

CASE NOTE

Financial Support to Apartheid: Outstanding Debts

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Abstract

This case note presents the arguments made in the *amicus curiae* brief submitted by the UN independent expert on debt and human rights to the OECD National Contact Point in the case brought in 2018 by Open Secrets and the Centre for Applied Legal Studies concerning the alleged complicit conduct of two banks during apartheid in South Africa. It also outlines the developments in this legal case and comments on why apartheid victims' claims against financial accomplices are now more compelling than ever.

Keywords

Apartheid, South Africa, complicity, financial institutions, human rights, accountability

INTRODUCTION

While scholars,¹ civil society,² court cases³ and even the Truth and Reconciliation Commission⁴ have provided strong evidence of the crucial involvement of financial actors in the consolidation and perpetuation of apartheid in South Africa, little has been achieved in terms of their actual legal accountability.

This case note proposes for discussion in the academic field the arguments made by the author in his capacity as UN independent expert on debt and

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1 See: H van Vuuren *A Tale of Profit, Guns and Money* (2017, Jacana Media); I Gubbay "Towards making blood money visible: Lessons drawn from the apartheid litigation" in JP Bohoslavsky and J Letnar Černič (eds) *Making Sovereign Financing & Human Rights Work* (2014, Hart Publishing) 337.

2 See generally the Open Secrets website, available at: <<https://www.opensecrets.org.za/apartheidbanksdocket/>> (last accessed 25 March 2022).

3 For example, *In Re South African Apartheid Litigation* 617 F Supp 2d 228 (SDNY 2009) (Civ No 03-cv-04524), paras 160–63, available at: <<https://casetext.com/case/in-re-south-african-apartheid-litigation-5>> (last accessed 25 March 2022).

4 *Final Report* (1998, Truth and Reconciliation Commission South Africa) vol 4, chap 2 at 58.

human rights in the *amicus curiae* [impartial adviser] brief submitted to the Organisation for Economic Co-operation and Development (OECD) National Contact Point in the case brought in 2018 by Open Secrets and the Centre for Applied Legal Studies concerning the conduct of KBL European Private Bankers and KBC Group Belgium.⁵ In the context of the corporations assisting the apartheid state and profiting from economic crimes, these two financial institutions were allegedly responsible for channelling as much as ZAR 350 billion (over USD 20 billion) through a global money-laundering scheme. This network was used to buy weapons secretly, despite mandatory UN arms sanctions against apartheid South Africa.⁶ The *amicus curiae* brief highlights⁷ that perpetrators of crimes against humanity and their financial accomplices must be held accountable, regardless of the time that has passed since the commission of the atrocities they committed and helped to commit, respectively.

In 2019 the complaints in the case were dismissed at a preliminary stage without full consideration of the evidence and ignoring the substantive arguments made in the complaints and *amicus curiae* brief. Moreover, even when it contradicts basic legal principles for one to be judge and judged at the same time, some representatives of the private sector's National Contact Point committee included KBC Group and, despite numerous requests from the complainants to address the potential and apparent conflict of interest, no meaningful action was taken during or after the process.⁸ As a result, the right to truth and the right to due process were not even considered, not to mention the victims' right to access effective remedies for human rights violations.

ARGUMENTS IN THE *AMICUS CURIAE* BRIEF

The *amicus curiae* brief addressed the following five main issues: how financial assistance to criminal regimes may adversely affect human rights; whether

5 *Open Secrets and CALS v KBC Group*. All documents related to the case are available on the OECD Watch's website, at: <<https://www.oecdwatch.org/complaint/open-secrets-cals-vs-kbc-group/>> (last accessed 25 March 2022). The *amicus curiae* brief is set out in full in the annex to this case note.

6 See the complaint submitted to the OECD National Contact Point by Open Secrets and the Centre for Applied Legal Studies (April 2018), available at: <<https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/bhr/resources/OS%20CALs%20OECD%20Complaint%20to%20Belgium%20%20Luxembourg%20NCP%2017042018.pdf>> (last accessed 25 March 2022).

