf of the Bernice Pauahi Bishop Museum, which kept the remains he unearthed.⁸⁸ The Luschans arrived in San

[and] 1,600 human and animal brains” by the early twentieth century. Aleš Hrdlička, *Physical Anthropology in America: an Historical Sketch*, 16 AMERICAN ANTHROPOLOGIST 508, 548 (1914)

⁸⁴ See GUIDE THROUGH THE MUSEUM OF ETHNOLOGY, *supra* note 70, at 118.

⁸⁵ See HOFFMANN, *supra* note 65, at 225–26

⁸⁶ John David Smith, *Felix von Luschan's Trip to America 1914–1915*, in Ruggendorfer & Szemethy, *supra* note 3, 141, 141–43.

⁸⁷ See *Director's Annual Report*, 6 OCCASIONAL PAPERS OF BERNICE PAUAHI BISHOP MUSEUM 26 (1918).

⁸⁸ *Id.* at 143; Nat'l Park Service, Notice: Inventory Completion of Native American Human Remains in Collections of the Bernice Pauahi Bishop Museum, Honolulu, HI, Fed. Reg. Doc. 95-15963 (June 28, 1995), 60 FED. REG. 33846 (June 29, 1995); *Visit of Noted Scientist*, HAWAIIAN ALMANAC AND ANNUAL 144 (1914).

Francisco in October, and traveled throughout the U.S.,⁸⁹ lecturing at universities on race and heredity, including a series at the University of Illinois at Champaign-Urbana, and in December 1914, the Luschans arrived in Morningside Heights, New York City, and moved into Columbia University's posh "Kaiser Wilhelm Professor" apartment.⁹⁰

28. In coordination with Boas, acting in his official capacities at the AMNH, the Luschans dedicated their time in the U.S. to a study of African-American men and women, and traveled the country, "substantial[ly] contact[ing]" the United States, in an attempt to write an "utmost careful and exhaustive monograph[]"⁹¹ concerning African-Americans.⁹² This monograph was ultimately published in late-1915 as a Special Print by the *Colonial Review*, intended as an introduction to African-American ethnology, race, culture, and demography.⁹³

⁸⁹ Smith, *supra* note 86, at 144.

⁹⁰ *Id.* at 144, 143–47.

⁹¹ Luschan, Speech, *supra* note 13, at 165, Exhibit A.

⁹² Smith, *supra* note 86, at 150.

⁹³ See generally FELIX VON LUSCHAN, DIE NEGER IN DEN VEREINIGTEN STAATEN [THE NEGROS IN THE UNITED STATES] (1915). Here, Luschan also discusses white supremacist policy and race theory, translating into German the writings of William B. Smith, Robert W. Shufeldt, Charles B. Davenport of the Eugenics Record Office, and Alfred H. Stone, who Luschan calls "an outstanding man." *Id.* at 508–510, 514–23, 527–31. Luschan also presents the writings and work of men such as Booker T. Washington, W.E.B. DuBois, and Monroe N. Work. *Id.* at 510–13.

29. Upon arriving in New York, Luschan wrote to Booker T. Washington and W.E.B. DuBois, announcing “I would like to study some problems of heredity,” requesting their aid in conducting an “exact pedigree of some hundred coloured families” to obtain “anthropometric and other data,”⁹⁴ and proposing, “if possible, measuring and describing every single available member of such families.”⁹⁵ With help from Washington, the AMNH, and other benefactors, the Luschans traveled to Tennessee, Missouri, Mississippi, Louisiana, Alabama, and Virginia, where they undertook “pedigree” and anthropometric studies on some 100 African-American families and 350 individuals,⁹⁶ alongside other studies, such as measuring the fingers and nostrils of schoolchildren, and coding

Luschan reports on black education through surveys at Hampton and Tuskegee, , *id.* at 512–14, compares the blacks of the South with Eastern-European Jews of urban Europe, *id.* at 539, and treats eugenics issues and racial marriage laws with a state-by-state survey, *id.* at 520–27. Luschan also treats proposed solutions to the “black question,” including proposals of Smith, Graves, and Shufeldt that climax in mass deportation. *E.g.*, *id.* at 514. In line with Luschan’s view of the equal dignity of human races, he concludes that African-Americans should be preserved and uplifted by the state. *Id.* at 535–36, 539–40.

⁹⁴ Smith, *supra* note 86, at 149–50 (quoting Letter, Luschan to Booker T. Washington (Dec. 23, 1914)).

⁹⁵ See Letter, Felix von Luschan to W.E.B. DuBois (Jan. 7, 1915), *online at* <http://credo.library.umass.edu/view/full/mums312-b009-i090>.

⁹⁶ See Smith, *supra* note 86, at 149–58, 156.

their skin color.⁹⁷ In March 1915, Luschan reported to Boas that he gathered “valuable research,” and in April, before returning to Germany, he deposited this valuable data, research, and analysis with Boas at the AMNH.⁹⁸

30. Luschan also engaged in collection activity while here. In Louisiana, Luschan met anatomist Professor Robert B. Bean at Tulane.⁹⁹ By agreement reached between the two men, Bean shipped the remains of African-American people from Louisiana to the Museum of Ethnology via the German Consulate in New York City, which thereby commercially trafficked in preserved ears, heads, brains, and other soft tissue of African-American men and women.¹⁰⁰

⁹⁷ *Felix von Luschan*, GERMANY AND THE AMERICAS: CULTURE POLITICS AND HISTORY 705, 706 (2005); Smith, *supra* note 86, at 149–55 (describing Luschan’s research in the U.S.).

⁹⁸ Smith, *Felix von Luschan’s Trip to America*, *supra* note 90, at 158. Luschan’s data and research was posthumously published in several publications. See Melville J. Herskovits, *The Physical Form of the American Negro*, 4 ANTHROPOLOGISCHER ANZEIGER [ANTHROPOLOGICAL GAZETTE] 293 (1927); Melville J. Herskovits, *Felix von Luschans Messungen amerikanischer Neger* [*Felix von Luschan’s Measurements of American Negroes*], 61 ZEITSCHRIFT FÜR ETHNOLOGIE [JOURNAL FOR ETHNOLOGY] 337 (1930).

⁹⁹ Smith, *Felix von Luschan’s Trip to America*, *supra* note 90, at 151.

¹⁰⁰ *Id.* at 152.

31. **Sale of the Teaching Collection to the AMNH.** Luschan died in February 1924. The Teaching Collection was then sold to the AMNH, and, based on the available evidence, the purchase price was paid on the AMNH's behalf by New York philanthropist Felix Warburg.¹⁰¹ This transaction's commercial nature is confirmed by a notice from the National Park Service: "Felix Warburg purchased these remains from Professor von Luschan and, in 1924, donated them to the American Museum of Natural History."¹⁰² According to experts Beate Kunst and Ulrich Creutz, upon Luschan's death in February 1924, "although Emma von Luschan wanted to keep her husband's Teaching Collection as heir, she did not receive a positive decision [and] the objects were eventually sold in the U.S."¹⁰³

32. The evidence is clear that the sale and shipment of the Teaching Collection from the Museum of Ethnology to the AMNH in New York was a commercial transaction having substantial contact with the United States within the meaning of 28 U.S.C. §

¹⁰¹ See Accession Card and Accession Record, Katuu Declaration, Pls' Opp. to Mot. to Dismiss, Exs. 1 & 2 (Dkt. No. 45-2); RON CHERNOW, THE WARBURGS: THE TWENTIETH-CENTURY ODYSSEY OF A REMARKABLE JEWISH FAMILY 86, 95–109 (1993).

¹⁰² Notice: Inventory Completion for Native American Human Remains and Associated Funerary Objects in Possession of the American Museum of Natural History, New York, 66 FED. REG. 20330, 20330 (Mar. 30, 2001).

¹⁰³ Kunst & Creutz, *supra* note 2, at 94.

1603(a)(3). Of course, the Teaching Collection is “connect[ed] with” more than just the transaction by which it arrived, but rather with all of the commercial activities discussed herein undertaken by Germany as the Teaching Collection’s custodian, creator, sponsor, owner, innovator, and beneficiary for over two decades.

33. After the Teaching Collection arrived at the AMNH in New York, it was used by students and scholars from around the world, as early as Harry L. Shapiro’s 1926–29 study of a skull series from the Greifenberg region of Carinthia,¹⁰⁴ and as recently as Morongwa N. Mosothwane’s 2013 study of South African human remains in the United States.¹⁰⁵

¹⁰⁴ See Harry L. Shapiro, *Contributions to the Craniology of Central Europe*, 31 *ANTHRO. PAPERS OF THE AMERICAN MUSEUM OF NAT’L HIST.* 1 (1929).

¹⁰⁵ Morongwa N. Mosothwane, *An Account of South African Human Skeletal Remains at Three North American Museum Collections*, 11 *S. AFR. ARCH. SOC’Y GOODWIN SERIES* 27 (2013); see also Vincent Francigny, *et al.*, *At the Border Between Egypt and Nubia: Skeletal Material from El-Hesa Cemetery 2*, 6 *J. ANC. EGYPTIAN INTERCONNECTIONS* (2014) (studying human remains in the Teaching Collection). Several dissertations were also recently written using the Teaching Collection, *e.g.*, Steven F. Miller, *The Patterning and Determinants of Craniofacial Robusticity in Extant Homo Sapiens* (Diss. 2010), <http://ir.uiowa.edu/etd/857>; Martha K. Spradley, *Biological Anthropological Aspects of the African Diaspora; Geographic Origins, Secular Trends, and Plastic Versus Genetic Influences Utilizing Craniometric Data* (Diss. 2006), http://trace.tennessee.edu/utk_graddiss/1864.

34. Available photographs of the Teaching Collection establish that it contains Herero and Nama human remains acquired by Luschan with support of the German state, military, and colonial administration. For example, a photograph of a page in Luschan's notebook identifies "Cranium... 2793,"¹⁰⁶ and on the left-hand page next to the 2793 entry, a handwritten note states: "Von Herrn Drauschke um M. 20 gekauft. Quittung bei E. 1832/07" ("Bought from Mr. Drauschke for 20 Marks. Receipt with E. 1832/07"). Confirming this is a photograph showing a skull marked "2793" and "Hottentottin," referring to a Nama woman.¹⁰⁷ Other writing on the skull appears to state "durch Franz Drauschke für M. 20 erworben," which means "purchased from Franz Drauschke for 20 marks." The skull appears to be dated December 28, 1907, and signed "v.L.," *i.e.*, von Luschan. I do not know who Franz Drauschke is.

35. Another set of photographs shows a skull marked "1512,"¹⁰⁸ with other writings including one identifying the skull as having belonged to a 30-year-old Ovatjimba Herero man. The skull is signed and dated "K. Borchmann e.t. 1896," alongside another "K. Borchmann" signature, which is likely Karl Borchmann, *Schutztruppe* Veterinary Officer, and known trader of

¹⁰⁶ See Katuuo Declaration, Pls' Opp. to Mot. to Dismiss, Ex. 4 (Dkt. No. 45-2).

¹⁰⁷ See *id.* Ex. 5.

¹⁰⁸ See *id.* Ex. 6.

human remains.¹⁰⁹ A marking also appears to state “T.m.d.M.f. Naturk.,” which probably means “Tausch mit dem Museum für Naturkunde” (“Exchange with the Museum of Natural History”). It is signed and dated “1899 v.L.,” *i.e.*, von Luschan. Dr. Mosothwane also studied this skull:

One specimen (VL/1512) had dental modification in which maxillary first incisors were filed and their mandibular counterparts had been removed. The skull had an ink marker indicating the individual was an Ovanjimba-Herero [sic]. The Herero people (commonly found in Namibia and northwestern Botswana) are popularly known for dental modification similar to the one described herein (Van Reenen 1978a, 1978b).¹¹⁰

36. Another photograph I examined shows a skull in the Teaching Collection with the number “5263” on the left mandible, and signed “v.L.,” *i.e.*, von Luschan. It is also marked “Lüderitzbucht,” *i.e.*,

¹⁰⁹ Holger Stoecker, *Human Remains als historische Quellen zur namibischen-deutschen Geschichte: Ergebnisse und Erfahrungen aus einem interdisziplinären Forschungsprojekt* [*Human Remains as Historical Sources in Namibian-German History: Results and Experiences from an Interdisciplinary Research Project*], in *SOURCES AND METHODS FOR AFRICAN HISTORY AND CULTURE* 469, 479 (Geert Castryck, *et al.*, eds. 2016).

¹¹⁰ Mosothwane, *supra* note 105, at 27.

Lüderitz Bay, suggesting that the skull belonged to a victim at the Lüderitz Bay concentration camp, where prisoners were held in conditions designed to kill them, where up to 70 percent of the Herero and Nama prisoners perished, and where skulls and body parts were taken en masse as an integral part of Germany's takings in violation of international law.¹¹¹

37. Germany's Ongoing "Commercial Activity" Related to Herero and Nama Human Remains. Because of their inextricable link to the Teaching Collection and the Museum of Ethnology, the Herero and Nama human remains have a strong, sufficient connection to Germany's ongoing commercial activities in areas of bone maintenance, repatriation, and scientific and cultural disentanglement, which continue today, still having substantial contact with the United States, and although the ultimate sovereign *purposes* are different, Germany's acts and activities remain judged by their *nature*.

