

## THE JURISPRUDENCE OF TRUTH? LITIGATING APARTHEID IN US COURTS

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‘The truth about *apartheid* – about its causes and effects...about who was responsible for its maintenance – continues to emerge. This litigation is one element of that emergence.’

It is rare for the Opinions of US District Judges to begin with quotations from African clergymen, however distinguished. In choosing to head her Opinion of 8 April 2009 with this statement from the *amicus* brief of Archbishop Desmond Tutu, Judge Shira Scheindlin suggested that the apartheid litigation currently before the US courts had a significance extending beyond the financial compensation of the South African plaintiffs in the lawsuits; in other words, that these private law actions initiated in the United States against multinational corporations had a wider public importance.<sup>1</sup> They could contribute, she suggested, to a better historical understanding of apartheid.

On this analysis, the South African apartheid litigation has an importance not only for those directly involved in the lawsuits, but also for all South Africans and, beyond them, for an international audience. Tom Lambert suggested nearly 50 years ago that US tort law was ‘the jurisprudence of hope’.<sup>2</sup> Can it now become an effective ‘jurisprudence of truth’ for the benefit of the victims/survivors of foreign repressive regimes and others interested in the clarification of responsibility for past wrongs? To what extent are US courts capable of effectively fulfilling this role? Should US courts even attempt to perform this task, or is it an unwarranted interference in the sovereign affairs of fledgling democracies attempting to deal with difficult legacies of conflict and human rights abuses?

### **The Alien Tort Claims Act, Multinational Corporations, and Transitional Justice**

The apartheid litigation is at the eye of the continuing storm in the US over the impact of tort law on big business. Complaints from the corporate sector and conservative efforts to ‘unmake’ progressive US tort law have rendered the Alien Tort Claims Act

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<sup>1</sup> In re South African Apartheid Litig., 346 F. Supp. 2d 538 (S.D.N.Y. 2004). Judge Scheindlin’s Opinion of 8 April 2009 is reported at 617 F. Supp. 2d 228.

<sup>2</sup> Tom F Lambert, Jr., ‘The Jurisprudence of Hope’ (1965) 31 Journal of the American Trial Lawyers Association 29.

of 1789 (under which the apartheid litigation has been brought) particularly vulnerable.<sup>3</sup> The Alien Tort Claims Act ('ATCA') grants US federal courts jurisdiction 'of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.<sup>4</sup> ATCA lay effectively dormant for many years until the 1980s, when it began to be used principally by foreign citizens to bring claims in the US courts against other foreigners in respect of wrongs done outside the USA.<sup>5</sup> In the last fifteen years, ATCA has increasingly been used in connection with claims against multinational corporations for human rights abuses committed overseas.<sup>6</sup> Despite the fact that no final judgment has ever been entered against a corporation in an ATCA case, the small number of cases brought to date has prompted a concerted campaign by corporate America to limit or repeal the legislation.<sup>7</sup>

Judicial recognition of the increasing political and commercial sensitivity of ATCA cases was demonstrated in 2004, when the Supreme Court in the *Sosa* case – a case which, however, did not involve corporate defendants - urged the lower judiciary

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<sup>3</sup> On conservative (and neo-conservative) efforts to 'unmake' progressive tort law, see Jay M. Feinman, 'Unmaking and Remaking Tort Law' (2005) 5 Journal of High Technology Law 61.

<sup>4</sup> 28 USC 1350.

<sup>5</sup> This line of jurisprudence began with the now famous *Filartiga v Pena-Irala* case, 630 F 2f 876 (2d Cir., 30 June 1980), in which Paraguayan plaintiffs, Dr Joel Filartiga and his daughter, Dolly, sued a former Paraguayan police official in the US courts for torturing to death 17 year old Joelito Filartiga in Paraguay in 1976, allegedly in retaliation for the political activities of his father, Dr Filartiga. At the time the claim was initiated, Dolly Filartiga and the defendant were in the US. Dr Filartiga had attempted to bring murder charges in Paraguay, but, under the repressive regime of Alfredo Stroessner, the case was hopeless. The Filartigas were eventually awarded substantial damages, which they were never able to recover. In the Filartiga case, the US State Dept (under the Carter Administration) supported the plaintiffs in an *amicus* brief.

