

In Pursuit of Democratic Renewal: Alternative Methods for Securing Corporate Accountability

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1. Introduction

The transition from one regime to another, and transitional justice more broadly, should not be understood as an event. Rather it is the progressive establishment of a way of doing the national business, and thus remains open to contestation. In South Africa, it is arguable that the failure of the Truth and Reconciliation Commission (TRC) to fully grapple with the role of corporations in aiding and abetting apartheid has contributed to a public discourse that minimises corporate accountability. Coupled with the erosion of state institutions of accountability and their capacity to tackle complex financial and economic crimes, this has meant that state led attempts to hold corporations accountable have often fallen short.

We suggest that the failure to grapple with corporate criminality under apartheid is intimately linked to the erosion of capacity to deal with these crimes in a democratic state. Powerful corporations and individuals have leveraged political actors to avoid accountability for their role in grand corruption and other crimes – and in doing so have undermined crucial state institutions such as the NPA. In turn, the survival of illicit private networks allows them to draw in new elites to entrenched ways of doing business – many of which are deeply corrupt. A case study in this regard is the manner in which the NPA and other law enforcement authorities have been undermined in an attempt to protect European arms companies and South African politicians from prosecutions linked to the 1999 Arms Deal. This in turn has origins in the survival of networks of companies and middlemen that ran the illegal trade in arms with apartheid

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South Africa. Turning our gaze forward, the erosion of institutions explains the failure of the state to address the most serious evidence of contemporary state capture.

In this context, there is mounting evidence that South Africa's democracy has a severe accountability deficit, particularly for corporate actors. In January 2009, the independent and highly successful Scorpions, an investigative unit under the NPAs direction, was disbanded and replaced by the Hawks, under the direction of SAPS and insufficiently independent (as decided by the Constitutional Court). In 2015, it was reported that there had been a 60% decline in arrests and 83% decline in convictions in the 6 years since the Hawks took over. The preparation of cases for court was particularly slow for commercial crimes.

Even when cases are investigated and criminal dockets constructed, the erosion of capacity and will at the NPA, largely a result of political interference, has had a disastrous impact on hard accountability for both the private sector and government actors. The Special Investigation Unit (SIU) focuses on investigating corruption and tender fraud, predominantly at a local and provincial level. In September 2018, the SIU indicated that it has reported 463 criminal cases of fraud and corruption to the NPA for prosecution since 2007. These cases involve the theft of billions of rands. The NPA has failed to prosecute a single case.¹ The NPA does report itself to have an impressive conviction rate but focusses almost exclusively on low level civil servants when it comes to corruption and economic crimes.

It would be easy to despair in the face of such an abysmal failure to hold powerful corporate actors to account. Yet these failures of formal institutions, while serious, do not preclude attempts by civil society to contribute to justice and accountability. This paper explores just two innovative ways in which civil society in South Africa has sought to shine a light on economic crimes from

¹ Mahlatse Mahlase and Kyle Cowan, 'NPA must explain why it failed to prosecute cases, including Bosasa - SIU', *News24* (4 September 2018).

both South Africa's apartheid past and today. These 'alternative' approaches importantly provide renewed opportunities for accountability and truth telling about the private accomplices who profit from the most serious economic crimes. The case studies are the first People's Tribunal on Economic Crime, and complaints made in terms of the OECD Guidelines for Multinational Enterprises.

These processes not only provide for a more public centred approach to truth telling and accountability but can be important contributions to more formal justice processes.

2. Exploring alternatives: The People's Tribunal for Economic Crimes and the OECD Guidelines

The section below provides background into the model of the People's Tribunal for Economic Crimes ('People's Tribunal') and the mechanism of the OECD complaint, known as a specific instance, under the OECD Guidelines for Multinational Enterprises ('OECD Guidelines') adopted by civil society to respond to inadequate state oversight of corporate criminality and expose the structural nature of corporate impunity and economic crimes.

2.1. The People's Tribunal on Economic Crimes

The People's Tribunal is primarily an advocacy tool that combines selective elements and objectives inspired by other non-statutory tribunals such as the International People's Tribunal that best address economic crime in South Africa. The three primary objectives being: first, to expose the absence or failure of existing formal legal and institutions to hold non-state actors to account; second, through the use of testimony, to document the nature and extent of corporate crime in South Africa by domestic and foreign companies and thirdly, to convey the nexus between economic crime and human rights violations and the nexus between different acts of, and actors in, corruption over different points in our history.² The outcome of the Tribunal is a series of non-binding

² Charter of the People's Tribunal on Economic Crimes (201, amended 2018) available at www.corruptiontribunal.org.za.

recommendations aimed at baring and deconstructing state failure to ensure corporate accountability and recommendations geared to combat corporate impunity through formal legal proceedings and civic action. By engaging with experiences of economic crimes and human rights violations often marginalised by the formal justice system, the recommendations help sculpt the narrative of the continuous and structural nature of economic crimes.