38. Germany has long played a role in the complex repatriation process, including with the Charité Human Remains Project itself, funded by the German Research Foundation (*Deutsche Forschungsgemeinschaft*),¹¹² which is financed by the German government. In 2008, the German Foreign Office (*Auswärtiges Amt*) accepted this logistical role, granting a request for repatriation of Herero, Nama, and other Namibian human remains, and approving

¹¹¹ See *supra*, ¶ 14 & n.35–37.

¹¹² See Koel, *et al.*, *Specimen A 817 (Nama)*, *supra* note 38, at *2.

300,000 Euros to finance the identification and return of Ovaherero, Nama, and other human remains.¹¹³

39. Three repatriations have taken place thus far. In September 2011, the remains of nine Herero and eleven Nama men, women, and children were repatriated by the Charité, eighteen of whom had died at Lüderitz Bay.¹¹⁴ In March 2014, the remains of a total of thirty- eight Herero, Nama, and other Namibian individuals, were repatriated by the Charité and the University of Freiburg.¹¹⁵ And in August 2018, the

¹¹³ See *Leichen im Keller* [Corpses in the Basement], Fränkische Nachrichten (Oct. 1, 2011), online at http://www.namibia-botschaft.de/images/stories/Herero/newspaperclips/presseclipping_rckgabe_260911_bis_041011.pdf, at *29.

¹¹⁴ See *Restitution of Namibian Skulls in 2011*, Charité Universitätsmedizin Berlin, online at https://anatomie.charite.de/ueber_den_faecherverbund/human_re_mains_projekt/restitution_of_namibian_skulls_2011/; Hadija Haruna, *Genocide in Africa: Murdered, Dissected, and Researched*, Tagesspiegel (Sept. 27, 2011), online at <https://www.tagesspiegel.de/wissen/genozid-in-afrika-ermordet-praeapariert-und-erforscht/4665882.html>; *Namibian Human Remains Identified in S. Africa*, The Namibian (Apr. 4, 2018), online at <https://www.namibian.com.na/176068/archive-read/Namibian-human-remains-identified-in-South-Africa>.

¹¹⁵ See *Restitution of Namibian Skulls in 2014*, Charité Universitätsmedizin Berlin, online at anatomie.charite.de/ueber_den_faecherverbund/human_re_mains_projekt/restitution_of_namibian_remains_2014/; Tendai Marima, *Bones of Contention: the Politics of Repatriating Namibia's Human Remains* (Mar. 19, 2014), online at <http://www.no-humboldt21.de/wp-content/uploads/2014/03/Bones-of-Contention-The-Politics-of-Repatriating-Namibias-Human-Remains-Think-Africa-Press.pdf>; Press Release, University of Freiburg (Mar. 4,

human remains of twenty-seven Herero, Nama, and other Namibian individuals, were repatriated by the Charité.¹¹⁶ Germany's continued commercial activities also includes funding for the travel and accommodation of those groups on the receiving end of the repatriation, including, *e.g.*, 50,000 Euros paid by the German Foreign Office to accommodate guests from Namibia for the most recent repatriation of human remains in August 2018.¹¹⁷ Germany reaffirmed its role in the repatriation of human remains from public and private German collections, when on August 31, 2018, commemorating the most recent repatriation German Minister of State Michelle Müntefering said:

2014), *online at* <https://www.pr.uni-freiburg.de/pm/2014/rektoratzeremonie-ruckfuhrung-04-03-14-pm-english.pdf>.

¹¹⁶ See *Germany to Return Human Remains from Namibian Genocide*, East African (Aug. 29, 2018), *online at* <http://www.theeastafican.co.ke/news/africa/Germany-to-return-Namibia-genocide-skulls/4552902-4734226-qgvjj/index.html>; Michelle Müntefering, Speech on the Occasion of the Third Repatriation of Human Remains from Germany to Namibia (Aug. 31, 2018), *online at* <https://windhuk.diplo.de/na-en/aktuelles/-/2131686>; Kirsten Grieshaber, *Germany Returns Twenty-Seven Sets of Colonial Era Remains to Namibians*, AP News (Aug. 29, 2018), *online at* <https://www.apnews.com/4d0d65b1f0f3427cad384180ded754d6>.

¹¹⁷ See *Weitere Schädel und Witboois Bibel werden repatriiert* [Additional Skulls and Witbooi's Bible to be Repatriated], Allgemeine Zeitung (Windhoek) (Aug. 22, 2018), *online at* <https://www.az.com.na/nachrichten/weitere-schdel-und-witboois-bibel-werden-repatriiert2018-08-21/>.

The German Government will [] make further efforts to determine the origin of as many of the human remains as possible that have been kept in Germany. We will expand our provenance research, so that we can acquire the necessary knowledge in this field and thereby return, with dignity and respect, the remains that are still in German institutions.¹¹⁸

40. Germany's earlier commercial activities and its ongoing commercial winding-up, investigation, identification, and repatriation activities *still* have a global reach that "substantial[ly] contact[s]" the United States. In 2017, the CEO of the Office of Hawaiian Affairs, a public agency, along with other Native Hawaiians and representatives, traveled to Germany, where on October 23, 2017, the State of Saxony handed over the human remains of four Hawaiian people.¹¹⁹ And in May 2018, a representative of the Chugach Alaska Corporation traveled to Berlin to receive

¹¹⁸ See Speech by Minister of State for International Cultural Affairs of the Federal Republic of Germany Michelle Müntefering on the Occasion of the Third Repatriation of Human Remains from Germany to Namibia (Aug. 31, 2018), *online at* <https://windhuk.diplo.de/na-en/aktuelles/-/2131686>.

¹¹⁹ See *Germany Returns Iwi Kupuna to Hawaii*, Big Island Video News (Oct. 27, 2017), *online at* <http://www.bigislandvideonews.com/2017/10/27/video-germany-returns-iwi-kupuna-to-hawaii/>; *German State Returns Human Bones Stolen from Hawaii Caves*, U.S. News (Oct. 23, 2017), <https://www.usnews.com/news/best-states/hawaii/articles/2017-10-23/german-state-returns-human-bones-stolen-from-hawaii-caves>.

“funerary artifacts” from the Prussian Cultural Heritage Foundation, which Jacobsen had acquired while engaged for the Museum of Ethnology in 1881–83.¹²⁰

Conclusion

41. Notwithstanding the dehumanization caused by Germany’s trade in these remains, it must be kept in mind that each skull is “[m]ore than just an object;”¹²¹ that they are “witnesses to, and evidence for what the Germans did between 1904 and 1908”;¹²² that they are Plaintiffs’ family members, anonymized and transformed into private property; and that they were treated as mere objects to rigorous examination. Moreover, it is respectfully suggested that each skull be viewed in the context of its *in rem* embodiment of the unique racial injury inflicted by Germany, which was suffered by the Ovaherero and Nama individually and

¹²⁰ Voice of America, *Berlin Museum Returns Native American Artifacts* (June 7, 2018), *online at* learningenglish.voanews.com/a/berlin-museum-returns-native-american-artifacts-to-tribe-in-alaska/4419712.html; *Ethnological Museum Returns Objects to Alaska Natives* (Dec. 17, 2017), www.preussischer-kulturbesitz.de/fileadmin/user_upload/documents/presse/pressemitteilungen/2017/171218_Restitution-Chugach_EN.pdf.

¹²¹ *See generally* FABER-JONKER, *supra* note 30, at 109.

¹²² *See id.* at 114 (2018) (quoting Andreas Winkelmann, Charité Human Remains Project).

collectively, with a distinct, painful, and unprecedented interest in the victims' races, skulls, soft tissues, and the scientific secrets they allegedly contained. That is, the Amended Complaint's gravamen broadly extends from the taking of land and livestock to the taking of people, because Plaintiffs allege not only state-sanctioned wars of extermination, expropriation, and enslavement, but also mass takings of bodies and body parts in violation of international law. Also crucial, as it exacerbates the injury to Plaintiffs, is that the Ovaherero and Nama are ancestor-worshipping societies who treat the dead as among the living, which the German state knew or should have known,¹²³ but nonetheless exploited the Herero and Nama dead for commercial purposes. The gravity and breadth of the injury, embodied in the human remains, supports this Court's jurisdiction over all of Plaintiffs' takings claims.

42. The Herero and Nama human remains arrived here from places like Lüderitz Bay, where they were taken and treated as private property, bought, traded, and studied, and thus unquestionably constitute "property taken in violation of international law" as alleged. And, in fact, Luschan placed them right alongside the skulls of Mohawk people in his Teaching Collection in Berlin. Plaintiffs' continuing investigation

¹²³ See generally Carl Gotthilf Büttner DIE HERERO UND IHRE TOTEN [THE HERERO AND THEIR DEAD] (1884). C.G. Büttner later served as Imperial Agent in Hereroland and Great Namaqualand. See also OLUSOGA & ERICHSEN, *supra* note 29, at 21 (2010); JOHANNES IRLE, DIE HEREROS [THE HERERO] 72–86, 144–48 (1906). See also ALEXANDER RÖHREKE, DER KOSMOS DER HERERO [THE COSMOS OF THE HERERO] 49–50 (2001).

since July 2018 has, we believe, thus uncovered important facts showing that the Herero and Nama human remains at the AMNH are connected to many commercial activities carried on by Germany both within the United States and elsewhere “having substantial contact with” the United States. It is respectfully requested, therefore, that the Court consider these new facts in its analysis of whether the Amended Complaint meets the jurisdictional requirements.

43 **Exhibits.** The following exhibits are attached to this Supplemental Declaration:

- A. Felix von Luschan, Speech, *Ziele und Wege der Völkerkunde in den deutschen Schutzgebieten* [Goals and Methods of Ethnology in the German Protectorates] (Oct. 11, 1902), in SONDERAUSDRUCK AUS DEN VERHANDLUNGEN DES DEUTSCHEN KOLONIALEKONGRESSES [SPECIAL PRINT FROM THE PROCEEDINGS OF THE GERMAN COLONIAL CONGRESS] (1902) (Translation and Original as A-1 and A-2);
- B. Retouched Photograph (Postcard) and Traced Drawing (Book) of German Soldiers Loading Chest of Skulls;¹²⁴

¹²⁴ FABER-JONKER, *supra* note 30, at 57.

C. Illustrations of five Herero men by Heinrich F.B. Zeidler;¹²⁵ *and*

D. Illustrations of Herero and Nama Children by Heinrich F.B. Zeidler.¹²⁶

44. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 21, 2018 in Las Vegas, Nevada.

Michael J. Lockman
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 McCallion & Associates
 LLP
 Attorneys for Plaintiffs
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 New York, NY 10017
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¹²⁵ Heinrich F.B. Zeidler, *Beitrage zur Anthropologie der Herera* [*Contributions to the Anthropology of the Herera*], 17 ZEITSCHRIFT FOR MORPHOLOGIE UNO ANTHROPOLOGIE [JOURNAL FOR MORPHOLOGY AND ANTHROPOLOGY] 185, 199, 207, 213, 218, 223 (1914).

¹²⁶ Heinrich F.B. Zeidler, *Beitrage zur Anthropologie der Gesichtsweichteile der Neger* [*Contributions to the Anthropology of the Soft Facial Tissue of the Neger*], 21 ZEITSCHRIFT FOR MORPHOLOGIE UNO ANTHROPOLOGIE [JOURNAL FOR MORPHOLOGY AND ANTHROPOLOGY] 153, 159, 163 (1920).

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Exhibit A-1

Felix von Luschan, Speech, *Ziele und Wege der Völkerkunde in den deutschen Schutzgebieten* [Goals and Methods of Ethnology in the German Protectorates] (Section Meeting, Oct. 11, 1902, in the a.m.) *printed in* SONDERAUSDRUCK AUS DEN VERHANDLUNGEN DES DEUTSCHEN KOLONIALKONGRESSES [SPECIAL PRINT FROM THE PROCEEDINGS OF THE 1902 GERMAN COLONIAL CONGRESS] 163 (1902).

[163] Ethnology in the broadest sense comprises the entirety of humanity from the first appearance of human or human-like beings up until present day. In a narrower sense of the word, it is divided into three fields of research: ethnography, anthropology, and prehistory.

[164] Of these three disciplines, prehistory finds itself in our protectorates in the very earliest stages. Sharpened stone axes are known only in Togo, and indeed in thousands of examples, but even there we know them only in their secondary appearance as magic or lightning stones in the possession of the current residents. We find such sharpened stone axes as such and even secondary replicas of prehistoric axes in all of the Guinea Highlands, where they are also related to oath stones, especially in Benin, where they were part of the sixteenth century royal array, and, comparable to Zeus's bundle of lightning, were held by kings as a scepter. Just like many farmers in our parts, the *Neger* of the Guinea Highlands also believes that when he

finds such an axe on his fields after a thunderstorm, that it fell from the heavens with lightning.

Schweinfurt already brought back similarly sharpened axes made of hematite from the land of the Monbuttu, where the natives also consider them “thunder wedges,” and no longer recognize them as tools. In recent years from the Congo basin and from Egypt, other, seemingly even much older stone artifacts have become known, hammered out entirely crudely, which, according to their appearance, correspond completely with the “paleolithic” flintstones of prehistoric Europe. Larger global movements, as such may be called for by more intensive agricultural use and in particular by locomotive systems, may shed throughout all of Africa even more light on the prehistory of humanity.

Who were the oldest humans, what did they do, where did they arise, how and with what means did they maintain and develop themselves further in the fight for survival? These are the initial questions that are imposed upon the prehistorian. But it is still completely uncertain in which part of the earth and in which zone these questions will first be solved.

