

Research Note: Corporate Apartheid-era Human Rights Violations before U.S. Courts: Political and Legal Controversies around Victimhood in Today's South Africa

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In 2002, South African victims of apartheid-era human rights violations instituted legal action against multinational companies, whom they accused of complicity with the apartheid regime in its perpetration of human rights abuses. Backed by national and international non-governmental organizations and individuals, they asked US Courts to address their experiences of injustice. This has had serious repercussions on the possibilities of a dialogue between the South African Government and victims seeking redress. The “apartheid litigations” have been pushing for corporate liability with the help of the Alien Tort Statute, which gives non-US citizens the right to sue in US Federal Courts over violations of international law.

In the past ten years, the notion of victimhood has changed in South Africa, not least due to these litigations. The narrow but collectivizing notion of victimhood advocated by the work of the Truth and Reconciliation Commission of the mid-1990s slowly transformed into a broader and more inclusive understanding of victimhood. Nonetheless, the decision to take the legal path has been ambivalent for victims. Although it gave visibility to their social and political concerns domestically and internationally, victims may also fall prey to politico-legal interests, in whose whims their concerns threaten to disappear, while their personhood remains injured.

Meanwhile, to the concern of the global human rights movement, the conservative US Supreme Court seems determined to ultimately declare the un-applicability of the Alien Torts Statute to pursue corporate liability. The fact that a US Court decides on such matter also points to the precarious situation of international human rights law today.

South Africa's transition to democracy in 1994 came after a decades-long, fierce and also global effort to overthrow the system of apartheid and its agents. Although a United Nations Convention declared apartheid a crime against humanity in the early 1970s³⁴, it still took some twenty more years of international activism before the liberation movements were unbanned, the exiles could return and the first democratic elections could unfold.

But not only resistance was global. International business had a strong interest in upholding the apartheid regime and doing business in an environment which was characterized, at least way into the 1970s, by a state controlled labour force combined with the absence of trade union activity. Although some companies complied with the pressure for sanctions or pulled out before business became unprofitable in a highly regulated economy, many performed quite well throughout the years of low-level civil war in the 1980s and other political turbulence (Bell/Ntsebeza 2003).

Amidst the most violent phase in the country's history, the first democratic elections and the inauguration of President Nelson Mandela took place. Business was encouraged to stay, or come back, and participate in the reconstruction of a new South Africa. Its profiteering from the system of apartheid, its role in upholding the system and its complicity with the commission of human rights violations were hardly addressed. Relief, exhaustion and the democratic reality yet to unfold did probably not help to question a process flawed by political and economic deals between the old and the new order (Bell/Ntsebeza 2003).

³⁴ The United Nations' *Convention on the Suppression and Punishment of the Crime of Apartheid* of 1973 declared apartheid to be criminal. The Convention was adopted by the General Assembly on 30 November 1973, by 91 votes in favor, 4 against (Portugal, South Africa, the United Kingdom and the United States) and 26 abstentions. The Convention came into force on 18 July 1976.

It was a politically controversial legal initiative by the South African civil society in 2002 that brought the topic of corporate role under apartheid rule to public and Government's attention. Today, ten years later, South African apartheid-era victims of human rights violations are at the forefront of writing global legal history in terms of corporate liability for breaches of international human rights law.

This research note looks at what had led to the so-called apartheid litigations and their subsequent history in US courts. I will focus on two potentially conflicting aspects of the litigations: on the one hand, they are pushing the formation of international human rights law, and on the other hand, they are an attempt to deal with the injustice experienced by victims. I will draw some conclusions on the translation of injustice into a legal form with the help of exemplary cases and the limits of justiciability of experiences of injustice.

This research note is based on research for my PhD dissertation.³⁵ It not only attempts to focus on one specific lawsuit which speaks to the broader concern of reparations and corporate liability in Africa and elsewhere, but it also provides some theoretical insights into the effects of political and legal formalization of apartheid-era victimhood in today's South Africa.

Redress deferred

The Truth and Reconciliation Commission (TRC) of the mid-1990s was to ultimately mark the break with the past. The Commission not only called on individual perpetrators of human rights violations to come forward but also had the mandate to investigate companies' role in these violations. A number of companies half-heartedly participated in the TRC process and submitted a statement.³⁶ Although technically, only those companies which

³⁵ Passages in this research note are based on secondary sources if indicated as such; otherwise information comes from my own research for my PhD dissertation. The apartheid litigations are only a small part of the overall PhD project. Much of what is indicated here is elaborated in the dissertation, however. For more information and sources thus see Kesselring (2012).

³⁶ Within the 7-volume report, business figures prominently in two chapters: *Institutional Hearing: Business and Labour* (Truth and Reconciliation Commission South Africa 1998 Vol. 4, Ch. 2) and *Reparations and the Business Sector* (Truth and Reconciliation Commission South Africa 2003 Vol. 6, Section 2). The latter chapter is more critical. Five years have passed between the publication of the first five volumes and the two final ones and business has shown little effort to restitute the past by contributing to business funds and so forth.

were granted amnesty upon full disclosure were free from threat of criminal or civil prosecution, factually, no company was ever prosecuted for apartheid-era human-rights violations by the South African judiciary. The submissions thus absolved them from the reproach of total denial of their probable involvement in human rights abuses and served as some expression of general regret without any admission of liability. Neither has there been proper research into whether and how business had colluded with the apartheid regime in the perpetration of human rights violations.

At that time, the uncovering of the atrocities committed at the hand of the apartheid regime was probably the most important aspect for South Africans. On a daily basis, a number of hearings were broadcasted in the radio and South Africans learnt much about what had been hidden and unknown. Apart from the truth aspect, the Commission's driving forces were theological notions of reconciliation and forgiveness, and it concentrated on the cathartic performance of truth and reconciliation. Consequently, questions of amnesty and reparations took second ground and were handled as a less vital and mostly administrative matter. While the Truth Commission's hearings ran for only 15 months in 1996 and 1997, it took the Amnesty Committee and the Reparation and Rehabilitation Committee an astonishing six more years to table its findings and recommendations with regard to amnesty and reparations to the President. Some 22.000 victims gave their testimony to the Commission about gross human rights violations, which they or their relatives had experienced at the hands of the former regime. They spoke of experiences of torture, about loved-ones who had disappeared, of the killings of family members, detention without trial or various forms of severe ill-treatment. However, many submissions were not accepted by the statement-takers because they fell through the TRC's narrow and legalistic categories of *gross* human rights violations and of *political* victimhood (e.g. Cronin 1999: 6).³⁷ Hence, most victims did not testify at all. Out of those, some were not prepared to speak about their painful experiences (Ross 2002: 163, Ross 2003: 172), others did not know about the Commission.

The Commission attempted to integrate everyone into a shared understanding of victimhood. It collectivized everyone's suffering and pain performatively. To do that, it used a representative – individualized –

³⁷ This is according to the founding Act of the Truth Commission, the Promotion of National Unity and Reconciliation Act of 1995 (1995: ch.1, sec.1).

victimhood, which was meant to speak to and for everyone. Of course, this is a fictive representation bound to fail to some degree. Also, by focusing on individual cases, the Commission lost focus of structural violence. Representation thus failed in a double sense: it blinded out structural victimhood and experiences remained individual ones. Hence, injury ultimately remained individualized both as an act and as a status, and, for most victims up to today, as an experience.