In terms of procedure, the People's Tribunal is organised by an organising committee consisting of civil society organisations who conduct leading work in the matters of corruption that fall within the theme of that particular Tribunal. The theme, mandate and rules of procedure of the Tribunal are set out in its terms of reference. For example, the first People's Tribunal on Economic Crimes focused on corruption and economic crimes and corruption in the arms trade through three periods. First, during the apartheid era (specifically from 1977 to 1994), the conclusion of Strategic Defence Procurement Package (known as the 1999 Arms Deal) by the South African government and in allegations of contemporary state capture. Broadly, evidence as to how foreign corporations and banks assisted apartheid South Africa's arms trade in the face of United Nations Security Council Resolutions imposing arms embargoes, irregular and unjustified expenditure in the R30 billion Arms Deal and the influence of a private family, the Guptas, on state enterprises were led under these respective themes.

Evidence was presented by primarily expert witnesses such as lawyers, academics and whistle-blowers. Written submissions were accepted from the public and all implicated parties were invited to respond to the allegations against them. Civil society organisations provided oral submissions on the impact of the corporate crime and economic crimes on communities and how it perpetuates racialised economic marginalisation in South Africa by corruption and the lack of basic services disproportionately affecting black people. A panel composed of five members who are leaders in the legal field and civil society heard evidence, analysed legal submissions and delivered final recommendations. Evidence leaders were appointed to lead the evidence of

witnesses and submit legal argument to the panel within the framework of international, foreign and domestic law.³

2.2. Specific instances under the OECD Guidelines

The Organisation for Economic Development and Co-operation ('OECD') adopted the OECD Guidelines as of the late 1970s to regulate the increasing role of business in the global economy. The OECD Guidelines are voluntary recommendations for responsible corporate behaviour addressed by governments to multinational corporations operating in or from OECD adhering countries with the objective of balancing corporate operations with the potential positive contributions of corporations to economic, social and environmental progress.⁴ These recommendations traverse, amongst others, employment relations, competition, the environment, combatting bribery and extortion and most recently, human rights.

The OECD Guidelines require adhering governments to establish National Contact Points ('NCPs') to promote and implement the Guidelines.⁵ Individuals, NGOs, trade unions and other interested parties may submit a specific instance to an NCP about the conduct of a corporation registered in or operating from its country. The NCP will then make an initial assessment of the admissibility of the complaint, and if admitted, offer its good offices to the party for mediation and conciliation should the specific instance before issuing a final recommendation. If the parties reach agreement about the issues, these will be reflected in the NCPs final statement. The power of the specific instance, however, lies in the NCP's ability to expose poor corporate practice and make a finding with recommendations even where the company refuses to engage in the process. This mounts pressure on the company as it makes the company's goodwill and reputation vulnerable to attack by its peers and investors.

³ Terms of Reference, People's Tribunal on Economic Crime (2017, amended 2018) available at www.corruptiontribunal.org.za.

⁴ OECD *Declaration on International Investment and Multinational Enterprises* (21 June 1976).

⁵ OECD *The Guidelines for Multinational Enterprises: Second revised decision of the Council* (amended June 1991). The NCPs are further contained in each successive set of OECD Guidelines including the 2000 Guidelines and the 2011 Guidelines (OECD Guidelines for Multinational Enterprises, 2011 Edition 68).

In 2018, Open Secrets and the Centre for Applied Legal Studies ('CALs') submitted a specific instance to the Luxembourg and Belgian NCPs in respect of the conduct of two banks, Kredietbank Luxembourg and Kredietbank (now KBC) respectively.⁶ The complainants allege, and provide evidence indicating, that the above-mentioned banks financed apartheid South Africa's arms trade between 1977 and 1994 despite UNSC arms embargoes against South Africa. The complainants rely on the 1977 OECD Guidelines in force at the time of the conduct to show that the banks violated the general duty on corporations to act in accordance with the policy objectives of member states. These include the duty to contribute to general economic and social development to operate in harmony with the host state's national and international law obligations.⁷ Most pertinently, the banks' conduct violated their host states' international customary law obligations to refrain from aiding and abetting apartheid as a crime of humanity and other gross human rights violations operationalised by the apartheid government's use of arms. Additionally, we allege that the banks failed to comply with the duty to disclose relevant information to its shareholders⁸ and to abstain from improper involvement in local politics.⁹ Finally, the specific instance motivates for the retrospective application of the 2000 Guidelines, the first set of Guidelines expressly incorporating respect for human rights in its Preamble, in light of the fact that the banks' financing of apartheid contributed to the legacy of apartheid which still manifests as structural, racialised inequality today.¹⁰ Importantly, the complainants specified that that they did not wish to enter into mediatory proceedings with the banks, given the nature of the issues and the relief sought.

