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South Africa: Landmark Ruling Allows Apartheid Victims to Sue Multinationals

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ANALYSIS

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*In one of the most significant legal rulings in the post-apartheid history of South Africa, victims of apartheid have finally received the green light from a US judge to sue multinational corporations that knowingly aided and abetted the regime. The implications of this ruling are colossal, writes **Khadija Sharife**, not only for Africa but for the world at large.*

After seven years of pacing legal hallways, South Africa's apartheid victims have finally received the green light from a US judge to sue multinational corporations that knowingly aided and abetted the apartheid regime. In her 144-page judgment, Southern District of New York Judge Shira Scheindlin found that select defendants - including IBM, General Motors and Ford - engaged in aiding and abetting apartheid, torture, extrajudicial killings, denationalisation and other crimes and could therefore be held accountable.

Scheindlin's 8 April ruling also crucially stated, 'Under the Rome Statute - and under customary international law - there is no difference between amorality and immorality. One who substantially assists a violator of the law of nations is equally liable if desires the crime to occur or if she knows it will occur and simply does not care.'

Her landmark decision has been called 'a major advancement in international human rights law' by the plaintiff's attorney Michael Hausfeld.

The lawsuits were previously dismissed by Southern District Judge John E. Sprizzo who stated that the class action suits 'could have serious consequences for US foreign relations and US commercial trade.' The class action suits were later reinstated by the 2nd US Circuit Court of Appeals in 2007 over the objections of the US State Department and the South African government, who granted a blanket amnesty to all corporations active during the apartheid era. The lawsuits Ntsebeza v. Daimler Chrysler Corp and Khulumani v. Barclay National Bank Ltd were later reassigned to Scheindlin on Sprizzo's passing.

CRIMES AGAINST HUMANITY

Though 15 years have passed since South Africa's first democratic elections in 1994, the economic system sustaining the apartheid regime has yet to be interrogated in a court of law.

Apartheid - meaning 'separateness' in Afrikaans - is often simplistically reduced to a state of racial segregation, marginalising the economic structure underpinning the strength and staying-power of the regime. The foundation of this structure - legalised in 1948 - was described by South Africa's notorious former Prime Minister John Vorster who stated, 'Each bank loan, each new investment is another brick in the wall of our continued existence.'

The processes of apartheid - declared a crime against humanity by the United Nations in the 1960s - witnessed close collaboration between foreign corporations including mining, banking, technology, automotive and energy corporations such as Fujitsu Ltd, Barclays, IBM, Daimler AG and the Ford Motor Company among others, intentionally financing, aiding and abetting the regime, in exchange for access to natural resources such as gold and diamonds, and deliberately cheapened human resources or labour. The reasoning - business as usual - was quickly justified by corporations such as Ford who stated, 'Why are we in South Africa? We would not be there were there not an opportunity to make a profit.'

One example of this alliance was the Defense Advisory Board (DAB), created in 1980 by Vorster's successor, the brutal P.W. Botha, for the purpose of devising 'security' policies related to various industries. Botha appointed corporate representatives from Barclays, Anglo American and other corporations to the board. In his statement to the House of Assembly Botha said, 'We have obtained some of the top business leaders to serve on the DAB in order to advise me from the inside... I want to unite the business leaders of South Africa, representative as they are, behind the South African Defence Force. I think I have succeeded in doing so.'

The loyalty of foreign corporations investing in South Africa continued in the banking sector until as late as 1989-90, when US$8 billion in outstanding foreign loans were rescheduled on easy terms. The period from 1984 onward saw a 400 per cent increase in foreign loans, with 260 banks rescheduling the 1985 government-imposed debt standstill on US$13 billion (of US$23.5 billion) in outstanding debt. The deal 'hammered behind a veil of secrecy' was headlined by a local newspaper under the caption 'South Africa makes a deal ... which the rest of the world's debtors can only envy.'

South Africa's Finance Minister Owen Horwood later said, 'There is a good deal of business with them [banks] which doesn't hit the headlines, and they remain important to us, particularly in the private sector.'

Victims of apartheid, represented by two reparations lawsuits filed eight years ago - Ntsebeza, et al. v. Daimler AG, et al. and Khulumani, et al., v. Barclays National Bank Ltd., et al - have now won the right to prosecute select corporations including General Motors, Ford, Daimler, IBM, Fujitsu and Rheinmetall using the vehicle of the Alien Tort Claims Act (ATCA). The ATCA allows foreign victims of tort or injury in their own country to seek redress in US courts. Though the case was labeled 'judicial imperialism' by former President Thabo Mbeki, the ATCA vehicle is the last hope of many victims who require neutral courts removed from the influence of corrupt or despotic regimes from which to litigate for justice, and has used been by Holocaust victims as well as those living in Burma and Nigeria.

In 2002, South African victims such as Professor Dennis Brutus, Lungisile Ntsebeza, Jubilee South Africa and the Khulumani Support Group charged a group of multinationals with aiding and abetting the regime through arms, finance and technology and automotive equipment and expertise - something admitted to by the architects of apartheid.

Automotive corporations such as Daimler are charged with knowingly supplying armoured Unimog 'military' vehicles to the regime. In July 1988, DaimlerChrysler employee Joachim Jungbeck proclaimed to a shareholder meeting:

'During a company visit, I was proudly shown aggregates of army vehicles, including huge numbers of axles from armoured vehicles. Storerooms contained large numbers of engines, axles and transmissions for Unimogs and armoured vehicles of the South African police and army.'

