

**Mandate of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Mr. Juan Pablo Bohoslavsky**

28 May 2018

## **Submission**

### **Complaint brought to the OECD by Open Secrets and the Centre for Applied Legal Studies concerning the conduct of KBL European Private Bankers and KBC Group Belgium**

This submission is respectfully submitted by Mr. Juan Pablo Bohoslavsky, United Nations Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights pursuant to Human Rights Council resolutions 34/03 and 37/11.<sup>1</sup>

This submission is drafted on a voluntary basis for consideration by the National Contact Points of Belgium's and of the Grand Duchy of Luxembourg, under the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, regarding the complaint brought by Open Secrets and the Centre for Applied Legal Studies concerning the conduct of KBL European Private Bankers and KBC Group Belgium in relation to their potential failure to comply with the OECD Guidelines for Multinational Enterprises in respect of violations of UN Security Council arms embargoes against apartheid South Africa.<sup>2</sup>

This submission should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations. Pursuant to UN Human Rights Council Resolution 34/03 and 37/11, Mr. Juan Pablo Bohoslavsky acts under the aegis of the Human Rights Council without remuneration as an independent expert within the scope of his mandate which enables him to seek, receive, examine and act on information from numerous sources.

This letter aims at contributing to the understanding of a number of issues central to this procedure, from the perspective of international human rights law. Notably, the Independent Expert addresses the following five main issues: a) how financial assistance to criminal regimes may adversely affect human rights; b) whether this assistance actually has helped criminal regimes, c) how the financial legacy (including the State's debts) can continue to affect for decades the realization of economic, social and cultural rights of the State's population; d) why complicit economic assistance is prohibited under international law; and, e) the relevance of the right to truth in the case under discussion.

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<sup>1</sup> <http://www.ohchr.org/EN/Issues/Development/IEDebt/Pages/IEDebtIndex.aspx>

<sup>2</sup> See for illustration UN Security Council resolution S/RES/418 (1977), and UN General Assembly resolutions 40/64A (1985), 41/35B (1986) and 42/23B (1987).

This submission is based upon and takes some key aspects from the report of the Independent Expert on “Financial complicity: lending to States engaged in gross human rights violations” (A/HRC/28/59) submitted to the UN Human Rights Council on 22 December 2014.<sup>3</sup> In the following paragraphs he addresses each of these issues:

a. *How financial assistance to criminal regime(s) can adversely affect human rights*

In the Independent Expert’s view, authoritarian regimes committing gross human rights violations are politically vulnerable because of their problems of legitimation. Such regimes endeavour to retain power and do so by securing privileges for part of the population, such as for example, economic or political elites, the military or the security apparatus, by allocating economic benefits and/or political concessions in exchange for support. To remain in power, a regime is usually compelled to address economic constraints in ways that secure a minimum political support or enable what may be a highly bureaucratic or repressive machinery to function efficiently, control society or repress the population. There is a mutually sustaining interaction between loyalty and repression, but there are also trade-offs, depending on the target of the strategies.<sup>4</sup> Both tactics require that governments possess sufficient economic resources. The national economy, and more specifically the State budget, must support an effective system to buy loyalty from the population or to enable repression.

Political loyalties can be acquired through (targeted) economic benefits that can consist of resource transfers, subsidies, tariff protections and regulations that guarantee profits, employment and consumption. At the same time, public finance and repressive expenditures are considered: the budget allocation and bureaucratic apparatus put in place can often reflect, to some extent, the repressive capacity of the regime. The loyalty of the military, police or secret services in controlling or repressing opponents are imperatives for autocratic regimes that rule mainly through violence.

Some global data confirms that autocratic regimes frequently increase military budgets and often overcompensate the military, police and other officials who control instruments/institutions of violence and coercion.<sup>5</sup> Indeed, military expenditures used to strengthen the coercive capacity of the regime and its stability,<sup>6</sup> have been found to contribute strongly to a country’s external debt burden.<sup>7</sup>

In a context of fiscal deficit and poor performance of the national economy, the options available for financing are limited, and thus any potential source of financing that

<sup>3</sup> Available in all UN languages at <http://www.undocs.org/A/HRC/28/59>

<sup>4</sup>See Daron Acemoglu and James A. Robinson, *Economic Origins of Dictatorship and Democracy* (New York, Cambridge University Press, 2005); Bruce Bueno de Mesquita and others, *The Logic of Political Survival* (Massachusetts Institute of Technology Press, 2003); Ronald Wintrobe, *The Political Economy of Dictatorship* (Cambridge University Press, 1998).