7 See in particular, annex, sec (d) below.

8 See the statement signed jointly with the UN special rapporteur on truth, justice, reparation and guarantees of non-recurrence: "Apartheid and bank complicity case: UN expert urges reform of OECD review mechanism to protect human rights" (UN Office of the High Commissioner of Human Rights (OHCHR) press release, 27 April 2020), available at: <<https://www.ohchr.org/en/press-releases/2020/04/apartheid-and-bank-complicity-case-un-expert-urges-reform-oecd-review?LangID=E&NewsID=25831>> (last accessed 7 April 2022).

this assistance has actually helped criminal regimes; how the financial legacy (including the state's debts) can continue to affect for decades the realization by the state's population of their economic, social and cultural rights; why complicit economic assistance is prohibited under international law; and the relevance of the right to truth in the case under discussion.

RECENT LEGAL DEVELOPMENTS

The issue of the legal implications of the causal link between financial decisions and human rights violations has become a feature of recent debate at an international level.⁹ In January 2017, the Thun Group of Banks¹⁰ published its second discussion paper,¹¹ warning that banks cannot be held responsible for the adverse effects on human rights that their clients' operations may have, because that impact is not a part of the operations of those banks. The answer provided by the UN Working Group on Business and Human Rights was categorical: “[i]f a bank proceeds with financing, absent rigorous due diligence and safeguards, then its decision to lend may contribute to adverse human rights impacts, since it could have mitigated or prevented harm through its due diligence processes and the terms of its loan”.¹² On a similar note, in June 2017, the Office of the UN High Commissioner for Human Rights (OHCHR) issued a document providing clarification on the meaning of human rights-related due diligence for banks;¹³ also, this author (in his previous capacity as the UN independent expert on foreign debt and human rights) addressed a letter to the Thun Group in October 2017, explaining why human rights due diligence in contexts marked by the existence of criminal regimes is particularly important for banks.¹⁴ Civil society

9 *Banks and Human Rights: A Legal Analysis* (December 2015, Foley Hoag LLP and the UN Environment Programme Finance Initiative), available at: <<http://www.unepfi.org/fileadmin/documents/BanksandHumanRights.pdf>> (last accessed 25 March 2022).

10 This informal group was created to discuss the implications of the UN Guiding Principles on Business and Human Rights for the banking sector. Its current members are UBS, Credit Suisse, Barclays, BBVA, BNP Paribas, Deutsche Bank, ING, RBS, Standard Chartered, UniCredit and JP Morgan.

11 “Paper on the implications of UN Guiding Principles 13b & 17 in a corporate and investment banking context” (December 2017, Thun Group of Banks), available at: <https://media.business-humanrights.org/media/documents/files/documents/2017_12_Thun_Group_of_Banks_Paper_UNGPs_13b_and_17.pdf> (last accessed 7 April 2022).

12 Letter from OHCHR (on behalf of the UN Working Group on Business and Human Rights) to the Thun Group of Banks (23 February 2017), available at: <https://media.business-humanrights.org/media/documents/files/documents/20170223_WG_BHR_Letter_to_Thun_Group.pdf> (last accessed 7 April 2022).

13 “OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector” (12 June 2017, OHCHR), available at: <<https://www.ohchr.org/sites/default/files/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>> (last accessed 7 April 2022).

14 Open letter from JP Bohoslavsky to members of the Thun Group of Banks (19 October

organizations also sent a letter to the Thun Group in March 2018,¹⁵ criticizing its interpretation that banks may only contribute to human rights abuses through their finance under “exceptional circumstances”.

All these developments make, at both national and global levels, complaints by the victims of South African apartheid against its financial accomplices more compelling than ever.

