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Can reparations for apartheid profits be won in US courts?

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A telling remark about US imperialism's double standards was uttered by Clinton-era deputy treasury secretary Stuart Eizenstat, who a decade ago was the driver of reparations claims against pro-Nazi corporations, assisting plaintiffs to gain $8 billion from European banks and corporations which ripped off Holocaust victims' funds or which were 1930s beneficiaries of slave labor (both Jewish and non-Jewish).

But how about reparations for apartheid profits? As a November 2002 keynote speaker for the "USA Engage" lobby of 650 multinational corporations organised to fight the Alien Tort Claims Act (ATCA), Eizenstat warned that South African reparations activists "can galvanise public opinion and generate political support," and "may achieve some success despite legal infirmities."

Six months later, at a Columbia University seminar, Eizenstat noted that "Anti-apartheid victims from SA have sued scores of US companies in US courts for their alleged – and I underscore alleged – participation in facilitating apartheid." (He prefaced this with a post-racist personal explanation for his own Holocaust-restitution zeal, embarrassedly recalling a 1950s experience in his hometown: "I was unwilling to break with convention and give an elderly black lady my seat on the white section of an Atlanta bus.")

Today, convention has it that the apartheid victims should and will lose the lawsuit to be heard in the New York Southern District Court on Tuesday, July 8. Attending will be professor Dennis Brutus, the 83 year old poet and activist who served time on Robben Island with Nelson Mandela, before kicking SA out of the 1968 Olympic Games. Brutus is a leading plaintiff, amongst many thousands of black South Africans suing three dozen corporations for profiting from a "crime against humanity", as the United Nations termed apartheid.

The ATCA, passed in 1789, says, simply, "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." ATCA was meant to get a legal handle on piracy, and in the process to persuade colonial powers it was safe to trade with the US.

But only in the last two decades has the law become widely known. Encouraged by Burmese villagers fighting Unocal, a case which in 2003 withstood challenge by the Bush Administration, activists like Brutus, Cape Town academic Lungisile Ntsebeza, the Khulumani Support Group for apartheid victims and Jubilee SA used the ATCA to sue latterday pirates: dozens of multinational corporations operating in SA prior to 1994 in spite of calls for sanctions and disinvestment.

But matters were complicated when SA president Thabo Mbeki was requested by the Bush

administration to oppose Brutus and the other activists in 2003. Thanks to the overarching imperial-subimperial alliance between Pretoria and Washington (as well as the British and German governments) on behalf of multinational corporations, Judge John Sprizzo initially decided the case on behalf of the defendants in late 2004. He reasoned that ATCA conflicted with US foreign policy and SA domestic economic policy, and indeed it did insofar as these policies consider corporate profits as their first priority.

But last October, litigants won an appeal and in May, when the US Supreme Court was expected to finally kill the lawsuit, on behalf of the corporations, four of the justices discovered conflicts of interest in their own investment portfolios. Because they owned shares in the sued companies, the case went back to Sprizzo, in what plaintiff lawyer Charles Abrahams argued was "a massive victory for the international human rights movement as a whole."

In contrast, the Washington representative of the SA government's International Marketing Council, Simon Barber, was dismissive of the litigants' Supreme Court win, citing Mbeki's charge that SA sovereignty was violated. In any case, "The endeavour remains quixotic."

Nicole Fritz, director of the Southern African Litigation Centre, disagrees: "Companies that were not perpetrators of human rights violations but were complicit in such violations through their dealings with oppressive governments are now potentially liable in law for their actions."

Disincentivizing future profit-taking from dictatorships such as Burma or Zimbabwe is a central objective. In mid-2008, just as Robert Mugabe's Zanu(PF) paramilitaries committed sufficient murder and torture to ensure his "reelection", thanks in part to Mbeki's perpetual connivance, AngloPlats announced a US$400 million investment in lucrative Zimbabwean platinum mines.

As Abrahams argues, "The substantive basis of the suit is that foreign multinational corporations aided and abetted the apartheid government by providing arms and ammunition, military technology, transportation and fuel with which the government and its armed forces were able to commit the most heinous crimes against the majority of the people of South Africa." (Such corporate work was, for Eizenstat, "alleged" – not obvious – facilitation of apartheid.)

Corporations being sued by Abrahams' plaintiffs include the Reinmetall Group, for providing arms and ammunition to the Apartheid government; British Petroleum (BP), Shell, Chevron Texaco, Exxon Mobil, Fluor Corporation and Total Fina-Elf, for providing fuel to the armed forces; Ford, Daimler-Chrysler and General Motors, for providing transportation to the armed forces; and Fujitsu and IBM for providing the government with much needed military technology. Banks financing apartheid include Barclays, Citibank, Commerzbank, Credit Suisse, Deutsche, Dresdner, J P Morgan Chase and UBS.

Although Mbeki was an exiled foreign representative of the African National Congress prior to 1994 and demanded that multinational corporations disinvest from SA, in subsequent years he conveniently developed amnesia.

In 2001, at the UN World Conference Against Racism (WCAR) here in Durban, he censored a suggested clause that the "US should take responsibility and pay reparations for the Trans-Atlantic Slave Trade." In spite of reparations advocacy by Nigeria and other African states,

Mbeki refused to allow this to be mentioned in the final document, calling instead merely for more donor aid.