<sup>5</sup>See Justin Conrad, “Narrow interests and military resource allocation in autocratic regimes”, *Journal of Peace Research*, vol. 50, No. 6 (November 2013). Specifically for military expenditures by Latin American dictatorships, see Thomas Scheetz, “The evolution of public sector expenditures: changing political priorities in Argentina, Chile, Paraguay and Peru”, *Journal of Peace Research*, vol. 29, No. 2 (May 1992).

<sup>6</sup>See Michael Albertus and Victor Menaldo, “Coercive capacity and the prospects for democratization”, *Comparative Politics*, vol. 44, No. 2 (January 2012).

<sup>7</sup>See, among others Robert E. Looney, “The influence of arms imports on Third World debt”, *Journal of Developing Areas*, vol. 3, No. 2 (January 1989); John Dunne, Samuel Perlo-Freeman and Aylin Soydan, “Military expenditure and debt in small industrialised economies: a panel analysis”, *Defence and Peace Economics*, vol. 15, No. 2 (2004); Russell Smyth and Paresch Kumar Narayan, “A panel data analysis of the military expenditure-external debt nexus: evidence from six Middle Eastern Countries”, *Journal of Peace Research*, vol. 46, No. 2 (March 2009).

the state may be able to access becomes even more critical. Ultimately, the regime must be capable of implementing efficient economic instruments to secure the support of key sectors of the country's economic and political life, and/or of executing a budget that will enable an effective repressive apparatus, which translates into greater spending in the military and police sectors charged with this task.

From a general perspective, while political institutions determine the level of state indebtedness (in absence of citizen control, an authoritarian government will tend to contract unlimited loans), the loans that a state receives also shape its political institutions, including those that carry out repressive activities (in terms of consolidating the regime).<sup>8</sup>

There is, in addition, a less obvious way of supporting repressive regimes: funds and financial services that facilitate the commission of gross human rights violations in a more direct way, for example, when they are used to equip intelligence services, police or other security forces with tools or weapons of repression. The fact that these financial services are provided in a surreptitious manner may actually reflect the mental state of this provider about the (i)legality and consequences of his financial decisions.

Financially assisting regimes that commit gross human rights violations may contribute to regime consolidation, prolong disrespect for human rights and increase the likelihood of gross violations of human rights. Those conclusions can stand for both official and private financial assistance to governments. Nevertheless, private lending seems to be more damaging, as it might enjoy lower public accountability compared to lending between States and to loans allocated by international financial institutions.

Market discipline alone provides insufficient incentives for lending that is sensitive to human rights. It looks mainly at debt sustainability and the likelihood that the loan will be repaid, not at the democratic character of a regime, nor its predisposition for human rights abuse. The market does not prevent loans to dictators. On the contrary, once loans are provided to autocratic regimes, the market rather provides incentives to grant additional funds to such a regime, in order to stabilize it and ensure its repayment capacity. Market logic thus becomes a self-fulfilling prophecy.

Unless financial decisions are subjected to human rights impact assessments, appropriately targeted or mitigated by contractual measures, financial assistance can have a persistent impact on authoritarian regimes, making it possible for them to consolidate autocratic rule and perpetuate political exclusion and human rights violations, and reducing the need for political concessions. However, it may sometimes be best not to lend nor assist on any condition, as financial inflows could impair the human rights situation, either immediately or over the longer term.

b. *Do funds consolidate regimes engaged in gross violations of human rights?*

Evidence shows that foreign financial sources might have an important impact on the durability of authoritarian regimes in power.<sup>9</sup> The authors of the study in question

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<sup>8</sup> Thomas Oatley, "Political Institutions and Foreign Debt in the Developing World," (2010) 54 *International Studies Quarterly* 1, 175.

<sup>9</sup> See Juan Pablo Bohoslavsky and Abel Escribà-Folch, "Rational choice and financial complicity with human rights abuses: policy and legal implications" in *Making Sovereign Financing and Human Rights Work*.

consider whether net transfers of public and publicly guaranteed external debt have an impact on the likelihood that an authoritarian regime transitions to democracy during the same year, using data covering the period 1970–2006.<sup>10</sup> The analysis is based on a data set capturing 158 different episodes of authoritarian rule in 91 countries.

