

The Apartheid Lawsuit

On 6 November 2003, when the Apartheid cases were heard before Judge Sprizzo in the Southern District of New York, Mr. Barron, acting on behalf of the corporations argued before the court that there is no consensus among the nations or the courts of the world that the notion of civil liability of aiding and abetting is an appropriate mechanism for enforcing international law. Barron argued that no binding treaty, convention or other traditional source of international law recognizes the existence of aiding and abetting in civil law. Anytime from now onwards Judge Sprizzo is due to give judgment as to whether Mr. Barron is correct on this point of law, amongst others. Whichever way, Sprizzo's decision will come at a time when the fledgling democracies of a number of countries in Africa are seriously threatened precisely because of the dangers of aiding and abetting.

To illustrate the point, on 7 March 2004, 70 suspected mercenaries were arrested in Harare, Zimbabwe when they tried to purchase weapons in Zimbabwe en route to Equatorial Guinea in order to stage an attempted coup in that country. Two days later, an advanced party of 8 South African men and six Armenians were arrested in Equatorial Guinea, among them a known South African arms dealer, Nic Du Toit, for their role in the alleged coup plot. It has now emerged that behind these men, a sophisticated network of money and organization existed, without which any attempted coup would not have been possible. On 25 August, Mark Thatcher, the son of the former British Prime Minister, Margaret Thatcher, was arrested in Cape Town for his role in allegedly bankrolling the alleged attempted coup in Equatorial Guinea. According to the South African investigators it is alleged that Mark Thatcher put up funds through a company called Tripple A Aviation, operating as a humanitarian organization Air Ambulance African, for the purpose of a helicopter gunship and providing cash of 275 000 dollars for use in the ill fated coup. Together with Thatcher, the names of disgraced Lord Jeffrey Archer and millionaire Lebanese oil trader, Ely Calil, emerged as being principle financiers, who stood to benefit in their millions from oil concessions promised by exiled leader, Severo Moto, whom the alleged coup plotters intended to install as president should it have succeeded. One can only imagine what the consequences might have been if this alleged coup was put in motion. We would not know.

However, in the case of Apartheid South Africa there is no need for one to imagine as the consequences have all too readily manifested itself. Just as recent as one week ago, South African investigators have discovered a secret-apartheid era graveyard, containing the remains of 18 Mkonto we Sizwe members, the former military wing of the ANC, some of whom were blown up and buried by the security police in the mid 1980,s. According to the report carrying this story, some of the victims were blown up with explosives to give the appearance that they had been trying to set off landmines after having being tortured and electrocuted.

It is common cause that Apartheid was a crime against humanity and that there is no need to repeat the tales of its endless horrors. However, of significance is the fact that just like the alleged attempted coup in Equatorial Guinea, there stood behind Apartheid South Africa an intricate but sophisticated network of international finance without which Apartheid could not have functioned the way it did. After all, it was Prime Minister, John Voster, who stated that 'each bank loan, each new investment is another brick in the wall of our continued existence.' In 1980, Voster's succeeding Prime Minister, P.W. Botha appointed a 13-member Defence Advisory Board to advise the armed forces on the 'best business methods, including the manufacturing of arms and said that 'I want to unite the business leaders of South Africa behind the South African Defence Force and I think I have succeeded in it.'

Basil Hersov of Barclays Bank was appointed as one of the directors of Botha's Defence Advisory Board not long after the bank was criticised for having purchased defence bonds worth 10 million rands at the time, which Barclays justified it as an act of social responsibility towards the people of South Africa. Whilst we might never know what the consequence of Thatcher's support for the alleged coup in Equatorial Guinea might have been, we know very well what the consequences of Barclays' act of social responsibility have been to millions of people that experience the horror and brutality of Apartheid in

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South Africa. The endless testimonies before the Truth and Reconciliation Commission and recent discovery of an apartheid-era mass grave are but a few minute examples of these horrors.

Thus, when Judge Sprizzo delivers his judgement, he would have decided whether Mr. Barron was correct when he said that no binding treaty, convention or other traditional source of international law recognizes the existence of aiding and abetting in civil law. Or would Judge Sprizzo have taken sufficient note that the law on aiding and abetting has sufficiently developed from the time of the Nuremberg Tribunals when it was held that Adolf Hitler 'had to have had the cooperation of statesmen, military leaders, diplomats and businessmen. When they, with the knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent if they knew what they were doing. Today, this notion is firmly entrenched in the international law jurisprudence of the International Tribunal of Yugoslavia, the International Tribunal of Rwanda and the Rome Statute of the International Criminal Court.

Already the US Supreme Court in the case of *Sosa v Alvarez* has dealt a devastating blow the one of the principled arguments of corporations that the Alien Tort Statute cannot be used by victims to sue for gross human rights violations. The Supreme, amidst severe pressure has kept the door opened, albeit in a narrow way and it now only remains to be seen which way Judge Sprizzo would go.

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