CONFLICTS OF INTEREST

None

ANNEX: TEXT OF *AMICUS CURIAE* BRIEF

Mandate of the independent expert on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights, Mr Juan Pablo Bohoslavsky (2014–20)

Submission (28 May 2018): Complaint brought to the OECD by Open Secrets and the Centre for Applied Legal Studies concerning the conduct of KBL European Private Bankers and KBC Group Belgium

This submission is respectfully submitted by Mr Juan Pablo Bohoslavsky, United Nations Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights pursuant to Human Rights Council resolutions 34/03 and 37/11.¹⁶

This submission is drafted on a voluntary basis for consideration by the National Contact Points of Belgium and of the Grand Duchy of Luxembourg, under the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, regarding the complaint brought by Open Secrets and the Centre for Applied Legal Studies concerning the conduct of KBL European Private Bankers and KBC Group Belgium in relation to their potential failure to comply with the OECD Guidelines for Multinational Enterprises in respect of violations of UN Security Council arms embargoes against apartheid South Africa.¹⁷

contd

2017, OHCHR), available at: <<https://www.ohchr.org/sites/default/files/Documents/Issues/Development/IEDebt/LetterThunGroup.pdf>> (last accessed 7 April 2022).

- 15 Letter from BankTrack and other civil society organizations to the Thun Group of Banks in respect of significant concerns regarding the Thun Group discussion paper (28 March 2018), available at: <https://media.business-humanrights.org/media/documents/files/documents/180322_Thun_Group_CSJL_letter.pdf> (last accessed 7 April 2022).
- 16 “Independent expert on the effects of foreign debt: Purpose of the mandate”, available at: <<http://www.ohchr.org/EN/Issues/Development/IEDebt/Pages/IEDebtIndex.aspx>> (last accessed 25 March 2022).
- 17 See for illustration, UN Security Council res S/RES/418 (1977) and UN General Assembly res 40/64A (1985), 41/35B (1986) and 42/23B (1987).

This letter aims at contributing to the understanding of a number of issues central to this procedure, from the perspective of international human rights law. Notably, the Independent Expert addresses the following five main issues: a) how financial assistance to criminal regimes may adversely affect human rights; b) whether this assistance actually has helped criminal regimes, c) how the financial legacy (including the State's debts) can continue to affect for decades the realization of economic, social and cultural rights of the State's population; d) why complicit economic assistance is prohibited under international law; and, e) the relevance of the right to truth in the case under discussion.

This submission is based upon and takes some key aspects from the report of the Independent Expert on "Financial complicity: lending to States engaged in gross human rights violations" (A/HRC/28/59) submitted to the UN Human Rights Council on 22 December 2014.¹⁸ In the following paragraphs he addresses each of these issues:

a. How financial assistance to criminal regime(s) can adversely affect human rights

In the Independent Expert's view, authoritarian regimes committing gross human rights violations are politically vulnerable because of their problems of legitimation. Such regimes endeavour to retain power and do so by securing privileges for part of the population, such as for example, economic or political elites, the military or the security apparatus, by allocating economic benefits and / or political concessions in exchange for support. To remain in power, a regime is usually compelled to address economic constraints in ways that secure a minimum political support or enable what may be a highly bureaucratic or repressive machinery to function efficiently, control society or repress the population. There is a mutually sustaining interaction between loyalty and repression, but there are also trade-offs, depending on the target of the strategies.¹⁹ Both tactics require that governments possess sufficient economic resources. The national economy, and more specifically the State budget, must support an effective system to buy loyalty from the population or to enable repression.

Political loyalties can be acquired through (targeted) economic benefits that can consist of resource transfers, subsidies, tariff protections and regulations that guarantee profits, employment and consumption. At the same time, public finance and repressive expenditures are considered: the budget allocation

18 The report is available in all UN languages at: <<http://www.undocs.org/A/HRC/28/59>> (last accessed 25 March 2022).

19 See D Acemoglu and J Robinson *Economic Origins of Dictatorship and Democracy* (2005, Cambridge University Press); B Bueno de Mesquita et al *The Logic of Political Survival* (2003, Massachusetts Institute of Technology Press); R Wintrobe *The Political Economy of Dictatorship* (1998, Cambridge University Press).

and bureaucratic apparatus put in place can often reflect, to some extent, the repressive capacity of the regime. The loyalty of the military, police or secret services in controlling or repressing opponents are imperatives for autocratic regimes that rule mainly through violence.

