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Using claims of sovereignty against human rights

On Switzerland's handling of the Apartheid court cases[1]

A few years ago Saskia Sassen[2], expert on globalisation and governance in a globalised world, wrote: "Two kinds of developments in this new transnational, spatial, and economic order matter for my discussion of sovereignty. One is the emergence of what I will call new sites of normativity, and the other, at a more operational level, is the formation of new transnational legal regimes and regulatory institutions that are either private or supranational and have taken over functions until recently located in governmental institutions. I argue that two institutional arenas have emerged as new sites for normativity alongside the more traditional normative order represented by the nation-state: the global capital market and the international human rights regime. The global market now concentrates sufficient power *and legitimacy* to command accountability from governments regarding their economic policies... So does the international human rights regime..." [3] This is precisely what we have experienced, live, for two years in pursuing the Apartheid court cases, whose aim is to oblige transnational banks and businesses to pay reparations for the victims of Apartheid. The Swiss establishment has stood solidly behind the accused large banks which have been taken to court. It not only sells this scandalous position - as has been the case for decades – in the name of Switzerland's national interest, but has also, of late – in order to acquire additional legitimacy for itself – sold it as a policy conceived in the name of South Africa's right to sovereignty and directed against the USA's hegemony.

On the 16th of June 2002, on the anniversary of the Soweto Uprising, US-American lawyer Ed Fagan announced the filing of a class action suit by victims of Apartheid against the banks UBS, CSG and Citicorp. The enforcement of claims through legal action against companies and banks from France, England and Germany were also to follow later. The press conference announcing the cases was held jointly with the South African lawyer John Ngcebetsha and a plaintiff, Dorothy Molefi, on Paradeplatz[4] in Zurich, Switzerland. The leading South African lawyer for the charges being brought and the South African Truth and Reconciliation Commission's former investigative head, Dumisa Ntsebeza, simultaneously held a press conference in Soweto. On Paradeplatz a mob booed and jeered Fagan, a mob which had, according to the Swiss Sunday newspaper *SonntagsZeitung,* been organised by the local Zurich politician Willy Eggler, member of the right wing *Schweizerische Volkspartei* SVP (Swiss People's Party) and an activist in the far right wing Auns, the movement for an independent and neutral Switzerland, (SonntagsZeitung, 23/6/2002). Neither the South African lawyer nor Dorothy Molefi, mother of Hector Petersen, the first victim of the Soweto Uprising of 1976, were able to make their voices heard. The hateful and ugly scenes denied the victims and their representatives

the possibility of stating their case and their right to free speech. Jubilee South Africa and the "Apartheid Debt and Reparations Campaign" (ADR) coordinated by Jubilee called the institution of legal proceedings a milestone in the struggle for reparations for the victims of Apartheid. Jubilee was forced to come to the conclusion that despite all of the ADR campaign's efforts, which they had conducted for more than three years, both Swiss business and the government refused to pay attention to the question of international reparations for the victims of Apartheid in Southern Africa. Jubilee once more called upon Swiss, US-American, German and British politicians and business people to work towards an international reparations conference. Even though the court case for which Fagan was the lead lawyer in the US had not been initiated by the ADR campaign, Jubilee nevertheless supported all court cases launched by victims of Apartheid (Jubilee press release, 17/6/2002).

At the beginning of August Jubilee South Africa announced that the ADR campaign had employed the renowned US-American lawyer Michael Hausfeld, in order for him to "support Jubilee in developing a campaign which had integrity, was sensitive and credible." (Swiss daily newspaper *Neue Zuercher Zeitung* NZZ, 6/8/2002). Jubilee in fact said it supported the Ntsebeza court case, but rejected both the fact that Fagan rushed in hastily and also his style of working. Yasmin Sooka, director of the Trust for Human Rights in Pretoria, Jubilee South Africa patron and a former member of the South African Truth and Reconciliation Commission and a present member of the UN tribunal in Sierra Leone, said in an interview: "Hausfeld will work together with us very closely and prepare a legally and content-wise very well-substantiated court case. Our aim is to hold corporations operating internationally liable for their behaviour and to ensure that they cannot again behave as was the case in Nazi Germany, or under the Apartheid regime, or in colonised Africa. We have a historic chance of making it clear to multinational corporations and their financers that they have to deal with the consequences if they violate the world order or the moral order." (Swiss weekly news magazine *Facts*, No. 32, 8/8/2002). On the 11th of November 2002 Hausfeld and South African lawyer Charles Abrahams instituted the victims' self-help organisation Khulumani's proceedings.