The results show the negative impact that foreign debt has had on the likelihood of a transition to democracy over a period of 36 years.<sup>11</sup> They suggest that foreign loans contribute to the perpetuation of authoritarian regimes. While the gross probability of a transition to democracy (within one year) in the sample is 2.2 per cent, moving from the minimum to the maximum value of the debt variable brings about a 1.65 per cent (per year) decrease in the probability of democratization (then reaching 0.3–0.4 per cent).<sup>12</sup> Over a 10-year period, for example, the effect would obviously be higher. The data set would predict that, on average, 22 per cent of all authoritarian regimes not benefitting from public or private lending would transition to democratic governance. However of those regimes regularly receiving net public or private lending, only 3.35 per cent would become democratically ruled. Some additional tests also reveal that foreign borrowing might be of special relevance in times of economic downturn, which usually lead to severe shrinkages in State revenues.

Net fund transfers may prolong autocratic rule and thus increase the risk of gross violations of human rights.

c. *How the financial legacy (including the state's debts) can affect for decades the enjoyment of economic, social and cultural rights of the population*

States engaged in gross human rights violations not only torture and commit extrajudicial killings, or disappearances, but they may also impose economic models that violate fundamental economic, social and cultural rights. As Antonio Cassese explained in a paper in 1979, the ways in which different rights violations are interlinked is often part of the survival strategy of a regime.<sup>13</sup> Foreign investors may benefit from the failure of a regime to respect human rights, such as the right to freedom of association and to form trade unions, or from countries with weak social, safety and health standards. If foreign actors make decisions based on profitability, and consider that profitability is more likely to be higher when human rights are restrained, then economic assistance can contribute to the perpetuation of human rights abuses and such abuses, in turn, might potentially bring about the necessary conditions to attract and obtain additional economic assistance or investment.

Moreover, a set of practices that have pernicious consequences for economic and social development may be part of the legacy of an authoritarian regime in the transition

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<sup>10</sup>Measured in constant (2000) dollars per capita. Data compiled from the World Bank *World Development Indicators*.

<sup>11</sup>To estimate those probabilities, the other variables have been held constant at their means.

<sup>12</sup>The results remain largely unaltered if one controls for trade (imports plus exports as a percentage of GDP).

<sup>13</sup>Antonio Cassese, "Foreign economic assistance and respect for civil and political rights: Chile - a case study," *Texas International Law Journal*, vol. 14, No. 2 (1979).

to democracy<sup>14</sup> and the economic structures created under authoritarianism will influence the prospects for consolidating democracy<sup>15</sup> and the full realization of all human rights.

*d) Why complicit economic assistance is prohibited by international law*

Core international human rights treaties as well as other instruments related to human rights issues of relevance to this particular case (some of them signed even before the behavior assessed in this case took place) expressly penalize complicity in general terms<sup>16</sup>— that is, in the sense of facilitating or contributing to the commission of crimes which violate human rights. These multilateral conventions and instruments have been accompanied for the most part by an expanding regulatory and administrative development in the field of human rights, both at the international and national levels, crystallizing customary international law on the subject, which has not been limited by persistent objections from national governments, in terms of opposing the idea that it is illegal to contribute to the violation of fundamental rights.

Even though it has been argued that there is no norm that specifically prohibits the complicity of corporations, the above conventions and instruments make no distinctions between natural and legal persons when prohibiting complicity in human rights abuses, whether the principal crime is committed by the state or by non-state subjects. Neither are contributions in the form of certain goods or services excluded. Excluding the provision of commodities from the general prohibition established is not an option that emerges either explicitly or implicitly from these conventions and instruments.

The Charter of the Nuremberg International Military Tribunal already penalized cooperation or contribution in the commission of major crimes and provided for the possibility of declaring that when individual members of a group were found to have perpetrated such crimes, the group such individuals belonged to would be considered a criminal organization.<sup>17</sup> The industrial cases heard by this military tribunal, in which several businessmen were convicted on charges of contributing to the Nazi regime confirmed the principle that companies themselves can be found to have breached international law even when their officials were criminally convicted, although only in

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<sup>14</sup> See Daniel Bradlow, “Don’t Waste a Serious Crisis<sup>14</sup>: Lessons from South Africa’s Debt Crisis,” in Juan Pablo Bohoslavsky and Kunibert Raffer, *Sovereign Debt Crises: What have we learned?*, Cambridge University Press, 2017.

