UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Vekuii Rukoro, et al.,	)	
	)	
Plaintiffs,	)	
	)	**17 cv 00062 (LTS)**
v.	)	
	)	
Federal Republic of Germany,	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, FOR LACK OF PERSONAL JURISDICTION, FOR FAILURE TO EXHAUST REMEDIES IN GERMANY AND UNDER THE DOCTRINES OF POLITICAL QUESTION AND *FORUM NON CONVENIENS*

Dated: May 8, 2018

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Introduction

Plaintiffs filed an Opposition to the Motion to Dismiss the Amended Complaint which, among other things, misstates the pleading standard in order to invoke the § 1605(a)(3) exception to the FSIA's broad grant of immunity to foreign sovereigns; fails to trace the proceeds of the allegedly "taken property" to the real estate Germany currently owns in New York; claims that the Court has jurisdiction under FSIA's commercial activity exception which was not alleged in the Amended Complaint; and adds hundreds of pages of affidavits and exhibits raising matters not pled in the Amended Complaint, including three affidavits which are legal memos and thus effectively avoids and evades the page limitation for their Opposition.

I. The pleading standard to invoke the § 1605(a)(3) exception to the FSIA.

The Opposition claims it has satisfied the pleading standard that the expropriation exception applies if its allegations "are-more-than-non-frivolous." (Opp. at 3). They make that claim, notwithstanding the holding in *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.* 137 S. Ct. 1312, 197 L.Ed.2d 663 (2017), that "Where, as here, the facts are not in dispute, those facts bring the case within the scope of the expropriation exception **only if they do show (and not just arguably show)** a taking of property in violation of international law." Ibid. 137 S. Ct. at 1324, 197 L. Ed.2d at 677 (emphasis added). They argue that the pleading standard of *Helmerich* applies only to the first and third elements of the expropriation exception (Opp. at 4) and not to the fourth element that the property or property exchanged for the property is present in the United States in connection with commercial activity of the foreign sovereign. This novel reading that different pleading standards apply to the various elements they are required to adequately plead is a misreading of *Helmerich.* While *Helmerich* arose in the context of the element of "a taking in violation of international law," the holding was

not limited to that element, as the Supreme Court concluded its opinion by stating that, "We conclude that the nonfrivolous-argument standard is not consistent with the statute." *Id*. This makes it clear that the standard does not only apply just to isolated elements of the expropriation exception. In addition, the Opposition fails to mention or distinguish the case of *Owens v. Republic of Sudan*, 864 F.3d 751, 779 (D.C. Cir 2017), cited in the memorandum supporting the Motion to Dismiss at 11, which applied the new pleading standard to the terrorism exception to the FSIA. This opinion by the District of Columbia Circuit Court of Appeals demonstrates their understanding that *Helmerich* applies to the FSIA as a whole, and not just the first and third elements of the expropriation exception.

As argued in the memo in support of the Motion to Dismiss the Amended Complaint, the Amended Complaint fails to adequately allege under the *Helmerich* standard "that expropriated property was turned into cash over 100 years ago and that cash became a part of the Defendant's general revenues and that fungible cash is traceable to the Defendant's present-day property in the United States." (Memo at 12). The Opposition does not argue that this meets the pleading standard. Rather, it simply states that tracing is an equitable doctrine that can be applied to fungible property derived from taken property. That general proposition is not at issue, rather, what is at issue is whether the Amended Complaint sufficiently traces the fungible property to present day property in New York derived from the alleged takings in the late 1800s and early 1900s. In support of this tracing argument the Opposition drops a footnote which makes the argument that the Amended Complaint "plausibly" alleges a tracing. First and foremost, the pleading standard requires allegations that **do show (and not just arguably show)** that the property exchanged for the taken property is in the United States. In addition, the author cited in the footnote does not purport to trace these fungible monies over the course of 100 or more

years. He does not account for the intervening financial devastation that Germany was subjected to twice in the 20th Century and ends by simply stating that it is "reasonable to conclude" that property exchanged for the taken property is present in part in Germany's New York real estate. Hence, the Opposition does nothing to undercut the argument in the memo in support of the Motion to Dismiss that the Amended Complaint fails to adequately allege that the property exchanged for the taken property can be traced to Germany's present day real estate in New York.

