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Title: German Colonialism in the Courtroom—Law, Reparation, and the Grammars of the Shoah

Abstract: In recent years, activists and human rights practitioners have turned to domestic and international legal mechanisms to attempt to address and redress the international legacies of colonialism and slavery. Such demands for redress are often made through the juridical and human rights language of accountability known as reparations. Successful lawsuits such as the cases of Mau Mau torture in Kenya and the Rawagede massacre in Indonesia suggest new horizons of juridical accountability for colonial atrocity, if not for colonialism and settler colonialism as structuring relations. This article examines a set of hearings that failed in going to trial and winning reparations, though they may have helped in the long and ongoing struggle for repair: that of the Herero and Nama v. The Federal Republic of Germany, which took place in New York City between 2017 and 2019. I explore the conditions of possibility for bringing such a case on American soil, arguing that the legacy of the 1990s Holocaust Restitution Movement is a key historical and epistemic condition. This movement understood the Jewish genocide to be primarily an economic crime. What happens, I ask, when this 'economic grammar of the Shoah' is applied to the context of a German colonial genocide in a New York courtroom? I suggest that this grammar provides both an opening and a foreclosure of reparatory possibility in the context of a colonial history where private property was not taken away but was rather *imposed* in order to dispossess. Overall, I demonstrate how specific forms of thinking and reasoning with the history of the Shoah can come to inform the manner in which other histories of racial violence at other times are narrated and contested.

Keywords: Reparations, Colonialism, the Holocaust, American courts, Genocide, Settler colonialism, Race and Racism

Social and political struggles to repair the global legacies of European colonialism, slavery, and native genocide are today ubiquitous. Domestic and international legal mechanisms have, in many cases, become central to these struggles. Successful lawsuits such as the cases of Mau Mau torture in Kenya[i] and the Rawagede massacre in Indonesia[ii] suggest new horizons of juridical accountability for colonial atrocity, if not for colonialism and settler colonialism as structuring relations. Often referred to as the "Jewish precedent", the history, legacy, and general idea of reparations to European Jews in the aftermath of the Shoah hovers overs these struggles and legal disputes[iii]. This article looks to the question of reparation for colonialism and slavery in relation to reparation for the Shoah by turning to a legal case in which this relationship is figured as central: that of the Herero and Nama v. The Federal Republic of Germany, which took place in New York City between 2017 and 2019.

In this article, I explore the conditions of possibility for bringing such a case on American soil through legal-historical analysis. While ostensibly a case that solely concerns questions about German colonialism, native dispossession, and stolen assets in Namibia, I argue that the case ended up being as much to do with the Shoah. A particular figure of the injured Jew and a historically American conceptualization of the Shoah as an economic crime informs this case, a crime that Irwin Cotler has referred to as *thefticide*[iv]. In the 1990s and early 2000s “Holocaust assets” became an arena of struggle for the American government and a set of American Jewish institutions and lawyers in the backdrop of the end of the Cold War and the triumph of American neo–liberalism[v]. In that moment, tort law, as opposed to criminal law, became a central mechanism for thinking through ‘Jewish repair.’ Undoing the harm of the Shoah to the Jewish diaspora centralized the question of restoring private property—especially financial assets, insurance policies, and most famously, stolen art. This is known as the "Holocaust Restitution Movement."[vi] I argue that this movement has come to contribute to a ‘propertyfication’ of a pre–existing grammar of the Shoah informed by American capitalism,

a way of thinking about the Shoah that is not identical to—for example—Israeli or German conceptions. It is a grammar of genocide as 'thefticide' bolstered by the emphasis of American (neo–)liberalism on private property, commercial transactions, and restitution as restoration of assets within a capitalist system.

This was a moment that has been meaningful for non-Jewish people seeking repair in courtrooms, providing them with a precedent and opening for legal action[vii]. It also, and at the same time, requires activists working with this precedent to present their case, through their lawyers, as a case of economic crime and loss of private property, with the case of theft of Jewish property as the ur-text. Whether through reference to Jewish art or reference to bones as stolen assets rather than stolen persons, an economic grammar of the Shoah, I argue, is key to understanding this case—one that moves beyond the maneuvers of lawyers in courtrooms. I look to how, in the courtroom, the Herero and Nama genocide is interpellated into both the confines of American tort law *and* an economic grammar of the Shoah, quite particular to the US context, that emphasizes theft of property and comparison to the Jewish genocide *as thefticide*. We see how reckoning with the aftermath of the Holocaust, and particular forms of American Jewish and non–Jewish self–fashioning and coalition making, can have an emancipatory function for indigenous people once (or perhaps still) colonized, but they can also be part and parcel of a process of dehumanization that denies the specificity of settler colonialism in Africa itself. To an extent, the Herero and Nama genocide becomes *prologue* to the story of the Shoah, and *epilogue* to the Holocaust Restitution Movement. Whilst my focus in this article is legal–theoretical, it is first necessary to engage with my involvement in this case in my wider work.

On Plaintiffs and Researchers

Between 2017 and 2019, I followed the ins and outs of a set of demands for reparations for German colonialism—focusing on the Herero and Nama genocide and its afterlife. These were demands that became politically and legally salient in the United States, Germany, and Namibia. As part of my work, I observed court proceedings in New York City between 2017 and 2019—where Herero and Nama activists attempted to sue the German state through American human rights lawyers (working pro bono) in a district court. They sued for damages for the genocide committed against their ancestors more than a century ago, as well as for its racial afterlife, and their contemporary exclusion from bilateral negotiations between the German and Namibian states. This case is part of what is now a landscape of struggle around the legacy of German colonialism, especially in Namibia, in which there has been what Anna Schirrer calls a "proliferation of various reparative rationales across multiple scales."[viii] In the Herero and Nama case, those scales include domestic struggles over ancestral land in Namibia itself[ix], bilateral negotiations between the German and Namibian states[x], and international struggles for the return of skulls and artefacts[xi].