Some global data confirms that autocratic regimes frequently increase military budgets and often overcompensate the military, police and other officials who control instruments / institutions of violence and coercion.²⁰ Indeed, military expenditures used to strengthen the coercive capacity of the regime and its stability,²¹ have been found to contribute strongly to a country's external debt burden.²²

In a context of fiscal deficit and poor performance of the national economy, the options available for financing are limited, and thus any potential source of financing that the state may be able to access becomes even more critical. Ultimately, the regime must be capable of implementing efficient economic instruments to secure the support of key sectors of the country's economic and political life, and / or of executing a budget that will enable an effective repressive apparatus, which translates into greater spending in the military and police sectors charged with this task.

From a general perspective, while political institutions determine the level of state indebtedness (in absence of citizen control, an authoritarian government will tend to contract unlimited loans), the loans that a state receives also shape its political institutions, including those that carry out repressive activities (in terms of consolidating the regime).²³

There is, in addition, a less obvious way of supporting repressive regimes: funds and financial services that facilitate the commission of gross human rights violations in a more direct way, for example, when they are used to equip intelligence services, police or other security forces with tools or weapons of repression. The fact that these financial services are provided in a surreptitious manner may actually reflect the mental state of this provider about the illegality and consequences of his financial decisions.

Financially assisting regimes that commit gross human rights violations may contribute to regime consolidation, prolong disrespect for human rights

20 See J Conrad "Narrow interests and military resource allocation in autocratic regimes" (2013) 50/6 *Journal of Peace Research* 737. Specifically for military expenditure by Latin American dictatorships, see T Scheetz "The evolution of public sector expenditures: Changing political priorities in Argentina, Chile, Paraguay and Peru" (1992) 29/2 *Journal of Peace Research* 175.

21 See M Albertus and V Menaldo "Coercive capacity and the prospects for democratization" (2012) 44/2 *Comparative Politics* 151.

22 See, among others: R Looney "The influence of arms imports on Third World debt" (1989) 3/2 *Journal of Developing Areas* 221; J Dunne, S Perlo-Freeman and A Soydan "Military expenditure and debt in small industrialised economies: A panel analysis" (2004) 15/2 *Defence and Peace Economics* 125; R Smyth and P Kumar Narayan "A panel data analysis of the military expenditure-external debt nexus: Evidence from six Middle Eastern countries" (2009) 46/2 *Journal of Peace Research* 235.

23 T Oatley "Political institutions and foreign debt in the developing world" (2010) 54/1 *International Studies Quarterly* 175.

and increase the likelihood of gross violations of human rights. Those conclusions can stand for both official and private financial assistance to governments. Nevertheless, private lending seems to be more damaging, as it might enjoy lower public accountability compared to lending between States and to loans allocated by international financial institutions.

Market discipline alone provides insufficient incentives for lending that is sensitive to human rights. It looks mainly at debt sustainability and the likelihood that the loan will be repaid, not at the democratic character of a regime, nor its predisposition for human rights abuse. The market does not prevent loans to dictators. On the contrary, once loans are provided to autocratic regimes, the market rather provides incentives to grant additional funds to such a regime, in order to stabilize it and ensure its repayment capacity. Market logic thus becomes a self-fulfilling prophecy.

Unless financial decisions are subjected to human rights impact assessments, appropriately targeted or mitigated by contractual measures, financial assistance can have a persistent impact on authoritarian regimes, making it possible for them to consolidate autocratic rule and perpetuate political exclusion and human rights violations, and reducing the need for political concessions. However, it may sometimes be best not to lend nor assist on any condition, as financial inflows could impair the human rights situation, either immediately or over the longer term.

b. Do funds consolidate regimes engaged in gross violations of human rights?

Evidence shows that foreign financial sources might have an important impact on the durability of authoritarian regimes in power.²⁴ The authors of the study in question consider whether net transfers of public and publicly guaranteed external debt have an impact on the likelihood that an authoritarian regime transitions to democracy during the same year, using data covering the period 1970–2006.²⁵ The analysis is based on a data set capturing 158 different episodes of authoritarian rule in 91 countries.