II. Commercial use of the New York Real Estate.

With regard to the use of the four properties that are alleged to conduct commercial activity, nothing refutes the principle, as set out in the memo is support of the motion to dismiss (at 16) that a foreign state in promoting its economic interests through Economic and Commercial Offices and cultural relations through Academic Exchange Offices, as well as sponsoring tourism through tourist offices, does not engage in commercial activity under the FSIA. *LaLoup v. United States*, 29 F. Supp. 3d 530, 551-52 (E.D. Pa. 2014). In fact, the operation of the German Academic Exchange Service is based on the Agreement concerning cultural relations between the United States of America and the Federal Republic of Germany (Exchange of notes at Washington April 9, 1953; entered into force April 9, 1953; 4 UST 939, TIAS 2798, 204 UNTS 79) and is, thus, non-commercial.

III. The Namibian bones are not present in the United States in connection with Germany's commercial activity.

While the Amended Complaint does not allege that Ovaherero and Nama bones at the American Museum of Natural History are in the United States in connection with commercial activity of Germany, Plaintiffs now assert in their Opposition that these bones are present in the United States in connection with commercial activity being carried on by Germany. However,

that is contradicted by the Plaintiffs themselves, who in the Amended Complaint make it clear that the sale of bones to the American Museum was not a commercial activity by Germany. Plaintiffs themselves have stated that human remains were part of a **private** collection of Professor Felix von Luschan which, after his death, in 1924, was sold by his widow to the American Museum of Natural History in New York (Amended Complaint ¶299: "after von Luschan's death in 1924, his widow sold his private collection to the AMNH in New York.").

IV. Germany's relation to the Herero and Nama people in German South West Africa was during the times in question entirely governed by domestic German – and not international – law.

To consider the relationship between the Herero and Nama people in German South West Africa and the German Reich as one governed by international law, one must apply the legal standards of that time. In the late 19th Century and early 20th Century, the applicable international law was defined as "the rules which determine the conduct of the general body of civilized states in their dealings with one another." Thomas Lawrence, The Principles of International Law, 4th edition, Macmillan, §1 p. 1 (1911).[1] Colonies or protectorates ("Schutzgebiete"), however, were not considered states. "Such protectorates cannot be client states, for they are not states at all in the sense of being members of the family of nations and subjects of International Law." Lawrence § 43, p. 77, 78; *see also* William Edward Hall, Treatise On International Law, 5th ed. Oxford, p. 126 (1904) ("The protected states or communities are not subject to a law of which they never heard; their relations to the protecting state are not therefore determined by international law.").

Furthermore, to add the Herero and Nama to the group of states recognized by international law at the time, an explicit act to that extent was required. "[…] states outside

[1] Available at https://catalog.hathitrust.org/Record/010406889.

European civilization must formally enter into the circle of law-governed countries. They must do something with the acquiescence of the latter, or of some of them, which amounts to an acceptance of the law in its entirety beyond all possibility of misconstruction." Hall, p. 41. No such act was ever performed, leaving the Herero and Nama outside of the circle governed by international law at the time. Thus, the Herero and Nama people were not subject to international law and their legal relation to the German Reich was not subject to international law, but was governed by domestic German law at the time.

The highest German court at the time, the German Reich Supreme Court (Reichsgericht) followed the same principle, when it decided that "protectorates" fell "under no other sovereignty than that of the German Reich," and were "from a perspective of international law no independent state entities and therefore not 'foreign territory' in relation to the German Reich," but much rather were "under **full sovereignty of the German Reich**" German Reich's Supreme Court Reporter for Criminal Matters (RGSt). Vol. 44 (1911), p. 403, 404 (emphasis added).

Lastly, the use of terms like "member of the protectorate" ("Angehöriger der Schutzgebiete") was explicitly seen as synonymous to "subject of the German Reich" ("Untertan"), Hermann Hesse[2] Die deutsch-ostafrikanische Landesangehörigkeit, Zeitschrift für Kolonialrecht (ZKolR) 1904, p. 4, 6. Generally, "Untertan" was seen as a permanent legal status of persons that were subject to German sovereignty without being full nationals; see also, *Hesse*, Gibt es eine unmittelbare Reichsangehörigkeit?, Berlin, p. 5., 1903.