Up until today (April 2004) the US-American district court judge in charge of the case has not yet made the decision public on whether the Apartheid court cases will be deemed admissible in US-American law. Simultaneously a case concerning the admissibility of a foreign human rights victim's reparations court case has, for the first time, been pending before the highest US-American court since the end of 2003. The so-called Alien Tort Claims Act (ATCA), a law dating from 1789, makes reparations court cases brought by foreigners before US-American courts possible for, amongst other things, the most serious human rights violations which have been committed outside of US state territory. Offenders or those responsible for a crime can only be taken to court, however, if they are present in the USA at the time of the case being brought or – in the case of a company – have a branch office or subsidiary in the USA. ATCA

invokes common law and written international law.[5] The future chances of human rights cases filed in the USA being ruled admissible depends on this Supreme Court decision.
The crucial point in the Apartheid court cases is the fact that Apartheid was condemned – just as National Socialism was – by the UN general assembly as a crime against humanity. Today it figures on the newly-created Den Haag International Criminal Court's list of serious crimes against humanity. The Swiss establishment and its social scientists have, until today, most difficulties with this comparison of Apartheid with National Socialism.

The counter-strategy of the Swiss foreign affairs department, the business associations and the Swiss Bankers Association

In a confidential policy paper of the Swiss Business Federation Economiesuisse, which had been drafted before proceedings in the Apartheid court cases had been instituted, it was stated that it was "important, above all, that business and government clearly reject the demands. It must be emphasised that, in contrast to the Holocaust discussion, Switzerland is not prepared to make any compromises." (SonntagsZeitung, 16.6.2002). The political authorities and business should coordinate their communication policy and their terminology, professional PR firms both in South Africa as well as in Switzerland should motivate the public to "politically condemn" the Apartheid court cases, the "opposition" would have to be closely observed and "curbed in time", "selected parliamentarians" should be kept regularly informed. Economiesuisse's public relations strategy had three main aims:
- Ed Fagan should be portrayed as the enemy, and his court case should be presented as "a populist lawyer's purely profit-seeking move", without any factual basis.
- The South African government should be encouraged to dissociate itself from the litigation and then the fact that it is, on the contrary, primarily interested in continuing investment, aid and experts' knowledge, rather than focussing on facing and confronting the past.
- In a "proactive" media campaign Switzerland must be shown as one of the most significant investors in South Africa and as a donor of development aid who is closely involved in building a new South Africa. By nurturing close contacts with the South African authorities, by promoting institutions such as the "Swiss Business Hub, chamber of commerce, South Africa fairs, investment seminars" Switzerland's presence in South Africa should be strengthened. The objective was to have a "change of focus: away from discussions about the South African past towards a positive approach for the future development of the country" (SonntagsZeitung, 16/6/2002). Former ambassador Thomas Borer was to recommend later that the objective had to be to "bring the USA and South Africa to distance themselves [from the court case]."(HandelsZeitung, 13/11/2002)

From the beginning the Swiss government, together with business, trade and commerce associations and the Swiss Bankers Association pursued "the joint objective of repelling the class action suits", according to a foreign affairs department spokesperson. Initially, however, the government tried to take a differentiating position. A press statement which was close to the business community's line was stopped at the last moment by foreign minister Joseph Deiss and secretary general of the foreign affairs department Walter Thurnherr, according to media reports. And foreign affairs department spokesperson Ruedi Christen argued that development aid could not be "a public relations instrument, not even in favour of the business community", and thus put the case against the "proactive" representation of Swiss development projects in South Africa (SonntagsZeitung, 23/6/2002). A few days later the government took its official position: "It is not for the federal council (the government) to advance an opinion as to the justification of such litigation. But it is of the opinion, nevertheless, that this kind of class action suit filed with a US court is not suitable for solving the political problems of other countries. [...]Switzerland and South Africa have close relations. The federal council will do all it can to deepen these relations. During the regular official contacts between Switzerland and South Africa there have been no indications that the South African authorities would support such class action suits." (A spokesperson for the federal council, 26/6/2002). In one and a half years Economiesuisse's public relations strategy has undoubtedly had great success in this country. The case of the current federal councillor Hans-Rudolf Merz is telling in relation to the dramatic changes in Swiss public opinion: his business activities during the Apartheid era and his statements on Apartheid led to a public polemic at the end of 2002 which resulted in Merz withdrawing his candidacy for the presidency of the centre-right Free Democrat political party. One year later he was elected a federal councillor (minister) without any difficulties.