But even if victimhood became a legal category for which only some qualified, the Commission's work had facilitated the emergence of a victim subjectivity that had effects beyond the TRC. Across South Africa, victims started to organize into groups and joined a national structure of regional and provincial support groups, Khulumani Support Group. It started with providing psycho-social support to those victims who testified to the Commission but grew into a solidarity and self-support network of thousands of unacknowledged victims. Today, its activities range from non-professional therapeutic sessions over the documentation of human rights violations in a database which now comprises over 70.000 entries, to political lobby work for a broad redress scheme based on an inclusive understanding of victimhood (Kesselring 2012). But what made Khulumani internationally known is its legal action against non-South African multinational companies.

Indebted Business

When the first five volumes of the TRC Report were tabled to President Mbeki in 1999, he seized the moment to clarify the state's position on apartheid-era victimhood:

[S]urely all of us must agree that reparation will be offered to those who fought for freedom by ensuring that monuments are built to pay tribute to these to whom we owe our liberty. . . . We must however also make the point that *no genuine fighter for the liberation of our people ever engaged in struggle for personal gain*. There are many who laid down their lives, many who lost their limbs, many who are today disabled and many who spent their best years in apartheid prisons. None of those expected a reward except freedom itself. We

must not insult them and demean the heroic contribution they made to our emancipation by turning them into mercenaries whose sacrifices we can compensate with money. Very many among these have not asked for any money, because their own sense of the dignity of the freedom fighter leads them to say that there is no cash value that should be attached to their desire to serve the people of South Africa and all humanity. [my emphasis]³⁸

This remark must be understood in the context of national and international lobbying for debts release or relief at the time, which was increasingly linked with demands for reparations. In 1997, the *South African Coalition against Apartheid Debt* made a submission to the TRC in which it requested an investigation into the financing of apartheid by foreign banks. A year later, the *International Apartheid Debt and Reparations Campaign* was officially launched in Cape Town. It stood for the cancellation of apartheid-caused debts and compensation from businesses that profited from the apartheid system and its abuses. While the campaign was specific in focusing on South African matters, another much broader movement grew rapidly, the largely faith-based International Jubilee 2000 Coalition. Founded in the UK in 1996 as a movement of individuals, faith-based organisations, NGOs, trade unions and student bodies from more than 40 countries, it pushed for debt relief of heavily indebted poor countries (HIPC) without conditionality by the new millennium. The debts they targeted derived from loans from the World Bank, the International Monetary Fund and private banks.

The South African state had voluntarily repaid most of the debts to the various funders towards the end of the millennium and the Government had refused to engage in anything related to the cancellation of debt. Jubilee South Africa has early on complemented the campaigns for debt release with struggles for financial and non-financial reparations for victims of apartheid crimes; its *Apartheid Debt and Reparations Task Team* was funded in 1998. The campaign included representatives from the South African Council of Churches, the South African National NGO Coalition

³⁸ Statement on the Report of the TRC Joint Sitting of the Houses of Parliament in Cape Town, 25 February 1999, accessible at <http://www.dfa.gov.za/docs/speeches/1999/mbek0225.htm> [last accessed March 22, 2012].

(SANGOCO)³⁹, Khulumani Support Group, the Congress of South African Trade Unions (COSATU), the Centre for the Study of Violence and Reconciliation (CSVR), the Institute for Justice and Reconciliation (IJR), legal specialists, researchers, and patrons of Jubilee. The themes were broad social reconstruction and development programmes in affected communities and individual compensation to victims of apartheid human rights abuses, but also corporate responsibility of international companies, which had backed and profited from the crime of apartheid.

There has thus been a shift of focus from debt and reparation to reparation only: What started as a quest for the state's rejection of debts, which the predecessor regime had accumulated, was now a demand for individual and community reparations for suffered harm and structurally constrained development – as the campaign argued, South Africans should not pay for apartheid twice. In this, companies became a much more targeted group; but the lobbied corporations continuously rejected the claims as unjustified and refused to engage in dialogue.

According to international law, states have an obligation to provide various forms of reparation to victims of human rights violations and of the violation of international law.⁴⁰ The South African state fulfilled part of this obligation, the dimension of the guarantee of non-repetition, with legal

³⁹ SANGOCO issued its "Statement by SANGOCO to Request Support and Solidarity on the Issue of Apartheid-Caused Debt and Reparations" on June 1, 1998, see http://apartheid-reparations.ch/documents/suedafrika/e_1998-06-16_Sangoco.pdf [last accessed September 05, 2012]. Ever since, this has been an important point of orientation for national campaigns, which formed part of the international campaign, such as those in Switzerland, Germany and the UK against their own governments and companies with headquarters in respective countries. Most of these national campaigns grew from anti-apartheid movements pushing for sanctions and offering their solidarity to liberation movements across Southern Africa.

⁴⁰ For example, the Universal Declaration of Human Rights, Art.8 (adopted 1948, entered into force in 1948; South Africa abstained), the *International Covenant on Civil and Political Rights*, Art.2 (3), Art. 9 (5) and Art.14 (6) (adopted by the General Assembly 1966, entered into force in 1976; South Africa: signed in 1994 and ratified in 1998), the *International Convention on the Elimination of all Forms of Racial Discrimination*, Art.6 (adopted by the General Assembly in 1965, entered into force in 1969; South Africa: signed in 1994 and ratified in 1998), the *Convention of the Rights of the Child*, Art. 39 (adopted by the General Assembly in 1989, entered into force in 1990; South Africa: signed 1993, ratified 1995), the *Convention against Torture and other Cruel Inhuman and Degrading Treatment*, Art.14 (adopted by the General Assembly in 1984, entered into force in 1987; South Africa: signed in 1993 and ratified in 1998) and the *Rome Statute for an International Criminal Court*, Art. 75 (adopted in 1998 and entered into force in 2002; South Africa: signed in 1998 and ratified in 2000), see also McCarthy (2009). The state's obligation to provide reparations also figures in regional instruments such as the *African Charter on Human and Peoples' Rights* (Art. 21(2)).

measures such as the new constitution. Also, the National Unity and Reconciliation Act of 1995, which established the Truth and Reconciliation Commission, acknowledged this obligation in general; the Act foresees the creation of a fund to pay out financial reparations, i.e. compensation to victims.

The situation is more complex when it comes to the obligations of non-state actors. They do not have a state's duty to protect its citizens from harm, and breaches of human rights committed by them are often difficult to prove. Also, the justiciability of corporate human rights breaches is more complicated and much less tested in courts, most of all when it comes to 'mere' aiding and abetting by companies of human-rights violations committed by the state. Applicants need to prove a causal connection between the companies' actions or omissions and the injuries.