V. The Court Lacks Subject Matter Jurisdiction under the Political Question Doctrine

In its opening brief, Germany demonstrated that this Court lacks subject matter

[2] Not, as Plaintiffs claim, the Nobel Laurate Hermann Karl Hesse, but the legal scholar Hermann Hesse (no relation).

jurisdiction under the political question doctrine because, in order to hear this case, the Court would have to consider and resolve issues which would involve judicial interference with foreign affairs, which the Constitution reserves to the legislative and executive branches. *Oetjen v. Central Leather Co*., 246 U. S. 297, 302 (1918). By way of illustration, the Court would be injecting itself in to the internal politics of Namibia, as well as the bilateral relationship between Germany and Namibia. (Memo in support of the Motion to Dismiss the Amended Complaint at 19-20). Plaintiffs avoid discussing this issue directly.

Instead, Plaintiffs erroneously claim that the political question doctrine is inapplicable. They primarily rely on the absence of a statement from the United States regarding this litigation, citing the Second Circuit's decision in *Whiteman v. Dorotheum GmbH & Co. KG*, 413 F.3d 57, 59-60 (2d Cir. 2005), and the Third Circuit's decision in *Gross v. German Found. Indus. Initiative*, 456 F.3d 363 (3rd Cir. 2006). However, in *Whiteman*, the Second Circuit merely decided how to weigh a statement by the United States which had been made to the court regarding the case and did not purport to state that the absence of such a statement would decisively shift the balance in favor of holding that the political question doctrine was inapplicable. In *Gross*, the Third Circuit also was determining what weight to give a statement by the United States and again did not purport to decide that the absence of such a statement would decisively shift the balance in favor of holding political question doctrine inapplicable.

Similarly, Plaintiffs incorrectly claim that Germany's reliance on *Davoyan v. Repub. of* Turkey, 116 F. Supp. 3d 1084 (C.D. Cal. 2013) is "misplaced," stating that the district court relied solely on Ninth Circuit precedent and "the Executive's foreign policy statements regarding the Armenian Genocide." In fact, the *Davoyan* district court decision clearly states: "In light of **the political question doctrine and** Ninth Circuit precedent, this Court cannot resolve such an

inherently political question that our Constitution reserves for the other two coordinate branches of government." *Ibid*., 116 F. Supp. 3d at 1104 (emphasis added).

Plaintiffs falsely assert that, while "Turkey fiercely disputes that its acts [with respect to the Armenians] constituted genocide, Germany has finally admitted its liability for the Ovaherero and Nama genocides after a century of denial." (Opp. at 20). In fact, this Court need look no further than pages 4 through 10 of Germany's brief in support of its motion to dismiss to determine that Germany is not admitting – and is indeed denying – that it has any legal liability to the Plaintiffs and/or those whom the Plaintiffs purport to represent.

Finally, statements by majority of the justices of the Supreme Court in the very recently decided case of *Jesner, et al. v. Arab Bank, PLC*, 2018 BL 143719, 86 U.S.L.W., 4217 (U.S. Apr. 24, 2018), make it clear that most of the Justices are exceedingly wary about the judiciary wading into cases which have very serious foreign policy implications. The majority opinion cautioned that that courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Jesner*, Slip Op. at 12 *(quoting Sosa v. Alvrez-MacHain*, 542 U.S. 642, 727 (2004)). The *Jesner* majority opinion also cautioned that "The political branches, and not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." Slip Op at 19. The majority also expressed the need for judicial caution where judicial decisions could trigger "serious foreign policy consequences" and urged deference to the "political branches." Slip Op at 27.[3]

[3] In concurring opinions Justices Thomas and Alito expressed concern that judicial decisions impacting foreign relation could cause "international strife." Thomas Slip Op. at 1; Alito Slip Op. at 1, 6. Justice Gorsuch also expressed concern that the "job of . . . navigating foreign policy disputes belongs to the political branches." Gorsuch Slip Op. at 1. Justice Gorsuch warned against the potential for "reprisals against this country" if U.S. courts "punish *foreign* parties for conduct that could not be attributable to the United States," and stated that "If a foreign state or citizen violates an 'international norm' in a way that offends another foreign state

Briefly stated, the instant case is a classic case where the political question doctrine deprives this Court of subject matter jurisdiction and the Court should so rule.

