

MICHAEL D. HAUSFELD\*  
SPEECH AT UNIVERSITY OF WITWATERSRAND, SOUTH AFRICA  
October 21, 2003

They came and took your land and your labor. They took your government and your natural resources. They took your homes and your education. They took your liberty and your identity. They took your dignity.

Of the twenty-six million people living in South Africa in 1976, only the four million classified as "white" had full citizenship rights, while nineteen million Africans who were born in South Africa, worked in South Africa, and died in South Africa were considered foreigners in their own land.

"Three hundred apartheid laws were put on the statute books to control and disadvantage black South Africans from the cradle to the grave." It was estimated that one in every four babies born in the homelands died during the first year of life. Whether the consequences to the victims are measured in terms of infant mortality, nutritional intake, life expectancy, literacy, domestic per capita earnings, employment levels or property ownership, the findings were the same. Apartheid imposed racially inscribed inequalities across the entire range of life experiences. Even this however was not enough. Repression was supplemented by abuse of every form, including systematic and organized murder, rape, kidnapping and torture.

In the words of one 16-year-old concentration camp survivor, who weighed 76 pounds on the day of her liberation, "they took all but my life." And in South Africa, for far too many, they took that as well.

Societies have acknowledged the "grim fact of worldwide interdependence," and the need to address, through the law, "shockingly egregious" violations of universally recognized principles. Whoever commits or aids such violations not only affronts his/her victims, but "also hurts the common safety and well-being of all nations" and is guilty of "a crime against the whole world." These are not ordinary crimes.

In the consciousness of all civilized people, regardless of the differences of individual national legal systems or geographic boundaries, there exists a certain nucleus of human rights. That nucleus cannot be violated or compromised by any law, by any government, by any person -- natural or corporate -- anywhere, any time.

That consciousness embraces the essentials of human dignity. It embodies a code of conduct that states universally abide by, or accede to, out of a sense of legal obligation and mutual concern. The principles must be more than merely professed or aspirational. They must be based on existing custom and practice expressed in either treaties, domestic law, judicial decisions, diplomatic dispatches, ministerial statements or declarations. Apartheid, genocide and official torture, rape, murder and kidnapping have been identified and condemned as crimes against all of humanity.

But who commits these crimes. How and to whom are they accountable?

The most obvious and simplest response is the government and its officials, the members of the military, the security and other law enforcement agencies, and in general, the ruling political party were the principal perpetrators of the crimes and abuses. They were the ones who passed the laws, pulled the triggers and tortured, raped, humiliated, oppressed and dominated. They were the faces of abuse.

But they were not alone. As the Judicial tribunal at Nuremberg observed – in order for Hitler to have effected his reign of terror and racial superiority, he ...had to have the cooperation of statesmen, military leaders, diplomats and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent...if they knew what they were doing.

Apartheid, likewise, needed and received the knowing cooperation and participation of business.

What did business know and what did they do?

For almost 40 years, the world community put the oil, arms, transportation, banking and technology industries on notice that their cooperation with the military and security elements of the apartheid government constituted knowing participation in crimes against humanity. They were repeatedly warned that their actions were “instrumental in encouraging and furthering the abuses” of the apartheid regime and their conduct was “so integrally connected to those abuses that the crimes would not have occurred in the same way without their participation.”

They knew what they did and they knew the consequences.

“After the Sharpeville massacre in 1960, the head of the representation office of UBS, the largest Swiss bank, asked in an article: ‘Is apartheid necessary or desirable?’ His response was: ‘Not really necessary, but definitely desirable.’ UBS was a leading lender to South Africa and acted on behalf of the South African Reserve Bank to channel funds to ARMSCOR. Other banks provided funds for South Africa’s internal security apparatus, served as members of the Defense Advisory Board and made large purchases of South Africa Defense Bonds, directly financing the military.

Mobil was advised by its South African attorneys that: “as oil was absolutely vital to enable the army to move, the navy to sail and the air force to fly, it is likely that a South African court would hold that it falls within the definition of munitions of war.” Nevertheless, Mobil kept the supply line open and plentiful, although American law prohibited oil sales to South Africa. Shell admitted it was responding to competitive realities in supplying fuels to the South African Police: “The alternative would be that we withdraw from South Africa, but then the police and army vehicles would use another brand.” Others candidly acknowledged they had “intentionally set out to thwart” the oil embargoes.

Arms companies similarly circumvented arms embargoes. At one point, for example, Rheinmetall shipped an entire ammunition factory, using fraudulent export declarations, to South Africa. Despite a criminal investigation and penalties, Rheinmetall trained members of the military in artillery.

Car manufacturers provided and maintained the specialized military vehicles used to patrol the townships. The Canadian government blocked sales of Ford vehicles to South Africa in the mid-1960s, on the grounds they violated a UN arms embargo. An internal GM memo stated that a refusal to supply vehicles for South Africa’s defense purposes would cast “doubt on the motives of the Company” and “lead to the direct loss of other government business.” Six months later, GM claimed to investors that it did not sell to the military. DaimlerChrysler produced specially

designed vehicles, including helicopters, used by South Africa to suppress mass demonstrations. It also serviced and repaired military vehicles, engendering complaints from its own employees that the repair work, which was kept "strictly confidential," facilitated "the occupation and control of black urban settlements." The Truth and Reconciliation Commission singled out companies that provided armored vehicles to the police and companies in the armaments industry as participants in apartheid who "willingly (and for profit) involved [themselves] in manufacturing products that [they] knew would be used to facilitate human rights abuses." Fujitsu supplied computers and support to the police, defense forces, and the bureaus that administered apartheid and was eventually fined by the United States. The government relied on IBM for its national identity system. IBM conceded its equipment was used for repression, but stated "its not really our policy to tell our customers how to conduct themselves."