[The] Litigating Business

In 2001, the Apartheid Debt and Reparations Campaign took the decision to institute legal proceedings against non-South African, multinational companies following the example of the action taken against Switzerland for its unclaimed assets of Nazi victims by Jewish plaintiffs. Hence, in 2002, while President Mbeki had still not announced his final decisions regarding amnesty and reparations, litigation against multinational companies for their alleged aiding and abetting the apartheid regime's security forces in their perpetration of gross human rights violations was instituted in US Courts: *Khulumani et al. v. Barclays National Bank et al.* [henceforth *Khulumani litigation*].

The original complaint, led by Michael Hausfeld from the US law firm Hausfeld LLP⁴¹ and advised by South African attorney Charles Abrahams, sued 23 multinationals and banks that span six different countries (Switzerland, Germany, France, The Netherlands, the UK and the US) and involved six different industries (arms and ammunition, oil, transportation, banking, computer technology and mining). The plaintiff organization

⁴¹ Michael Hausfeld was a partner of the US law firm Cohen, Milstein, Hausfeld & Toll, see www.cmht.com [last accessed September 5, 2012] (today Cohen, Milstein, Sellers and Toll PLLC) and since late 2008 a partner of Hausfeld LLP, see www.hausfeldllp.com [last accessed September 5, 2012].

Khulumani as well as 87 individuals alleged specific violations of international human rights law, which were made possible by corporate actions: extrajudicial killing, torture, detention and cruel treatment, all of which took place between 1960 and 1994.

A few months before the Khulumani litigation was filed with the Eastern District Court of New York⁴², a US personal injury lawyer, Ed Fagan, filed *Lungisile Ntsebeza et al. vs Daimler Chrysler Corporation et al.* [henceforth the Ntsebeza litigation] against UBS, Credit Suisse Group and Citicorp in the Southern District Court of New York.⁴³ In an amended version of the case, Anglo American, de Beers, Sasol and Fluor Corporations, Barclays, Deutsche Bank, Dresdner Bank, Commerzbank, Crédit Lyonnais, Banque Indo Suez, IBM, Novartis, and Sulzer were added. Also, the South African Government, former President Nelson Mandela and then President Thabo Mbeki as the legal successor of the apartheid regime were mentioned as defendants. Fagan's South African legal partners were Advocate Dumisa Ntsebeza, head of the TRC's investigative Unit, and attorney John Ngcebetsha. Due to controversies around the credentials of Ed Fagan (who was eventually charged with professional misconduct in a number of cases and disbarred in New York and New Jersey⁴⁴), the US human rights litigator Paul Hoffman, a partner with Schonbrun, De Simone, Seplow, Harris and Hoffman LLP, took over the case. The South African companies and the South African state were taken out of the complaint. In December 2002, the Multi District Litigation Panel decided that the multiple apartheid cases should be consolidated and heard by the Southern District Court of New York.

The lawsuits are based on common law principles of liability and on the Alien Tort Statute (ATS). The ATS is a curious and hotly contested statute that dates back to 1789, when George Washington signed legislation for an anti-piracy bill (28 U.S.C. §1350). It reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed

⁴² U.S. District Courts are trial courts and part of the federal court system. They have jurisdiction to hear federal cases on both civil and criminal matters.

⁴³ The plaintiffs were six South Africans. One of them is Dorothy Molefi. She is the mother of 13-year-old Hector Petersen shot dead by the South African Police in the 1976 Soweto school riots. He became an icon of the Soweto uprising and resistance against the apartheid regime through a picture on which Mbuyisa Makhubo is carrying his body.

⁴⁴ Matter of Edward D. Fagan, M-2732, M-3148, M-3193; Supreme Court of the United States, Appellate Division, First Judicial Department.

in violation of the law of nations or a treaty of the United States". The Statute gives foreign citizens the right to sue in US Federal Courts over violations of international law, whether they arose in the United States or abroad. It lay practically dormant for almost 200 years, but has become the basis of some hundred lawsuits since 1980. In the mid-1990s, many Holocaust-related litigations gave visibility to it, and ATS claims became a rapidly growing instrument to bring to justice persons who have committed human rights violations. Up to today, there has been no ruling in favor of the applicants of a case filed under the provision of the Statute; the litigants have always opted for prior settlement, not at least of fear to be ordered by the courts to open their archives (Stephens et al. 2008). The Alien Tort Statute has been discussed at length by numerous scholars and legal experts (Henner 2009, Mattei 2003, Stephens et al. 2008) and is seen, on the one extreme, as the ultimate expression of US legal imperialism or, on the other side, is heralded as the last option that potentially establishes that individuals and private companies can be held accountable for (complicity in) breaches of international law and international human rights standards. Despite the South African Cabinet's initial assurance that Government neither supported nor opposed legal action in this matter⁴⁵, on the occasion of the tabling of the two final volumes of the TRC Report [April 15, 2003], President Mbeki strongly condemned the legal actions:

[W]e consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country

⁴⁵ As late as in November 27, 2002, Jubilee South Africa issued a press statement in which they stated that they firmly believed the government remained neutral on the issue of the apartheid litigations: "In all our discussions with South African government ministries it is clear that the position of the South African government is neither to oppose nor to actively support the reparations lawsuits, since citizens have an undeniable right to legal recourse. The rule of international human rights law must be upheld". And on December 12, 2002, the South African Cabinet „reiterated its recognition of the right of all citizens to undertake legal action on any matter. Government however is not party to this litigation; and it neither supports nor opposes it.“ <http://www.gcis.gov.za/content/newsroom/media-releases/cabinet-statements/statement-cabinet-meeting-4-december-2002> [last accessed September 5, 2012]. See also Terreblanche (2002).

and the observance of the perspective contained in our constitution of the promotion of national reconciliation.⁴⁶

On the one hand, Mbeki was determined to look towards the future of his country instead of one-sidedly looking back, hence to focus on construction instead of punishment, as he confirmed in an interview at the occasion of a visit to Switzerland (Kapp 2003). On the other hand, he must have felt sufficient pressure from Western countries to clarify on his Government's position in apartheid litigations matters. In August 2003, then Justice Minister Penuell Maduna confirmed at the Civil Society Reparations Conference in Randburg, South Africa, that the US Government asked to be educated about South Africa's position regarding litigation in the US Courts (Pambazuka News 2003). And, apparently, Colin Powell, then US Secretary of the State, encouraged Minister Maduna with a phone call to file a submission to the District Court.⁴⁷

In this speech, he also announced that Government would only very partially institute the recommendations of the Reparation and Rehabilitation Committee of the TRC. The state, he said, would impose no wealth tax on business (hence rejecting the Committee's recommendation of a one-off tax)⁴⁸ and each of the 22.000 identified victims would receive a one-off payment of R30 000 (instead of 17 000 to 23 000 per year for a period of six years, as recommended by the Committee).

After legal proceedings had been instituted in 2002, the Southern District Court of New York received expressions of support for either party. These so-called *amicus curiae* briefs were overwhelmingly clear in their respective arguments.