This strategy's success story will be shown in this paper. The objective is to present the most important elements of the official reasoning against the court cases, but also to show how much orchestration, manipulation and attempts to apply pressure there was behind the scenes. Naturally scientific blessing from some professors was required and the disgusting game of playing with anti-semitic clichés was also not shied away from, even if it is currently enriched by anti-US-American reflexes.

How the court case came under fire in Switzerland

"With this court case we are expressing our committed struggle for a better future for the victims of Apartheid, for human rights and for the rule of law," Khulumani and Jubilee South Africa wrote on the occasion of the submission of the Khulumani court case in New York (media release 12/11/2002). The rule of law is an expression which frequently pops up in Switzerland in documents on development aid, foreign investment and good governance. But the recognition

of the rule of law was to be ignored or denied any vestige of legitimacy from the beginning when it came to the victims of Apartheid.
The Zurich history professor Joerg Fisch, who had worked on South African history, colonialism and public international law, was one of the first social scientists to make his voice heard. "You cannot take such a court case, which is not based on any clear legal basis, seriously. Otherwise it would be possible to construct an excuse for a court case out of every historical act which was in any way connected with negative consequences or foul intentions. That doesn't make sense. Fagan has conclusively disqualified himself with this as a political clown." (Tages-Anzeiger 18/6/2002) Christoph Stueckelberger, general secretary of Bread for all and ethics professor at the University of Basel, reinforced the message in his way: "The South African victims speak the language of suffering and injury. They seek healing and reconciliation. But we Swiss hear and understand only the language of money - just like Fagan. And in so doing it is always forgotten what this case is really all about. In its essence namely it concerns the question of how the dignity of the victims of Apartheid can be restored." Stueckelberger writes about a "money trap", also about a "trap of the past" and a "trap of becoming too hard". The objective should be for "the state, the business community and the public, as well as the churches and the development aid agencies, to jointly find and pursue promising and sustainable ways forward." In addition he said that "the instrument of a US-American class action suit, with the inherent danger of arbitrariness and potential for misfeasance, did not correspond to a European sense of justice." (NZZ am Sonntag, 7/7/2002) Hans-Balz Peter, social ethicist and co-author of a study on the Federation of Swiss Protestant Churches SEK's relationship with the Apartheid regime, also opined recently that "class action suits as a specific legal means of US-American society are not to be encouraged, as they are rather humiliating for South Africa and will only hinder banks' and businesses' cooperation with South Africa." (Tages-Anzeiger, 23/4/2004).
In my experience this moralising discourse on the most appropriate reconciliation process and the money taboo met with considerable response in Swiss public perception, just as the media-nurtured excitement of politicians in the FDP, SVP and further to the far right against Ed Fagan. In contrast to this probably nobody wanted to believe the large banks' or Economiesuisse's standard proclamations of innocence: neither for their regrets concerning the South African population's suffering during Apartheid, nor for their rejection of any degree of co-responsibility whatsoever.
In addition, experts aware of the facts saw clearly that, contrary to all the bankers' assertions, the court cases were not in any way without any chance of success. Ivo Schwander, professor for international private law, comparative law and Swiss law at the University of St.Gallen, formulated it without any illusions: "The issue is not whether the US-American lawyer who initiated these class action suits is pleasant and nice or not. The motives which led to the court case are equally not the issue. When assessing the court case's chances one should be lead exclusively by the facts and by the legal position. [...] In

my opinion it is likely, however, that the US-American court will not deal with the blanket accusation that the granting of loans sustained the Apartheid regime longer. [...] If the initiators of the class action suit succeed in proving, on the contrary, that the loans from the accused banks served to finance means of spreading terror and of oppression, and that the accused banks knew this, then the case's admissibility, or corresponding prior pressure from the court for an out-of-court settlement, could be likely. On this as well as on other questions the Swiss public will have to get used to the fact that Switzerland's and the Swiss business community's behaviour in critical times will not be judged from a legal point of view in accordance with Swiss law alone. Those who trade with the world must subjugate themselves to the written and unwritten law and ethics of universally recognised norms." (St.Galler Tagblatt, 8/7/2002)

The South Africa government's strategy

Right from the beginning, Swiss government representatives claimed that the South African government was against the court cases. In fact, opinions were initially divided. President Thabo Mbeki spoke out against the court cases from the beginning – just as he also spoke out, by the way, against the Truth and Reconciliation Commission's very modest reparations recommendations. When the South African government passed an official resolution in December 2002, however, it became clear just how controversial opinions were: "Cabinet reiterated its recognition of the right of all citizens to undertake legal action on any matter. Government however is not party to this litigation; and it neither supports nor opposes it." This did not correspond to what Swiss representatives had hoped for.