The task of anthropology and ethnography, in contrast, is to research how, where, and when the later and the present still living races and *Völker* arose, how they live and aspire, how they behave to their neighbors, and what conclusions from the history of the human species can be drawn for its future.

That is the large field of work for the many anthropological and ethnographical organizations and museums, which have arisen in recent decades. In order to promote these goals as swiftly and as comprehensively as possible, the Ethnological Museum of Berlin has drafted a broadly arranged schematic of questions, to serve as an "Guide to Ethnographic Observation and Collection," [165] which was distributed for free in thousands of copies, and which have already born rich fruits.

The most important groundwork and the only firm foundation for any advance in ethnology lies in the utmost careful and exhaustive monographic treatment of each individual tribe. Much has already been done here in our protectorates (Stuhlmann, Fülleborn, Krämer, Pater Erdweg, and others), but there is still much more left to do, and there is danger in delay: modern transportation is a frightful and grim enemy of all primitive circumstances; whatever we cannot secure in the coming years and rescue for posterity, will face absolute demise, and can never again be obtained. Conditions and institutions, which have developed in their own unique way over thousands of years, are now changing almost from one day to the next under the influence of the white man; and so, snatch quickly, before it becomes forever too late. —

The further development of ethnology is thus initially a comparative one. Boas's work on the North American Indians, for example, has shown in an exemplary manner what can be achieved in the field of mythology. In our protectorates, and in particular in

Polynesia, almost immeasurable mythological treasures have been piled up, the salvage of which has in many places only just now been attempted, while other comparative research exists in great number, of which Weule's examination of the African arrow and Ankermann's work on musical instruments can be highlighted as exemplary.

Other pathways lead in whole or in part to neighboring fields. Linguistic, technical, zoological, botanical, anatomical, and biological, as well as jurisprudential and sociological examinations belong so comprehensively to our daily work tools, that indeed there is no scientific discipline besides ethnology that has as many and as intimate relationships to other sciences. Even fields apparently completely remote are now brought into the field of ethnology. For example, the new examinations by Stumpf, Abraham, v. Hornbostel, and others, have opened us to completely new and previously unimagined perspectives on the ethnographical meaning of musical studies—similar to how the recent lucky discovery of ancient Greek music awoke in us the hope of learning something one day about ancient Babylonian music.

First and foremost, however, the examinations on the origin and spread of the languages are to be mentioned, and the enormous field of comparative linguistics. [166] From other disciplines, for example, questions to be mentioned include the origin of the wheat varieties, the banana, the coconut,¹ or the

¹ Professor Neger in Eisenach recently discussed the origin, history, and spread of the coconut palm (*Globus*, Vol. 82, p. 92). I

question of the origin of our domesticated animals. The history of ceramic, weaving, cattle domestication,² cannot be studied without technical knowledge, and that is true all the more as to bronze technology, which, *e.g.*, in the Guinea Highlands has blossomed with such grand flowers, and only especially so with regard to iron technology, about which we now know that it was born in tropical Africa, and that we Europeans therefore have to thank the black “wild people” for it.

In contrast, purely social questions, at least temporarily, play a much smaller role than here. In the colonies there is still no pauperism, almost no crime, no unmarried women, and thus also no woman question.

The only social questions that are now of great importance in our protectorates, are the relationship of the magicians and rainmakers to the chiefs, thus precisely what by us one knows as the fight between church and state.

Now, however, under the European influence, other social questions have unfortunately arisen, all

cannot entirely agree with the models used by this author, and all the less so as he completely misses its broad appearance in Africa. Also with the strange confusing of coconut with kava, special weight need not be given to the author's other explications.

² As to cattle breeding techniques, it appears India must be seen as the place of origin. Remnants of the technique are still in existence there, both concretely present and verifiable in the literature. From India, the technique traveled west to Africa and east to Oceania—similar somewhat to the banana, which undoubtedly can be transplanted only by sapling, and thus certainly spread through human collaboration. The origins of North American cattle raising technique still clearly remain uncertain.

connected with the triple plague that we have inflicted upon our dark brothers, with alcoholism, with venereal disease (I remind you only of the equation “Civilization = Syphilization,” as shameful as appalling, which was the case for all of Africa and all of Oceania), [167] and with the slave hunts that, as “*labour trade*,” are not a bit less brutal, mean, and base as it was in Africa.

There is no doubt, that, under the long-lasting effect of these sinister influences, the same social-anthropological circumstances that we suffer at home will also arise sooner or later in our protectorates, initially pauperism and crime. But there it can be countered more easily than here. Nothing is in a more sorry state in Europe today than the criminal law. For some two-thousand years, we have studied crime, but not the criminal. We avoid any and all prophylaxis, and we shut the barn door only after the ox ran off. Our jurists will one day come to understand what our doctors have long known, that prevention is more important than healing; but it will take much time in Europe in light of the *vis inertia*, which appears characteristic of all legislatures.³

³ Our judiciary is only now starting to deal with these questions; now in Berlin, Professor von Liszt is to thank for the numerous proposals for reform of our completely antiquated criminal law. The “conditional judgment” and the possibility of placing alcoholics under guardianship are meaningful starts for a scientific social hygiene.

In most other countries, the administration is either completely mindless as to these ideas or directly inimical to them. Typical for these circumstances is the treatment of people with

The task of our colonial administration will be formed all the more beautifully and thankfully, hurrying ahead on its own and by the slowly lagging reform of domestic criminal law, to isolate individuals who have become morally defect, and thereby make impossible not only their own reproduction, but also the social evils themselves that come with them.

[168] Examinations of the position of the human in nature fall again in a different field, that of the descriptive and comparative anatomy, zoology, and biology.

Last year at the International Zoological Congress in Berlin, Branco presented in an illuminating way the current status of this work, and there also made mention of the surprising results of Friedenthal's blood experiments. Research like this would belong together with the research plan of a biology laboratory to be erected in Cameroon.⁴

alcoholism in the vast majority of countries. These unfortunate invalids stay with their family or in their surroundings until they drink in excess in particular amounts, then they go for a few weeks to a hospital, from which they are released due to lack of space as soon as the acute symptoms have vanished; hardly back in the old circumstances, they again become a source of misfortune for family and friends, ultimately have to return to the hospital and be again released, and that is often repeated until they eventually kill their wife or kids one day, or otherwise commit murder and homicide.

⁴ Friedenthal's examinations have shown that human blood has a more or less toxic function on the blood of all other animals, but not on the blood of the orangutan, the chimpanzee, and the gibbon. The new methods for examining small blood flecks by serum

That the scant remains of the pithecanthropus, which are of such decisive importance as to all questions about the position of the human in nature, were found on Java, the justifiable hope appears that similarly meaningful fossils might also be found in neighboring New Guinea.

In close connection with the studies on the relationship between the human to the other mammals, there is the old question about the singularity or multiplicity of the human species. We now know that the process of human evolution occurred just once, and we count the theory of the absolute unity of the human species as among the most important accomplishments of modern anthropology. There are still some researchers, who want to connect the short-headed Malays to the orangutan and the long-skulled *Negers* to the chimpanzee, but one can skip over them on the agenda. It is particularly good for a Colonial Congress to remember the words of K. E. v. Baers directed at the American slave barons and their procurers: [169] only barbaric egoism could deny the obligation of cultured peoples vis-à-vis the *Negers* under the false scientific pretense that they are of a lower species.

examination are as important for zoology as for forensics, and makes the “blood relationship” between humans and hominids appear far greater than anyone has yet dared to assume.

Fertile crossings between humans and apes are no longer possible today, but there must have been a time during which it was possible; W. Branco actually thinks it possible that DuBois’s pithecanthropus was a *Mischling* between a human of the Late Tertiary and a hominid ape.

With the greatest decisiveness, I must now note that it no longer proper to talk about “wild people” or even about “*Naturvölker*.” All efforts to find the criteria between *Kulturvölker* and “wild people” must be seen as complete failures. Every new author sets new boundaries and discovers intermediate levels. For example, one tried to differentiate between active and passive races, and then Carus inserted between the day people and night people the “twilight people,” and thus placed the *Mongols* between the Europeans and the *Negers*.

Just as naive and untenable are the separations according to color,⁵ “beauty,” cleanliness,⁶ morals, shamefulness, the presence or absence of clothing,⁷ the possession or absence of a written language,⁸ the

⁵ Dark skin color is to be considered fundamentally as a protective means against sun burn, and has not the least to do with ethnic dignity.

⁶ Many Bantu carefully brush their teeth with a coarse brush after every meal. How many German and Russian farmers have never even heard of a toothbrush! The majority of “wild peoples” also bathe on a daily basis, while there are many Europeans who never wash themselves.

⁷ The ancient Greeks (*cf.* Herodotus I. 10, Thucydides I. 6, 5, *etc.*) were proud of their naked bodies and knew that being seen naked was shameful among barbarians.

⁸ One could compare the enormous majority of illiterate people, unable to read or write, for example, in Russia, and in contrast, the incredible memory of most Polynesian tribes.

occurrence of human sacrifice,⁹ and any other such type of criteria.

The better that we get to know these “wild people” or these “*Naturvölker*,” all the more we will be able to see that there is nowhere a boundary that sharply and certainly separates them from “*Kulturvölker*.” Even the relatively limited contact with the outside world, which for us generally appears to be the most certain criterion of a primitive *Volk*, is, [170] however, always a relative, never absolute characteristic.¹⁰

As to the real unity of the human species, it is due to the fact that so far every attempt to separate the human races according to an artificial schematic has failed most miserably. None of these attempts is able to distinguish the *Melanesians* from the *Negers*, and in Huxley’s scheme, even the ancient Egyptians are placed next to Australians!! In this connection, the dwarf peoples or pygmies also need to be mentioned, who were first truly discovered by our Schweinfurth in Monbuttu Land. Now we know many others from elsewhere in Africa, Indochina, and Indonesia, and also in New Guinea some of have been substantiated and have been photographed by Warburg on the Aru Islands; but one now wants to substantiate them also in Europe, Peru, Japan, and actually in the entire world,

⁹ Before the battle of Salamis, the Greeks sacrificed to Dionysus three captured Persians, nephews of Xerxes!

¹⁰ The previous sentences were repeated from my lecture on the childish conception of the so-called *Naturvölker*, held on June 15, 1900 at the Association of Child Psychology in Berlin.

and one loves to view them as the actual early humans. But one overlooks the fact that there can be many different causes for small stature, and that under the so-called pygmies and pseudo-pygmies, one finds people with long and short skulls, narrow and wide faces, light and dark skin, straight and curly hair.

Actually with many of these real and apparent pygmies, it is a convergence. At the same time there can be no doubt that the superficial similarity between *Melanesians* and African *Negers* is not conditioned on any particularly close relation, but again rests in the same manner on convergence. To date, this word has been used with regard to human race characteristics only by Thilenius, but the term is commonly used among botanists and zoologists. I recall the known similarity between two alpine plants, with no relation between them, and especially the story of the large ostrich-like flightless bird, the ratite, which for a long time one held to be related to the ostrich, descended from a common antarctic home. We now know that some of these ratites are descended from doves, others from rails, and others from crane-like birds, and that there is not the slightest relation between, for example, the African ostrich, the South American rhea, and the New Zealand moa. This gigantism of flightless birds with a flat, keelless sternum is a typical appearance of convergence.

[171] The occurrence of dwarf-like races spread across the entire world is to be viewed in precisely the same manner, just like dark skin color, curly hair, and probably still another set of other characteristics, which

one otherwise normally considers as evidence for particularly close racial relationship. The appearance of convergences of this type can naturally lead to incorrect conclusions about racial relationship, and they therefore must be investigated with utmost care.

On the other hand, their determination can contribute to clarifying many circumstances that still remain puzzling. For example, it is not yet ruled out that extreme brachycephaly or blondness in such different races presents as a pure convergence. In many cases one will be able to readily identify the direct reason of such a convergence. For example, dark skin, which we find in races with such differences from one another, is doubtlessly due to protection against sunburn, provided by the skin pigment, like a dark veil.

In any case, it will be useful in the future in judging race relationships to take convergence into consideration, alongside the similarities conditioned by an original common ancestry, and alongside the appearance of divergence that have long been known.

Like every other science, ethnology also initially has an inner value that is completely independent of the material utilization that it can bring; but also that itself is absolutely to be estimated at no low value. Political successes, always and everywhere, can be expected and achieved only on the basis of ethnographic knowledge, and the ignorance of ethnographic circumstances has often enough led to great losses of money and human life. Furthermore, in our modern times with its grand contest between labor and capital, tapping into new market regions is the foundation of political wisdom.

“The creation of market regions is simultaneously an art and a science.” (Sombart). But how can one want to find and create market regions in the African and other colonies without being instructed in the most precise way about the nature and character of the natives !

Knowledge is power.

In this manner, the reason for the loyal collaboration of most missionaries to the tasks of ethnology is also the goal of warm goodwill, which will also be brought to our colonial government and colonial companies through ethnographic efforts, and which will emerge in the first instance through the appreciation of the practical value of ethnography.

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Exhibit A-2

Exemplaren unentgeltlich verschickt wird und schon reiche Früchte getragen hat.