The following section critically evaluates the ways in which the People's Tribunal and the OECD mechanism can contribute to securing aspects of

⁶ Open Secrets & CALs 'KBL European Private Bankers & KBC Group, Belgium, Failure to comply with the OECD Guidelines for Multinational Enterprises in respect of violations of the UNSC arms embargoes against apartheid South Africa during 1977 – 1994. Submission to the Luxembourg and Belgium National Contact Points (24 April 2018).

⁷ Preamble of the 1976 Guidelines, para 6, 7, 1.

⁸ 1976 OECD Guidelines, Chapter III.

⁹ 1976 OECD Guidelines, Chapter II(9).

¹⁰ Preamble of the 2000 OECD Guidelines for Multinational Enterprises.

formal justice and renew democratic participation in the justice system. This assessment is made in relation to three aspects: first, the capacity to portray the structural nature of economic crimes and its continuing effect; second, the ability to serve as a tool for record-keeping and truth telling and finally, the mechanisms' contribution to the formal justice system.

3. The potential of advocacy tools: contributions to the formal justice system and renewing public participation

3.1. Highlighting the structural nature of economic crimes

The value of prosecutions for serious corporate crimes and grand corruption cannot be overstated. There is not only the value of contributing to ending impunity and achieving accountability for these crimes, but the crucial additional step in disrupting corrupt networks and their ability to repeat their crimes. Having said this, there are limitations to formal justice processes, not least in the way that they exclude all information that is not strictly relevant to an often narrow question of legal liability. In doing so, it often does not provide for a full account of the structural nature of corporate crime and grand corruption, nor the long story of how the networks that perpetuate these crimes came to be, survive and even thrive.

One of the most inaccurate and distracting narratives around corruption in South Africa is that it has been the creation of a democratically elected (black) government. The People's Tribunal was able to challenge such a view by deliberately extending the terms of reference of the Tribunal to consider evidence of grand corruption and economic crime over a period of 40 years, from apartheid to the present day. The mandate of the People's Tribunal was explicitly to "interrogate the continuities in 'grand corruption' over the past 40 years in South Africa, from apartheid to contemporary state capture."¹¹ Through this, the Tribunal was able to shine a light on the actors in the private and public sector who have committed or been complicit in acts of corruption

¹¹ Terms of Reference of the People's Tribunal on Economic Crime, South Africa, 2017.

or economic crime over an extended period, and to identify when economic crimes separated by time or context often had the same actors and *modus operandi* at their core.

The Tribunal thus holds the great advantage of highlighting the continuities in violations, particularly those of an economic nature that include powerful corporations. This was evidenced by the final findings of the panel which spoke directly to the continuities in economic crimes over time, and the nature of the structures that underpin them. In these findings, the panel held that *“We would also emphasise that state capture is to some extent also a result of the corrupt activities that had gone before it. Absent the violation of United Nations sanctions, and the corrupt Arms Procurement Package, the kind of state capture described in the evidence would probably not have occurred. The examples of state capture mentioned here are the tip of the iceberg.”*¹²

Aside from continuities in the actors and *modus operandi* involved in corporate criminality, another important structural dimension to economic crimes that any process should address is their inherently international nature, and the need to pursue accountability in different jurisdictions. This is particularly relevant when one considers the central role of global banks and advisory firms in many cases of grand corruption and other economic crimes. Often, there is insufficient pressure on their home countries to provide oversight and accountability for their role in crimes elsewhere. In this regard, specific instances under the OECD Guidelines provide the possibility of taking the struggle against impunity beyond South Africa’s borders.

In the complaint laid by Open Secrets and CALS, the advocacy campaign and demand for investigations have moved beyond South Africa to the countries where complicit corporations are based. As discussed above, beyond making the case that KBC and Kredietbank aided and abetted the crime of apartheid and thus violated international law, the complaint also

¹² Interim Findings of the People’s Tribunal on Economic Crimes (2018) available at www.corruptiontribunal.org.za.

explores how this conduct constituted serious violations of the OECD's own guidelines on multinational enterprises. There is significant value in pressuring mechanisms in the global north to enforce the regulations that they pass, ostensibly to mitigate the potential harm their corporations can cause in their global operations.