<sup>15</sup> See Tony Addison, “The political economy of the transition from authoritarianism,” in *Transitional Justice and Development: Making Connections*, Pablo de Greiff and Roger Duthie, eds. (New York, Social Science Research Council, 2009); and, generally, *Justice and Economic Violence in Transition*, Dustin Sharp, ed. (New York, Springer Publications, 2014).

<sup>16</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 4); International Convention on the Suppression and Punishment of the Crime of Apartheid (Art. 3(b)); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Art. 6); Convention on the Prevention and Punishment of the Crime of Genocide (Art. 3(e)); Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Art. 1(2)); United Nations Convention against Transnational Organized Crime (Art. 5(1)(b)); International Convention for the Suppression of the Financing of Terrorism (Art. 2(5)(a)); International Convention for the Suppression of Terrorist Bombings (Art. 2(3)(a)); Protocol against the Smuggling of Migrants (Art. 6(1)(b)); Statute of the International Criminal Court (Art. 25(3)); and the Statutes of the International Tribunals for Rwanda (Art. 6) and for the Former Yugoslavia (Art. 7).

<sup>17</sup> Charter of the International Military Tribunal, Art. 9, August 8, 1945, 59 Stat. 1544, 82 UNTS, 279.

one exceptional case was the death penalty applied to company.<sup>18</sup> Among other business operators, these proceedings – which were founded on customary international law – convicted individuals who had contributed commercially (Bruno Tesch, for supplying gas to the Auschwitz concentration camp) and financially (Friedrich Flick, the German industrialist who used slave work and donated money to the SS) to the acts of genocide perpetrated by the Nazi regime.<sup>19</sup>

Non-state subjects can, technically, breach international human rights law, with which the different consideration of states and non-states is, in practice, a chapter of legal theory (in crisis) and an issue that requires a casuistic analysis more than a mandatory or innate definition of international law. Corporations are, in fact, increasingly regulated by international law (consider, for example, bilateral investment treaties), so that the scope of their rights and obligations is more the result of political decisions than of deductions derived from their subjectivity in international law, as occurs in the domestic sphere. In that way, corporations, like natural persons and states, are not exempted from the duty of respecting the fundamental human rights that, depending on the case, concern them.

Although in the current state of international law legal persons do not specifically fall under the jurisdiction (*ratione personae*) of international criminal tribunals, that does not mean they are exempted from the principle that prohibits contributing to acts of serious human rights abuses, in particular when *jus cogens* norms are involved. Admitting that option would entail accepting that corporations can be used as useful vehicles for breaking the law and for profiting by facilitating serious crimes, an assumption that is unacceptable for international systems for the protection of human rights. It would also put corporations in a position of absolute immunity vis-à-vis peremptory norms, a position to which states, as legal persons, could not aspire.

*e) The relevance of the right to truth in the case under discussion*

This case is about learning the truth relating to financial contributions to a criminal regime that violated *jus cogens* norms and how these actors may have helped in the consolidation of it. Right to the truth is well rooted in international law.<sup>20</sup> Determining whether OECD Guidelines for Multinational Enterprises were violated would contribute to a more complete historical narrative regarding the Apartheid period. So that it is clear how the way of dealing with past behavior has a concrete, direct impact now on the effective and full realization of right to the truth of victims and the whole South African society.

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<sup>18</sup> On the dissolution of IG Farben ordered precisely because of its implication in serious violations of international law during World War II, see Control Council Law no. 10, Punishment of Persons Guilty of War Crimes, December 20, 1945, in I Enactments and Approved Papers of the Control Council and Coordinating Committee, p. 306.

<sup>19</sup> “In re Tesch (The Zyklon B case),” 13 Ann. Dig 250 (Brit. Mil. Ct. 1946), reprinted in 1 United Nations War Crimes Comm’n, Law Reports of Trials of War Criminals, 93, 1947; United States v. Flick (The Flick case), December 22, 1947, in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law no. 10, 1, 1952.

<sup>20</sup> “Study on the Right to the Truth” Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/2006/91, February 8, 2006.