When I heard about the reparations case against Germany that was going to take place in New York courts, I wanted to observe the case. After reaching out over Facebook, I met with Kariu Mbeumuna (a pseudonym), one of the plaintiffs from the Association of the Ovaherero Genocide in the USA at a bakery on 115th Street by Central Park, where Mbeumuna told me that he was born and raised in Namibia in an Ovaherero family under apartheid. He explained to me that the Herero and Nama people had become diasporic because of the genocide of 1904–1908, which caused their dispersal to numerous other locales, including eventually the United States. This was, and is, a transnational struggle, one that links activists in the United States, Canada, Germany, the UK, Botswana, South Africa, and Namibia. It is

partly this transnationalism that has made it possible for some Namibians—especially Ovaherero living in the United States—to access American courts.

Mbeumuna invited me to attend the pre–trial hearings, to observe the proceedings, and to help spread knowledge of this history. He told me too of another 'supporter,' another white Jewish person, an American woman. Together, she and I were at many of the hearings that followed. Many of the lawyers, too, were white and Jewish, or had been deeply involved in prior cases involving the Holocaust. It was here that an aspect of my positionality that I had not considered became clearer: I was part of a wider interest in this case on the part of some white Jews, including lawyers involved in the case, who were and are interested in legacies of German race–making that link histories of Jewish subjugation on the part of the German state to other histories of racial subjugation. Whilst a minority, the number of Jews interested in this case is growing. In the process of engaging in this case, however, I began to understand that my position as a Jewish "expert" in this process was a crucial piece to be investigated.

I came to realize, then, that the involvement of Jewish expertise in the case was not coincidental, and it is not only because of New York City's large Jewish population. It also must do with the complex ways in which this history, as Samudzi has outlined, has become seen in some quarters to be a *prologue* to the 'main story' of the Shoah[xii]. This court case, then, became a reparatory *epilogue* to the 'main story' of Holocaust *reparations.* What I was researching, then, was as much what brought me to this case in New York as a Jewish social justice activist and anthropologist, as that which brought Namibians themselves to the case. I came to appreciate the precise ways in which this Namibian legal struggle gets interpellated into a set of legal and political questions concerning the aftermath of Holocaust reparations. Whilst ethnographic work in and around the courtroom was central to what became my dissertation, in this article I draw solely on evidence gathered from semi-structured interviews and analysis of court transcripts to specifically elucidate a legal-historical argument. I argue

that this court case reproduces the idea that the Herero and Nama genocide was a form of economic crime, a *thefticide,* an idea that partially derives from the Holocaust Restitution Movement.

The Herero and Nama Genocide(s)

Germany was a major colonial power between 1884 and 1914. During this time, the German state committed the horrors that have come to be known as the Herero and Nama genocides. The majority of both the Herero and the Nama people were murdered between 1904 and 1908[xiii]. Damara and San people were also significantly affected by a mass extermination policy initiated by German colonial troops in alliance with settlers, using British weaponry in Southwest Africa, now independent Namibia, while the territory was a German colony. Yet mass extermination was not the sole, or even the primary object of the genocide. As Zoé Samudzi argues, the genocide constituted more than the very specific "intention to annihilate" that Lemkin had in mind when coining the term.[xiv] The massacres were part of a wider settler–colonial process according to which indigenous peoples in Namibia were deprived of their lands and livelihoods through the concept of *Lebensraum*[xv]. It was part of a militarized German science, crucial to the emerging pseudoscience of eugenics that would reverberate across the world and which influences contemporary practices of genomics.[xvi] Their lands were seized by white settlers—English, Germans, and Afrikaaners, who dominated the country subsequently under a decades–long occupation as part of South Africa's apartheid regime. Those lands are predominantly still in white hands in a country in which Black people live with different gradations of sovereignty[xvii]. South African domination forced Namibians' struggle to entirely concern questions of sovereignty and liberation from South Africa—the German genocide and its afterlife were sidelined. In the years since independence from South Africa, the genocide has now become central to discussions of Namibian lives and livelihoods—especially for those

whose ancestors were targeted by extermination orders, land expropriations, racial science, and German anthropology—Herero, Nama, Damara, and San people. Herero and Nama skulls taken at the time to be used in scientific "experimentation" continue to sit in European and American institutions today—including the American Museum of Natural History[xviii]. The dispossession of their bodies and their incarceration in Euro–American hospitals and museums is deeply interrelated with the dispossession of land, artefacts, and human remains throughout European colonies. It is a story that links European colonialism to the colonial museum and the discipline of anthropology,[xix] and the sciences more generally themselves.

It is in this context of continuing dispossession, erasure, and neglect that Herero and Nama activists both inside and outside Namibia have fought to seek redress ever since the end of apartheid and the independence of "Africa's last colony" in 1990[xx]. Herero and Nama organisations have come together twice since the year 2000 to collectively sue German corporations and the German state in acts of lawfare. The first set of hearings took place against German corporations between 2001 and 2003 in Washington DC[xxi]. This article focuses, however, on the second set of hearings that took place against the German state between 2017 and 2019 at the Southern District Court in New York City. In a series of pre-trial hearings, lawyers made arguments, moved through discovery, and met with representatives of the German state in the presence of a large number – approximately 60 – predominantly Ovaherero and Ovambanderu people who flew from Namibia to be present in court. The lawyers sued the German state on behalf of a Herero and Nama class action for damages for the Herero and Nama genocide and inclusion in bilateral negotiations between the German and the Namibian governments. They represented three organisations who came together to form a class action and speak in the name of Herero and Nama people worldwide: the Association of the Ovaherero Genocide in the USA – a group of Herero people living in the United States, the Ovaherero Traditional Authority – represented by the paramount chief and representing the vast majority

of Ovaherero people in Namibia, Botswana, and South Africa, and the Nama Traditional Leaders Association – representing the vast majority of Nama people and their various nations within Namibia itself.