These processes thus enable a powerful focus on two fundamental structural dimensions to corporations and their role in economic crimes; namely the continuities in these crimes over time and between different regimes, and the inherently globalised nature.

3.2. Creating a public-record and a platform for truth telling

While both the Tribunal and OECD process cannot directly hold actors accountable, they provide an important platform for truth telling, and are potentially powerful tools to reshape the narrative on economic crime and the role of the private sector therein. The value of this should not be understated.

Both the People's Tribunal and OECD complaint hold the possibility of reinvigorating discussions on corporate accountability and re-imagining narratives inherited from South Africa's transition and the TRC process. Writing on the discursive power of truth commissions, Zenaida Miller reminds us that truth commissions are inherently discursive projects that play a central role in making some issues visible while obscuring others. In this, we can see the risk of obscuring the role of economic crime - and particularly corporate complicity in such crimes - in broader injustice in South Africa.¹³

South Africa's transition evidences this. The TRC played an important role in South Africa's history, but the focus on physical violence, torture and other civil and political violations contributed to an invisibility of economic crimes and other violations by the private sector. The failure of that process to

¹³ Z Miller "Effects of Invisibility: In search of the 'economic' in transitional justice" (2008) *International Journal of Transitional Justice* 2(3), 266.

demand testimony from corporate accomplices has compromised the struggle for economic and social justice in South Africa's ongoing transition.

The People's Tribunal provided a platform for over twenty individual activists, researchers, whistle-blowers and social movements to lead evidence about the crimes of corporations over decades in South Africa, and their consequences for everyday South Africans. This provided a countervailing narrative to the South African public by placing economic crime and apartheid's corporate accomplices at the centre of a pursuit for justice. It has the potential to stimulate debate and understanding about the nature of economic crime in South Africa and its historical trajectory.

The OECD specific instance offers similar opportunities for truth telling, particularly because it does not apply a strictly legalistic threshold for what evidence is admissible. This allows complainants and other parties who wish to make submissions to introduce broader context and help create an understanding of the violations in question. Coupled with advocacy, this provides an opportunity to explore the structural nature of the crimes in questions, but also address gaps in the public narrative.

This was the argument of the 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, Mr. Juan Pablo Bohoslavsky. In a submission to the Belgian and Luxembourg NCPs, made in support of the complaint, he argued that the process was essential in fulfilling the public's right to truth about financial complicity in criminal and violent regimes. Mr. Bohoslavsky added that "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 behaviour

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".¹⁴

Both the People's Tribunal and the OECD complaint contribute to fulfilling this right to truth and empower South Africa's citizens by providing an evidence -based narrative on the role of powerful private actors in the country's most serious crimes.

3.3. Contributing to the formal justice system

The People's Tribunal and OECD specific instance mechanism can contribute to the capacitation of the formal justice system in at least two ways. First, these tools have the potential to produce recommendations, which, if adopted and implemented, capacitate state institutions, improve state legitimacy and help accelerate the administration of justice. Secondly, exploiting these mechanisms allows one to deconstruct their effectiveness, call out their limitations and lobby for improved systems that result in effective access to justice.

The outcomes of the People's Tribunal are indicative of both. The model assisted in unravelling the legal and political limitations of the prosecutorial system as they relate to the prosecution of past and contemporary economic crimes. The evidence presented to the Tribunal made it clear that the government's reliance on the TRC to address corporate contribution to apartheid and subsequent criminal prosecution of corporate entities was inadequate. As discussed above, the mandate of the TRC obfuscated the contribution of the private sector and economic crimes to apartheid and where it did recommend the prosecution of certain entities to the National Prosecuting Authority ('NPA'), these have not materialised in the last twenty years. A host of reasons underlie the lack of prosecution including lack of political will on the part of the government, alleged wilful obstruction of apartheid-era prosecutions,

¹⁴ Bohoslavsky's full submission is available online: <https://www.ohchr.org/Documents/Issues/IEDebt/OECDNationalContactPointsBelgiumLuxembourg.pdf>.

economic and political interests and poor human and financial capacitation of the NPA and its related units. These reasons extend to the poor investigation and prosecution of parties implicated in the 1999 Arms Deal and state capture.