Die wichtigste Vorarbeit und die einzige feste Grundlage für jeden Fortschritt in der Völkerkunde liegt eben in der möglichst eingehenden und sorgfältigen monographischen Behandlung jedes einzelnen Stammes. Hier ist in unseren Schutzgebieten schon viel geschehen (Stuhlmann, Fülleborn, Krämer, Pater Erdweg und andere), aber noch sehr viel zu tun übrig, und da ist Gefahr im Verzug: Der moderne Verkehr ist ein furchtbarer und unerbittlicher Feind aller primitiven Verhältnisse; was wir nicht in den nächsten Jahren sichern und für die Nachwelt retten können, das geht dem völligen Untergang entgegen und kann niemals wieder beschafft werden. Verhältnisse und Einrichtungen, die sich im Laufe von Jahrtausenden eigenartig entwickelt haben, ändern sich unter dem Einflusse des weissen Mannes fast von einem Tag zum anderen; da heisst es, rasch zugreifen, ehe es hierzu für immer zu spät sein wird. —

Der weitere Ausbau der Völkerkunde ist dann zunächst ein vergleichender. Was da zum Beispiel auf mythologischem Gebiet erreicht werden kann, haben Boas' Arbeiten über die nordamerikanischen Indianer in vorbildlicher Weise gezeigt. In unseren Schutzgebieten und ganz besonders in Polynesien sind fast unermessliche mythologische Schätze aufgehäuft, deren Bergung an vielen Orten kaum noch erst versucht ist, während andere vergleichende Arbeiten in grosser Zahl vorliegen, unter denen Weules Untersuchungen über den afrikanischen Pfeil und Ankermanns Arbeit über Musikinstrumente als mustergültig hervorgehoben werden können.

Andere Wege führen ganz oder teilweise auf Nachbargebiete. Sprachliche, technische, zoologische, botanische, anatomische und biologische sowie rechtswissenschaftliche und soziologische Untersuchungen gehören in so ausgedehntem Masse zu unserem täglichen Arbeitszeug, dass es wohl überhaupt keine andere wissenschaftliche Disziplin gibt, die so zahlreiche und so innige Beziehungen zu anderen Wissenschaften hat wie gerade die Völkerkunde. Selbst scheinbar ganz entlegene Fächer werden jetzt in das Bereich der Völkerkunde gezogen. So haben neue Untersuchungen von Stumpf, Abraham, v. Hornbostel u. a. uns ganz neue und bisher ungeahnte Ausblicke auf die ethnographische Bedeutung musikalischer Studien eröffnet — ähnlich wie die uns kürzlich durch einen glücklichen Fund erschlossene altgriechische Musik die Hoffnung in uns erweckt, einmal auch von der altbabylonischen Musik etwas zu erfahren.

In erster Reihe aber sind hier die Untersuchungen über Ursprung und Verbreitung der Sprachen zu erwähnen, und die ungeheueren

Gebiete der vergleichenden Sprachforschung. Aus anderen Disziplinen seien hier nur beispielsweise die Fragen nach der Herkunft der Getreidearten, der Banane, der Kokosnuss¹⁾ erwähnt, oder die nach der Heimat unserer Haustiere. Die Geschichte der Keramik, der Weberei, des Rindenzeuges²⁾ kann ohne technische Kenntnisse nicht studiert werden, und noch mehr gilt das von der Bronzetechnik, die z. B. in Ober-Guinea zu so hoher Blüte gediehen ist, und gar erst von der Eisentechnik, von der wir jetzt wissen, dass sie im tropischen Afrika zu Hause ist, und dass wir Europäer sie also den schwarzen „Wilden“ verdanken.

Hingegen spielen die rein sozialen Fragen in unseren Schutzgebieten wenigstens vorläufig eine sehr viel geringere Rolle als bei uns. Noch gibt es in den Kolonien keinen Pauperismus, so gut wie keine Verbrechen, keine unverheirateten Frauen und daher auch keine Frauenfrage.

Die einzigen sozialen Fragen, die in unseren Schutzgebieten schon jetzt grosse Bedeutung haben, betreffen das Verhältnis der Zauberer und Regenmacher zu den Häuptlingen, also genau das, was wir bei uns als Kampf zwischen Staat und Kirche kennen.

Unter europäischem Einfluss entstehen jetzt allerdings auch andere soziale Fragen, die leider alle mit der dreifachen Pest zusammenhängen, mit der wir unsere dunkleren Brüder heimgesucht, mit dem Alkoholismus, mit den venerischen Krankheiten (ich erinnere nur an die ebenso beschämende wie entsetzliche Gleichung „Civilisation = Syphilisation“, die für ganz Afrika und für ganz Ozeanien Geltung hat) und mit den Sklavenjagden, die in der Süd-

1) Über Ursprung, Geschichte und Verbreitung der Kokosnusspalme hat kürzlich Professor Neger in Eisenach gehandelt (Globus, Bd. 82, S. 92). Ich kann mich den Ausführungen dieses Autors durchaus nicht anschliessen, um so weniger, als er das ausgedehnte Vorkommen in Afrika völlig übergeht. Auch die merkwürdige Verwechslung von Kokosnuss und Kawa ist nicht danach angetan, den anderen Ausführungen des Autors besonderes Gewicht zu verleihen.

2) Für die Rindenzeug-Technik scheint Indien als ursprüngliche Heimat betrachtet werden zu müssen. Reste der Technik haben sich da noch erhalten, sowohl greifbar vorhanden als literarisch nachweisbar. Von Indien aus ist sie dann westlich nach Afrika und östlich nach Ozeanien gewandert — ähnlich etwa wie die Banane, die zweifellos nur durch Schösslinge, also sicher nur unter Mitwirkung der Menschen verpflanzt werden kann. Unsicher bleibt freilich noch immer die Herkunft der amerikanischen Rindenzeug-Technik.

see als „labour-trade“ nicht um ein Haar weniger brutal, gemein und niederträchtig waren, als in Afrika.

Es unterliegt keinem Zweifel, dass sich unter der dauernden Wirkung dieser unheilvollen Einflüsse früher oder später auch in unseren Schutzgebieten dieselben sozial-anthropologischen Verhältnisse entwickeln werden, an denen wir in der Heimat krankten, zunächst der Pauperismus und das Verbrechen. Aber dort kann ihnen leichter entgegengetreten werden als bei uns. Nichts vielleicht liegt in Europa heute noch so im Argen wie das Strafrecht. Seit zweitausend Jahren etwa studieren wir das Verbrechen, aber nicht den Verbrecher; wir verzichten auf jede Prophylaxe und schliessen den Stall immer erst zu, wenn der Ochse schon weggelaufen ist. Natürlich wird das auch in Europa einmal anders werden. Auch unsere Juristen werden einmal begreifen, was wir Ärzte schon lange erkannt haben, dass Vorbeugen wichtiger ist als Heilen; aber das wird in Europa noch lange dauern, bei der vis inertiae, welche eine Eigenschaft aller Gesetzgeber zu sein scheint¹⁾.

Um so schöner und dankbarer wird sich dann die Aufgabe unserer Kolonialverwaltung gestalten, aus sich selbst heraus und der langsam nachhinkenden Reform der heimischen Strafpflege vorausseilend, die moralisch defekt gewordenen Individuen zu isolieren und so nicht nur deren eigene Fortpflanzung, sondern mit ihr auch die der sozialen Übel selbst unmöglich zu machen.

1) Unsere Rechtspflege fängt eben erst an, sich mit diesen Fragen zu beschäftigen; gerade in Berlin ist es Professor von Liszt, dem zahlreiche Anregungen zu einer Reform unseres völlig rückständigen Strafrechtes zu danken sind. Die „bedingte Verurteilung“ und die Möglichkeit, einen Säufer zu entmündigen, sind bedeutsame Anfänge einer wissenschaftlichen Sozialhygiene.

Noch steht in den meisten anderen Ländern die Verwaltung diesen neuen Ideen völlig stumpfsinnig oder direkt feindselig gegenüber. Typisch für diese Zustände ist die Behandlung der Leute mit Säuferwahnsinn in den weitaus meisten Ländern. Diese unglücklichen Kranken bleiben in ihrer Familie oder unter ihrer Umgebung solange, bis sie einmal ganz besonders excedieren, dann kommen sie auf wenige Wochen in ein Krankenhaus, aus dem sie wegen Raum-mangel entlassen werden, sobald die akuten Erscheinungen geschwunden sind; kaum in die alten Verhältnisse zurückgekehrt, werden sie wieder eine Quelle des Unglücks für ihre Angehörigen, müssen schliesslich wieder ins Spital und werden wieder entlassen und das nur zu oft solange, bis sie einmal ihre Frau oder ihre Kinder töten oder sonst Mord und Totschlag begehen.

Wieder in ein anderes Gebiet, in das der beschreibenden und der vergleichenden Anatomie, der Zoologie und der Biologie, fallen die Untersuchungen, die sich mit der Stellung des Menschen in der Natur beschäftigen.

Den gegenwärtigen Stand dieser Arbeiten hat Branco im vorigen Jahre dem internationalen Zoologenkongress zu Berlin in lichtvoller Weise dargelegt und dabei auch die überraschenden Ergebnisse von Friedenthals Blutuntersuchungen erwähnt. Forschungen wie diese würden mit in den Arbeitsplan eines etwa in Kamerun zu errichtenden biologischen Laboratoriums gehören.¹⁾

Dass die spärlichen Reste des Pithecanthropus, die bei allen Fragen über die Stellung des Menschen in der Natur von so einschneidender Bedeutung sind, auf Java gefunden wurden, lässt die Hoffnung berechtigt erscheinen, dass auch in dem benachbarten Neu-Guinea einmal ähnlich bedeutsame Fossilien gefunden werden möchten.

Im engen Zusammenhange mit den Studien über das Verhältnis des Menschen zu den anderen Säugetieren steht die alte Frage nach Einheit oder Mehrheit des Menschengeschlechtes. Wir wissen jetzt, dass der Prozess der Menschwerdung sich nur einmal vollzogen hat, und zählen die Lehre von der absoluten Einheit des Menschengeschlechtes zu den wichtigsten Errungenschaften der modernen Anthropologie. Noch gibt es vielleicht einzelne Forscher, welche den kurzköpfigen Malaien an den Orang und den langschädlichen Neger an den Schimpanzen anschliessen wollen, aber man geht über sie zur Tagesordnung über. Gerade auf einem Kolonialkongresse ist es gut, sich der Worte K. E. v. Baers zu erinnern, die an die Adresse der amerikanischen Sklavenbarone und ihrer Zuhälter gerichtet waren,

1) Friedenthals Untersuchungen haben gezeigt, dass menschliches Blut mehr oder weniger giftig wirkt auf das Blut aller anderen Tiere, nur nicht auf das Blut des Orang, des Schimpanse und des Gibbon. Die neuen Methoden, kleine Blutflecken auf dem Wege der Serum-Untersuchung zu prüfen, haben eine ebenso grosse zoologische wie forensische Bedeutung und lassen die „Blutsverwandtschaft“ zwischen Menschen und Anthropoiden viel grösser erscheinen als irgend jemand bisher anzunehmen gewagt hätte.

Fruchtbare Kreuzungen zwischen Mensch und Menschenaffen sind heute nicht mehr möglich, aber es muss eine Zeit gegeben haben, in der sie möglich waren; tatsächlich denkt W. Branco an die Möglichkeit, dass Dubois' Pithecanthropus ein Mischling zwischen einem jungtertiären Menschen und einem Menschenaffen gewesen sei.

nur barbarischer Egoismus könne die Verpflichtungen des Kulturmenschen gegen die Neger unter dem wissenschaftlichen Vorwande leugnen, sie seien geringerer Art.

Mit der grössten Entschiedenheit muss ich hier darauf hinweisen, dass es nicht angeht, so ohne weiteres von „Wilden“ oder auch von „Naturvölkern“ zu sprechen. Alle Bemühungen, irgend welche Kriterien zwischen Kulturvölkern und „Wilden“ zu finden, müssen als völlig gescheitert betrachtet werden. Jeder neue Autor stellt da neue Grenzen auf und entdeckt neue Zwischenstufen. So hat man versucht, aktive und passive Rassen zu unterscheiden, dann hat Carus zwischen seine Tag- und Nachtmenschen noch die „Dämmerungsmenschen“ eingeschoben und so die Mongolen zwischen die Europäer und die Neger gestellt.

Genau ebenso naiv und haltlos sind die Scheidungen nach der Farbe¹⁾, nach der „Schönheit“, nach Reinlichkeit²⁾, nach der Moral, nach der Schamhaftigkeit, nach dem Mehr oder Minder an Bekleidung³⁾, nach dem Besitz oder dem Fehlen der Schrift⁴⁾, nach dem Vorkommen von Menschenopfern⁵⁾ und nach allerhand anderen Kriterien solcher Art.

Je besser wir jetzt diese „Wilden“ oder diese „Naturvölker“ kennen lernen, umso mehr sehen wir ein, dass es nirgend eine Grenze gibt, die sie scharf und sicher von den „Kulturvölkern“ scheidet. Selbst der verhältnismässig geringere Verkehr mit der Aussenwelt, der uns im allgemeinen noch als das sicherste Kriterium eines

1) Die dunkle Hautfarbe ist im wesentlichen als Schutzmittel gegen Sonnenbrand zu betrachten und hat mit der ethnischen Dignität nicht das geringste zu schaffen.

2) Viele Bantu reinigen sich nach jeder Mahlzeit sorgfältig die Zähne mit einer scharfen Bürste. Wie viele deutsche und russische Bauern haben niemals von einer Zahnbürste auch nur gehört! Die Mehrzahl der „Wilden“ pflegt täglich zu baden, während es viele Europäer gibt, die sich niemals waschen.