The results show the negative impact that foreign debt has had on the likelihood of a transition to democracy over a period of 36 years.²⁶ They suggest that foreign loans contribute to the perpetuation of authoritarian regimes. While the gross probability of a transition to democracy (within one year) in the sample is 2.2 per cent, moving from the minimum to the maximum value of the debt variable brings about a 1.65 per cent (per

24 See JP Bohoslavsky and A Escribà-Folch “Rational choice and financial complicity with human rights abuses: Policy and legal implications” in Bohoslavsky and Letnar Čerňič (eds) *Making Sovereign Financing*, above at note 1, 17.

25 Measured in constant USD 2,000 per capita. Data compiled from the *World Development Indicators* (1970–2006, World Bank).

26 To estimate those probabilities, the other variables have been held constant.

year) decrease in the probability of democratization (then reaching 0.3–0.4 per cent).²⁷ Over a ten-year period, for example, the effect would obviously be higher. The data set would predict that, on average, 22 per cent of all authoritarian regimes not benefitting from public or private lending would transition to democratic governance. However of those regimes regularly receiving net public or private lending, only 3.35 per cent would become democratically ruled. Some additional tests also reveal that foreign borrowing might be of special relevance in times of economic downturn, which usually lead to severe shrinkages in State revenues.

Net fund transfers may prolong autocratic rule and thus increase the risk of gross violations of human rights.

c. How the financial legacy (including the state's debts) can affect for decades the enjoyment of economic, social and cultural rights of the population

States engaged in gross human rights violations not only torture and commit extrajudicial killings, or disappearances, but they may also impose economic models that violate fundamental economic, social and cultural rights. As Antonio Cassese explained in a paper in 1979, the ways in which different rights violations are interlinked is often part of the survival strategy of a regime.²⁸ Foreign investors may benefit from the failure of a regime to respect human rights, such as the right to freedom of association and to form trade unions, or from countries with weak social, safety and health standards. If foreign actors make decisions based on profitability, and consider that profitability is more likely to be higher when human rights are restrained, then economic assistance can contribute to the perpetuation of human rights abuses and such abuses, in turn, might potentially bring about the necessary conditions to attract and obtain additional economic assistance or investment.

Moreover, a set of practices that have pernicious consequences for economic and social development may be part of the legacy of an authoritarian regime in the transition to democracy²⁹ and the economic structures created under authoritarianism will influence the prospects for consolidating democracy³⁰ and the full realization of all human rights.

27 The results remain largely unaltered if one controls for trade (imports plus exports as a percentage of GDP).

28 A Cassese "Foreign economic assistance and respect for civil and political rights: Chile - a case study" (1979) 14/2 *Texas International Law Journal* 251.

29 See D Bradlow "Don't waste a serious crisis: Lessons from South Africa's debt crisis" in JP Bohoslavsky and K Raffer *Sovereign Debt Crises: What have we learned?* (2017, Cambridge University Press) 220.

30 See T Addison "The political economy of the transition from authoritarianism" in P de Greiff and R Duthie (eds) *Transitional Justice and Development: Making Connections* (2009, Social Science Research Council) 110; and, generally, D Sharp (ed) *Justice and Economic Violence in Transition* (2014, Springer Publications).

d) Why complicit economic assistance is prohibited by international law

Core international human rights treaties as well as other instruments related to human rights issues of relevance to this particular case (some of them signed even before the behavior assessed in this case took place) expressly penalize complicity in general terms³¹ - that is, in the sense of facilitating or contributing to the commission of crimes which violate human rights. These multilateral conventions and instruments have been accompanied for the most part by an expanding regulatory and administrative development in the field of human rights, both at the international and national levels, crystallizing customary international law on the subject, which has not been limited by persistent objections from national governments, in terms of opposing the idea that it is illegal to contribute to the violation of fundamental rights.

Even though it has been argued that there is no norm that specifically prohibits the complicity of corporations, the above conventions and instruments make no distinctions between natural and legal persons when prohibiting complicity in human rights abuses, whether the principal crime is committed by the state or by non-state subjects. Neither are contributions in the form of certain goods or services excluded. Excluding the provision of commodities from the general prohibition established is not an option that emerges either explicitly or implicitly from these conventions and instruments.