Some of the legal limitations that were outlined include the potential prejudice that statutes of limitations lend to the prosecution of 'historic' crimes and establishing domestic and foreign jurisdiction for the prosecuting apartheid era crimes.

To urge prompt investigation and prosecution of the apartheid-era cases, the Tribunal recommended that a specialised unit be set up within the NPA. The objective was to dedicate a well capacitated unit, subject to biannual oversight by parliament, to the prosecution of these cases within a period of two years.¹⁵ Recommendations of this nature that are sanctioned by legitimate panel assist civil society in lobbying for mechanisms aimed at capacitating state institutions and increasing victims' expeditious access to justice and remedy. A further example of how advocacy tools can dovetail with state-sanctioned institutions is evidenced by the Tribunal's recommendation that the evidence before the Tribunal be submitted to the commission of inquiry into state capture. This recommendation specifically opened the doorway for the submission of argument to the Commission on the continuities in economic crime and corruption in South Africa and creates the possibility for the Tribunal's recommendations to be adopted and sanctioned by a body with greater political and legal gravitas, furthering the potential implementation of the recommendations.

Similarly, exploiting the OECD specific instance has highlighted the value and limitations of the mechanism in ensuring corporate accountability. Legally, there are challenges relating to the temporal application of each set of Guidelines, the standing of various parties, jurisdiction of the NCPs and the adequacy of employing mediation as the dispute resolution mechanism. To provide a glimpse into some of these issues, the OECD framework requires that

¹⁵ Final findings of the People's Tribunal on Economic Crime (20 September 2018) www.corruptiontribunal.org.za.

a specific instance must be lodged under the OECD Guidelines in operation at the time of the impugned conduct. OECD Guidelines are updated regularly to provide more parties with standing to submit specific instances,¹⁶ to extend the jurisdiction of NCPs to corporations operating in non-adhering countries¹⁷ and to recommend corporate compliance with human rights.¹⁸ All these improvements are argued to only come into effect as of the 2000 OECD Guidelines. As the Guidelines do not apply retrospectively, this means that NGOs bringing specific instances today in relation to conduct pre-dating 2000 may be prejudiced on the grounds that they cannot effectively appeal to human rights law or found jurisdiction of a particular NCP. Further, the NGOs standing to bring a complaint may be challenged.

Apart from these technical aspects of the Guidelines, accessing the specific instance mechanisms and the NCPs can be difficult due to the cost implications involved and the technical understanding of the Guidelines. In the process of submitting the OECD specific instance, it has also come to Open Secrets and CALS attention that there is an apparent conflict of interest in the structure of the Belgian NCP, with members of the implicated parties being represented on the NCP through the worker's federation that forms part of the tripartite.

The challenges and constraints detailed above have exposed the limitations of the OECD mechanism. This insight can augment calls for governments to adopt regulatory mechanisms that are binding, and which have an effective, independent remedial mechanism with clear lines of procedure and jurisdiction. Positively, the OECD specific instance can run parallel to legal proceedings, allowing one harness the positive advocacy value of the mechanism while pursuing legal proceedings. Findings emanating from OECD specific instance also serve as starting point for eliciting corporate and state acknowledgement of their responsibility for economic crimes that can be furthered through formal justice systems.

¹⁶ OECD Guidelines for Multinational Enterprises, 2000 edition. See 'Commentary on the Implementation of the OECD Guidelines for Multinational Enterprises' 58.

¹⁷ OECD Guidelines for Multinational Enterprises, 2000 edition. See 'Commentary on the Implementation of the OECD Guidelines for Multinational Enterprises' 60.

¹⁸ OECD Guidelines for Multinational Enterprises, 2011 edition 31.

4. Conclusion

The absence of adequate state intervention to ensure accountability for private and public actors in economic crimes has a deleterious effect on the public's trust in state institutions and democratic government more broadly. It also breeds impunity and breaks down the rule of law.

This paper has considered two innovative, transparent and inclusive socio-legal processes that South African civil society has embarked upon to address this accountability gap. These methods have aimed at ensuring public and private sector accountability for so-called historic and contemporary economic crimes, as well as 'state capture'.

We have suggested that acknowledging the limits of the law - particularly in a context where capacity and will has been seriously eroded within the state - these alternative mechanisms play an important role in pursuing justice. They not only provide a platform to fulfil the public's right to truth but offer unique ways of revealing the structural nature of serious economic crimes and state capture. They also challenge us to critically consider what a 'victim-centred' approach to accountability might be. Finally, these processes can powerfully feed into more formal justice processes that provide opportunities for hard accountability.