<sup>6</sup> The case of *Doe v Unocal*, initiated in 1996, was the first in which it was held that ATCA actions could apply to corporations: see *Doe 1 v Unocal Corp.*, 963 F. Supp. 880 (C. D. Cal. 1997). In 2002, the US Court of Appeals for the Ninth Circuit found that Unocal could be liable under ATCA for aiding and abetting abuses by the Burmese military, if it had the requisite knowledge/intent: see *Doe 1 v Unocal Corp.*, 395 F. 3d 932 (9th Cir., 2002). In that case, Burmese villagers filed suits against Unocal in California under both ATCA and California tort law, alleging that Unocal had contracted with the Burmese military for the provision of security for a gas pipeline project and was liable for complicity in the human rights violations committed by Burmese soldiers against local people in pursuit of that goal. The litigation was settled out of court in December 2004 on confidential terms involving the payment by Unocal of compensation to the plaintiffs and the provision of funds for the improvement of living conditions in the region of the pipeline. See Rachel Chambers, 'The *Unocal* Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses', available at <http://www.wcl.american.edu/hrbrief/13/unocal.pdf?rd=1>.

<sup>7</sup> For the argument that the campaign against ATCA is a strategic error by the corporate sector, see Paul Tarr, 'Is Trying to Kill the Alien Tort Claims Act Digging for Fool's Gold?', Ethical Corporation magazine, May 2004, available at <http://www.ethicalcorp.com/content.asp?ContentID=2036>. The Bush administration resisted the repeal of the legislation, but supported US business in the courts: see Beth Stephens, 'Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation' (2004) 17 Harvard Human Rights Journal 169. The Bush administration filed an *amicus* brief in support of Unocal (note 6 above).

to adopt a more restrictive approach to the interpretation of ATCA.<sup>8</sup> In that case, the Supreme Court did not completely close the door on ATCA lawsuits; instead, it left the door ‘ajar, subject to vigilant gatekeeping’.<sup>9</sup>

Some human rights lawyers have cogently argued that a degree of judicial restraint is in fact desirable in ATCA cases, helping to ‘preserve and legitimate the statute to do its vital work’ of ensuring that corporations are not completely immunised from serious allegations by systemic failure and the politically-inspired interventions of governments.<sup>10</sup> In general, however, the *Sosa* case was a disappointment to human rights activists, conscious that the human rights documents of the last half century embody unrealised ideals for people in many parts of the world and that the ATCA was emerging as perhaps ‘the only effective means available anywhere of holding corporations legally accountable for international human rights violations.’<sup>11</sup>

The Opinion of the late Judge Sprizzo of the District Court for the Southern District of New York in the apartheid litigation, discussed further below, was delivered shortly after the Supreme Court’s judgment in the *Sosa* case. In what he saw as an exercise in ‘vigilant gatekeeping’, Judge Sprizzo dismissed the South African plaintiffs’ claims in their entirety. Following an appeals process in which the majority of the Court of Appeals took a different view from Judge Sprizzo and the Supreme Court found itself – extraordinarily – unable to muster a quorum, the case came before the District Court again in 2009, on a second motion to dismiss by the corporate defendants. Heard this time by Judge Scheindlin, the plaintiffs’ claims survived, though in a severely limited form.

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<sup>8</sup> *Sosa v Alvarez-Machain* (2004) 542 US 692. Although this case did not concern corporate defendants, it was sensitive from the perspective of the US administration for a different reason, in that it arose out of the kidnapping in Mexico of a Mexican doctor by other Mexican civilians hired by the US Drug Enforcement Agency. The doctor was subsequently tried in California and acquitted.