The Charter of the Nuremberg International Military Tribunal already penalized cooperation or contribution in the commission of major crimes and provided for the possibility of declaring that when individual members of a group were found to have perpetrated such crimes, the group such individuals belonged to would be considered a criminal organization.³² The industrial cases heard by this military tribunal, in which several businessmen were convicted on charges of contributing to the Nazi regime confirmed the principle that companies themselves can be found to have breached international law even when their officials were criminally convicted, although only in one

31 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art 4; International Convention on the Suppression and Punishment of the Crime of Apartheid, art 3(b); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art 6; Convention on the Prevention and Punishment of the Crime of Genocide, art 3(e); Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art 1(2); UN Convention Against Transnational Organized Crime, art 5(1)(b); International Convention for the Suppression of the Financing of Terrorism, art 2(5)(a); International Convention for the Suppression of Terrorist Bombings, art 2(3)(a); Protocol against the Smuggling of Migrants, art 6(1)(b); Statute of the International Criminal Court, art 25(3); and the Statutes of the International Tribunals for Rwanda, art 6 and for the Former Yugoslavia, art 7.

32 Charter of the International Military Tribunal, art 9 (8 August 1945) 59 Stat 1544, 82 UNTS 279.

exceptional case was the death penalty applied to company.³³ Among other business operators, these proceedings - which were founded on customary international law - convicted individuals who had contributed commercially (Bruno Tesch, for supplying gas to the Auschwitz concentration camp) and financially (Friedrich Flick, the German industrialist who used slave work and donated money to the SS) to the acts of genocide perpetrated by the Nazi regime.³⁴

Non-state subjects can, technically, breach international human rights law, with which the different consideration of states and non-states is, in practice, a chapter of legal theory (in crisis) and an issue that requires a casuistic analysis more than a mandatory or innate definition of international law. Corporations are, in fact, increasingly regulated by international law (consider, for example, bilateral investment treaties), so that the scope of their rights and obligations is more the result of political decisions than of deductions derived from their subjectivity in international law, as occurs in the domestic sphere. In that way, corporations, like natural persons and states, are not exempted from the duty of respecting the fundamental human rights that, depending on the case, concern them.

Although in the current state of international law legal persons do not specifically fall under the jurisdiction (*ratione personae*) of international criminal tribunals, that does not mean they are exempted from the principle that prohibits contributing to acts of serious human rights abuses, in particular when *jus cogens* norms are involved. Admitting that option would entail accepting that corporations can be used as useful vehicles for breaking the law and for profiting by facilitating serious crimes, an assumption that is unacceptable for international systems for the protection of human rights. It would also put corporations in a position of absolute immunity vis-à-vis peremptory norms, a position to which states, as legal persons, could not aspire.

e) The relevance of the right to truth in the case under discussion

This case is about learning the truth relating to financial contributions to a criminal regime that violated *jus cogens* norms and how these actors may have helped in the consolidation of it. Right to the truth is well rooted in international law.³⁵ Determining whether OECD Guidelines for Multinational

33 On the dissolution of IG Farben, ordered precisely because of its implication in serious violations of international law during World War II; see Control Council Law No 10: Punishment of Persons Guilty of War Crimes (20 December 1945) in *Enactments and Approved Papers of the Control Council and Coordinating Committee* (1946, Office of Military Government of Germany (US)) I at 306.

34 *In re Tesch (The Zyklon B case)* 13 Ann Dig 250 (Brit Mil Ct 1946), reprinted in *UN War Crimes Commission, Law Reports of Trials of War Criminals* (1947) 1 at 93; *United States v Flick* (22 December 1947) in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law* (1952) 10/1.

35 "Study on the right to the truth" (report of the OHCHR, 8 February 2006), UN doc E/CN.4/2006/91.

Enterprises were violated would contribute to a more complete historical narrative regarding the Apartheid period. So that it is clear how the way of dealing with past behavior has a concrete, direct impact now on the effective and full realization of right to the truth of victims and the whole South African society.