3) Die alten Griechen (cfr. Herodot I. 10, Thukidides I. 6, 5 u. s. w.) waren stolz auf ihren nackten Körper und wussten, dass es bei den Barbaren eine Schande sei, nackt gesehen zu werden.

4) Man vergleiche die enorme Überzahl der Analphabeten über die Schreibkundigen zum Beispiel in Russland und im Gegensatz dazu das grossartige Gedächtnis der meisten polynesischen Stämme.

5) Vor der Schlacht bei Salamis haben die Griechen drei gefangene Perser, Neffen des Xerxes, dem Dionysos geopfert!

primitiven Volkes erscheint, ist immer nur eine relative, niemals eine absolute Eigenschaft¹⁾).

Tatsächlich liegt es an dieser wirklichen Einheit des Menschengeschlechtes, dass bisher noch jeder Versuch, die menschlichen Rassen nach einem künstlichen Schema in Gruppen zu teilen, auf das kläglichste misslungen ist. Keiner dieser Versuche vermag die Melanesier von den Negern zu trennen, und in Huxleys Schema sind sogar die alten Ägypter zu den Neuholländern gestellt!! In diesem Zusammenhange müssen auch die Zwergvölker oder Pygmäen erwähnt werden, die unser Schweinfurth zuerst im Moubutt-Land wirklich entdeckt hat. Jetzt kennen wir solche vielfach auch sonst aus Afrika, aus Hinterindien und aus Indonesien, auch in Neuguinea sind sie schon nachgewiesen und auf den Aru-Inseln von Warburg photographiert worden; aber man will sie jetzt auch in Europa, Peru, Japan und eigentlich in der ganzen Welt nachweisen und liebt es, sie als die eigentlichen Urmenschen zu betrachten. Dabei übersieht man, dass es sehr verschiedene Ursachen für kleine Statur geben kann, und dass sich unter den sogenannten Pygmäen und Pseudopygmäen lang- und kurzköpfige, schmal- und breitgesichtige, helle und dunkle, schlecht- und kraushaarige Menschen befinden.

Tatsächlich handelt es sich bei sehr vielen dieser wirklichen und scheinbaren Pygmäen um Konvergenz. Ebenso kann es auch keinem Zweifel unterliegen, dass die oberflächliche Ähnlichkeit zwischen Melanesiern und afrikanischen Negern nicht durch besonders nahe Verwandtschaft bedingt ist, sondern gleichfalls auf Konvergenz beruht. Dieses Wort ist mit Bezug auf menschliche Rasseigenschaften bisher nur von Thilenius gebraucht worden, aber der Begriff ist den Botanikern und Zoologen schon lange geläufig. Ich erinnere an die bekannte Ähnlichkeit zwischen untereinander nicht verwandten Alpenpflanzen und ganz besonders an die Geschichte der grossen straussartigen Laufvögel, der Ratiten, die man lange Zeit für untereinander verwandt hielt und aus einer gemeinsamen antarktischen Heimat abstammen liess. Wir wissen jetzt, dass einige dieser Ratiten von Tauben, andere von Rallen, andere von kranichähnlichen Vögeln stammen, und dass nicht die allergeringste Verwandtschaft etwa zwischen dem afrikanischen Strauss, dem südamerikanischen Rhea und dem neuseeländischen Moa besteht. Dieser Riesenwuchs flugunfähiger Vögel mit flachem, kiellosem Brustbein ist eine typische Konvergenzerscheinung.

1) Die letzten Sätze sind wiederholt aus meinem Vortrage über kindliche Vorstellungen bei den sogenannten Naturvölkern, gehalten am 15. Juni 1900 im Verein für Kinderpsychologie zu Berlin.

Genau ebenso ist das über die ganze Erde zerstreute Vorkommen zwerghafter Rassen zu betrachten und genau so die dunkle Hautfarbe, das krause Haar und wahrscheinlich noch eine Reihe anderer Eigenschaften, die man sonst als Beweis für besonders nahe Rassenverwandtschaft zu betrachten gewohnt ist. Derartige Konvergenzerscheinungen können natürlich überall zu unrichtigen Vorstellungen über Rassenverwandtschaft führen und sind deshalb mit grosser Sorgfalt zu ermitteln.

Andererseits kann ihre Feststellung dazu beitragen, viele bisher rätselhaft gebliebene Verhältnisse aufzuklären. So ist es nicht ausgeschlossen, dass auch die extreme Brachykephalie oder die Blondheit bei sonst verschiedenen Rassen als reine Konvergenz auftritt. In manchen Fällen wird es auch gelingen, den direkten Grund einer solchen Konvergenz ohne weiteres zu erkennen. So liegt er für die dunkle Haut, die wir bei sonst untereinander ganz verschiedenen Rassen finden, zweifellos in dem durch das Hauptpigment wie durch einen dunklen Schleier gewährten Schutz gegen Sonnenbrand.

Jedenfalls wird es in Zukunft bei Beurteilung von Rassenverwandtschaft nützlich sein, neben den durch die ursprünglich gemeinsame Abstammung bedingten Ähnlichkeiten und neben den längst bekannten Divergenzerscheinungen auch die Konvergenz in Rechnung zu ziehen.

Wie jede andere Wissenschaft hat auch die Völkerkunde zunächst einen inneren Wert, der von dem materiellen Nutzen, den sie bringen kann, völlig unabhängig ist; aber auch dieser selbst ist durchaus nicht gering zu schätzen. Politische Erfolge können stets und überall nur auf Grundlage ethnographischer Kenntnisse erwartet und erreicht werden, und die Unkenntnis der ethnographischen Verhältnisse hat oft genug zu grossen Verlusten an Geld und Menschenleben geführt. Ausserdem aber ist in unserer modernen Zeit mit ihrem grossartigen Wettstreit zwischen Arbeit und Kapital die Erschliessung neuer Absatzgebiete das Um und Auf jeder staatspolitischen Weisheit. „Die Schaffung von Absatzgebieten ist eine Kunst und eine Wissenschaft zugleich“ (Sombart), wie kann man aber in den afrikanischen und anderen Kolonien Absatzgebiete suchen und schaffen wollen, ohne über Natur und Art der Eingeborenen auf das genaueste unterrichtet zu sein! Wissen ist Macht.

In dieser Einsicht ist auch der Grund für die treue Mitarbeit der meisten Missionare an den Aufgaben der Völkerkunde zu suchen, und ebenso ist das warme Wohlwollen, welches unsere Kolonialregierung und unsere kolonialen Gesellschaften den ethnographischen Bestrebungen entgegenbringen, sicher zunächst aus der Würdigung des praktischen Wertes der Völkerkunde hervorgegangen.

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Exhibit B



Figure 2

Postcard from German South-West Africa, ca. 1905. The caption on the back reads: 'Verladung der für deutsche Museen u. Universitäten bestimmten Herero-Schädel'.



Figure 3

Illustration from 'Meine Kriegs-Erlebnisse in Deutsch-Südwest-Afrika. Von einem Offizier der Schutztruppe' (1907), an anonymous account of the German-Herero war.

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Exhibit C-1

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BEITRÄGE
ZUR
ANTHROPOLOGIE DER HERERO.

INAUGURAL-DISSERTATION
ZUR
ERLANGUNG DER DOKTORWÜRDE
GENEHMIGT VON DER
PHILOSOPHISCHEN FAKULTÄT
DER
FRIEDRICH-WILHELMS-UNIVERSITÄT
ZU
BERLIN
VORGELEGT VON
HEINRICH F. B. ZEIDLER
BERLIN.

TAG DER PROMOTION: 20. MAI 1914.

STUTTGART 1914.

kommen und einen Transversus menti bilden, dessen Breite ca. 10 mm beträgt. Die Ausdehnung der Triangulares auf dem Unterkieferrande ist beiderseits die gleiche (40 mm).

3. Zygomaticus maior (H. VIRCHOW). Auf beiden Seiten ist ein Teil des Ursprungs vom Orbicularis oculi bedeckt. Auf der linken

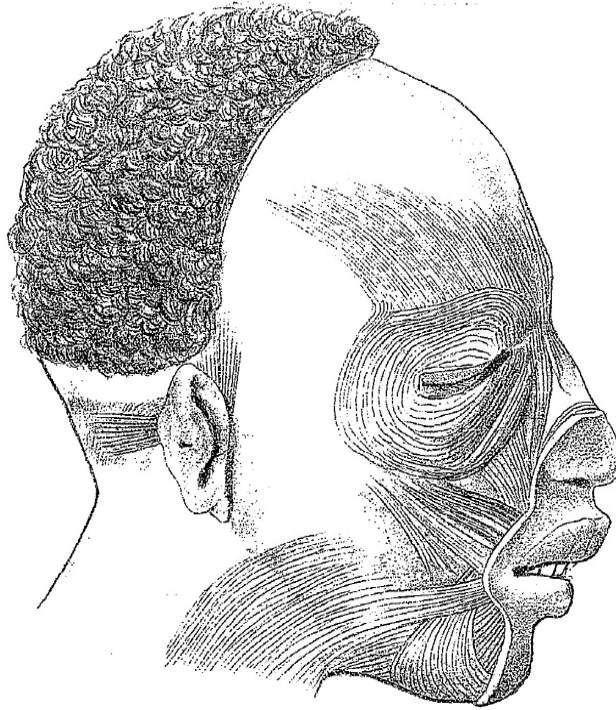


Fig. 1. Herero A ♂.

Geringe Ausdehnung des Wangenplatysma. Teilweise Überlagerung des Triangularis. Kein Risorius. Zusammensetzung des Zygomaticus maior aus einem unteren Haupt- und einem oberen Nebenbündel.

Sehr starker Orbicularis oculi, der tief in die Wange hinabreicht. Occipitalisfasern biegen lateralwärts um und erreichen die Ohrmuschel.

Seite ist die Ursprungsstelle 50 mm vom Tragus entfernt und 10 mm breit. Die Fasern sind stark und dick, laufen ca. 20 mm geschlossen, dann senden sie auf dem der Orbita zugekehrten Rande zwei Bündel ab, die denselben Verlauf haben wie der Hauptteil. Die Breite jedes einzelnen Bündels beträgt ca. 3 mm, die des Hauptbündels ca. 8 mm. Die Insertion am Mundwinkel bietet ein typisches Beispiel für BLUNTSCHLI'S

dessen Scheitel erst auf der Höhe der Protuberantia mentalis gelegen ist. Auch hier sah ich wieder einen Transversus menti, der aber nicht ganz so breit war wie am vorigen Präparat. Die Breite des Platysma auf dem Unterkieferende gemessen beträgt links 98 mm, rechts 103 mm. Auffallend ist der Verlauf des Muskels in der Wangenregion. Man

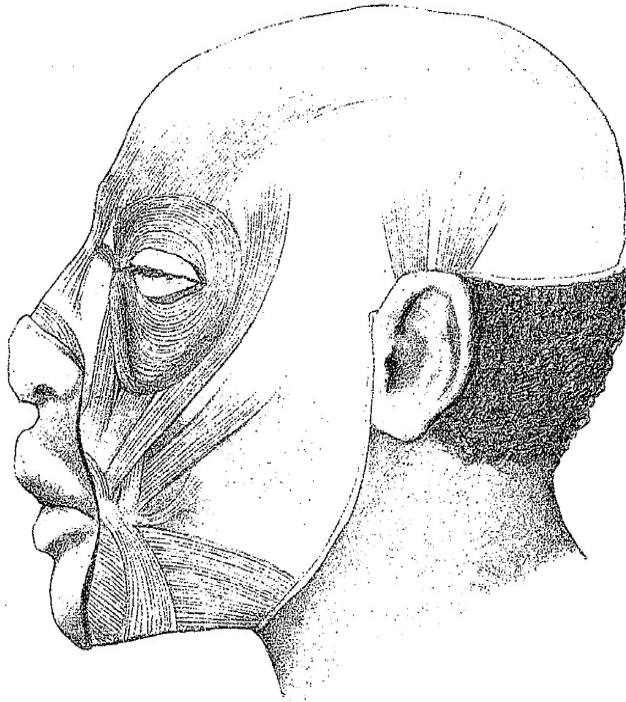


Fig. 2. Herero B ♀.

Geringe Ausdehnung des Wangenplatysma. Triangularis-Risorius (SANTORINI). Zusammenhang des Orbicularis oculi mit dem Zygomaticus minor. Laterale obere Randbündel des Orbicularis oculi. Depressor capitis supercilii. M. transversus glabellae (RUGE).

erwartet vielleicht bei allen Exemplaren dieser Rasse eine weite Ausdehnung des Platysma über die Wange. Hier besteht eine deutliche Reduktion des Platysma. Das Platysma überschreitet an diesem Präparat nicht mehr die Linie, die den Mundwinkel mit dem unteren Ohrmuschelansatz verbindet. Eine »Pars aberrans« des Platysma fehlt beiderseits; der Befund entspricht dem Typus III von BLUNTSCHLI, womit gleichzeitig gesagt ist, daß der Risorius fehlt.

feldes des Zygomaticus maior ist beiderseits die gleiche (ca. 10 mm). In seiner Breite wird er vom Zygomaticus minor um die Hälfte übertroffen.