In April 2003, Mbeki agreed with Bush that it was "completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country, and the observance of the perspective contained in our constitution of the promotion of national reconciliation."

He expressed "the desire to involve all South Africans, including corporate citizens, in a cooperative and voluntary partnership" – but failed to reflect upon numerous such attempts by the Reparations Task Force and Cape Town's Anglican Archbishop Njongonkulu Ndungane, for years prior to the lawsuits.

SA trade minister Alec Erwin then insisted that Pretoria was "opposed to, and contemptuous of the litigation" by activists. Any findings against companies "would not be honoured" within SA.

In July 2003, SA justice minister Penuell Maduna wrote to the courts that the case would discourage "much-needed foreign investment and delay the achievement of the government's goals. Indeed, the litigation could have a destabilising effect on the SA economy as investment is not only a driver of growth, but also of unemployment."

As a friend of the court on behalf of the claimants (alongside Archbishop Desmond Tutu), Nobel laureate Joseph Stiglitz replied that such comments had "no basis," because, "those who helped support that system, and who contributed to human rights abuses, should be held accountable."

Maduna's letter to the US court requested that the lawsuits be dismissed, "in deference to the sovereign rights of foreign countries to legislate, adjudicate and otherwise resolve domestic issues without outside interference." (Mbeki and Maduna made no effort to establish SA's own ATCA.)

But in August 2003, at the opening plenary of a major Reparations Conference, Jubilee SA's Berend Schuitema reported that Maduna made an extraordinary confession: "The reason why he had made the objection was that he was asked for an opinion on the lawsuit by Colin Powell. He gave Powell his written response, whereupon Powell said that he should lodge this submission to the Judge of the New York Court. Howls from the floor. Jubilee SA chairperson M.P. Giyose pointed out the bankruptcy of the sovereignty argument."

Within a few months, the adverse implications of Maduna's intervention for international justice became even more ominous, in a case involving women victims of Japanese atrocities during World War II. Fifteen "comfort women" from Korea, China, the Philippines and Taiwan sued Tokyo in the US using the ATCA. In June 2005, the US Court of Appeals in the District of Colombia rejected their suit, citing Maduna's affidavit.

Meanwhile at home, the South African government was unilaterally paying just $3500 each to 19 000 families whose members suffered apartheid-era murder or torture, considered a paltry sum.

Jubilee then took the opportunity to tackle Barclays in a mass citizens' campaign, in the course of the London financier's 2005 takeover of SA's second-largest bank, ABSA. SA justice minister Brigitte Mabandla (Maduna's 2004 replacement) responded with an October

2005 friends of the court brief on behalf of the bank, prompting a demonstration by Jubilee.

Led by Brutus, Jubilee went on to picket eight international banks located in Sandton: “These banks gave billions of dollars of loans to the Apartheid Government, renegotiated its debts and thus enabling it to spend even more on its military, and, in the case of Barclays, gave money directly to the South African Defense Force in 1976.”

Jubilee’s demand was simple: “All of these banks need to fully apologize to the South African people for the support they gave to the Apartheid regime, and pay reparations to those who have suffered from its actions.” The Washington-based Mobilization for Global Justice and a coalition of Swiss activists joined Jubilee protesters in solidarity demonstrations.

From Sandton to Washington, Citibank was targeted, for as the UN’s Special Committee against Apartheid had observed in 1979, “Citigroup has loaned nearly 1/5 of the $5 billion plus which has gone to bolster apartheid”. In Berne and Zurich, Credit Suisse and UBS were the subject of protest because from the early 1980s they replaced US and British banks as the main apartheid financiers.

To be sure, conflict has existed between plaintiffs that makes it harder to win the hearts and minds of the broader public. The first set of cases were filed by a discredited New York lawyer (active in the Holocaust settlement), Ed Fagan, who fell out with Ntsebeza.

Then, between the Khulumani Support Group and Jubilee, tensions arose over claims to ownership of the case and over direction of strategy. And between Jubilee’s former Johannesburg staff on the one hand, and on the other, board members and several provincial chapters, a dispute erupted that temporarily paralyzed the organization.

Still, Brutus believes the plaintiffs can leapfrog Mbeki to appeal to a much richer strand of African nationalism than one that relies simply upon an appeal to sovereignty. The Organization of African Unity made a case for reparations in the 1993 Abuja Proclamation against slavery, colonialism, and neo-colonialism, damage from which is “not a thing of the past, but is painfully manifest in the damaged lives of contemporary Africans from Harlem to Harare, in the damaged economies of the black world from Guinea to Guyana, from Somalia to Surinam.”

A “moral debt is owed to the African peoples”, the Abuja Proclamation declares, requiring “full monetary payment through capital transfer and debt cancellation.”

In addition, Northern ecological debt to the South must be raised, in contrast to dubious climate change policy proposals for “Clean Development Mechanism” projects as funding vehicles for Third World greenhouse gas reduction.

So the challenge for activists is not only to protest and to deploy ATCA, and in the process – as Eizenstat fears – win more hearts and minds. It is also to gather more allies across the African continent and Third World so that reparations demands can be expanded. In the process, these linkages to other constituencies will ensure the struggle becomes a broader, deeper critique of economic injustice, at its roots, in the profit motive.

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