Switzerland's economic significance for South Africa, and thus also its influence in South Africa, has decreased quite a bit in the last few years. A comparison with the USA clearly illustrates this. In 1989, when the sanctions were at their height, South Africa's foreign liabilities (foreign direct investment, shares, loans and bond issues, ownership of real estate) vis-à-vis Switzerland amounted to around two-thirds of the USA's. Swiss and US direct investment was roughly the same, outstanding Swiss loans and bond loans to the Apartheid government however were twice as high as the USA's. In 2001 US direct investment was 2.7 times as high as Switzerland's, bond loans and loans to the South African government were 27 times higher than Switzerland's and in total all the direct and indirect investment were more than 7 times higher than Switzerland's. In other words, Switzerland's share of foreign direct and indirect investment in South Africa since 1956 has never been as small as it is now[6]! It amounted to 2.5% of all foreign direct and indirect investment in South Africa in 2001 and was thus more than five times less than in 1989 and roughly half that of 1956.

So, whilst Switzerland's possibilities of exerting influence have diminished in the last few years, South Africa has been exposed to intense attempts by the

Bush government of putting it under pressure. The conflicts already began in 2001, when the USA withdrew from the UN Conference against Racism in Durban, which South Africa was coordinating and leading. When South Africa refused to support the Bush government in its rejection of the International Court of Justice the USA cancelled military aid to South Africa, as well as 24 other countries (Mail & Guardian, 11/7/2003). South Africa came under pressure again on account of its anti-war stance on the Iraq war. Of the UN debates on the Iraq war, the South African ambassador to the UN said that it had been a "brutal process with coercion, threats and incentives" (Mail & Guardian, 19/5/2003).
A few days after the Khulumani court case was submitted in November 2002, more than 50 well-known US corporations consulted in Washington on the further procedure concerning the Apartheid court cases as well as other "human rights court cases" against transnational corporations in the USA. Stuart E.Eizenstat was the main speaker. As Bill Clinton's Special Representative on Holocaust-era issues and for the restitution of property to victims of the Holocaust in the 1990s he helped negotiate agreements between victims of the Holocaust and the Swiss, Germans, Austrians, and French. Today he is a partner in the Washington law firm Covington & Burling - where UBS is amongst the clients. (NZZ am Sonntag, 8/12/2002).

The scandal in Switzerland

At the World Economic Forum in January 2003 in Davos, where Eizenstat was also present, first exploratory talks were conducted. Mbeki, in rough and brusque language, castigated the court cases in a speech before parliament in April 2003. Shortly thereafter the Swiss federal council (government) announced the closing of the federal archives for researchers of the national research programme NFP42+ on Switzerland's relations with South Africa. This applies until today, above and beyond the 30-year time limit for the release of records, for "files which contain names of firms involved in South African business or which contain information on capital export and other export business to South Africa." (Swiss finance ministry media release of the 11/9/2003 on the Hollenstein parliamentary motion number 03.3366). Mbeki again dissociated himself massively from the court cases in June, namely on the occasion of an official visit to Switzerland which was extraordinarily short – only half a day – and additionally took place shortly before a parliamentary session in which a comprehensive historical study of Swiss-South African relations and the closing of the federal archives were to be debated.
Thus law commission spokesperson Alexander J. Baumann, member of parliament for the right wing *Schweizerische Volkspartei* SVP (Swiss People's Party), declared: "In any case, access to private and business archives would violate privacy and the banking secrecy laws. [...] In the context of the class action suits, a majority of the commission is [...] of the opinion that the protection of privacy is more important than the interest which the state might

well have in finding out everything about Swiss companies' activities in the sense of a comprehensive historical study in all detail. Let me add in the name of the commission what South African President Thabo Mbeki detailed on the occasion of his visit to Switzerland last week, namely that his government rejects the class action suit. In his opinion it is not wise to look backwards into the past all too much and thus forget about today's problems such as poverty, aids or unemployment. South Africa also does not want US courts to make decisions concerning the country's problems." (Parliamentary minutes of the 20/6/2003).

Since Mbeki's official visit to Switzerland it is practically impossible to place any information on the Apartheid Debt and Reparations Campaign and its position on the court cases in the Swiss media. In July 2003 the South African government submitted an amicus curiae letter to the New York court responsible for the decision concerning the admissibility of the court cases[7], in which it took a clear stance against the cases and asked the court to rule the cases inadmissible in the interest of South Africa's sovereign rights. In August – at a conference of South African non-governmental organisations on the reparations court cases – the South African justice minister admitted that South Africa had been requested to write the amicus curiae letter by the US government. The conference demanded the immediate withdrawal of the letter. In further amicus curiae letters prominent South Africans such as former Archbishop Desmond Tutu expressed their opposition to their government's stance. The reparations debate is not yet over in South Africa - in contrast to Switzerland. The South African government has exposed itself to intense national criticism with its written statement. The question of whether the court case will be ruled admissible in the USA has also not been decided yet.