<sup>9</sup> *Sosa*, above, at p.729. For a comment on this case, see Beth Stephens, “‘The Door Is Still Ajar’ for Human Rights Litigation in US Courts”, (2004-05) 70 Brooklyn Law Review 533.

<sup>10</sup> The argument is well articulated in a thoughtful article by Michael Osborne, a South African lawyer advising some of the plaintiffs in the apartheid litigation, in ‘Apartheid and the Alien Torts Act: Global Justice Meets Sovereign Equality’, Ch.9 in M. du Plessis and S Pete (eds.), “Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses”, (2007) Intersentia: Antwerpen-Oxford. For a similar argument in relation to universal criminal jurisdiction, see A. Cassese, ‘Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction’, (2003) 1 Int’l Crim. Just. 589.

<sup>11</sup> Osborne, above, p. 231. The UK courts have in fact in recent years been developing an important jurisprudence allowing foreign citizens to bring what might broadly be termed ‘human rights cases’ against corporations for damage caused overseas, where the cases can be framed in terms of such familiar concepts as negligence: see e.g. *Lubbe v Cape Plc* (2000) 1 WLR 1545.

The post-apartheid context of the litigation and Judge Scheindlin's emphasis on the issue of historical truth makes the apartheid litigation particularly interesting among ATCA cases to the transitional justice movement. To date, the focus of this movement, which has promoted greater accountability for human rights violations committed under ousted repressive regimes, has been largely on the *criminal* responsibility of *individuals* – generally, political leaders and members of state security forces. Increasingly, the responsibility of members of non-state armed groups for abuses has also received attention. Yet the responsibility of other non-state actors, such as corporations, has so far slipped under the radar of the transitional justice movement. At Nuremberg – the 'locus classicus' of the transitional justice movement - some prominent individuals from corporations closely allied to the Nazi regime were prosecuted, but the corporations themselves escaped liability.

In some ATCA cases against corporate defendants, such as *Unocal* and *Talisman*, corporations have been accused of collaborating with a repressive regime, but one that remains in power – in those cases, the Burmese military government and the Sudanese government of Al-Bashir respectively.<sup>12</sup> The *Wiwa* case, alleging complicity by Shell with some of the excesses of the military regime of Sani Obacha in Nigeria, was instituted in the US in 1996, some two years before the death of Abacha and the subsequent election of President Obasanjo.<sup>13</sup> The potentially complicating circumstances of political transition thus did not arise in *Unocal* and *Talisman*, and did not initially arise in *Wiwa*. There was no suggestion in these cases that the plaintiffs should have brought their cases in Burma, Sudan or Nigeria.<sup>14</sup>

The apartheid litigation, in contrast, was commenced some eight years after the first democratic elections held in South Africa in April 1994. It is a remarkable historical milestone, representing a first serious attempt to address under ATCA the civil responsibility of global corporations for their actions under an ousted repressive regime in Africa.

One of a number of possible obstacles to the realisation of a 'jurisprudence of truth' by the US courts is the attitude of fledgling democracies to the exercise of jurisdiction by US courts over matters they may prefer either to suppress or to deal

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<sup>12</sup> *Doe v Unocal*, note 6 above, and *Presbyterian Church of Sudan v Talisman Energy, Inc.* 244 F. Supp. 2d 289 (S D N Y 2003). For recent developments in the *Talisman* case, see note 85 below.

<sup>13</sup> *Wiwa v Royal Dutch Petroleum Co.* 226 F. 3d 88 (2d Cir 2000).