On the 6th of March 2019, the final case was dismissed on the grounds of foreign immunity by Judge Taylor Swain. Yet, surprisingly, she did not reject much of the substantial claims, that is, she acknowledged that a genocide had indeed taken place in Namibia. The case was appealed but was dismissed once again at the court of appeals. Although this most recent case never went to trial, the fact that the German state sent a representative was considered by many present to be a success. The German state is responding in ways that accept what politicians call "moral and historical" responsibility, while refusing what they call "juridical" responsibility—and referring to what happened through the lens of "historical atrocity" rather than "genocide." In the public words of Herero activist and politician Esther Utji Muinjangue, "The German government are so careful not to use the word 'genocide' because as soon as they do then they have to commit themselves to something."

Several analyses examine the powerfully contradictions and inadequacies of the German state's genocide–denying response to this case that valorises colonial law, reproducing racial constructions of indigenous barbarism[xxiixxiii]. While keeping in mind Germany's investment in the valorisation of colonial law throughout the hearings, I focus here instead on the question of what made it possible for this case to be heard in New York in the first place, and the relationship between that historical framing and the juridical language through which it was presented to the court. I look specifically to how, in the process of this history going through New York courts, the Herero and Nama genocide was interpellated into the Holocaust Restitution Movement and into ways of reasoning about theft, dispossession, and loss of life that can be understood to derive as much from an economic grammar of the Shoah as the legal system itself. This is not the work of any individual agent, but rather a structural condition in

the context of an American legal establishment that privileges property rights and a (neo–)liberal cultural context which has come to understand the Shoah as a singular exercise in asset–stripping as much as an exercise in mass murder and desire for *lebensraum* (living space). The case both allows the history of German colonialism and genocide to be heard and demonstrates that it is almost impossible to do so without the intermediary of a prior, American specific, economic grammar of the Shoah. I thereby draw upon and further arguments of scholars who have also focused on the Holocaust connection to reparations in this case such as John Torpey[xxiv] and Jeremy Sarkin[xxv], but who have not looked to the concept of thefticide. Like the context of the Shoah, such a notion of colonial genocide as thefticide has effects beyond the courtroom itself. Colonial crime becomes reified as *theft*, contributing toward a general lack of attention to the way that a property relation must first be imposed upon the colonized for any theft to take place. Whilst there are certainly important links between Nazism and European colonialism, the former by and large did not introduce capitalist property relations to the territories that it occupied, whereas the latter did. This difference is flattened in the context of the understandable desire to make them comparable histories where Auschwitz is sacralized and the Holocaust continues to receive attention as the "crime of crimes"[xxvi].

Genealogizing the Case: The Alien Tort Claims Act and the Holocaust Restitution Movement

At first glance it could be easily assumed that this case was heard in New York City solely due to the specific opening that allows for some cases outside of the US to be brought under American jurisdiction. To understand this, we must first turn to a law created at the dawn of the American republic known as the Alien Tort Claims Act. The act has ostensibly allowed non–US class–action lawsuits to take place on US soil since 1789, though this has been significantly watered down in recent years. This was a piece of legislation that drew directly

on the notion of the 'law of nations' at the moment of the American revolution. It was designed to prevent individual states in the fledgling republic from going against their commitments to the international law of the time—most significantly to prevent them from contravening European interests.[xxvii] The statute states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The act was, however, only used twice before the 1980s, when the Cold War was coming to an end and the 'human rights revolution' reached its peak.[xxviii] Between 1980 and 2004, foreign nationals liberally made use of the act to sue in the United States for torts arising from human rights violations, even when those violations occurred not on American soil.[xxix] The liberal legalism that undergirded foreign justice–seekers turning to United States courts in the wake of the Cold War enabled courts to assess questions that other jurisdictions had been unable to answer, not least due to often strict statutes of limitations. The international system and the courts that define it—whether the International Criminal Court (ICC) or the International Court of Justice (ICJ)—are woefully inadequate at dealing with the question of reparations for colonialism, slavery, and genocide committed by the West. American courts have, sometimes, come to fill in that gap,[xxx] in ways that often occlude American racial violence. In many ways, it is the Alien Tort Claims Act and tort law more generally that mean that cases such as this one must speak so closely to questions of property and damages *to* property.

There is, however, another genealogy of how this case entered the New York courts and its related emphasis on damages to property, and this is the question of the place of the Holocaust in American life. In the aftermath of the Shoah, Jewish activists in various locations worked toward a political settlement that led to the Luxemburg Reparations Agreement in 1952[xxxi]. Payments were made—whether in the form of cash or commodities—to the State of Israel and to the Jewish Claims Conference, a body setup to represent global Jewry beyond the

Jewish state. Local German restitution and reparation laws were also implemented.[xxxii] Together, these ongoing processes have come to be known as *Wiedergutmachung* (making good again). The early 1950s moment was not, however, designed to alleviate either structural or individual racial injury, since the Shoah was not yet understood to be anything particular at all, let alone foundational to the post–war order.[xxxiii] The question of seized Jewish property in Europe was left almost completely unresolved.