South Africans and individuals and organisations around the world wrote letters in support of the applicants. For instance, former Archbishop

⁴⁶ President Mbeki's Statement to the National Houses of Parliament and the Nation, at the tabling of the Report of the Truth and Reconciliation Commission (April 15, 2003) is available at <http://www.thepresidency.gov.za/pebble.asp?relid=3014> [last accessed September 05, 2012].

⁴⁷ This phone call is often cited without a source: "Initially, the South African government under former Minister of Justice Dullah Omar had vowed to remain neutral. That would change after Colin Powell, on behalf of the Bush administration approached Omar's successor, Penuell Maduna, in 2003. Prodded by Washington, Pretoria ultimately invoked national sovereignty in opposing the lawsuits" (Sharife 2009); confirmed in Bond (2008).

⁴⁸ Notably, by virtue of this recommendation, the TRC untypically integrated the notion of *systemic* beneficiary and responsibility, putting it next to the responsibility of individuals who had committed politically motivated crimes. The latter had been its focus.

Desmond Tutu, in his capacity as Chairperson of the Truth and Reconciliation Commission and former Archbishop of Cape Town, emphasized that the apartheid litigations were in line with what the TRC had found. Opposing the Government's statement that the litigation would undermine the national reconciliation process and simultaneously criticizing the gap between the TRC's recommendations and the actual payouts by the Government, Tutu wrote:

[T]he obtaining of compensation for victims of apartheid, to supplement the very modest amount per victim to be rewarded as reparation under the TRC process, could promote reconciliation, by addressing the needs of those apartheid victims dissatisfied with the small monetary value of TRC reparations.⁴⁹

Other supporters were solidarity coalitions such as the Swiss Apartheid Debt and Reparations Campaign and individuals like Joseph Stiglitz, Nobel Economy Prize winner 2001 and former Chief Economist of the World Bank. Objection to the apartheid litigations was just as fierce. Then South Africa's Minister of Justice, Penuell Maduna, filed an affidavit calling upon District Court Judge Sprizzo to dismiss the two lawsuits.⁵⁰ According to the Ministry, the litigations pre-empted the Government's ability to handle domestic matters of reconstruction and reconciliation and discouraged investment in the South African economy.

Many expressions of objection were not directed to the Court directly but were placed elsewhere. For instance, then South African Minister of Trade and Industry, Alec Erwin, addressed Parliament:

[W]e are opposed to and indeed contemptuous of attempts to use unsound extra-territorial legal precepts in the USA to seek personal financial gain in South Africa.⁵¹

⁴⁹ Brief of Amici Curiae Commissioners and Committee Members of South Africa's Truth and Reconciliation Commission in Support of Appellants, August 30, 2005; page 10, footnote 10. The *brief* is accessible on http://kosa.org/documents/05-08_TRC_amicus.pdf [last accessed July 15, 2012].

⁵⁰ The Maduna Declaration can be accessed on the website of the South African government: <http://www.info.gov.za/view/DownloadFileAction?id=70180> [last accessed March 23, 2012].

⁵¹ Debate on the Truth and Reconciliation Commission Report: Speech by Minister of Trade and Industry, Alec Erwin, 15 April 2003: <http://www.info.gov.za/speeches/2003/03050214461004.htm> [last accessed March 31, 2012].

While he acknowledged the right to seek recourse in law, he condemned “the abuse to use the law of another land to undermine our sovereign right to settle our past and build our future as we see fit”. He reproached the plaintiffs for “break[ing] that indefinable collectivist identity that was the origin of our strength” and for “exploit[ing] our history”.⁵² And the late Kader Asmal, then South African Minister of Education, argued that South Africa “does not need the help of ambulance chasers and contingency fee operators, whether in Switzerland, the Netherlands, or the United States of America”.⁵³

While the plaintiffs were labeled unpatriotic and treacherous, part of the distrust towards the apartheid litigations has to be attributed to the involvement of the US personal injury lawyer Ed Fagan, who had initiated the Ntsebeza litigation. Although another renowned US lawyer, Paul Hoffman, took over, political damage with regard to how the South African Government viewed the apartheid litigations had been irreversibly done. As Terry Bell, labor activist and journalist, told me:

Once it has started, you can't stop it, that's the trouble. You have already committed yourself to the courts, which is why the case is such a mess in America. [...] I think you also had the slick American lawyers who – the English expression – talk a hole in your head. They just completely outfoxed the locals.” [interview of January 2006]

On the US side, soon after the cases were filed, then US Secretary of Commerce, Donald Evans, described the litigations as “unhelpful development” (Friedman 2003). In a Statement of Interest, the Bush Administration's State Department argued that the “continued adjudication of the [apartheid litigations] risks potentially serious adverse consequences for significant interests of the United States” by threatening to be “irritant in

⁵² Ibid.

⁵³ Address by the Minister of Education, Professor Kader Asmal, MP, in the Debate on the Truth and Reconciliation Report, National Assembly, Cape Town, 15 April 2003: <http://www.info.gov.za/speeches/2003/03041515461001.htm> [last accessed March 23, 2012]. He would, 7 years later, surprise human rights organizations, activists and the plaintiffs with his *amicus curiae* brief to the Second Circuit Court of Appeals in which he argued that corporations cannot be held liable under customary international law.

U.S.-South African relations” and for international economic relations with other countries whose firms are defendants.⁵⁴

Indeed, Switzerland and Germany, together with the UK and Australia, officially spoke out in favor of the companies with headquarters in their territories, and filed *amicus curiae* briefs in their support.⁵⁵

Switzerland is a case in point in how strong the reactions to the litigations were. In the late 1990s, the Swiss Federal Council, upon decision of Parliament, had commissioned an extensive research project looking into the political and economic relations between Switzerland and South Africa between 1948 and 1994 (Kreis 2005). In April 2003, however, whilst research was underway, the Federal Council shut down access to official archival files documenting corporate links to the apartheid regime.⁵⁶ It argued that keeping up free access to archives would disadvantage Swiss banks in relation to defendants from other countries. As it explained, it had decided against well-documented research findings and for the protection of “equality before the law” [Rechtsgleichheit] of Swiss and foreign defendants.⁵⁷

⁵⁴ The Submission of Interest (October 27, 2003) is quoted on page 9 of Brief for the United States as Amicus Curiae Supporting Appellees filed to the US Second Circuit Court of Appeals on November 20, 2009, see <http://www.scribd.com/doc/23603048/U-S-Statement-of-Interest-in-Apartheid-Reparation-Claims-under-the-Alien-Tort-Statute> [last accessed April 1, 2012].

⁵⁵ For a study on the relation between German companies and the apartheid regime, see Morgenrath/Wellmer (2003). For a paper by ECCHR (European Center for Constitutional and Human Rights) on the position of the German government in relation to the apartheid litigations against Daimler and others, see <http://www.medico.de/media/ecchr-schutz-deutscher-souveraenitaet-und-wirtschaft.pdf> [last accessed April 1, 2012].