4. Quadratus labii superioris. Die Ursprungsportionen des Quadratus schließen sich auf beiden Seiten bald zu einer ununterbrochenen Platte, die sich dann an der Mundwinkelgegend dicht dem

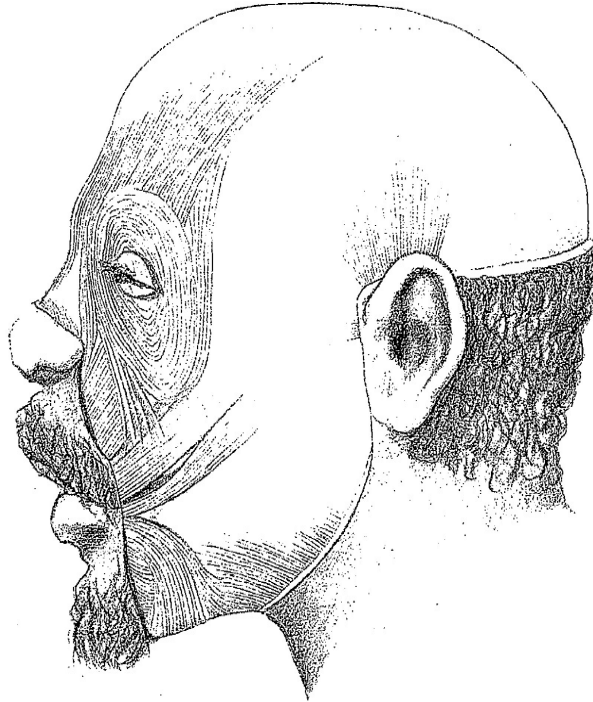


Fig. 3. Herero C ♂.

Kommunikation des Platysma mit den lateralen Triangularisfasern. Zygomaticus maior mit kleinem oberem Nebenbündel, im ganzen schwächer entwickelt als der Zygomaticus minor. Orbicularis oculi untere mediale und obere laterale Randbündel. Sehr breiter Levator labii proprius; auricularis anterior.

Zygomaticus maior anlagert. Der Levator alae nasi et labii superioris ist mit dem Orbicularis oculi vollkommen verwachsen. Erst in der Höhe des Ursprungsfeldes des Levator labii superioris teilt sich der Levator alae nasi und der Orbicularis oculi. Die Breite des Levator proprius beträgt an dieser Teilungsstelle 11 mm. Der Levator labii superioris proprius ist an seinem oberen Teile nur mit der Nasenportion des Quadratus vereinigt, während der Zygomaticus

gut ausgebildet, zeigen keine Verzweigungen oder Kommunikationen (abgesehen von der Mundwinkelgegend). Die Maße sind: Breite des Ursprungfeldes 9 mm links und 11 mm rechts. Die größte Breite ist beiderseits 14 mm.

4. *Quadratus labii superioris*. Der Muskel ist auf beiden Seiten zugunsten des *Levator labii superioris* auf Kosten des *Levator*

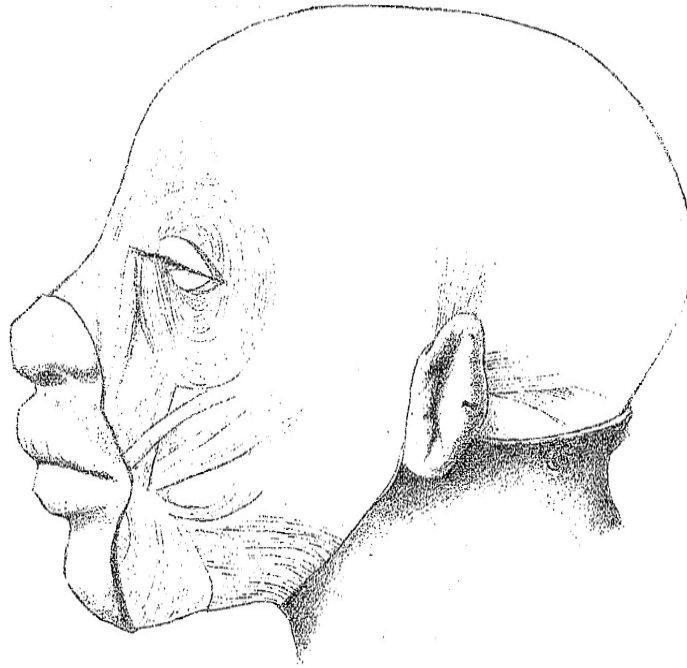


Fig. 4. Herero D ♂.

Triangularis-Risorius (SANTORINI). Schwaches oberes Nebebündel des *Zygomaticus maior*. *Zygomaticus minor* klein, überdeckt den *Levator labii proprius*. *Orbicularis oculi* keine „ausbrechenden Bündel“. Kräftiger *Auricularis posterior*.

alae nasi et labii superioris und besonders des *Zygomaticus minor* stark ausgebildet. Auf beiden Seiten greift der *Orbicularis oculi* auf den *Levator alae nasi et labii superioris* und einen Teil des *Levator proprius* über. Nach Lösung dieser Partie des *Orbicularis* zeigt sich, daß eine genaue Trennung der beiden medialen Portionen des *Quadratus* nicht möglich ist, sondern daß die eine in die andere sich fortsetzt. Die Ursprungslinie stellt eine schwach S förmig gebogene Kurve dar, deren lateraler Bogen dem Ursprungsfeld des *Levator alae et labii*,

lateral gelegene ist, hat vom gleichseitigen Mundwinkel eine Entfernung von 56 mm. Die Maße sind nur auf der rechten Seite genommen, da die linke Seite etwas verdrückt ist; jedoch würden die linksseitigen Maße nur um Weniges mit den anderen differieren.

3. *Zygomaticus maior* (H. VIRCHOW). Beide Muskeln sind sehr

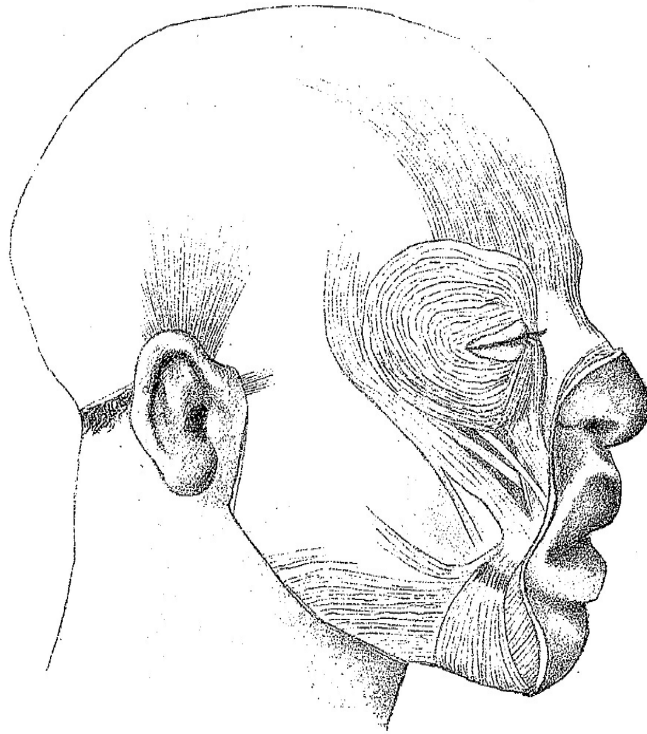


Fig. 5. Herero E ♂.

Spuren eines Nackenplatysma. *Triangularis-Risorius* (SANTORINI). Obere Schicht des *Triangularis* nach unten geschlagen. *Zygomaticus maior*: unteres und oberes Nebenbündel. Ursprung dem *Orbicularis oculi* dicht angelagert. *Orbicularis oculi* sehr kräftig. Laterale obere und mediale untere Randbündel. *Auricularis anterior*.

kräftig entwickelt und sind denselben der vorigen Präparate in den Flächenmaßen als auch in den Dickenverhältnissen der Muskelbündel weit überlegen. Die Breite des Ursprungsfeldes beträgt ca. 11 mm, die größte Breite 15 mm. Auch hier finden sich Abzweigungen vom Hauptbündel und zwar nach oben sowohl, wie nach unten. Das Hauptbündel läuft am Mundwinkel mit dem *Caninus* zusammen, ohne sich jedoch mit seinen Fasern zu vereinigen; der obere Teil zieht hinter dem

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Exhibit C-2

Exhibit C-2. Heinrich F.B. Zeidler, *Beiträge zur Anthropologie der Herero* [*Contributions to the Anthropology of the Herero*], 17 ZEITSCHRIFT FÜR MORPHOLOGIE UND ANTHROPOLOGIE [JOURNAL FOR MORPHOLOGY AND ANTHROPOLOGY] 185, 199, 207, 213, 218, 223 (1914).

Page 185:

Contributions
to the Anthropology of the Herero

Inaugural Dissertation
in Achievement of the Doctoral Title
Approved by the Philosophical Faculty
of the Friedrich Wilhelm University
in Berlin
Presented by
Heinrich F.B. Zeidler
Berlin
Day of Doctorate: May 20, 1914

Page 199:

Fig. 1 – Herero A - ♂

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Fig. 2 – Herero B ♀

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Fig. 3 – Herero C ♂

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Fig. 4 – Herero D ♂

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Fig. 5 – Herero E ♂

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Exhibit D-1

Beiträge zur Anthropologie der Gesichtsweichtheile der Neger.

Von Dr. med. et phil. **Heinrich F. B. Zeidler**, Berlin-Friedenau.

(Mit 5 Textabbildungen.)

Die folgenden Untersuchungen an den Weichteilen von drei kindlichen »Neger«-Köpfen möchte ich als Fortsetzung meiner »Beiträge zur Anthropologie der Herero«¹ aufgefaßt wissen. Ich bin mir zuerst nicht klar darüber gewesen, ob eine Untersuchung von kindlichem Rassenmaterial eine Bereicherung unserer Kenntnisse darbieten würde, zumal sich die Befunde an einheimischen kindlichen Weichteilen, wobei doch sicherlich keine Materialschwierigkeiten in Betracht kommen, in sehr geringer Anzahl in der Literatur vorfinden. Vor allem durch Loth² bin ich bestimmt worden, das noch vorhandene Material meines Lehrers P. BARTELS zu verarbeiten, denn in seinen »Beiträgen zur Anthropologie der Negerweichtheile« finden sich zahlreiche Erwähnungen von kindlichem Rassenmaterial, das sich recht wohl zur Ableitung seiner Schlußfolgerungen verwenden ließ.

Mein Material war zusammen mit den Hereroköpfen während der Afrikawirren von den Herren Stabsarzt Dr. BOFINGER und Oberarzt Dr. WOLFF gesammelt und durch Vermittlung von Herrn Hauptmann WAGENFÜHR Herrn Prof. Dr. BARTELS überlassen worden. Im vorigen Jahre stellte mir Frau Professor BARTELS in liebenswürdigster Weise das noch im Nachlasse ihres verstorbenen Gatten befindliche Material zur Verfügung.

Die Köpfe waren bis zu ihrer Verarbeitung in einer Formollösung geblieben, die während der letzten zwei Jahre etwas schwächer gewählt wurde (5%). Der Zustand des Materials ist durchweg recht gut, wie auch die beigegebenen³ Photographien erkennen lassen; daß die Haut und das subkutane Fettgewebe stark gehärtet war, ist bei der langen Konservierungszeit nicht anders zu erwarten. Allerdings wurde die Präparation dadurch sehr erschwert, und die Köpfe zeigen nach Bearbeitung nicht das saubere Aussehen, wie ich es bei dem vorigen Material erreichen konnte. Diese Tatsache durfte mich natürlich nicht

¹ Zeitschrift für Morphologie und Anthropologie, 1914, Bd. XVII, Heft 2.

² Studien über Forschungen zur Menschen- und Völkerkunde, IX, 1912.

³ Mußten leider im Druck fortgelassen werden.

Hottentotte ♀.**1. Platysma.**

Der Muskel tritt am Kieferwinkel in geschlossener Platte auf die Wange, er verläuft dicht unter dem Bichat'schen Fettklumpen fast horizontal zum Mundwinkel. Erst in dem Winkel zwischen Zygomaticus und Triangularis zerfasern sich die oberen Bündel des Platysma, die unteren bleiben geschlossen und gehen undifferenzierbar in den Muskelkomplex des Mundwinkels, besonders des Quadratus labii inferioris, über. Die medialen Fasern beider Platysma-Hälften bilden ein geschlossenes Ganzes,



Textfigur 1. Hottentotte, Mädchen.

das vom Transversus menti überquert wird. Die Breite des Muskels, mit dem Bandmaß am Kiefferrande gemessen, beträgt rechts 62 mm, links 48 mm. Risoriusfasern fehlen beiderseits.

2. Triangularis.

Der Muskel ist kräftig entwickelt, die Fasern sind derb. In breiter Ausdehnung läuft der Muskel in scharfem Bogen über dem Platysma zum Unterkiefer, von wo sich der größte Teil der medialen Fasern beider Muskeln vereinigt und unter dem Kinn einen 5 mm breiten Transversus menti bildet. Auf der rechten Seite zweigt sich ein Teil der lateralen Fasern schon vorher ab und strahlt in die Wange aus, wo er, vom Mundwinkel 26 mm entfernt, auf dem Bichat'schen Fettklumpen endet. Links ist diese Bildung nur wenig angedeutet. Die Ausdehnung des Triangularis auf dem Unterkiefferrande beträgt 13 mm rechts, 15 mm links. Ein Risorius fehlt beiderseits.