After the reunification of Germany and the end of the Cold War, the Holocaust past became once more politically salient to the present – alongside the question of how to reintegrate the collectivized property regime of the former Soviet Union into capitalist systems and capitalist property relations[xxxiv]. In this early 1990s moment it was the United States rather than Germany or Israel that made adjudication of the Holocaust past central to its political identity—especially under Bill Clinton's government—and this time the question of property was front and center—spurred on by the work of the World Jewish Congress and its search for a new role after the Soviet Union's collapse[xxxv]. American courts heard an enormous number of issues that had been left seemingly unresolved in the 1950s: slave labor in concentration camps, Volkswagen and its "Nazi nurseries," Swiss banks, American companies that profited from the Shoah, German pharmaceutical companies, and of course, art collectors. Many of these cases were settled out of court—the most prominent of which led to the German Foundation of Memory, Responsibility, and Future[xxxvi]—a collection of German corporate and German state funds dedicated to compensating victims of National Socialism, especially forced laborers.[xxxvii] While the issue in court differed, the legal apparatus was always similar with its focus on tort law and its emphasis on 'unjust enrichment'[xxxviii]. Essentially, the Nazi genocide was seen to be a massive unjust investment. According to Derek Brown, for example: "Historically speaking, genocide is a very lucrative business. While it often requires a hefty

initial capital investment, it may provide an enormous return on investment when executed properly."[xxxix] Genocide is thereby framed in relation to economic investment.

This, as William Schabas argues, constitutes a reading of mass atrocity as "thefticide" and, in the American case, its focus is primarily, though not exclusively, those who once held significant private property: "The focus (was) on the Holocaust as thefticide, whereby prosperous Jews lost their artworks and antiquities, their large homes and their Swiss bank accounts…"[xl] For the HRM, it was not that the Holocaust was made to fit the confines of American tort law, it was rather that the Holocaust itself was understood by a number of lawyers and diplomats, including members of the Clinton administration, to be the "greatest robbery in history" and that, therefore, tort rather than criminal law was deeply appropriate for its adjudication. The HRM produced, and was produced by, a political and economic moment in which history had apparently come to an end – in which the final "wrongs" of the Shoah could be made right again – the violations against property and against the 'normal' engine of capitalism itself. The American legal system alongside American (neo–)liberal notions of "life, liberty, and property" infused a moment in which *Lex Americana* was hailed as the centre of Jewish and non–Jewish repair for legacies of racial violence.

The HRM, then, contributed to the centrality of questions of property in the American imagination when it came to the Holocaust. The seizure of Jewish art, for example, has inspired numerous books, movies, and ongoing court cases. What did this moment do to American understandings of Jewry, the Holocaust, genocide, and racial violence more generally? For non–Jewish people involved in struggles for reparations for colonialism and slavery, how does that grammar affect the way the history of another genocide at another time committed by the German state enters American courts, in this case when one can argue that the two genocides have deep structural links?[xli] What happens especially when other histories of racial violence, here the Herero and Nama genocide, become framed through the notion of "thefticide"? I want

here to turn to some of the specificity of the legal filings of the case in New York City to examine these questions. My evidence here is primarily drawn from the court filings, semi-structured interviews, and public statements on the part of activists and lawyers, though informed by public hearings that I attended.

The 'Reparatory Continuity Thesis': Between Holocaust Reparations and Reparations for Colonialism

The 'continuity thesis' is the name given to a historiographical notion that there is a direct link between German colonial genocide in Namibia and German genocide in Europe – echoing arguments made by scholars such as Frantz Fanon, Aimé Césaire, Hannah Arendt, and Jürgen Zimmerer. It is partly because of the continuity thesis that newfound attention in Europe has been given to genocide in Namibia, and it is a thesis that appeared and that appears strongly in the court case itself. On the very first page of their submissions, after stating that the plaintiffs are suing for damages and inclusion in bilateral negotiations, the filings read:

> 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.[xlii]

Such conceptions of continuity are echoed at other points throughout the filings, and this use of historical literature and notions of continuity seems to have little to do with questions of jurisdiction and commercial transaction. It communicates something beyond the letter of the law—that is—that this case is not only about genocide in Namibia, that it also concerns other atrocities at other times, namely the Holocaust of European Jewry— a genocide that took place in the heart of Europe. This notion of continuity between the Holocaust and the Namibian

genocide is one that the lawyers ascribe to—evidenced too by the fact that the lead lawyer met the plaintiffs at an event entitled "From Africa to Auschwitz" at the Long Island Holocaust Museum. In a country where the Holocaust has become seen to be the *crime of crimes,* echoed throughout the West– as Natan Sznaider and Daniel Levy have argued[xliii], there is a significant political gain to be achieved from the notion that the Namibian genocide case led to the Holocaust—that the Herero and Nama people are, in my words: "proto–Jews." The idea that genocide in Namibia was a dress rehearsal for the Holocaust denies the settler–colonial specificity of the Herero and Nama genocide—and yet what it allows the lawyers to show is that the history of the Herero and Nama people matters in an international system that sacralizes Auschwitz[xliv]. It also, of course, demonstrates the deep structural connections between anti–Black racism and antisemitism – an important observation – though a historical observation that can often reduce the injured Black subject to the (imagined) world of the injured Jewish subject.