<sup>14</sup> In *Wiwa*, Shell argued on the basis of *forum non conveniens* that the case should have been brought in England – an argument accepted in 1998, but reversed in 2000 – but it did not attempt to argue that the proper forum was Nigeria.

with in a different manner, e.g. through a programme of reparations, a truth and reconciliation commission and/or proceedings in domestic courts. The apartheid litigation is taking place in the context of a political transition which included a commitment on the part of the new South African government to establishing a moral and legal framework for dealing with past human rights abuses. Despite the plaintiffs' status as victims of apartheid, the hearing of their claims against multinational corporations in the US was adamantly opposed by the ANC government under President Thabo Mbeki. The extent to which the US courts should defer to the wishes of democratically-elected governments in transitional or post-conflict societies was thus squarely raised in the proceedings. Before any Opinion had been handed down in the apartheid litigation, the Supreme Court in the *Sosa* case had commented on the issue:

‘There are now pending in Federal District Court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa. The Government of South Africa has said that these cases interfere with the policy embodied by its Truth and Reconciliation Commission, which “deliberately avoided a ‘victor’s justice’ approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill.” The United States has agreed. In 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.’<sup>15</sup>

In the course of the apartheid litigation to date, US courts have displayed strikingly different attitudes to the proper role of US courts in calling multinational corporations to account for their part in South Africa’s abusive past. These will be examined in the next section.

### **The Apartheid Litigation**

The apartheid litigation began in 2002 as a number of separate actions brought by three groups of South African plaintiffs in eight US federal district courts. All the plaintiffs claimed to have suffered damage of varying kinds during the apartheid era

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<sup>15</sup> *Sosa*, above, at p.732, footnote 21.

in South Africa. The actions were brought against some of the world's leading companies, which had operated in apartheid South Africa and which allegedly bore 'some measure of responsibility for the crimes that pervaded that dark era of South African history'.<sup>16</sup>

In the aftermath of apartheid, the democratically-elected government of South Africa embarked on an extensive programme of reform, reconstruction and redress.<sup>17</sup> This included the drafting of a new constitution with an extensive bill of rights (including economic and social rights); a land reform and restitution scheme; black economic empowerment measures; the progressive reform of institutions, including the apartheid judiciary, prosecution service and police; and the creation of the South African Truth and Reconciliation Commission ('the TRC'), headed by Desmond Tutu, with power to investigate and report on a limited category of apartheid human rights violations, recommend reparations for victims and grant amnesty on certain conditions to perpetrators. Despite the sometimes uncomfortable compromises agreed in the context of the negotiated ending of apartheid and the many cogent critiques that have since been made of the government's programme, these efforts unquestionably represented a serious attempt to deal with the apartheid past, unparalleled in other post-conflict societies in Africa.<sup>18</sup>

Nevertheless, by the time the apartheid litigation was initiated in the US in 2002, the extent of the 'unfinished business' arising from the apartheid past had become clear, and the frustrations of those whose needs had not been addressed had bubbled to the surface. A particularly sore point for those victims of apartheid who had participated in the TRC between 1996 and 1998 was that the South African government had still not approved the recommendations of the TRC on reparations for the approximately 22,000 people it had officially recognised as victims. All attempts to induce the government to publish a policy on reparations had been deflected. The 'mood music' emanating from the government was that it might not approve the TRC's proposals, which it said were too expensive, and some government

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<sup>16</sup> Scheindlin J., 617 F. Supp. 2d 228, at p.241

<sup>17</sup> For a critical analysis of this programme, with a particular focus on land restitution and the work of the South African Truth and Reconciliation Commission, see C. Jenkins, 'After the Dry White Season: The Dilemmas of Reparation and Reconstruction in South Africa', (2000) 16 South African Journal on Human Rights 415.

<sup>18</sup> The possible exception to this is Rwanda, where a wide-ranging programme of prosecutions and law reform was undertaken in the aftermath of the genocide of 1994.

ministers had begun to characterise the legitimate demand for reparation (a constitutionally-mandated requirement) as mercenary.<sup>19</sup>

