

ECAAR-South Africa Challenges Arms Expenditures

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In November 2001, ECAAR-SA and Terry Crawford-Browne lodged a class action suit on behalf of "the class of poor people in South Africa" for cancellation of South Africa's 5 billion US dollar armaments acquisition program for new warships and warplanes. These have been ordered from Germany, Britain, Sweden and Italy.

Legal commentators are keenly following the case as a critically important test of constitutional commitment to socio-economic rights, as enshrined in the Bill of Rights of South Africa's 1996 Constitution. At that time, there was vigorous debate on whether such rights should be included, and whether they were judicially enforceable. Inclusion prevailed.

Thus, while the United States' Bill of Rights guarantees "first generation" rights: freedom of speech, freedom of assembly etc., the South African Bill of Rights extends to the "second generation" rights of housing, health care, food, water, social security, children's rights, and education, and to the "third generation" right to life. Literally the first test of the South African Constitution was the ruling by the supreme Constitutional Court that the death penalty was incompatible with the right to life.

The Constitution, adopted as "the supreme law of the Republic." is regarded as being perhaps the world's most progressive.

In bringing the class action suit in terms of Section 38 of the Constitution, ECAAR-SA is arguing that the arms deal is constitutionally unlawful because it is:

- Strategically irrational since there is no conceivable foreign military threat to South Africa to warrant massive expenditures on armaments, and that the real threat to South Africa's security and democracy is poverty;
- Economically irrational because it was predicated upon expectations that expenditure of US\$5 billion (R30 billion in 1999) would generate offsets of foreign investments and exports worth R110 billion to create 64,165 jobs; and
- Financially irrational because foreign exchange and other risks limit the State's financial ability to meet the socio-economic commitments of the Bill of Rights.

Cabinet ministers were warned of the foreign exchange risks by ECAAR-SA and by the Department of Finance but proceeded with the acquisition program then costed at R6.25 per US\$1. In December 2001, it fell to R13.88 per US\$1 and is projected at weaker than R40 per US\$1 by the year 2010.

The Minister of Finance who signed the loan agreements for the arms deal in January 2000, insisted until February 2002 that the contract price remained R30 billion, but then conceded that currency depreciation brought the rand cost to R52.7 billion before including interest and other charges.

In addition, the Budget confirmed that increases in defense spending, at 15 percent annually, are by far the fastest growing, and dwarf expenditures on education, housing, health and welfare which average 6 percent. By 2010, the cost of the arms deal may well rise to over R350 billion, thus squeezing out the State's ability to meet socio-

economic expenditure plans.

The Executive responded in March 2002 on procedural points:

- That jurisdiction in the case should be in Pretoria rather than Cape Town, because Pretoria is South Africa's executive capital and Cape Town the parliamentary capital and that the loan agreements had been signed in Pretoria;
- That ECAAR-SA and Terry Crawford-Browne do not have locus standi to bring the case;
- That documentation, including the "arms deal" report, the "affordability study," and various affidavits (including one by Jeff Dumas) should be ruled irrelevant and inadmissible;
- That once the Cabinet had agreed upon the acquisitions, the role of the Minister of Finance was merely to negotiate the cheapest means of finance.

Courts in South Africa, as elsewhere, are reluctant to challenge the right of the Executive to make policy. However, the Constitution requires that public power vested in the Executive and other functionaries must be exercised in an objectively rational manner. Action that fails to pass this threshold is inconsistent with the requirements of the Constitution, and is therefore unlawful.

The world and most South Africans have been bewildered by the Executive's policies regarding HIV and AIDS. As an AIDS dissident, President Thabo Mbeki has seemingly denied the causality between HIV and AIDS, and has blamed AIDS on poverty. South Africa is now the country worst affected, with some 25 percent of pregnant women testing HIV positive. An estimated six million South Africans are likely to die of AIDS-related complications within the next five years, and the life-expectancy rate will plummet from 60 to 44 years.

The economic consequences of AIDS in South Africa are horrendous. The apartheid state and the democratic government have squandered 20 years before addressing this catastrophe.

The Treatment Action Campaign (TAC) has challenged the Executive's refusal to provide the drug nevirapine to pregnant women and their children. This drug is cheap and has proved effective in preventing mother-to-child transmission. TAC has won a series of court battles against both the pharmaceutical companies and the Executive and, in May 2002, the Executive is expected to lose its final appeal to the Constitutional Court.

Having previously claimed that South Africa could not afford a comprehensive program against AIDS, the Executive is now furiously back-pedaling, and is quintupling its financial commitments. Even so, its HIV/AIDS budget for the financial year 2004/2005 will still be a derisory R1.8 billion (US\$164 million) compared to the tens of billions being spent on warships and warplanes. The TAC precedents have enormous implications both constitutionally and in supporting ECAAR-SA's case for cancellation of the arms deal.

The arms deal has been the subject of massive public controversies over the past six years, mainly because of allegations and evidence of corruption submitted by ECAAR-SA in September 1999 for investigation by the Heath Special Investigating Unit. After President Mbeki dismissed Judge Heath, a parliamentary investigation was thwarted by party politics.

Similarly, a joint investigation by the Auditor General, Public Protector and Directorate of Public Prosecutions—although finding the acquisition procedures riddled with malpractices—exonerated the Executive. The Chief Director of Procurements and lesser officials have been dismissed, and the ANC's former Chief Whip in Parliament and the CEO in South Africa of European Aeronautic and Defense Systems (EADS) are awaiting trial on charges of corruption and fraud. The Institute for Democracy in South Africa (IDASA) ranks the arms deal investigations as the "litmus test of South Africa's commitment to democracy and good governance."

Despite public interest in the corruption issues, this is not the basis on which we are challenging the acquisitions. South Africa is probably the country least vulnerable to foreign naval attack. The real threat to South Africa's security is poverty, with some 35 percent of the population being unemployed and more than 50 percent classified as "poor."

ECAAR-SA's court application for nullification of the loan agreements signed by the Minister of Finance would, if granted, effectively cancel and collapse the arms deal. The cancellation costs of export credit guarantees would be borne by the European governments concerned, not by South African taxpayers.

The EU Code of Conduct on Arms Exports requires regard for the socio-economic circumstances in countries receiving European arms. A successful court case will help European civil society begin to challenge their governments about the marketing and promotion of arms exports to developing countries.

Because of its constitutional implications, an excellent legal team has drastically cut its fees to take the case. We are now wrangling with the Executive on procedural points, not on the substance of the case. This phase can end soon, and a court date be set. The case is now lodged in the Cape Town High Court, which can make a decision subject to constitutional ratification, or refer it to the Constitutional Court based in Johannesburg.

Should the application be successful, it will have enormous implications for South Africa's military posture. A complete re-think of defense requirements will become possible—away from traditional notions of military security for the State in favor of human security for the people.

The socio-economic focus of the Constitution means that the governing principles are as follows: "National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life."

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