Yet it is not only the global sacralization of Auschwitz that matters here in the context of the use of the continuity thesis. There is also something about how this case is seen to be a story about restitution and reparation for the Holocaust itself, a 'Reparatory Continuity thesis' that frames reparations for the Herero and Nama genocide as an *epilogue* to Holocaust reparations. This is the idea that Herero and Nama people should get the same treatment that Jewish people received at the hands of American courts. When I explained to one of the lawyers in an interview that I had come to the case partly through recourse to my own investments in reckoning with Jewish identity, he said:

> I have that background, the Jewish background–because this case, in some ways is *about the Holocaust.* (my italics). If you accept any part of the continuity theory, the idea that there is a link here–that what the German government was doing in 1904 and then what it did in 1933–1945, there is some link. Anyway who honestly looks at the history has to accept some link. It is hard to put into words. A lot of the scholars write

> about it, and I would defer to them. My Jewish background does inform my participation in the case to some extent.

How this case is inserted into a continuity with Holocaust reparations and the context of Jewish legal activism is here clear. In the context of the above quote, this happens through reference to continuities between genocide in Namibia and the Shoah, or reference to the relationship between this case and Jewish identity, or that this case is "about the Holocaust." Yet it also is an assumed processual link between the Holocaust era cases of the 00's and the Herero and Nama case. Several of the lawyers involved in this case were actively involved in prior cases involving Holocaust compensation, and they came to be interested in this case often through their experiences in those prior cases. In another interview, a lead lawyer on the case explained to me:

> I became involved in this particular struggle about a year ago. And it's interesting that the Holocaust was mentioned. Because I spent a good bit of my career representing various Jewish organisations, Jewish groups in various Holocaust related litigations against France and ultimately, the litigation and settlement with Germany and German industry in 2000. And it was a long struggle. But I think I can learn, we learned a few lessons to ultimately achieve success….

In making such arguments about Holocaust reparations, the Herero and Nama plaintiffs are understood to require litigation to deal with a similar issue that was dealt with in those prior Holocaust cases that were central to the Holocaust Restitution Movement. A grammar of the Shoah here informs a style of thinking about the case. This is undoubtedly an act of solidarity in a context where organisations such as the World Jewish Congress and the ADL so often argue that the Holocaust is exceptional, an idea of singularity that is echoed by some Holocaust studies scholars both today and in the past[xlv]. It is intended to show that it is not only Jewish people who can receive justice from American courts – that "Holocaust Justice" can be expanded to other peoples at other times. Yet, like the historical continuity thesis more

generally, it also assumes that both cases can be dealt with in a similar kind of reparatory form, namely the idea of racial violence as economic crime, as 'thefticide'. In what follows I want to explore the parameters of this solidarity which articulates both the Herero and Nama genocide and the Holocaust as forms of thefticide.

Thefticide, Unjust Enrichment, and 'Bone Jurisdiction'

The legal filings for the case on the side of the plaintiff, unlike on the side of the defendant (Germany) were rigorously researched and provide a detailed description of the history. They tell a largely accurate history that does not confine the genocide to the actions of individuals such as infamous "genocidaire" Lothar Von Trotha, emphasizing several of the dynamics of settler colonialism beyond individual perpetrators—especially the dispossession of ancestral land, animals, and human remains due to state, settler, religious, and scientific violence. It is certainly the loss of these lifeworlds and not just the loss of life that formed a central part of the genocidal process itself. The filings describe the dispossession of these elements of indigenous life and livelihood with a technical and emotionally charged emphasis on one element in particular: thefticide: "Defendant merged the twin goals of taking and genocide into a single policy, practice, and endeavour. The takings were themselves genocide, and the genocide was itself a taking."[xlvi] This focus on land, cattle, and skulls importantly goes beyond the typical focus on indigenous peoples being targeted "purely for being indigenous"—and it is a legal maneuver that comes closer to matching the reality of indigenous dispossession. Yet it is a focus that inevitably ends up ignoring how colonial genocide turned land, cattle, and skulls themselves *into* property—it reifies capitalist and colonial notions of property. The argument is that German colonizers went to "Southwest Africa" (Namibia) and found propertied people whom they dispossessed of said property. This is the argument for *why* New York courts have jurisdiction, aside from the Alien Tort Claims Act. It is a necessary argument

given the confines of American law and liberal law more generally, yet it is also an argument that is influenced by and goes on to influence the narration of the story of the Herero and Nama genocide as a violation of Plaintiffs' rights in property.

Perhaps the most significant element in this narration of genocide concerned human remains, namely the "skulls, flesh, brains, hair, and other mortal remains of family members… and the corpses of family members." (178/42) For Herero and for Nama people (and indeed for Damara and San people)—the return of human remains is as important a demand as the return of ancestral land[xlvii]. The brief goes on to state: "By taking these skulls, Germany's message was not only that Herero and Nama lives did not matter, but that they were not really human lives at all." Maintaining human remains in western institutions or on German Namibian farms is part of the *ongoing* denial of humanity of this genocidal process—it is the continuation of the genocide itself. And skulls became central to this case, not primarily because—as has sometimes been argued—they are central to the demands of Herero and Nama people in the American courtroom. In fact, the return of skulls was not central to the legal *demands*, the emphasis on skulls in this case and the intensity to which they were under discussion in the media as a result had more to do with the search on the part of the legal team for a "jurisdictional hook." – something that can be argued in court so that a New York court can legitimately be seen to have jurisdiction. For the case to be actionable, plaintiffs needed to prove that commercial activity had been "carried on" in the US with a direct connection to the Herero and Nama genocide. Lawyers struggled in the first instance to find that link, to demonstrate to an American courtroom that there was a link between American economic activity and German economic activity that could somehow be traced to the "fruits" of genocide in Namibia. After the second hearing, however, the American Museum of Natural History announced that they had found Herero and Nama skulls in their collection, skulls from the Von Luschan collection that had been used for eugenic science—these human remains had been sitting at the museum

for decades[xlviii], and it was one of the successes of legal activism that the museum finally began to think about the possibility that German genocide in Namibia may have contemporary imprints in its collections. The presence of these skulls and the fact of their entrance into a bone trade became *the* avenue in and through which jurisdiction could be argued for—the "fruits" of the genocide were found to be present in New York city itself.