For the victims, the reluctance of the government to respond to their needs was dismaying and the insinuation that they were attempting to ‘cash in’ on their suffering insulting. Most were poor. Some had lost a breadwinner in the struggle against apartheid. Others were grandparents attempting not only to overcome grief but also to bring up the children of a deceased family member. Others were sick, mentally ill or disabled as a result of torture or bomb blasts and needed medical help for which they could not afford to pay. Archbishop Tutu and other anti-apartheid activists spoke out in favour of the victims, and some anti-apartheid lawyers attempted to assist them in legal proceedings to oblige the government at least to publish a reparations policy. Noting that the struggle against apartheid had been a struggle for justice, the Chair of the South African Human Rights Commission and former anti-apartheid activist, Jody Kollapen, rejected the government’s claim that the reparations package recommended by the TRC was too expensive, arguing that the reparations issue was more one of lack of political commitment than lack of resources.<sup>20</sup> Some speculated that the ANC had been so aggrieved by the adverse findings made against the party in the TRC’s Report that it had simply visited its ire on the Commission by ignoring its recommendations for reparations and effectively discrediting its legacy.<sup>21</sup>

The precise genesis of the US anti-apartheid litigation is not known with certainty; but the idea of bringing legal proceedings in the US against corporations for their role in apartheid was first publicly raised to the knowledge of the author in this tense and difficult context, at a meeting of members of the Khulumani Support Group (a victims support group formed in 1995, *inter alia* to assist survivors to engage with the TRC) and human rights activists and lawyers, held in Johannesburg.<sup>22</sup> The novel suggestion was received with interest by the meeting, though the focus of efforts continued to centre on persuading the South African government to fulfil its

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<sup>19</sup> See Jenkins, note 17 above, p.475-8 and p.482.

<sup>20</sup> Interview with the author, quoted in C. Jenkins, ‘Amnesty for Gross Violations of Human Rights: A Better Way of Dealing with the Past?’ in I. Edge (ed.), ‘Comparative Law in Global Perspective’ (2000).

<sup>21</sup> The ANC famously made a court application at the eleventh hour to try to delay publication of the TRC’s Report in October 1998 – a move which prompted angry criticism from Desmond Tutu. There has been widespread puzzlement about the ANC’s rejection of findings which were predictable, given the results of the ANC’s own investigations in to allegations of human rights abuses committed in its camps in Angola

<sup>22</sup> The idea was proposed to the best of the author’s knowledge by a foreign researcher working for the charity Jubilee 2000.

obligations to victims. Nevertheless, for a number of reasons, the idea of suing corporations, both local and global, held some appeal, which was not simply a matter of finding defendants with deep pockets. For a start, the activities of the corporate sector under apartheid were widely regarded as having been inadequately dealt with by the TRC and thus constituted an area of ‘unfinished business’.<sup>23</sup> Moreover, some critics of the government’s economic policy – particularly those to the left of the political spectrum - considered the ANC itself to have been ‘too soft’ on the corporate sector; and the ‘fat cats’ of the new black elite were regularly being accused by the media of ‘getting into bed’ with big business for personal gain.

The wide-ranging appeal of pursuing corporations for their actions under apartheid is evidenced by the committee of distinguished South African lawyers, historians, economists and others which advised and assisted the US lawyers with the initiation of the apartheid litigation. The connection to the inadequacies of the TRC was emphasised by the close involvement of Dumisa Ntsebeza, a South African lawyer and former Head of the Investigations Unit at the TRC; his brother, Lungisile, became the lead plaintiff in the first proceedings.

The first group to launch proceedings were the so-called Ntsebeza plaintiffs, who had engaged the US lawyer, Ed Fagan, well-known for his success in persuading a number of Swiss banks to settle Holocaust claims out of court. The Ntsebeza plaintiffs filed a number of actions in seven district courts between 19 June and 6 December 2002. The actions were filed on behalf of the class of individuals who lived in South Africa between 1948 and the present and who suffered damage as a result of the crimes of apartheid. The corporate defendants in the actions included banks (such as Citigroup, Inc. and Credit Suisse), arms manufacturers (such as Oerlikon Contraves, AG, now a subsidiary of German arms manufacturer, Rheinmetall), automotive companies (such as American Isuzu Motors, Inc.), oil companies (such as Exxon Mobil Corporation, Inc.), computer companies (such as Honeywell, and IBM), mining companies (including Anglo-American Corporation and De Beers), and a variety of assorted corporations (including Holcim Ltd, EMS Chemie and Schindler AG). All were alleged to have actively and willingly collaborated with the apartheid