⁵⁶ “[D]er Zugang zu Südafrika-Akten im Bundesarchiv, welche die Apartheidzeit betreffen und Namen von Unternehmen enthalten, [wird] vorübergehend unterbunden» Eidgenössisches Finanzdepartement EFD, 17.4.03, see <http://www.admin.ch/cp/d/3e9e5adf@presse1.admin.ch.html> [last accessed March 31, 2012].

⁵⁷ At the time of printing [update], the Federal Council had still not undone the ban on the archives. This is despite the fact that since the ruling of Justice Scheindlin at the Southern District Court of New York of April 2009, no Swiss company is implicated in the apartheid litigations anymore. The Swiss Anti Debt and Reparations Campaign (Swiss ADR) has sent several letters of inquiry to the Swiss Federal Council to inquire about the possibilities of undoing the ban, the last of which are dated in 2011. For the inquiries and the Federal Council’s replies, see http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20113939 and http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20111069 [last accessed April 1, 2012].

Caught in Courts

In early 2004, the applicability of the Alien Tort Statute in US Courts seemed finally confirmed when the US Supreme Court handed down a positive judgment in another ATS case, *Sosa v Alvarez-Machain*. For this case, the US Supreme Court produced a widely quoted decision, which upheld the right of foreigners to seek compensation under the provision of the ATS. However, it urged Federal Courts to interpret the Statute narrowly as to avoid judicial interference in foreign affairs. The judicial power should be exercised “on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today”⁵⁸. Justice Souter, for the majority, referred to the pending apartheid litigations in a footnote and noted that “[i]n such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy”.⁵⁹

Later in that year, the first procedural decision in matters apartheid litigations was passed down. Judge Sprizzo of the Southern District Court of New York dismissed the apartheid litigations on the grounds that he did not regard aiding and abetting international law violations as a universally accepted standard of international law.⁶⁰ In its judgment, the Court also referred to the briefs of the South African and the U.S. Government. Justice Sprizzo granted the right to appeal and plaintiffs appealed to the Second Circuit Court of Appeals.⁶¹

Yet again, Desmond Tutu, together with former TRC commissioners and committee members filed an *amicus curiae* brief to the Second Circuit Court of Appeals, in which they urged the Court to reverse the decision of the District Court.

⁵⁸ *Sosa v Alvarez-Machain*, 542 U.S. at 729.

⁵⁹ *Sosa v Alvarez-Machain*, 542 U.S. at 733, footnote no. 21.

⁶⁰ The Court further stated that the rulings of the international criminal tribunals such as the ICTY, the ICTR and the Nuremberg Tribunal were not binding sources of international law. Furthermore, the Apartheid Convention had not been ratified by such major powers such as the US, the UK, Germany, France, Canada, and Japan, and the Convention was not binding international law. The decision is available at www.apartheid-reparations.ch/documents/reparationen/e_200412_sprizzo.pdf [last accessed March 31, 2012]

⁶¹ The Second Circuit Court of Appeals is one of the thirteen US Court of Appeals. Its territories are the three states New York, Vermont and Connecticut. The Court has appellate jurisdiction over the Southern District Court of New York and five others.

[T]he TRC expressly recognized bases for civil liability of certain businesses for their actions, including the aiding and abetting of human rights abuses by the apartheid regime.

[T]he payment of reparations was linked to the grants of amnesty, and the receipt of reparations by victims did not amount to a release of their claims for compensatory damages against those who had not been granted amnesty. [...]

[N]o corporation was given amnesty – neither South African corporations, nor the multinational corporations named as defendants herein. The notion then that defendants are entitled to any amnesty from civil suit because of a policy embodied in the TRC is simply mistaken.⁶²

In October 2007, the Second Circuit Court of Appeals reversed the lower court's dismissal. It centrally held that "a plaintiff may plead a theory of aiding and abetting liability"⁶³ under the ATS and referred the cases back to the lower court, which offered the opportunity to file amended cases.

Only days after the Appeals Court handed down judgment, the successor of Mr. Maduna, Justice Minister Brigitte Mabandla, reiterated the South African Government's consistent position as "essentially of a political nature". "We submit", she wrote, "that another country's court should not determine how ongoing political processes in South Africa should be resolved".⁶⁴

The amended complaints were lodged in October 2008 and the trial was supposed to be reopened in February 2009. Before that, though, the defendant companies petitioned the U.S. Supreme Court for *certiorari*. In other words, they asked the highest authority to hear their appeal of the October 2007 decision of the Appeals Court.⁶⁵ It was a difficult moment for the plaintiffs and their supporters. The Supreme Court holds power to ultimately dismiss cases. And in this case, this could potentially jeopardize the application of the ATS for all other pending and future cases. It turned

⁶² www.kosa.org/documents/05-08_TRC_amicus.pdf [last accessed March 31, 2012]

⁶³ *Khulumani v. Barclay National Bank*, 504 F.3d 254, 260 (2d Cir. 2007)

⁶⁴ Mabandla's comment on the US Court of Appeals decision was issued on October 19, 2007, see <http://www.info.gov.za/speeches/2007/07101915451001.htm> [last accessed March 31, 2012].

⁶⁵ The defendants' Petition for a Writ of Certiorari of January 10, 2008 is accessible at <http://www.scotusblog.com/wp/wp-content/uploads/2008/01/SA.pdf> [last accessed April 1, 2012].

out differently: the Court could not pass judgment for a lack of quorum of six, because four of the nine justices had to recuse themselves as they owned stock in some of the corporate defendants. The Supreme Court had no option but to uphold the decision of the Second Circuit Court of Appeals, and it referred the cases back to the District Court, where they had first been filed.

The legal teams of the plaintiffs seized the opportunity to strengthen their complaints and change some crucial characteristics of the case. The Khulumani complaint underwent three substantial changes: it requested a jury trial, reduced the defendants from 23 to eight and reformulated it into a class action suit. The latter resulted in a reduction of the number of named plaintiffs from 87 to 13 individuals.⁶⁶ Typically, class plaintiffs sue on behalf of themselves and all other individuals who are similarly situated. This meant that every South African, who or whose relative had experienced torture, prolonged unlawful detention and cruel, inhuman and degrading treatment or extrajudicial killing, was a potential plaintiff. Khulumani Support Group remained a plaintiff. The eight defendants were Barclays National Bank, Daimler AG, Ford Motor Company, Fujitsu, General Motors Corporation, IBM, Rheinmetall Group AG, and UBS.⁶⁷

After the detour via the Supreme Court, it was yet again the Southern District Court in New York, which heard the amended complaints in February 2009.⁶⁸ Since the first hearing, Justice Sprizzo had passed away (Weber 2008). He was replaced by Justice Shira Scheindlin, who was nominated by President Clinton and generally seen as progressive. After procedural questions had dominated for seven years, Justice Scheindlin finally issued a first substantive ruling on April 8, 2009.⁶⁹ In favor of the plaintiffs, she allowed the claims to proceed. She opened her decision with a quote by Desmond Tutu:

⁶⁶ The named plaintiffs in the amended complaint are Sakwe Balintulo, Dennis Brutus, Mark Fransch, Elsie Gishi, Lesiba Kekana, Archington Madondo, Mpho Masemola, Michael Mbele, Catherine Mlangeni, Reuben Mphela, Thulani Nunu, Thandiwe Shezi and Thobile Sikani.