What is the accountability of these secondary actors? Is it moral only? Is their sin or error merely one of misbehaving such that a confession is sufficient to cleanse their conscience and excuse their indiscretion? If they declare they were only doing business or following orders, are they to be forgiven in the name of commerce or trade? Or do they have some obligation to those who were victimized by the criminal conduct they knowingly assisted and furthered? Is there a form of justice which holds them accountable in some measure to those they helped abuse?

Both customary international law and domestic law specifically recognize the liability of principals who commit a tortious act. Both also recognize the liability of those who aid, abet or otherwise knowingly participate in that wrongful act.

For example, in convicting Emil Puhl, one of the leading executive officials of the Reichsbank, for participating as a banker in the disposal of looted assets, the Nuremburg Tribunal stated:

It would be a strange doctrine indeed, if, where part of the plan and one of the objectives of murder was to obtain the property of the victim, even to the extent of using the hair from his head and the gold of his mouth, he who knowingly took part in disposing the loot must be exonerated and held not guilty as a participant in the murder plan. Without doubt all such acts are crimes against humanity and he who participates or plays a consenting part therein is guilty of a crime against humanity.

The International Tribunal for the Former Yugoslavia recently reaffirmed these principles, holding that aiders and abettors are responsible for criminal acts if they provided practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The Tribunal noted that the practical assistance "need not constitute an indispensable element" of the crime but that it is enough that the assistance makes "a significant difference to the commission of the criminal act by the principal." The Tribunal also held that liability is appropriate where "the criminal act most probably would not have occurred in the same way" without the acts of the aider and abettor.

An aider and abettor need not share the state of mind of the perpetrator or even know the precise crime the perpetrator intends to commit: it is enough that the aider and abettor is "aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed..." Under such circumstances, the aider and abettor is deemed to have "intended to facilitate the commission of that crime."

Article III of the International Convention on the Suppression and Punishment of the Crime of Apartheid specifically imposes liability based on these principles. The Convention declares that everyone who “irrespective of the motive involved... directly abets, encourages or cooperates in the commission of the crime of apartheid” is guilty of participation in that crime.

Of what significance are all these principles? As stated by the Truth and Reconciliation Commission: “The recognition and finding by the international community that apartheid was a crime against humanity has important consequences for the victims of apartheid. Their right to reparation is acknowledged and can be enforced in terms of international law.”

But that right is resisted by the corporate community. As explained by a former Senior Vice President of Global Affairs for a major international corporation: “For years, the multinational business community has strongly supported the development of a new “global financial architecture” to protect capital flows and property rights. But it has adamantly opposed creating a complementary “international social framework” of corporate responsibility....”

Why? That same corporate official answered. “Litigation threatens to breach barriers that have historically shielded multinational corporations from liability.”

Should there be a shield of immunity for multinational corporate irresponsibility? By what right do multinational corporations elevate themselves above the law?

Lawsuits seeking to hold corporations legally accountable for what they previously, but grudgingly, only admitted as to their moral omission, represent a new force in the global debate. Some have candidly asked “what will drive companies to adopt global standards for their behavior?” As the Minister of Trade and Investment for the United Kingdom recently expressed,

We believe that the most effective means of achieving the goal of combating impunity for human rights violations is the strengthening and developing of credible national justice mechanisms that conform to international human rights standards.

A United Nations subcommission is presently considering written global rules for governments, heads of state, and private and corporate individuals with regard to their accountability for crimes against humanity in an effort to match global moral progress with global governance. In an increasingly integrated world, the welfare and freedoms of each people depend upon the “comprehension and protection” of the welfare and freedoms of all people.

But nations and international corporations claim that the resolution of these issues is beyond the competence and authority of courts. As one scholar recently commented, violations of human rights require a consideration of the relative values of costs and benefits. He went on to say that “courts are not good at measuring the costs and benefits of anything. They are good at right and wrong, not costs and benefits.” But the very function of the law and courts is to decide right and wrong. As one judicial system has observed, human rights violations are the very essence of right and wrong, particularly suited to the Judicial process: “the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of

fact.”

There is no greater consensus in the international community than that apartheid, genocide, slavery, systematic rape and torture are crimes against humanity. The welfare of each society and of all societies as a whole depends on balance – a balance between benefit and harm. In the course of events, that balance at times has been disrupted by those seeking to extract too great a benefit for too few at the direct expense of too many who are made to suffer too much. The balance is destroyed because of a lack of and a lapse in conscience – a failure to abide by and respect basic human dignity. That balance is restored by a sense of legal obligation and a recognition that the well-being of each of us depends on the well being of all of us.

Regrettably, what was once taken can never be replaced as it was. But those who have been offended have the means to seek a measure of relief from those responsible for causing their misery. They may make their voices heard – peacefully. Declare their discontent, democratically. Pursue their right to justice, legally. For those who offend the laws of humanity must be held accountable not because they may choose to do so, but because fundamental principles of civilized societies demand it.

*Michael D. Hausfeld is one of the top civil litigators of the USA, specializing in antitrust, human rights, employment discrimination, environmental and consumer rights cases (Cohen, Milstein, Hausfeld & TOLL P.L.L.C, [www.cmht.com](http://www.cmht.com)). Michael Hausfeld and Charles Abrahams (South Africa) have been instructed to file the legal complaint in the USA on behalf of the Khulumani Support Group, an organisation of about thirty-two thousand victims of gross apartheid human rights violations (Khulumani et al. V. Barclays et al., filed at 11<sup>th</sup> of November 2002 in New York).*