The Significance of the Successful Appeal Ruling in the Khulumani Lawsuit:
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Introduction
On October 12, 2007, the Second Circuit Court of Appeal in New York issued its ruling in the *Khulumani et al v. Barclays et al* lawsuit. In the ruling, the Court reversed the decision of the District Court on the Alien Tort Statute claims, and held that aiding and abetting liability exists and can be pled under the Alien Tort Statue. The Alien Tort Claims Act (ATCA) provides for the right of foreigners to institute lawsuits in the United States of America for human rights abuses wherever they may have been committed. This right was confirmed by the US Supreme Court in June 2004. The panel of judges ruled that the Khulumani case should be sent back to the district court for further proceedings. The lawsuit sues 23 foreign corporations for aiding and abetting the apartheid government in the perpetration of human rights atrocities, on behalf of *specified* individual victims who are demanding compensation for damages.

Some Background on the Khulumani Claim
The Khulumani lawsuit should be understood against the background of the South African government's failure to make good on its reparations promises or to deal comprehensively with the lifelong consequences to victims and survivors of the gross human rights abuses that resulted from their stand against the 'machinery' of apartheid on an almost daily basis. It is the companies that equipped and financially supported this 'machinery' – the apartheid government's security apparatuses that are being sued in the Khulumani lawsuit.

None of the companies being sued engaged with the TRC or applied for amnesty. None of them has acknowledged the TRC's findings concerning the business community's complicity with the apartheid regime that: "[b]usiness was central to the economy that sustained the South African state during the apartheid years"; "[b]usiness failed in the hearings to take responsibility for its involvement in state security initiatives specifically designed to sustain apartheid rule"; and "banks that gave financial support to the apartheid state were accomplices to a criminal government that consistently violated international law"; and none has engaged in any programme of reparations for victims of gross human rights violations.

Advocate Dumisa Ntsebeza, a former Truth and Reconciliation Commission (TRC) commissioner, has said, "transnational companies … owe to the victims of South Africa (mostly black people), a duty to give reparations."

In summary, the Khulumani case alleges that the named defendants violated customary international law and a series of United Resolutions by aiding and abetting the crimes of apartheid; that the corporations acted with an unjustifiably high risk of harm to the

oppressed population of South Africa that was either known, or was so obvious that it should have been known; and that therefore the defendants are liable to the plaintiffs for compensatory and punitive damages, as well as any other appropriate equitable and injunctive relief.

Government Opposition to the Khulumani Claim

Khulumani lawsuit lodged its claim after consulting with the South African government which initially asserted that it *"(it) recognises the right of citizens to institute legal action"* and stated that it would adopt a neutral stance in respect of the lawsuit.

Early in 2002, government changed its position when President Mbeki said, *"We 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 and the observance of the perspective contained in our Constitution on the promotion of national reconciliation."*

The South African government has since gone to great lengths to oppose the Khulumani lawsuit. Former Minister of Justice and Constitutional Development, Mr Penuell Maduna, submitted an *ex parte* declaration opposing the Khulumani litigation to the district court in July 2003. He makes three central claims in this declaration: first, that the litigation undermines South Africa's sovereignty –

> "the issues raised in these proceedings are essentially political in nature. These should be and are being resolved through South Africa's own democratic processes. Another country's courts should not determine how ongoing political processes in South Africa should be resolved";

second, that the litigation will undermine South Africa's own reconciliation, and transformation processes –

> "these proceedings…will intrude up [sic] and disrupt our own effort to achieve reconciliation and reconstruction";

and third, that the litigation will hinder foreign direct investment and thus negatively impact on the South African economy -

> "this litigation…will…discourage much-needed direct foreign investment in South Africa and thus delay the achievement of our central goals. Indeed, this litigation could have a destabilizing effect on the South African economy as investment is not only a driver of growth, but also employment."