⁶⁷ The Amended Complaint is available on the Hausfeld LLP law firm website http://www.hausfeldllp.com/content_documents/9/KhulumaniClassActionComplai.pdf [last accessed April 1, 2012].

⁶⁸ Accessible at the Hausfeld LLP website http://www.hausfeldllp.com/content_documents/9/KhulumaniHearingTranscript022609.pdf [last accessed April 1, 2012].

⁶⁹ <http://www.law.harvard.edu/programs/hrp/documents/Ntsebeza.pdf> [last accessed April 1, 2012].

The truth about apartheid – about its causes and effects [...] about who was responsible for its maintenance – continue[s] to emerge. This litigation is one element of that emergence.⁷⁰

Justice Scheindlin ordered two major changes. Firstly, the exclusion of those defendants whom it was difficult to prove that they did more than “merely doing business” (i.e. banks), which reduced the defendants to Daimler, Ford, General Motors, IBM, Fujitsu, and Rheinmetall Group.⁷¹ And secondly, she argued that the organisation Khulumani had no standing as a plaintiff.⁷²

The plaintiffs’ attorneys filed the Second Amended Complaints according to her order. The defendant companies, however, filed yet another appeal to dismiss to the Second Circuit Court of Appeals. It heard the cases on January 15, 2010 and reserved judgment. The decision was still pending at the time of writing this research note, July 2012.

A few months after Judge Scheindlin had issued her Opinion and thus gave the go-ahead to the apartheid litigations, previously deadlocked positions fundamentally shifted in September 2009. The South African Government reversed its opposition. The current Minister of Justice, Jeff Radebe, communicated to the Court that it was «now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law». ⁷³ He also offered Government’s assistance to mediate a settlement.

Widely unnoticed, the US also made a significant submission to the Court at this stage. In response to the Second Circuit Court of Appeal’s call for opinions, the Obama Administration filed its second Statement of Interest after Bush in 2007. It argued that it had never explicitly asked for the dismissal of the cases on the grounds of the US foreign policy interests and

⁷⁰ Brief of Amici Curiae Commissioners and Committee Members of South Africa’s Truth and Reconciliation Commission in Support of Appellants, August 30, 2005. The Brief is accessible on http://kosa.org/documents/05-08_TRC_amicus.pdf [last accessed July 15, 2012].

⁷¹ For an in-depth study on how the Swiss banks supported the apartheid regime, see Madörin (2008).

⁷² Judge Scheindlin’s Opinion and Order of April 8, 2009 is available on the Hausfeld LLP website http://www.hausfeldllp.com/content_documents/9/KhulumaniOpinion040809.pdf [last accessed April 1, 2012].

⁷³ The letter is available on the Khulumani website <http://www.khulumani.net/khulumani/documents/file/12-min.justice-jeff-radebe-letter-to-us-court-2009.html> [last accessed March 31, 2012].

that it had been misquoted by the corporate defendants. The fact that the South African state had reversed its opposition surely helped the US state to drop its objections. Also, Obama's legal advisor, Harold Hongju Koh, had, prior to his post under Obama, joined a *brief*, which argued for a broad aiding-and-abetting standard for corporate liability for their complicity in human rights abuses abroad.⁷⁴

Corporate Personhood

While the decision on the apartheid litigations was pending, a case against Royal Dutch Petroleum (*Kiobel and Others v Royal Dutch Petroleum Company and Others*) took the lead in matters ATS. Twelve plaintiffs allege that Royal Dutch Petroleum aided and abetted human rights violations committed against them and their murdered or executed relatives by the Abacha military dictatorship in the Niger Delta between 1992 and 1995.⁷⁵

It was also the Second Circuit Court of Appeals that heard the *Kiobel v. Royal Dutch Petroleum* case. It came as a shock to the international human rights movements when a panel of three ruled on September 17, 2010 that companies could not be held liable for violations of international human rights law. One of the three judges, Justice Leval, wrote a strong dissenting opinion. He noted that the majority's (Chief Justice Jacobs and Justice Cabranes) reasoning would be a "substantial blow to international law and

⁷⁴ See: <http://www.iie.com/publications/pb/pb09-9.pdf> [last accessed March 2012].

⁷⁵ This case was preceded by the more widely known *Wiwa v. Shell* case, which was eventually settled out of court in 2009. In *Wiwa v. Shell*, one of the nine plaintiffs is the son of the late renowned writer and activist Ken Saro-Wiwa, who was the leader of the Movement for the Survival of the Ogoni People (MOSOP) and was arrested and executed by a special military trial in 1995. The case alleged the Royal Dutch company, its Nigerian subsidiary, Shell Petroleum Development Company (SPDC or Shell Nigeria), and the former head of its Nigerian operation with complicity in the torture, killing, and other abuses of non-violent Nigerian activists in the mid-1990s in the Ogoni region of the Niger Delta. The out-of-court settlement, which was untypically made public, provides a total of \$15.5 million. This compensates the 10 plaintiffs, including family members of the deceased victims. Also, a trust fund for the Ogoni people should be established. Finally, it will cover a part of plaintiff's legal costs. The plaintiffs only negotiated on behalf of themselves and not on behalf of a class of victims. For more details, see <http://ccrjustice.org/ourcases/current-cases/wiwa-v.-royal-dutch-petroleum> [last accessed April 1, 2012]. Paul Hoffmann, the attorney who also leads the South African Ntsebeza litigation and argued for the Mexican Mr. Alvarez-Machain in *Sosa v Alvarez-Machain*, represents the Nigerian plaintiffs.

its undertaking to protect fundamental human rights".⁷⁶ The plaintiffs' petition for rehearing en banc was denied in a 5-5 vote on February 4, 2011. The Nigerian plaintiffs filed petition of *certiorari* with the Supreme Court, which announced in October 2011 that it would hear their claims.

Given that the application of the ATS became the core issue, it halted all the other cases filed under the provisions of the ATS. This was the first time that the Supreme Court substantially addressed the question of corporate liability under the ATS.⁷⁷

The mobilization for briefs on either side was extensive and reflected the urgency and the interest for the issue at stake. Briefs in support of the Nigerian applicants and hence for corporate liability under international law were filed among others by the US Government, Earth Rights International, Former US Senator Arles Specter, UN High Commissioner for Human Rights Navi Pillay. Briefs in support of the respondents included the US and the German Chambers of Commerce, *economiesuisse*, the German, UK, and Netherlands Government, BP, Caterpillar, IBM, CATO Institute, Chevron, Ford, Coca-Cola, Rio Tinto etc.