3. Zygomaticus maior. (H. VIRCHOW.)

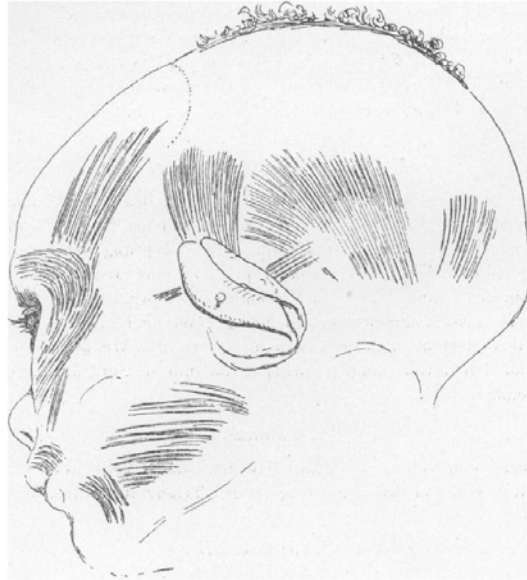
Die Ursprungsstellen liegen auf beiden Seiten unbedeckt, aber anschließend

Herero, Kind 1.

Nach der Entfernung der Haut zeigt sich ein dickes Fettpolster, das das ganze Gesicht bedeckt und am stärksten in der Wangenregion und am schwächsten im Gebiet der medialen Augenwinkel und der Nasolabialfurche ist.

1. Platysma.

Der Muskel tritt nicht als geschlossene Platte, sondern gefiedert über den Unterkieferrand in die Wange, um dem Zygomaticus zuzustreben, und erreicht die



Textfigur 3. Herero, Kind 1.

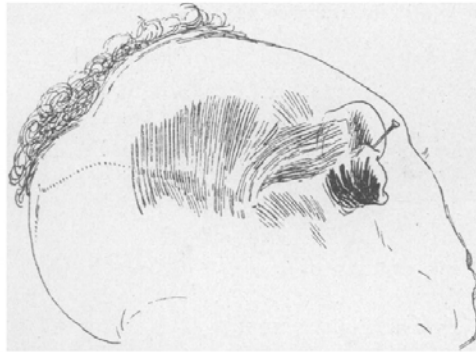
Mundwinkel-Traguslinie. Nur die innersten medialen Fasern biegen nach dem Kinn und Mundwinkel um, jedoch sind auch diese nur schwach entwickelt und keineswegs ein geschlossenes Ganzes. Die Ausbreitung seines Bereichs ist groß, denn die äußersten Fasern laufen dicht unter dem Ohr. Eine „Pars aberrans“ sowie ein Risorius fehlt beiderseits. Die Breite, auf dem Unterkieferrande gemessen, beträgt 61 mm. Der Verlauf in der Halsmitte läßt sich nicht genau feststellen, da das Präparat durch Kehlkopf- und Zungenuntersuchungen sehr gelitten hat. Eine Vereinigung der beiden Hälften scheint bestanden zu haben.

2. Triangularis.

Beide Muskeln sind recht kräftig entwickelt und bilden besonders an den Mundwinkeln eine dicke Muskelerhebung. In weit ausholendem Bogen laufen die Triangulares über Platysma und Quadratus labii inferioris fort, um unter dem Kinn einen 10 mm breiten Transversus menti zu bilden. Auf diesem Verlauf brechen

sollen sie nach den von RUGE aufgestellten Grundsätzen eingereiht werden, woraus sich dann Schlüsse über die Pro- oder Regressivität herleiten lassen. Ich glaube bei der Beurteilung über den phylogenetischen Stand nicht allzu zaghaft vorgehen zu müssen; wenn die jetzigen Untersucher in ihrem Material eine Bestätigung früherer Befunde erblicken, so dürfte man wohl diese, ohne oberflächlich zu erscheinen, so lange als Norm ansehen, bis an Hand von größerem Material eine Widerlegung möglich ist.

Auf das eine kann meines Erachtens nicht oft genug hingewiesen werden: Wer der Ansicht ist, daß sich bei Rassenmaterial Zustände



Textfigur 4. Herero, Knabe 2.

finden, die von dem der weißen Rasse grundverschieden sind, wird in seinen Erwartungen getäuscht werden. Wir finden im allgemeinen nur geringe Abweichungen, deren konstantes Vorkommen uns aber dennoch zu weittragenden Schlußfolgerungen berechtigt. Auf zwei, man kann wohl sagen, durchweg gefundene Tatsachen will ich gleich eingangs hinweisen, die sich auch bei meinem jetzigen Material wieder deutlich ausgeprägt zeigten. Schon der erste Anblick eines präparierten Negerkopfes läßt uns erkennen, daß die Gesamtmuskulatur massiver, die einzelnen Fasern derber sind, als wir es beim Europäer sehen. Das soll nicht heißen, daß wir dieses Bild beim Weißen nie beobachten, es wird aber immerhin eine Seltenheit sein. Das zweite Hauptsymptom bei der Betrachtung der Gesamtmuskulatur ist die geringe Differenzierung der mimischen Muskulatur bei Rassenmaterial. Auch hier habe ich dasselbe beobachtet wie bei den Köpfen erwachsener Hereros, nämlich daß sich die mangelhafte Differenzierung vor allem im Gebiet der Nasolabialgegend geltend macht. Diese beiden Hauptsymptome, die wir als Abweichungen der farbigen Rassen von der weißen Rasse finden, die

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Exhibit D-2

Exhibit D-2. Heinrich F.B. Zeidler, *Beiträge zur Anthropologie der Gesichtsweichteile der Neger* [*Contributions to the Anthropology of the Soft Facial Tissue of the Neger*], 21 ZEITSCHRIFT FÜR MORPHOLOGIE UND ANTHROPOLOGIE [JOURNAL FOR MORPHOLOGY AND ANTHROPOLOGY] 153, 159, 163 (1920).

Page 153:

Contributions to the Anthropology of the Soft Facial
Tissue of the *Neger*

by Dr. Heinrich F.B. Zeidler, Berlin Friedenau

(with 5 text illustrations)

I wish that the following examinations of the soft tissue of three child “*Neger*” heads be considered a sequel to my “Contributions to the Anthropology of the Herero.”¹ I was not sure at first whether an examination of child racial material would offer an

¹17 JOURNAL FOR MORPHOLOGY AND ANTHROPOLOGY, Issue 2 (1914).

enrichment of our knowledge, especially the findings in the soft tissue of indigenous children, whereby...

My material was collected together with the Herero heads during the Africa troubles by Medical Officers Dr. Bofinger and Head Medical Officer Dr. Wolff, and given to Prof. Dr. Bartels through procurement by Mr. *Hauptmann* Wagenführ. Last year, Mrs. Prof. Bartels most lovingly made available to me the material located in the estate of her deceased spouse...

Page 159:

Text Figure 1. Nama, Girl

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Text Figure 3. Herero, Child 1

Page 169:

Text Figure 4. Herero, Boy 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VEKUII RUKORO, Paramount
Chief of the Ovaherero People
and Representative of the
Ovaherero Traditional Authority;
JOHANNES ISAACK, Chief
and Chairman of the Nama
Traditional Authorities
Association, THE
ASSOCIATION OF THE
OVAHERERO GENOCIDE IN
THE USA INC.; and
BARNABAS VERAA
KATUUO, Individually and as an
Officer of The Association of the
Ovaherero Genocide in the USA,
Inc., on behalf of themselves and
all other Ovaherero and Nama
indigenous peoples,

DECLARATION
OF
BARNABAS
VERAA
KATUUO

Plaintiffs,

-against-

FEDERAL REPUBLIC OF
GERMANY,

Defendant.

BARNABAS VERAA KATUUO declares as
follows under penalties of perjury:

1. I am one of the named plaintiffs in this

action, and a resident of Rockland County, New York, within the Southern District of New York. I am also the President of The Association of the Ovaherero Genocide in the USA, Inc., based in New York City, which has worked for more than [] years to seek restorative justice for the descendants of the Ovaherero and Nama peoples who were subjected to genocide and unlawful taking by defendant Germany.

2. I submit this declaration in opposition to the opposition to Germany's motion to dismiss Plaintiffs' Amended Complaint in the above-captioned matter.

3. Approximately one year ago, we received information from Dr. Holger Stoecker, a noted professor and researcher associated with the Institute for Asia and Africa Studies at Humboldt University in Berlin, who has chaired the Africa department there since 2015. Dr. Stoecker informed us that the American Museum of Natural History ("AMNH" or "the Museum") here in New York City has a collection of approximately 5000 human remains that had been acquired from German anthropologist Felix von Luschan in 1926.

4. I and others associated with our organization contacted the Museum, which confirmed the information we had been provided by Dr. Stoecker and others in Berlin, and further confirmed that the Museum's von Luschan collection included remains obtained by von Luschan in the early 1900s from former South West Africa (now Namibia) and elsewhere.

5. I and others working with me on this research project then met with Museum officials and staff, and at least one of our researchers was given access to the relevant archives at the Museum to review and study the relevant documentation relating

to these human remains.

6. Among other things, we learned that von Luschan often employed the help of German colonial soldiers to locate and/or transfer human remains from Ovaherero and Nama territory and lands to Germany, some of which ultimately found its way to New York and the AMNH as part of a commercial transaction involving the transfer of funds.

7. Significantly, Von Luschan collected these human remains while he was employed as the Director of the Berlin Institute for Ethnography (“the Institute”), which was a German government royal museum for the study of anthropology and ethnography established by Kaiser Wilhelm I. Upon information and belief, the Institute still exists today.

8. According to the Museum’s records, it paid about \$40,000 USD in 1926 for this collection of skulls and other human remains. We also were reliably informed by the Museum staff and relevant archival records at the Museum that the funds for the purchase were donated by New York philanthropist Felix Warburg.

9. Our research at the Museum also disclosed that, upon information and belief, the AMNH’s accession record for the collection show that the Museum’s head of anthropology at the time, Clark Wissler, had plans to use the von Luschan collection it had acquired to develop a “Great Hall of Races” at the Museum. The Museum apparently hired a specially trained dentist to examine skulls in the collection. Today, the collection represents a large portion of the human remains maintained by the Museum’s anthropology department for outside researchers to use.

10. The remains of eight individuals have

been identified by the Museum as Ovaherero and Nama remains. There are eight skulls, two of which were accompanied by skeletons. Each is numbered and signed by Felix von Luschan in ink.

11. Specifically, **Skull #2793**, for example, belonged to a 20 year-old woman identified as a “Hottentot” (a derogatory term used by the Germans at the time to refer to the Nama peoples). Markings on the cranium suggest von Luschan purchased it for 20 Reichsmarks from a soldier named Franz Drauschke, who was an “*Unteroffizier*” (underofficer) in the German *Schutztruppe* (German army). A photo of a corresponding note in his archived field manual referencing a receipt issued for the transaction is attached hereto as **Exhibit A**, and two images of the skulls are attached hereto as **Exhibit B**.

12. **Skull #2463** is that of a 30-year-old male Herero (or Ovaherero) from Ovatjimba purchased from a soldier named “K. Borchmann.” Investigation revealed that, upon information and belief, this reference is to “Karl Borchmann,” a German government employee who was a veterinarian and collector working in Windhoek for the Government. Other markings in this skull are less easily deciphered and warrant further investigation. Our investigation continues in order to determine, among other things, whether the Museum archive has a record of the price paid for this skull.

13. **Skull #1512** was, upon information and belief, obtained by Felix von Luschan in his capacity as a German government agent from Conrad Hagenbacher, a German who was a major “dealer” in the collection, trade and sale of skulls, bones, and other human remains from areas where the Ovaherero and Nama were located and where the genocides took place.

14. There are six more individuals whose remains have been recently inspected, upon information and belief, by Ovaherero and Nama representatives and researchers. Notably, two of them came from locations where the Germans maintained “concentration” or death camps for Herero and Nama prisoners: Luederitz Bay (Shark Island) and Windhoek.

15. Also, upon information and belief, the Museum keeps records pertaining to the skulls histories which to my knowledge have not yet undergone full and methodical investigation, including logs of researchers who have used the skulls, as well as the accession record. The Museum’s archives also contain von Luschan’s field manual, in which he noted each skull he acquired in order and assigned them numbers.

16. We are continuing to coordinate with the Museum staff regarding this continuing research, and we are also discussing with the Museum staff the possibility of establishing an online exhibition relating to the history and culture of the Ovaherero and Nama peoples, as well as the genocide, the genocidal taking of Ovaherero and Nama property, and how the human remains of our ancestors came to end up at the Museum here in New York. The Museum has also sponsored receptions and meeting at the Museum so that members of the Ovaherero and Nama communities in the U.S., Namibia, Botswana and South Africa can visit the Museum reestablish the deep connections that we have with the remains of our ancestors that were taken against the will of the people by German government agents such as von Luschen and were then sold for profit or used as part of racist and pseudo-scientific experiments designed to establish the superiority of the Germanic and Aryan peoples and the inferiority of black Africans.

The Blue Book in New York

17. Among the other cultural treasures in New York that relate to the Ovaherero and Nama genocides is a rare copy of the Blue Book, published in 1918, which is located at the New York Public Library's main branch on Fifth Avenue in Manhattan. The book, entitled "Union of South Africa - Report On the Natives of South-West Africa and Their Treatment by Germany," was prepared by South African officials and published in the United Kingdom by His Majesty's Stationery Office (HMSO) and presented to both Houses of Parliament that year. See Blue Book cover, attached hereto as **Exhibit C**.