V. The Plaintiffs, for the first time in their opposition, assert jurisdiction under the Commercial Activity Exception to the FSIA which the Court should not consider as it is not alleged in the Amended Complaint. In any event it does not give the Court subject matter jurisdiction.

The Amended Complaint alleges jurisdiction under the FSIA exclusively on the so-called takings exception. (Amended Complaint ¶ 38: "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."). Nowhere does it assert that the Court has subject matter jurisdiction under the Commercial Activity Exception. (28 U.S.C. § 1605(a)(2)). Now, in their Opposition, which is a brief and not a pleading, Plaintiffs assert that the Commercial Activity Exception gives the Court subject matter jurisdiction. "The court assesses a facial challenge [in a 12(b) (1) motion] as it does a Rule 12(b)(6) motion in that it 'looks only at the sufficiency of the allegations **in the pleading**. . . .'" *In re IntraMTA Switched Access Charges Litig. (MCI Commc'n Servs. Inc. v. Ariz. Tel. Co.)*, 158 F. Supp. 3d 571, 574, 2015 BL 377889, 3 (N.D. Tex. 2015) (emphasis added), (citing *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. May 1981)).

While the Court should not consider this belated attempt to assert jurisdiction on a basis not found in the Amended Complaint, it would fail even if it had been properly included in the Amended Complaint. Plaintiffs argue (not allege in a pleading) "that Subject-matter jurisdiction also exists over this action, as it is on Germany's acts 'outside the territory of the United States

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or citizen, the Constitution arms the President and Congress with ample means to address it. Or, if they think best the political branches may choose to look the other way." Gorsuch Slip Op at 13 (emphasis in the original).

in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.' § 1605(a)(2)." (Opp. at 17).

Plaintiffs argue that the commercial activity was the "sale" of bones to the American Museum of Natural History. However, the Amended Complaint alleges that the transfer of bones to the museum was a sale by a private party, which is not commercial activity of Germany. (Amended Complaint ¶299: "after von Luschan's death in 1924, his widow sold his private collection to the AMNH in New York."). Moreover, Exhibit F-2 to Opposition to Motion to Dismiss. (Doc 45- 13), which purports to be a receipt for the bones, state the bones were received "as a gift" from the widow, contradicting Plaintiffs' allegations in the Amended Complaint that the transaction was a sale. Regardless of whether the alleged transaction was a sale by or gift from the widow of von Luschan, it clearly was not a commercial activity by Germany.

Plaintiffs argue that the fact that the bones are at the museum is the required direct effect in the United States. (Opp. at 18). "As the Supreme Court explained in *Weltover*, for purposes of the third clause of § 1605(a)(2), 'an effect is direct if it follows as an immediate consequence of the defendant's . . . activity." *MMA Consultants 1, Inc. v. Republic of Peru*, 2017 BL 452770, 6 (2d Cir. Dec. 19, 2017) (internal citation omitted). Here there is no immediate consequence of Germany's commercial activity. Rather, in 1924, at least 15 years after the activity of Germany as alleged in the Amended Complaint, the widow of a private Germany citizen either sold or gave her husband's collection of Namibian bones to a museum in New York. This is not the kind of "immediate consequence" required to satisfy the direct effect requirement.

The commercial activity exception is not satisfied even if it had been pled. The Plaintiffs have already had two bites at the apple (the original complaint and the Amended Complaint) and chose not to assert the commercial activity exception as a basis for subject matter jurisdiction

and should not be permitted to do so in an opposition to the motion to dismiss.

Conclusion

The Federal Republic of Germany is immune under the FSIA, as the expropriation exception does not apply. In addition, this Court lacks subject matter jurisdiction to hear the case because it presents several political questions which the Constitution reserves to the legislative and executive branches and which would require the Court to interfere with foreign affairs, including the bilateral relations between Germany and Namibia. Even if Defendant is not immune under the FSIA, the Court should decline to exercise jurisdiction and require the Plaintiffs to exhaust their remedies in Germany. In addition, Germany is a more convenient forum and the factors that apply should permit the Court to dismiss the case on that basis. Lastly, the Court should reject Plaintiffs' eleventh-hour attempt to assert jurisdiction under the commercial activity exception of the FSIA, as it is procedurally defective and the facts alleged in the Amended Complaint refute any belated assertion that the commercial activity exception is applicable.

Dated: May 8, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached 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.

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