Herero and Nama people consistently talk of these remains as individuals with personhoods, as ancestors who have not yet been buried[xlix]. In the pre–trial hearing context those personhoods needed to be converted into *property* and into part of the history of business in the courtroom for a New York court to have jurisdiction. This idea became known in and outside the courtroom by the lawyers as "bone jurisdiction" — the turning of indigenous personhood into a legal basis for jurisdiction. In one court hearing that I attended in 2018, the skulls at the American Museum of Natural History were shown on screens inside the courtroom. While being displayed for the attendees and the judge to view—remains that are extremely distressing for many to witness—the argument was made that these skulls were sold to the United States as part of a commercial transaction and that it was this that constituted the movement of German property and that therefore gives the US jurisdiction over Germany. The following transcript from the court is illustrative:

> LAWYER: Now, as we argued in our papers, the primary commercial activity that was engaged in by Germany was in the business of bones and eugenics which was a very big business at that particular time. What we have –
>
> THE COURT: Business in what sense? Was it horrible? It was development of these theories upon which government

> policies were predicated. It was the basis of science that is
>
> not respected. But how is it business?[l]

Paradoxically in this case, the lawyers are having to prove to a New York court that skulls are property and that eugenics was business, that is—rather than emphasizing the inhumanity of trading in human remains—the emphasis must be on the property relation. In many ways this is, of course, not untrue. Eugenics was a business of sorts. It was also, however, racial science and involved the enforced movement of human remains, of ancestors. But it is not science that is here on trial—the intricacies of the eugenics movement and the precise nature of dispossession of personhood is subjected to the rational calculation of the courtroom through a notion of "bone jurisdiction." Remains become legal objects. We see a process of juridification,[li] and a related process of depoliticization—in which the loss of family and the presence of family members' human remains must be considered as part of a commercial transaction to be considered acceptable fodder for the demanding of repair. The New York court proceedings, therefore, enable attention to the stripping of assets that can be understood as 'private property'. They highlight, in an important way, how the history of colonial genocide can also be seen as a history of economic theft. They disable, however, attention to the specificities of colonial violence, in which property expropriated was not originally 'private property' but became private property because of colonization.[liiliiiliv] The proceedings also focus on those who were targeted due to their possession of ancestral land, or who possessed cattle (though not through a private property framework) — especially the Ovaherero people. The Nama, however, were often considered by the colonizer to be economically insignificant,

especially given their lack of possession of cattle — and this has influenced their ongoing dispossession today. Nama people, like other Khoisan people — were understood to be particularly savage and incapable of proper labour — something Nama chief Gaob Johannes Isaack has publically referred to as having caused "generational systemic decay". Can such dispossession, or any settler colonial process, be understood through the context of a notion of "thefticide"?

Expanding on Brenna Bhandar's notion of a "racial regime of ownership"[lv], Yasar Ohle explains how German land law made property in the specific space of Southwest Africa[lvi]. Unlike in the context of the Holocaust - German colonialism solidified private property as a concept in South West Africa and transformed lands that were primarily held in common into private hands. It referred to *herrenloses* (master–less) land that needed to be surveyed to find out who the master in fact was. Eventually this land was marked as belonging to a particular native individual, considered by German land law to be a property owner, so that this land could then be sold by said "owner" through contract law. Rather than a notion of *terra nullius*, Germans came with a notion of the land as occupied by private property owners, rather than communal stewards, who could then be rightfully convinced to sell their individual pieces of private land. The paradox of German colonial land law as Ohle points out, was seeing it as both unoccupied and fully occupied at the same time. He writes: "Criticising the exchanges in land as fraudulent or usurious means accepting the underlying exchange relation as given, and thus only affirms the logics of exchange and private property introduced in the colonial encounter." Much more than an exercise in asset stripping - this was a genocide that was involved in the very

making of property, and thus of race– this 'race making property making' took its extreme form in the enslavement of Herero and Nama people in concentration camps — where indigenous subjects themselves *became* property. This was a direct result of turning them into a landless class through the imposition of German land law. It was the imposition of a notion of the right to property itself that began the process in which property could be brought, sold, and sequestered by the German state. It allowed for the system of enclosures and land surveying that continues to torture the Southern Namibian landscape.

American Tort Law distilled through the cultural context of the Holocaust Restitution Movement both enables and disables an analysis of how Native peoples became subject to genocide. The fact that eugenics must be packaged as a business for it to be legible to an American court may have more to do with the demands of Tort Law than with an American grammar of the Shoah. It is still, however, the Holocaust Restitution Movement that made this case possible and *legible.* The reworking of bones as property that could be bought and sold, as sites for jurisdiction, become intimately intertwined with an economic grammar of the Shoah. Human remains become, in the courtroom, of the same category as stolen Jewish art — as if they are somehow interchangeable. As if a stolen Klimt painting can be understood in the same category — loss of rights to property — as a dismembered human who was not understood to be fully human at the time.