18. This Blue Book is an invaluable record which includes testimony to the atrocities from genocide survivors. The presence of a Blue Book copy in New York is extraordinary since between the two World Wars Great Britain considered Germany briefly as an ally and attempted to suppress records of Germany's genocide of the indigenous peoples of South West Africa by, among other things, destroying all copies of the Blue Book. The copy located at the New York Public Library is one of the few surviving copies.

New York As A Center For Ovaherero/Nama Genocide Research

19. The Ovaherero and Nama communities in the greater New York area have active social, cultural and educational programs, and have also established a wide range of historical, educational and cultural ties with numerous not-for-profits, museums, cultural/educational entities and multimedia programs

in the New York area.

20. Indeed, New York has become one of the leading research and conference centers for the study of the Ovaherero/Nama genocide. In addition to our ties with the AMNH as discussed above, the Ovaherero/Nama communities have established a relationship with the Schomburg Center for Research in Black Culture, located at 515 Malcolm X Blvd in Manhattan, which, in association with the Plaintiff Association, has undertaken research and conferences, including one entitle “The First Genocide of the 20th Century,” chaired by Dr. Ngondi Kamatuka, who is also a descendent of the Ovaherero/Nama genocide and now a U.S. citizen.

21. In addition, Columbia University has sponsored an ongoing research program, and another major educational conference there focused on the German south west African genocide, bringing together leaders and members of the Ovaherero and Nama communities with photojournalists and documentary film makers based in New York, who have documented the lasting and continuing impact that the Defendant’s genocide has had on the descendants of these victims both in Africa and in the United States. The Holocaust Studies and Human Rights Program of Cardozo Law School, Yeshiva University, has also committed some of its resources to this project.

22. The Ovaherero/Nama Genocide has been given significant attention by the Holocaust Memorial and Education Center, Glen Cove, New York, which sponsored an international conference, research and educational program, and has hosted the filming of a public television program and series with WLIW21 and WNET.

I declare under penalty of perjury under the

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laws of the United States of America that the foregoing is true and correct. Executed on April 23, 2018 at New York, New York.

BARNABAS VERAA KATUUO

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1924-37
AMERICAN MUSEUM OF NATURAL HISTORY
Dear Sir: Accession number 25182 ^{Purchase} has been
assigned to the material recently received in your department
from ^{Felix Wagner} ~~Prof. Felix von Luschan (deceased)~~
Anatomical collection consisting of 5,000
human crania, 200 complete skeletons, study
collection and private library. ^{5/0014/24}
and has been duly acknowledged. Please have this number recorded
in the catalogue of the specimens.
Very truly yours
GEO. N. PINDAR
Registrar
New York, May 16, 1924

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<small>DEPARTMENT</small> FILE OR ACCESSION NUMBER <u>1224-37</u>		<small>REGISTRAR'S</small> ACCESSION NUMBER <u>25102</u>	
AMERICAN MUSEUM OF NATURAL HISTORY ACCESSION RECORD			
NEW YORK, <u>May 5th & 14th,</u> 1926			
RECEIVED FROM <u>Mr. Felix Warburg - New York - as a gift</u> Prof. Felix Von Luschan, (deceased)		<small>DATE OF RECEIPT OF SPECIMENS</small> <u>4/11</u>	
ADDRESS <u>Museum für Völkerkunde, Berlin, Germany</u>			
DESCRIPTION OF MATERIAL <u>anatomical collection, consisting of 5,000 human crania,</u> <u>200 complete skeletons, study collection, and private library</u>			
LOCALITY <u>entire world</u>		No. OF SPECIMENS <u>?</u>	
COLLECTOR <u>above</u>		ESTIMATED VALUE \$ _____	
HOW ACQUIRED { <div style="display: inline-block; vertical-align: top; margin-left: 10px;"> <input checked="" type="checkbox"/> <u>Gift</u> <input type="checkbox"/> <u>Specimens</u> <input type="checkbox"/> <u>Expedition</u> <input type="checkbox"/> <u>Exchange</u> </div>		CONDITION { <div style="display: inline-block; vertical-align: top; margin-left: 10px;"> GOOD <input checked="" type="checkbox"/> FAIR <input type="checkbox"/> BAD <input type="checkbox"/> </div>	
PRICE \$ <u>41,500</u>		EXAMINATION <input type="checkbox"/> DEPOSIT <input type="checkbox"/> STUDY <input type="checkbox"/> IDENTIFICATION <input type="checkbox"/>	
DEPARTMENT CATALOG No. _____			
NUMBER AND NATURE OF SPECIMENS GIVEN IN EXCHANGE, OR OTHER INFORMATION _____ _____ _____ _____			
SIGNED _____			
FORWARD TO REGISTRAR <small>REGISTRAR'S FILE</small> INSERT NAME OF EXPEDITION OR FUND _____		DEPT. OF <u>Anthro.</u>	

Report on Physical Anthropology

April 19, 1927

Director Sherwood:

In response to your request for a memorandum covering future plans for the utilization of the Von Luschan collection, I beg to submit a general statement of the total situation as respects physical anthropology. Unless this situation is taken into consideration one cannot fully understand what has been done with the Von Luschan collection and the limits under which the work in physical anthropology operate.

General Plan

For many years my plan has been to develop physical anthropology in the Museum on the following lines:-

- a. To develop in the Museum a research center for physical anthropology.
- b. To develop a Hall of the Races of Man, to stand as an achievement in museum exhibition.
- c. To prosecute field-work exhaustively in one or two geographical areas, preferably the Islands of the Pacific and South America.

These are reciprocal units in the main plan, one supplementing the other.

Resources in Museum Material

We have a large run of anthropological materials, in the main, falling under the following heads:-

1. A general anatomical collection for the Indians of North America; a special collection for Southwestern United States; and the Von Luschan collection covering, for the most part, the races of the Old World.
2. A large series of plaster casts taken on the living, chiefly for the races of the New World, Hawaii, and miscellaneous examples from other parts of the world.
3. A large collection of photographic material, in which are represented all the ^{main} ~~important~~ racial types of the world.
4. A special collection of racial hair samples.

This assemblage of materials offers opportunity for several major research projects. Of these the most promising are:-

1. The development and sequence of racial types in Southwestern United States. Since it is generally conceded that we have the best collection from the Southwest, research on this material is highly desirable.
2. The Von Luschan collection and our other general collections lend themselves to a number of special problems; for example, age changes in cranial and facial types.

3. Special parts of the Von Luschan collection lend themselves to a study of inbreeding racial groups, the investigation of which should lead to a clearer understanding of race evolution.

These are but examples of problems connected with our collections, the pursuit of which is necessary, if we fully utilize our resources.

Immediate Work on the Von Luschan Collection

We have no staff in physical anthropology, comparable to that for archaeology and ethnology. In archaeology, for example, we have three salaried archaeologists and two honorary members of the staff. In contrast to this, we have for physical anthropology, one paid member of the staff and one honorary member.

Doctor Shapiro is an able young man, just out of the graduate school, with no previous experience in museum work; yet, since he is the only member of the staff specializing in physical anthropology, he must perform all the duties of a keeper of such collections, meet visitors wishing to study our material, carry on correspondence, etc. The size and extent of our physical anthropological collections make these responsibilities heavy, so that there is little time left for research. Doctor Hellman, the honorary member of the staff is a very able investigator and will some day bring out a study of prime importance, chiefly based on the Von Luschan collection, but we have no demand on his time, nor do his professional duties permit him to give much attention to the work of the Museum.

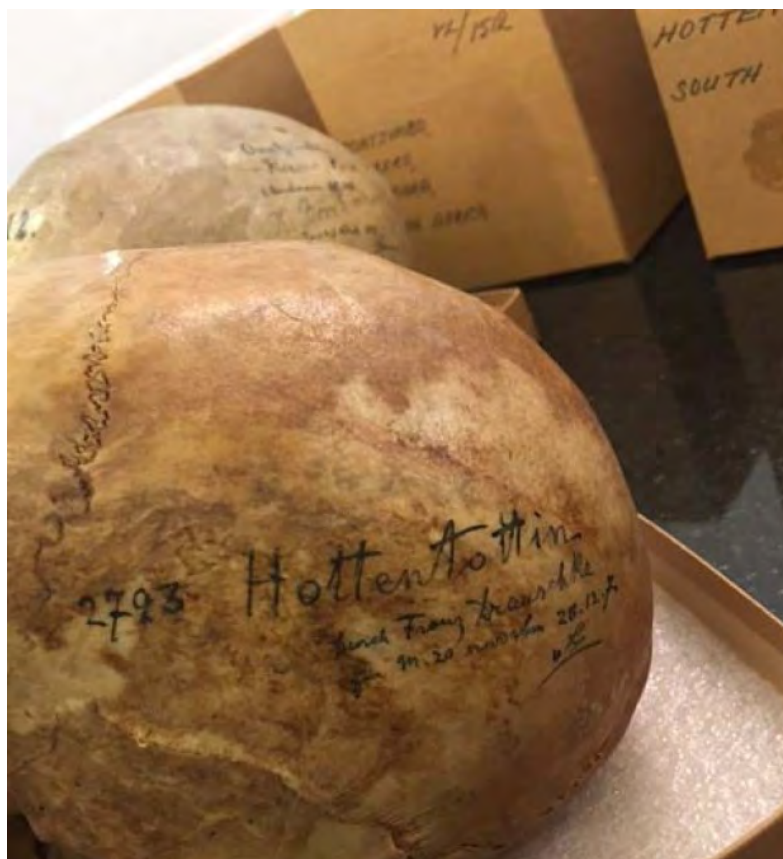
I also call your attention to the fact that the staff budget for physical anthropology for the year 1927 is \$2400. In addition, we have a special fund which yields about \$500 a year for the purchase of additional material. That this provision is entirely inadequate is obvious.

Immediate Needs

To bring physical anthropology up to the level of archaeology calls for additional financial support. To fully realize on our investment in anthropological materials and to fully develop our exhibition plans we need an additional \$25000 a year. If such a sum could be pledged for a period of five years we could develop an adequate staff and carry through the program scheduled. At the outset such an appropriation would provide the following:-

1. An additional curator in physical anthropology.
2. A regular statistical assistant.
3. Stipends for two research fellowships, such fellows to work upon museum material in hand.
4. Of this amount \$8000 would be needed annually for publication. The situation as respects anthropological publications is such that even should Doctors Shapiro and Hellman complete researches there is no possibility of publishing the same, except outside financial support be found. In fact, the publication situation is at present so hopeless that there seems no good reason for encouraging research on the part of the staff.

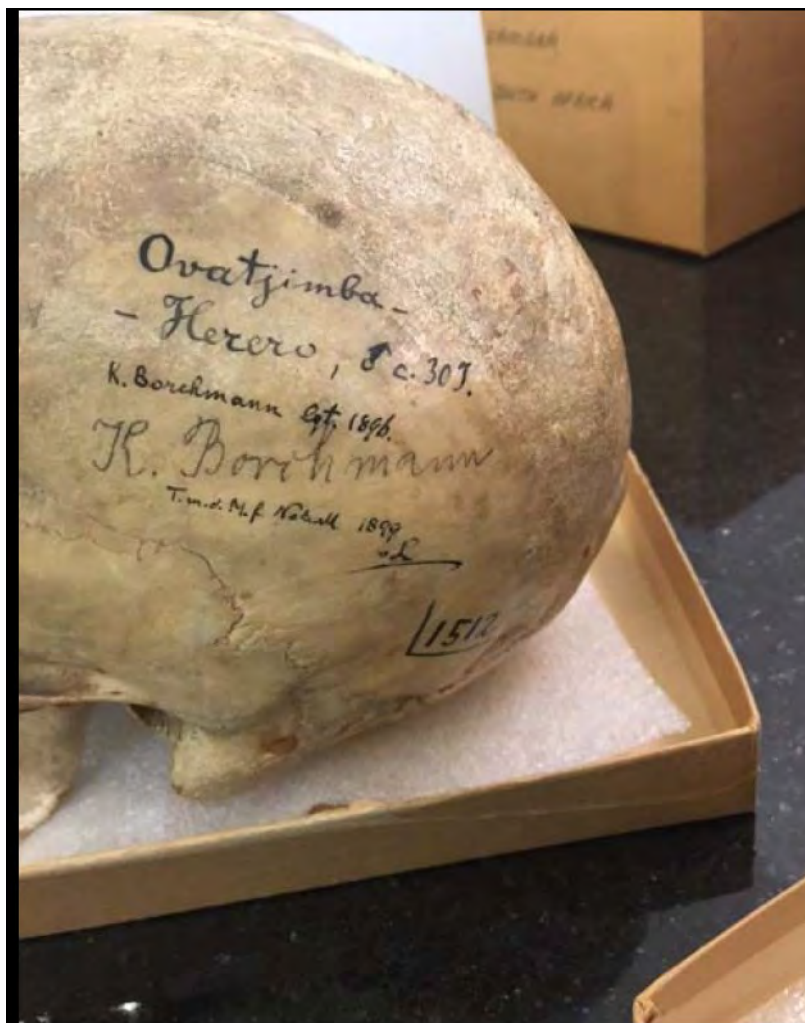
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UNION OF SOUTH AFRICA



REPORT

ON THE

NATIVES OF SOUTH-WEST AFRICA

AND

THEIR TREATMENT BY GERMANY.

Prepared in the Administrator's Office, Windhuk,
South-West Africa, January 1918.

Presented to both Houses of Parliament by Command of His Majesty.
August, 1918.



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