It is important to remember that only two years before the Supreme Court heard *Kiobel v. Royal Dutch Petroleum*, it ruled in *Citizens United v. Federal Election Commission* in January 2010 that corporations constituted persons with unrestricted First Amendment rights to spend unlimited sums during political campaigns. This confirmed that corporations have constitutional rights and would, of course, be in direct contradiction to a finding that corporations have no liabilities under constitutional law. Hence, at the core of the *Kiobel v. Royal Dutch Petroleum* case and other ATS cases has come to be corporate personhood. The fact that the US Courts alone should decide on the liability of corporations is telling for the precarious situation of international human rights law.

⁷⁶ The decision and the dissenting opinion are available on www.ccrjustice.org/files/2010.09.17_Kiobel_Majority_Opinion_and_Dissent.pdf [last accessed March 31, 2012].

⁷⁷ The question of the applicability of the ATS is generally seen as producing a "circuit split". The 11th Circuit Court has upheld corporate liability. Attorneys of both parties try to mobilize this split for their advantage.

Pushing the formation of international human rights law

It seems, however, that a Supreme Court dominated by conservative Judges might avoid this contradiction by questioning the Alien Tort Statute as a whole because in early March 2012, the Court announced that it wanted to rehear the *Kiobel v. Royal Dutch Petroleum* case in the next term. Quite unusually, it called on the parties to submit supplemental briefs by June 2012 on whether the ATS allows Federal Courts to hear lawsuits alleging violations of international law that occur *outside* the US without involving US citizens. This was not the question the appellants had approached the Court for, but it constitutes a core dimension in the recent application of the ATS. The Court's conservatives seemed ready to set a precedent on extraterritoriality, a "less politically explosive but much more consequential" (Sacks 2012) question in relation to the applicability of the ATS, to finally declare the *general* inapplicability of the controversial Statute. Or, as conservative Supreme Court Justice Alito put it during the oral argument: "What business does a case like that have in the courts of the United States?"⁷⁸ The latest development before printing was that the US Justice Department filed its supplemental *amicus curiae* brief in June 2012 in which it argues that the *Kiobel* case should be dismissed because it lacks a sufficient nexus to the US. It did not take a definitive stance on the question of corporate legal subjectivity.⁷⁹ The Supreme Court is expected to hand down judgment in late 2012.

To recapitulate, with *Sosa v. Alvarez-Machain*, the US Supreme Court upheld the constitutionality of the Alien Tort Statute in 2004. In *Kiobel v. Royal Dutch Petroleum*, the Second Circuit Court of Appeals held in 2010 that only individuals – and not companies – could be sued under the Statute. Together with the Supreme Court's decision in *Citizens United v. Federal Election Commission* of 2010, in which corporate personhood was expanded, this gives the impression that companies mainly have rights but very little responsibilities (see also Weiss 2012).

⁷⁸ The official transcript of the hearing on February 28, 2012 is accessible here: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf [last accessed March 23, 2012].

⁷⁹ The *brief* can be accessed here:

http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2012/06_-_June/kiobel-dojbrief.pdf [last accessed September 05, 2012]. The State Department legal advisor Harold Koh did not sign it.

Apartheid-era victimhood in South Africa

As for many other plaintiffs in cases that sue multinational companies under the provision of the US Alien Tort Statute, to claim justice for human rights violations in general and under a foreign jurisdiction has been an ambivalent experience for the apartheid-era victims. The apartheid litigations are an example of how discourses about victimhood shift once the juridical route is taken.

The decision to take the (international) legal route to demand acknowledgement and reparations for victims of human rights violations has been contingent on (national) political negotiations in South Africa. As apparent in the process that led to the apartheid litigations, the recourse to law is often a last resort in a debate which had been held through non-legal means.

The fact that the Truth Commission of the mid-1990s offered a stage to act out victimhood for a limited number of victims partly cemented a narrow victim subject position. On the one hand, the Commission's work produced an ethical obligation to partake in the performance of reconciliation and forgiveness. This pressure was framed as political solidarity based on the successful liberation, which had required the suffering of all South Africans. In this logic, individual victimhood was subsumed under collective victimhood. On the other hand, the Commission's work and findings promoted a legal and thus exclusive and individualized definition of victimhood. A person's official recognition as a victim was tied to, firstly, the ability to give testimony to painful experiences and, secondly, to fitting the narrow categories of gross human rights violations. On these two levels, the Commission was a governing body (whose findings were ultimately up to the President to execute). It excluded those whose experiences did not fit and those who were too late to apply, unable or unprepared to reconcile or to speak, or to partake in an ANC driven political process of nation-building. This exclusive granting of the status of formal victimhood was – although inevitable as an administrative act – consequential (Kesselring 2013).

Endeavours such as the apartheid litigations to include more victims in a redress and recognition scheme than the Commission could handle and Government was prepared to acknowledge proved politically very delicate. Plaintiffs, most of whom are members of the victim support group

Khulumani, were faced with serious allegations of being unpatriotic and selfish from state officials. For many years, the positions in the inner South African debate around reparations and restitution hardened. The state's opposition to the legal action also meant that other civil society initiatives of and for victims received little recognition and support. Certainly, as stated above, Mbeki's opposition to the lawsuits must be understood against the background of his strong urge to build on a new African society and a regional power and leave behind things of the past with a kind of chosen collective amnesia.

Things were complicated by the fact that non-South African courts were appealed to. For the South African state, this was an affront against its national efforts to deal with transitional processes without foreign interference (the latter was particularly important for President Mbeki). Taking companies to account for their alleged liability in human rights violations also clashed with Mbeki's adoption of a business friendly model, which promoted economic growth and foreign investment (GEAR).⁸⁰

In the course of the decade that the apartheid litigations have been pending in the US courts, the plaintiffs' concerns have received fluctuant attention. The changes of administration in both the US (from Bush to Obama) and South Africa (from Mbeki to Zuma) brought some tentative signs of support. Government's position softened slightly. It may be a momentary hope, though. Zuma has never iterated the concession publicly. Nonetheless, reparations claims of apartheid-era victims were discursively no longer directly connoted with betrayal of the liberation struggle and the undermining of the TRC process.

More recently, while the legal processes were still blocked due to *Kiobel v. Royal Dutch Petroleum* pending before the Supreme Court, the claims of the apartheid-era victims further received political recognition vis-à-vis its Government and a resigned public. In February 2012, the first out of court settlement between the litigating parties in the apartheid litigation was announced.

On the very same day as the Supreme Court held the (first) hearing on the Nigerian *Kiobel v. Royal Dutch Petroleum* case, the Bankruptcy Court of the Southern District of New York announced a settlement between General

⁸⁰ The Growth, Employment and Redistribution (GEAR) plan had replaced Mandela's Reconstruction and Development Program (RDP), which addressed needs such as housing, land, health, education and services.