Judaica and Dispossession

The clearest example of this in practice can be seen in the affidavit of the Jewish Heritage Foundation to the appeal of the Herero and Nama case at the Supreme Court in New York City,

an appeal that failed. (Note that there was no affidavit from a Black American organization, or a Native American organization) In that affidavit, the foundation argues that:

> This case is of critical importance to the Jewish Heritage Foundation and other organizations seeking to recover Judaica and artworks stolen from Jewish communities during the Holocaust ...(it) hits the Jewish community whose interests JHF represents disproportionately hard as New York is located within the Second Circuit and more than 1.7 million Jews are estimated to live in New York State, which, in context, represents almost 25% of the Jewish population of the United States. The Second Circuit's Rukoro decision would effectively bar JHF from assisting any potential litigant who wishes to pursue a claim for Judaica who lacks venue options other than within the second circuit.[lvii]

The intent of this Affidavit is clearly to support Herero and Nama plaintiffs, and it does so by and through comparison to Jewish people, and by making a comparison between *cultural items:* namely, here, Judaica and artworks—Jewish ritual items and artworks stolen from Jews who had the means to possess it (most did not). It also iterates the nature of the importance of New York's Jewish community for this case and the generalized interest in Jewish organizations in the case succeeding. That is, if the case fails then it might have repercussions for Jews and the possibility of restoring Jewish cultural property. Here, a clear emphasis sameness between Herero and Nama people and Jews, between Judaica, indigenous land, cattle, and human remains—between the HRM and the movement for reparations for Herero and Nama people.

Central to the Holocaust Restitution Movement, as I have previously outlined, was the idea that American jurisdictions are enlightened and able to clear up Germany's "mess". That is, the cultural notion that Americans can appropriately arbitrate over German racial pasts—a notion that became deeply embedded in American life after Nuremberg—partly informed it. This notion of racism being a greater problem abroad rather than at home has also become

central to forms of Jewish self–fashioning in the United States – especially since the break between Jewish activists and the civil rights movement and the black power movement in the 1960s. There was, once, a more thriving relationship between Black and Jewish struggle in the US[lviiilixlx]. As Jewish people assimilated more and more into forms of American whiteness, that solidarity was often given up on. The fact that the Herero and Nama genocide is, in the US, "fit" into the history of the Holocaust suggests an important resurgence of solidarity, but it also suggests an inability to link genocide in Namibia to settler colonialism and the history of enslavement in the United States itself. Such a notion was suggested to me by Namibians in the courtroom at times, if not directly in relation to the Holocaust Restitution Movement and its legacy. For example, one of the plaintiffs Samuel Eiseb (a pseudonym) told me: "That's always the… those contradictions will always be there. The US through its own legislation is in principle receptive to other nations, or victims of human rights abuses, welcoming them to come in and make use of its legal system to assert their rights, but not necessarily being receptive to those who suffered similar crimes at its own hands– making use of its own legal system to benefit from it."

Stolen Land and Stolen People?

This story of the American courtroom as the appropriate place for Holocaust justice in the late 20th and early 21st centuries has endured considerable critique[lxi]. Some expressed dissatisfaction about the centrality of capital, property, and theft—especially useless for those who constituted the majority of those murdered during the Holocaust—that is propertyless, impoverished *Ostjuden*, and Roma and Sinti people. Others have pointed out the hypocrisies of American institutions dealing so intensively with racial injustice on another continent rather than in its backyard.[lxii] Yet the ways in which the movement filtered into a wider American consciousness of the Shoah, and thus racial violence more broadly, as a form of *thefticide* was

somewhat under–studied. Perhaps the key analysis of an American grammar of the Shoah, Peter Novick's *Holocaust in American Life*, barely touched upon the Holocaust Restitution Movement. In that text he asks how it is possible that a country that had previously been largely uninterested in Jewish suffering could suddenly afford Jewish people and their suffering such importance. [lxiii] Novick analyzes the consequences of this for American identity politics, museology, and the continuing relegation of Black life to the realm of inhumanity (he does not address questions of Native sovereignty). Novick never, however, touches upon the relationship between this Americanization of the Shoah and the HRM — his analysis does not interrogate the relationship between Law and History — and the precise ways in which American liberal legalism formed a *particular figure* of the *propertied* Jewish victim that is not necessarily co–constitutive with the kind of victimhood that is figured in other parts of the West — where atrocity is more often, for example, understood in relation to a subject whose body and mind is harmed and who requires saving[lxiv].

My argument here is that, whilst the Herero and Nama case in New York has had an emancipatory function, it has also interpellated Namibian activists into an American grammar of the Shoah influenced by the Holocaust Restitution Movement and the idea of racial dispossession as "thefticide", an economic crime. Those who came to sue Germany for reparations in a New York court, however, were not Holocaust victims nor were they descendants of Holocaust survivors. They were not dispossessed of their lands and homes for the same reasons as Jewish people between 1939 and 1945. While ongoing antisemitism and the absent presence of Jewish people in Europe, and especially in Germany, displays the tenacity of the afterlife of the Holocaust, settler colonialism in Namibia is not in any way over: it is a structure and not an event[lxv]. The lands of Herero, Nama, Damara, and San continue to be occupied by Germans and their humans remains, their ancestors, are still often gatekept by Europeans. Whether or not the Shoah can be understood as an economic crime is one issue (I

find this questionable), but under discussion here is whether colonialism and colonial genocide can be treated as such. Herero and Nama history and the history of German colonialism more generally cannot be so easily understood through reference to settler colonialism and genocide primarily through "lost assets" and that engages with comparisons with the idea of the Shoah as an economic crime. This notion of sameness, that Jewish people and Herero and Nama people were both dispossessed of their private property, that Judaica and Herero and Nama skulls are for example interchangeable forms of property, is suggestive of a kind of a multidirectional memory[lxvi] and form of solidarity between (American) Jews and Black and indigenous subjects of colonial violence. Yet at the same time as it proffers the possibility of this kind of solidarity, it also intimates the inability for subjects seeking reparation for colonial and racial violence to be rightfully heard *without* the intermediary of the Jewish legal case and the Jewish reparations story. I, therefore, see the case of the Herero and Nama in New York City as needing to fit into an economic grammar of the Shoah that has emerged in an American context—— a grammar that understands the Holocaust to be as much about mass–theft as mass murder. This is a grammar that Namibian activists and their lawyers can usefully take advantage for a struggle for reparation—even as it at the same time forces them to become subjects of—or to exploit——what Late Herero Paramount Chief Vekuii Rukoro himself said at a press conference: "American legal civilization."