A workshop with Eizenstat on the court cases in the USA again took place at the World Economic Forum in January 2004. On the 24th of January 2004 the Swiss foreign affairs department, that is its public international law department together with Great Britain and Australia, signed an amicus curiae letter to the Supreme Court of the USA. It refers to a court case in which the US government negates the right of Humberto Alvarez-Machain, a Mexican citizen, to take a representative of the US Drug Enforcement Agency to court. This case – the first of its kind before the Supreme Court – will, as has been mentioned, be path breaking for the future of the right of foreign victims of grave and massive human rights violations' to go to court in the USA. The letter signed by Switzerland relies on the South African government's amicus curiae letter on the Apartheid court cases, which is appended to the letter in its entirety. Besides Switzerland, Great Britain and Australia it is above all US business federations and the Bush government who have spoken up for restrictions on the right to take someone to court.

Numerous US-American and international human rights organisations and human rights experts have, in contrast, now voiced their opposition to any attempts to limit the right to take someone to court, as have organisations which deal with corporations' social responsibility. These are, amongst others,

Amnesty International, organizations against torture, Mary Robinson, former UN High Commissioner for Human Rights, Richard J. Goldstone, former South African constitutional court judge and former chief prosecutor at the UN court of justice on Yugoslavia and Rwanda, many retired high-ranking US diplomats, around one hundred law professors and civil society organisations such as the World Jewish Congress, the International Center for Corporate Accountability, OECD Watch, Oxfam International, TransAfrica Forum, Jubilee South Africa, Christian Aid and Human Rights Watch. From Switzerland, the Zurich professor for criminal law and former president of the European Commission for Human Rights, Stefan Trechsel, the Berne Declaration and Trial as well as international human rights organisations located in Geneva have signed.[8] In response to public protest the Swiss foreign affairs department announced that the Swiss signature under the amicus curiae letter had nothing to do with the Apartheid court cases, but rather was directed against the increasing misfeasance of public international law by the USA (Tages-Anzeiger 19/3/2004) – a strange claim, as the case under contention concerns a kidnapping in Mexico upon the instructions of the US drugs authorities, that is to say that it simultaneously concerns grave and massive sovereignty violations and human rights violations. The South African government's communiqué against the Apartheid victims' court cases is unashamedly instrumentalised therein.

This is a translation of the article
M. Madoerin, *Mit Souveränitätsansprüchen gegen Menschenrechte. Vom Umgang der Schweiz mit Apartheidklagen [Using claims of sovereignty against human rights. On Switzerland's handling of the Apartheid court cases],* in Widerspruch, No. 46, summer 2004 (Zurich), pp. 191-200.

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[1] This article is based on a chronology of selected newspaper articles, government statements and media statements made by the international Apartheid Debt and Reparations Campaign. It was compiled by Martina Egli as part of a project commissioned by Aktion Finanzplatz Schweiz. The documentation comprehensively and impressively covers the period from mid-June 2002 up until the end of 2003. A shortened version will be published soon by the Switzerland-South Africa research group (www.solifonds.ch and www.aktionfinanzplatz.ch).

[2] Saskia Sassen is the Ralph Lewis Professor of Sociology at the University of Chicago. Her current book, "Denationalization: Economy and Polity in a Global

Digital Age" is based on her five-year project on governance and accountability in a global economy.

[3] Saskia Sassen, *Toward a Feminist Analytics of the Global Economy*, in Indiana Journal of Global Legal Studies, Vol. 4, No. 1, (Fall 1996), pp. 7-41, quote p. 32). (Also quoted in "Olympe" 7/97, page 95.)

[4] 'Paradeplatz' translates as parade ground. This square is THE symbol today for the power and success of the large Swiss banks.

[5] In contrast to the US state of affairs, victims' reparations rights are hardly anchored at the newly-created International Court of Justice in Den Haag. Also in contrast to US-American law, the possibilities of going to court against legal bodies are expressly excluded.

[6] Since when the South Africa Reserve Bank has been publishing the corresponding statistics from which these figures have been compiled.

[7] In the USA amicus curiae interventions allow a third party not involved in a legal case to provide the court with its factual knowledge or to point out certain legal points of view. Particularly high value is attached to interventions from foreign governments.

[8] See www.nosafehaven.org and www.aktionfinanzplatz.ch on this case.