Motors (GM) and the plaintiffs of the apartheid litigations. The negotiations go back to 2009, when GM, as a result of the financial crisis, filed for bankruptcy protection before a bankruptcy court in New York. The plaintiffs' legal teams followed suit and filed their claims with the same court against the company.⁸¹ The Bankruptcy Court, however, disallowed the claims and relieved GM of any legal obligation towards the putative class claimants. Although, due to its liquidation status, GM had no longer been part of the main legal apartheid action, Khulumani's leading lawyer Michael Hausfeld managed to negotiate a settlement in February 2012. The settlement, US\$1.5 million worth of shares of the company, was between Motors Liquidation Company (formerly known as General Motors Corporations), General Unsecured Creditors (GUC) Trust and the South African claimants. Although the Court's order does not require an admission of liability by GM and the amount is insignificantly small, the attorney and the plaintiffs judged it nonetheless as a step towards corporate accountability.⁸²

Lived experience of victimhood before court

The developments of the apartheid litigations in conjunction with other cases filed under the provision of the Alien Tort Statute show that litigation for experienced injustice can bring forth new human rights law. However, for that to happen, plaintiffs' injuries have to be translated into a legal form first.

Class actions, a legal mechanism mainly reserved to the US jurisdiction, offer the opportunity to make structural violations of human rights actionable. In order to do that, they subsume the conditions of thousands of plaintiffs under a few named plaintiffs who stand as representatives for a legal category of injury. Their experience of harm is assumed to be exemplary for similar cases. Hence, although a class action is a "mass"

⁸¹ The claim was filed on behalf of a so-called putative class, which means that no court had yet certified a class.

⁸² For Khulumani's press release, see <http://www.khulumani.net/khulumani/statements/item/620-breaking-news-bankrupt-general-motors-agrees-to-settle-in-apartheid-lawsuit.html>; and for the German Campaign's statement, see www.kosa.org/documents/2012_03_01_GM_Khulumani_Pressemitteilung.pdf [last accessed April 1, 2012]. The English speaking press took a great interest in the settlement.

action, the law individuates injury in order to judge it. Necessarily, the legal view on injury falls short of grasping experienced victimhood.⁸³

But also attorneys and the courts grapple with the tension between individual and structural harm and the legibility of experienced injury. In class actions filed under the ATS, the attorneys of the companies argue precisely for the non-justiciability and unmanageability of the cases. In order to have the cases dismissed, they tried to show the impossibility of inquiring into the injuries sustained by thousands of plaintiffs.

In the apartheid litigations, it took seven years in the US Courts until one Justice took interest in the lived experiences of the South African plaintiffs *in their personhood*. It happened so in the 2009 hearing before Justice Scheindlin at the Southern New York District Court (see above). The attorney for the defendants was anxious to show the “huge and amorphous nature of this case” and emphasized “the distance of those events [injuries committed by the apartheid regime] from our [US] shores, 8,000 miles”. He also elaborated on the complexity of getting data on the plaintiffs:

[T]he volume of materials that this Court would have to review [is enormous], and keep in mind that each of the plaintiffs, of which there are many, and each of the punitive members of the class would have his own individual story, or her own individual story, taking place at different times in different places in South Africa with different witnesses, different facts.⁸⁴

Later in the hearing, the companies’ attorneys argued that the plaintiffs missed the 10-year time bar to institute action (with the argument that apartheid ended with the release of Mandela in 1990). In 1991, US President Bush lifted the sanctions that President Reagan had imposed under the Comprehensive Anti-Apartheid Act. Justice Scheindlin, in turn, inquired what it must have been like being a South African in those years:

The fact that our [US] government became comfortable enough to lift restrictions doesn’t tell me what it was like to be a black person

⁸³ See also my PhD dissertation, Kesselring (2012).

⁸⁴ On page 80 (13-25) of the official transcript of the hearing, http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf [last accessed March 23, 2012].

living in South Africa in 1991 who was contemplating suing some South African companies or subsidiaries of national companies that do business in South Africa claiming that they were collaborating in the apartheid system when the control was still in the hands of the very white politicians who had enforced the system. So there is a disconnect here between our government lifting a restriction on certain things and what it would have been like to be a plaintiff.⁸⁵

By emphasizing the disconnect between the interpretation of political situations, Justice Scheindlin also pointed at the influence US policy has had – also on people living 8.000 miles away. It is a remarkable and exceptional inquiry into the lived realities of plaintiffs.

However, the law works by proxy. Although individual victims find solidarity and acknowledgment in a collective movement of victims, injuries and suffering ultimately remain an individualized state of being. And the law cannot address this individual dimension of experienced suffering.

On the contrary, many legal solutions actually isolate victims further. One such example is the GM settlement mentioned above. It was reached on behalf of each of the 25 named plaintiffs in the two apartheid litigations (Khulumani and Ntsebeza litigations). The US\$1,5m are apparently equally split between the teams of the two litigations. The Khulumani group announced that its 13 named plaintiffs will receive R10 000 [US\$1300] each and that the rest will go into a Reparations and Rehabilitation Trust Fund for programs in the most affected communities.⁸⁶

The settlement, both in amount and in distribution, bears no connection to the relation between harmed person and degree of injury. And, in effect, it attributes more weight to the suffering of some (the named plaintiffs) than to that of others.

Now, settlements are a curious compromise between a judicious and a political way of settling disputes. They certainly do not address the relation

⁸⁵ On page 89 (4-14) of the official transcript of the hearing, http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf [last accessed March 23, 2012].

⁸⁶ Assuming that the \$1.5m are divided between the two apartheid litigations, the Khulumani group has roughly \$10 for each of its 70.000 members (apart from the named plaintiffs) who are registered in its database. In July 2012, the membership in the various provinces of South Africa was still debating as to how the money should be used. Some voted that the GM settlement should be a first contribution to Reparations and Rehabilitation Trust Fund, hoping that other companies will equally make their contributions. Others voted for individual pay-out to each member.

between the individually harmed person and the experienced violence. Further, they neither set a legal precedent for future cases to draw on (this is precisely why they are a favoured tool of companies to avoid both prosecution and precedent).

A legal process has effects and gives visibility to the social and political dimension of real social claims. Victims become relevant, politically and legally, and their brave actions potentially write legal history. But once actions are instituted, victims not only become target of political interests but may also fall victim to the whims of politico-legal interests. Their concerns threaten to disappear in this process.

Instituting claims in countries where the alleged violations occurred is often politically too delicate and the plaintiffs run high personal risks.⁸⁷ In turn, international jurisdiction, such as the International Criminal Court (ICC), which is a favourable forum, heavily relies on the co-operation of the reluctant states. Also, the ICC can only prosecute crimes committed on or after the date of its founding treaty entered into force in July 1, 2002.

Hence, in an environment in which few institutions, be they judicial or political, secure the accountability and liability of corporations, the US Alien Tort Statute has been a unique mechanism. In all its ambivalence, it has had the power to enforce liability for compromising the dignity of human beings, and has strengthened international human rights against corporate abuses, both of which are, I believe, a nonnegotiable goal. In a few months, we will know whether it can continue to do so.

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⁸⁷ In 2011, however, the South African Constitutional Court issued a landmark ruling on an asbestos case against AngloGold, which laid the legal ground for claims for compensation. South African lung-diseased miners sued the company for damages for contracting silicosis and tuberculosis while working for the company in the 1980s and 1990s. On the issue of where litigations against multinational companies that operate in African countries are being instituted, whether in domestic or foreign courts, see Frynas (2004) for an overview.

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