While these might appear to be legitimate grounds for opposition, none of them has any substance. The claim that trying a case brought by South Africans in a foreign court undermines South Africa's sovereignty would only be legitimate if there was the

opportunity for such cases to have been filed in a South African court. The ATCA legislation is unique in allowing foreign nationals to sue any private actor in the US courts and cases have first to overcome the procedural hurdle of proving that there is no other forum in which the case could be heard. The second claim, that the litigation undermines South Africa's own reconciliation and reparations processes, has been met with stern opposition, not least from the TRC members themselves, a majority of whom, including Archbishop Desmond Tutu, submitted an *amicus curiae* brief to the New York court in support of the litigation, noting that,

> None of the Defendants in this action sought amnesty before the TRC. It would be bizarre at best to hold that they may now find shelter from civil liability in private litigation because their payment of damages might somehow interfere with a reconciliation process in which they refused to participate. The *Khulumani* action involves the private redress of private harms from private actors. The now-completed work of the TRC is not implicated in any way.

The final claim by the South African government – that the litigation will impede much-needed foreign direct investment – has the most profound implications. The claim that the litigation will negatively affect the future of foreign investment, and thus employment, is a contested view. Nobel laureate economist Joseph Stiglitz has pointed out, that contrary to government's assertion, "addressing corporate misconduct (in fact) brings confidence to consumers and markets".

It should be pointed out that the South African government's affidavit in the Khulumani case has had major negative impact for other victims of human rights abuses seeking to use the ATCA. In 2005, a case brought by "comfort women" from Korea and other Asian countries was dismissed by a US district court after nearly 50 years of struggle to claim compensation for being used as bonded sexual slaves for the Japanese military during the Second World War. The court cited the Maduna affidavit in rejecting this claim.

After listening to heads of argument, Judge Sprizzo dismissed the apartheid claims in September 2004, suggesting that they could have serious consequences for United States Foreign Relations and in particular for US commercial trade.

When the appeal hearing took place in New York in January 2006, government tabled an *amicus curiae* brief supporting the defending companies and sent its current Minister of Justice and Constitutional Development, Ms Brigitte Mabandla, to attend the hearing. It is the ruling of this court that has now been made.

Litigating Corporate Accountability

While government argues that the Khulumani lawsuit undermines the sovereignty of South Africa, it may in fact be the power of multinational corporations to dictate to governments that actually threatens national sovereignty. Multinational corporations dictate terms to

democratic governments and insist that their interests are raised above those of citizens. They have become able to hold governments hostage to their economic demands and governments have been forced to accede because of their increasing reliance on foreign direct investment as development aid decreases. In return for their business investments, corporations insist that they remain free from accountability for any past, present or future human rights violations. Most states have little power to control corporate activity within their borders and when they become involved in human rights violations, it is extraordinarily difficult to hold them to account for these abuses because of their global presence, their socio-political influence, the impotence of the state, and the unenforceability of international law.
Often governments find themselves beholden to corporate interests as corporate and political elites have developed the same basic interests with many members of government having direct business interests or having entered politics from the business-world. Corporations have also secured their interests through financing election campaigns. A Daimler-Chrysler subsidiary, African Defence Systems (ADS), has been associated with allegedly bribing politicians with massively discounted vehicles. DaimlerChrysler is a defendant in the Khulumani lawsuit.

To the extent that corporations are able to secure their interests through their ability to buy influence, in whatever way, democracy no longer exists as ‘one person, one vote’. It is clear that the South African government’s stance on the Khulumani lawsuit is bedeviled with these dynamics.

Conclusion

Given the difficulty of holding multinational corporations accountable, the Khulumani lawsuit has particular international significance. It is a *post-facto* attempt to ensure that the impact of corporate investment in illegitimate regimes is properly acknowledged and censured – and that a ruling against the corporations named in this complaint will prove a deterrent to these and other corporations from doing business that aids and abets other illegitimate and criminal regimes.

The ATCA remains one of the only effective tools by which corporate accountability might be achieved. It is the one means by which the extraordinary trans-national power of corporations can be reined in and some national accountability retained.

If successful, the Khulumani lawsuit would provide a useful means of ensuring some form of corporate accountability for the kind of human rights violations that have become almost commonplace in corporate activity in the developing world. Indeed, this lawsuit could provide an important basis for the manner in which South African corporations themselves, do business as they move into other parts of the continent, especially in cases where they

are operating under repressive regimes. Further, a positive outcome in this case will go a long in resolving some of the unfinished business of the TRC and thereby contribute to more meaningful and sustainable social reconciliation and substantive justice.

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