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Briefing on the Reparations Lawsuit facilitated by the Apartheid Debt and Reparations Campaign of Jubilee South Africa

Background

In order to understand the legal basis upon which this lawsuit is brought, it is necessary to understand the background against which it is taking place. In 1998, Jubilee South Africa (then known as Jubilee 2000 South Africa), as part of the global Jubilee 2000 coalition of organisations, embarked upon an international campaign calling for the cancellation of Third World debt. The South African chapter of Jubilee 2000 in particular, conducted its own unique campaign around the 'Apartheid Debt.' The 'Apartheid Debt' is the 'debt' inherited by present government from the former Apartheid regime.

It is Jubilee's position that this 'debt' is an immoral debt and should not have to be paid back to foreign banks and corporations to whom it was owed. For this reason, Jubilee South Africa called upon foreign banks and corporations to cancel this 'debt' as an act of reparations in favour of the people of South Africa. However, these banks and creditors failed to heed this call. As a result, Jubilee South Africa considered it appropriate to embark upon legal action, not only against such foreign banks and corporations to whom this 'debt' is owned, but also against a number of other banks and corporations that had co-operated with the Apartheid regime.

International law basis of the lawsuit

Customary International Law (CIL) is the legal basis upon which we bring this lawsuit. Customary International Law is the conscience of the community of nation-states as a whole, as it is the expression of norms acceptable and those unacceptable to humanity in general. Thus, as early as the 18th century after slavery was outlawed as an abominable trade the community of nation-states has come to outlaw acts of aggression, genocide, torture, extra-judicial killing, long arbitrary detention and unlawful medical experimentation. The most recent category added to these unacceptable and abominable norms was apartheid. In 1973, the United Nations General Assembly adopted an international convention declaring Apartheid a crime against humanity and called for the criminalisation and prosecution of all those persons and institutions that practicing the crime. The Convention, drafted along the lines of the Genocide Convention, defined Apartheid as a system that:

- included murder;
- inflicted serious bodily or mental harm, torture or cruel, inhuman or degrading treatment;
- deliberately imposed living conditions upon non-white racial groups to cause its physical destruction in whole or a part thereof;
- to exploit the labour of the non-white racial groups by submitting them to forced labour; and
- dividing the racial groups by creating separate reserves and ghettos

Today, the Rome Statute of the International Criminal Court to which South Africa is a State party, explicitly cites Apartheid as an international crime over which it has jurisdiction. It defines it as a system of inhuman acts which includes murder, enslavement, deportation or forcible transfer of a population, torture and sexual violence committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other group or groups and committed with the intention of maintaining that regime.

In the light hereof, it is now established law that the system of Apartheid as practiced in South Africa explicitly promoted extra-judicial killing, torture, cruel, inhuman and degrading treatment and consisted of elements of genocide and forced labour, all of which were and still are against the norms of Customary International Law (CIL).

Third Party or Secondary Liability under International Law

This lawsuit is aimed at foreign corporations and banks that aided and abetted the system of Apartheid. This principle of Third Party Liability, also known as secondary liability under Customary International Law, refers to those that aid and abet crimes against humanity. Crimes against humanity are normally committed by primary perpetrators, whilst third party perpetrators normally aid and abet primary perpetrators in the commission of these crimes. Primary perpetrators are thereto primary liable whilst third party perpetrators are secondary liable. This principle dates back as far as 1794 for instance, when the Third US Congress enacted a law barring all and every person, so building, fitting out, equipping of vessels fitted for the 'carrying on of the slave trade,' loading, or otherwise preparing, or sending away, any ship or vessel, knowing or intending that the same shall be employed in such trade or business or in any way aiding or abetting therein. In the light hereof, the US Congress in 1820 determined that the slave trade was so repugnant that the perpetrators as well as the aiders and abettors thereof should be subject to the death penalty and the slave trade should be formally equated to the international crime of piracy.

One hundred and thirty years later, the Nuremberg Tribunal would uphold this important principle of Third Party or secondary liability when it held that:

> "Those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it … He had to have the cooperation of statesmen, military leaders, diplomats and business men. 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".

In the light hereof, those that have aided and abetted the Apartheid regime are clearly liable of having committed a fundamental wrong under Customary International Law. Hence, this lawsuit, after thorough consideration, brings together a number of foreign corporations and banks for their role in aiding and abetting Apartheid and in so doing furthered the Crime of Apartheid.

Why bringing this suit in the United States?

This lawsuit is brought in the United States because it is the only country in the world that allows for this type of litigation to be brought in its jurisdiction. The remedy under which this suit is brought is the Alien Tort Claims Act (ATCA). It allows for any non-US citizen to bring a claim for damages against any other person that has violated customary international law. The further requirement is that that person who had violated customary international law should have a presence in the United States. South African citizens who are filing this suit are non-US citizens and bring it against foreign corporations and banks for having been aiders and abettors to the Crime of Apartheid. Such corporations and banks all have a presence in the United States.

This suit and the work of the Truth & Reconciliation Commission!
The Promotion of National Unity and Reconciliation Act of 1995 under which the TRC was established, empowered the TRC to investigate and establish as complete a picture as possible of the nature, causes and extent of the gross human rights, within and outside of South Africa, committed during the period 1 March 1960 to the cut-off date contemplated in the Constitution. The Act defined gross violation of human rights to mean:

a) the killing, abduction, torture or severe ill-treatment of any person; or

b) any attempt, conspiracy, incitement, instigation, command, or procurement to commit an act referred to in paragraph (a), which emanated from conflict of the past and which was committed during the period 1 March 1960 to the cut-off date; and

provided for an inquiry into all persons, authorities, institutions and organisations involved in such violations. On the strength hereof, Section 18(1) of the Act made provision for any person to apply for amnesty in respect of any act, omission or offence on the grounds that it was an act associated with a political objective.

It is our view that in terms of the provisions of the act, nothing prevented individual business people from approaching the TRC and make full disclosure of the complicity with the Apartheid regime as this clearly constituted an act associated with a political objective. However, not one single foreign business person has approached the TRC to ask for amnesty for his or her role in aiding and abetting Apartheid, other than those submissions made by business. Whilst we are fully aware of the fact that the Promotion of National Unity of Reconciliation Act only made provision for individual amnesty as opposed to institutional amnesty, this should not have precluded foreign corporations and banks to come forward and reveal their complicity with the Apartheid regime. In fact, Jubilee South Africa's international 'Cancel the Apartheid Debt' campaign provided an ideal opportunity for institutional corporations and banks to admit to the wrongfulness of their co-operation with the Apartheid regime, and cancel the Apartheid Debt as an act of reparations in favor of the people of South Africa. Instead, such institutional corporations and banks have failed to heed the call. As a result, we believe that foreign corporations and banks have forfeited their rights to claim any entitlement under the spirit of the Promotion of National Unity & Reconciliation Act and have opened themselves to litigation.

Who are the claimants?
The claimants to this suit are individual members of the Khulumani Support as well as the Khulumani Support Group itself that bring this suit on behalf of its general members that suffered injuries resulting from recognised categories of violations of customary international law. Thus, this suit is brought on behalf of claimants who suffered torture, extra-judicial killing, cruel, inhuman and degrading treatment, sexual violence, long unlawful detention and disappearance of relatives.

Prepared by Attorney Charles Peter Abrahams on behalf of the Apartheid Debt and Reparations Campaign of Jubilee South Africa