In an interview with plaintiff Kariu Mbeumuna, he spoke of the extent to which the history for which he was now suing Germany had affected his own life—the history of settler colonialism and native genocide, of land loss, and apartheid. Mbeumuna disavowed the idea that this was a case for reparations for events existing solely in the past tense, that is, a case concerning an event that took place in the past. He spoke instead of himself as a *direct victim* of genocide, particularly because of the dispossession of ancestral lands that occurred at the time and the presence of human remains and artefacts in German and North American

institutions: “The descendants are the victims,” he told me. “The situation we are in today is because of that genocide. There are people today in Botswana who can’t even speak Otjiherero, their own language. Are they not victims?” Like Mbeumuna, hardly any other Namibians seeking reparations refer to them strictly as a question of monetary compensation paid to Herero and Nama bank accounts or through the language of theft of private property. One of the reasons for this is that under discussion here is the question of dispossessed land that was once under collective stewardship, land that is often now the private property of German Namibian or other white landowners. Whilst comparison with, and the grammar of, American Holocaust restitution may be a useful "hook", it can be a distraction from the specific dynamics of German settler colonialism. Unlike in the context of Nazi empire, colonialism in Namibia introduced private property relations to the lands that it colonized. This crucial distinction becomes obfuscated when histories are directly mapped onto each other in a New York courtroom and beyond.

‘Holocaust Grammars’ and the Colonial Politics of Recognition

The court case of the Herero and Nama people against Germany in New York City for a genocide committed against them more than a century ago, and the corollary dispossession of their lands that persists alongside it—ought to be understood as part of the legacy of "Holocaust Justice" — in this case, the legacy of *Americans* adjudicating over the aftermath of the attempted extermination of European and North African Jewry and the German settler colonization of the European East. By fitting this legacy, Herero and Nama activists and their lawyers, in particular, can place their history into the long march of reparatory justice for the Holocaust. This sacralised place of the American redemption of the European Jew after the Cold War — especially in courtrooms and through compensation cases has a dual function. It creates both an opening and a foreclosure. It allows for the Herero and Nama case to *be heard*

within the construct of Jewish humanity that the case conjures, and yet at the same time, it requires Herero and Nama activists to confer upon themselves the status of the subject who was a victim of 'thefticide', the kind of subject capable of redemption by the American legal system and the HRM.

How the story of the Holocaust past is told in the political present can produce grammars of thinking and reasoning that pertain to victimhood, theft, and dispossession. These grammars can provide openings for solidarity, but they can also function to constrain and racialize non–Jewish and Jewish subjects, who must operate in particular ways to receive recognition in a context where geographically and spatially specific conceptions concerning the figure of the injured Jew reign: in this case where the Holocaust, and therefore colonial genocide, are both understood as forms of thefticide. I am interested less in the enormous field of what has become "Holocaust memory" but rather in the varieties of what I want to think of as "Holocaust grammars." Such grammars dictate ways of speaking and feeling about the Shoah and its relationship to the past and the present in different locations. They produce and are produced by fields within which various politics of recognition and refusal often operate. They are not necessarily Azoulay's "imperial grammars"[lxvii]—but they can undermine proper attention to what Azoulay terms the "self–fashioning of the excluded and the dispossessed," including, paradoxically, Jews.

Scholars in legal and political sociology and anthropology who have analysed the politics of recognition have long pointed to how legal settings can reinscribe, or even produce, forms of victimhood[lxviiilxixlxx]. Elizabeth Povinelli, for example, invites scholars of liberal legalism and liberalism more generally to interrogate its contours at the point not where it fails, but where it *succeeds*[lxxi]. In this case, the success of bringing it to a courtroom and getting the German state to "show up" cannot be understated, and yet this success arguably contributed toward a reinscription of victimhood. This is not only due to the refusal on the part of the

German state to engage in its legacy of anti–Blackness. It is also because Black and indigenous subjects were interpellated into a movement for restitution that involves the legacy of redress for a particular figuration of another kind of victim, namely European Jews as coded in a particular American economic grammar of the Shoah. We can see this in the continued reiteration by lawyers that the case echoes the prior Holocaust cases, the similarities in notions of 'thefticide,' and the use of affidavits by Jewish organizations such as the Jewish Heritage Foundation. The American courtroom context here arguably involves the transformation of the Black and Native subject at the gates of Law into the Jewish subject at the gates of Law. We see how reckoning with the aftermath of the Holocaust, and particular forms of American Jewish and non–Jewish self–fashioning and coalition making, can have an emancipatory function for indigenous people once (or perhaps still) colonized, but they can also be part and parcel of a process of dehumanization that denies the specificity of settler colonialism in Africa itself. The Herero and Nama genocide becomes *prologue* to the story of the Shoah, and its reparation becomes *epilogue* to the Holocaust Restitution Movement.

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