Much like the banks who funneled finance to state-owned entities such as ARMSCOR and ESCOM, Daimler directly collaborated with ARMSCOR, purchasing shares in the state-established Atlantis Diesel Engines (ADE) whose main client was the South African army, as well as 56 per cent capital stock in Allgemeine ElektizitÃƒÂ¤tsgesellschaft (AEG) used to monitor the movement of black people.

In their Joint Motion to Dismiss, Daimler AG, Ford Motor Company, Barclays Bank, International Business Machines Corp., Fujitsu Ltd. and UBS claimed that allegations of aiding and abetting the apartheid government were not actionable because doing business with apartheid South Africa did not violate international law, international law did not impose obligations on the corporations to divest and that defendants' home countries did not prohibit South African commerce altogether. These corporations also stated unanimously that the UN General Assembly was not a 'lawmaking body' but was instead 'merely advisory' and that international law does not recognise corporate liability.

RULES OF ENGAGEMENT

Defendants claimed that South Africa viewed the case as an intrusion on its sovereignty. Although the former Minister of Justice Dullar Omar assured the plaintiffs that the government would maintain a neutral stance, allowing for victims to seek redress in any competent court of law, his successor Penuell Maduna obstructed the case by submitting an amicus curiae brief (also known as the Maduna Declaration) opposing litigation, saying that the responsibility of addressing apartheid lay with the government, and that the case would undermine national sovereignty. The back-pedalling occurred when Maduna received a letter from US Secretary of State Colin Powell requesting the government invoke the issue of sovereignty. According to Mbeki, 'We are not defending the multinationals. What we are defending is the sovereign right of the people to decide their future.'

Yet according to Scheindlin, 'International comity does not require dismissal of this suit.' In a footnote, she wrote that 'defendants [corporations] argue the real issue is not whether defendants were granted amnesty' but whether a federal court should interfere with South Africa's stated preference. In 1994, the ANC (African National Congress) government granted a blanket amnesty to all corporations; no alternative forum was created to investigate the economic structure underpinning apartheid. The Truth and Reconciliation Commission (TRC) established by the state to redress wrongs committed during apartheid was never mandated to investigate the role of corporations and was instead limited to individual acts of aggression. In 2005, an amicus filed by the TRC proclaimed that the corporations charged with aiding the regime never engaged with the TRC, plead for amnesty or offered reparations. The TRC also found that the lawsuit against multinationals does not interfere with the TRC's policies or mandate, nor does it undermine national sovereignty, South Africa's courts or the constitution. The TRC stated that private corporations may be held legally accountable as a matter of civil law.

Contrary to the claims of the South African government, Scheindlin quoted the TRC report stating that, 'there is absolutely nothing in the TRC process, its goals or the pursuit of the overriding goal of reconciliation, linked with truth that would be impeded by this litigation. Such litigation is entirely consistent with these policies and the findings of the TRC.'

Scheindlin quoted former World Bank economist Joseph Stiglitz's argument that, 'Suits seeking to hold foreign companies accountable for their unlawful collaboration with a prior regime will not discourage foreign investors from investing in that country in the future.'

According to Desmond Tutu, 'The case is important for what it means to the victims of apartheid. But it is also important as a warning to those who support unjust regimes with their business. Business like sport is never really politically neutral.

'Sadly the litigation if it is successful will expose the meanness of the reparations our country gave to victims and is a rebuke to our government who tried to oppose the case.'

Marje Jobson, director of the Khulumani Support Group, stated that the lawsuit targets 'companies that did profitable business by [knowingly] equipping the apartheid security agencies with the means of enforcing and sustaining apartheid' and 'asks for compensation for injuries on behalf of individual victims who fall into four classes of victims. The decision regarding compensation would be based on standards established in international law.'

Individual supplemental memorandums lodged by corporations further contested charges that parent corporations should be held liable for the alleged acts of subsidiaries. Ironically, piercing the 'corporate veil' of parent-subsidiary relationships is largely impossible as internal-transfer pricing, information transfer and the overall pyramid structure related to multinational operations - comprising 60 per cent of global trade - is secretive and lacks transparency.

TORT

Though Scheindlin narrowed the claims, dismissing charges against banks such as Barclays, she found that the technology corporation IBM could be charged for supplying equipment used 'to register individuals, strip them of their citizenship, and segregate them in particular areas of South Africa', that Rheinmetall Group can be prosecuted for aiding and abetting extrajudicial killing and apartheid through the supply of armaments, and that General Motors, Daimler and Ford were 'intimately involved' with aiding and abetting apartheid, torture and inhumane treatment as well as providing military equipment used by the South African Defense Forces and other security branches. Hopes for a settlement are pinned on the new US government of Barack Obama - who supported corporate divestment from South Africa during the apartheid regime - and the presumably left-leaning Jacob Zuma-led South African government.

Despite Scheindlin's dismissal, the case for prosecuting banks financing 'terrorist regimes' or state terror (defined as the systematic use of terror as a means of coercion) is certainly legitimate, especially in light of well-documented supporting evidence concerning foreign financial support and the characteristics of the apartheid regime.

If successful, the case sets a global precedent defining the contours that can be used to hold multinational non-state actors accountable for aiding, abetting and sustaining various brutal, dictatorial and corrupt regimes.

In doing so, the multinationals propping up undemocratic regimes that are dependent on foreign finance, the demand for expropriated natural resources and deliberately cheapened human labour - as well as technology, automotive and armaments sources - may well find themselves out in the cold, subject to the long arm of the law.

One small step for South Africa, one giant leap for mankind...

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