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<sup>23</sup> The TRC was required to set the gross human rights violations it was mandated to investigate in context. To this end, it held a number of so-called ‘institutional hearings’, one of which was on ‘business and labour’. The failure adequately to deal with the responsibility of corporations, local and global, is explicitly identified as ‘unfinished business’ in T. Bell (with D. Ntsebeza), ‘Unfinished Business: South Africa, Apartheid and Truth’ (2003).

regime. The relief claimed by the Ntsebeza plaintiffs included restitution and disgorgement of all monies that could be linked to aiding, conspiring with or benefiting from apartheid South Africa. The plaintiffs also sought equitable relief including the establishment of an international historical commission and the institution of affirmative action and educational programmes in South Africa. They also asked for injunctive relief to prevent the defendants from destroying documents relating to their investment in apartheid South Africa.

On 2 August 2002, a second group, the so-called Digwamaje plaintiffs, brought a class action claim under ATCA as well as claims under the Torture Victim Protection Act of 1991 ('TVPA')<sup>24</sup> and the Racketeer Influenced and Corrupt Organisations Act ('RICO').<sup>25</sup> The defendant corporations, including IBM and Xerox, were alleged to have provided material assistance to the apartheid regime between 1948 and 1994, by engaging in commerce in South Africa and with the apartheid regime, and by employing forced labour. The TVPA claim asserted that the defendants had 'aided and abetted the apartheid regime's subjecting the plaintiffs to torture and extrajudicial killing within the meaning of the Torture Victim Protection Act...under actual or apparent authority, or under color of law'. The plaintiffs sought in excess of \$400 billion in compensatory damages and punitive damages from all defendants, jointly and severally, as well as equitable and injunctive relief.

A third group, the so-called Khulumani plaintiffs, filed a complaint in November 2002 against 23 corporations. Eschewing the flamboyant style of Mr Fagan and the extensive relief claimed by the Ntsebeza plaintiffs, the plaintiffs in the Khulumani lawsuit sought to distinguish their lawsuit from the Ntsebeza actions. Rather than bringing a class action on behalf of an extremely large class of victims, the Khulumani plaintiffs were 91 named individuals, together with the Khulumani Victim Support Group. The claims were brought in respect of specific, well-recognised violations of international human rights law: many of the plaintiffs were acting as personal representatives of members of their families who had been victims of extrajudicial killing by the apartheid regime, while others claimed personally to have been victims of torture, sexual assault, indiscriminate shooting or arbitrary

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<sup>24</sup> Pub.L. 102-256, 106 Stat. 73 (1992), codified at 28 USC 1350. The TVPA provides: 'An individual who, under actual or apparent authority, or under color of law, of any foreign nation – (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.'

<sup>25</sup> 18 USC 1961.

detention by the regime. The Khulumani plaintiffs employed separate legal counsel, with a low key case management style. They sought compensatory and punitive damages and production of the defendants' documents related to their activities in South Africa, but deliberately did not seek the wider forms of relief claimed by the Ntsebeza plaintiffs, such as the creation of an historical commission. Moreover, unlike the Ntsebeza plaintiffs, the Khulumani plaintiffs did not include any South African companies as defendants.

The defendant corporations in the Khulumani proceedings included banks (such as Barclays PLC, J. P. Morgan Chase, Dresdner Bank AG, Deutsche Bank AG, UBS AG and Credit Suisse), oil companies (including ExxonMobil, BP, Shell, Total and Chevron Texaco), automotive companies (including Ford, Daimler Chrysler and General Motors), computer companies (IBM Corp. and Fujitsu Ltd), the armaments manufacturers Rheinmetall Group AG, the engineering and construction company Fluor Corporation, and the mining company Rio Tinto Group.

As the actions proceeded, the Ntsebeza and Digwamaje actions were consolidated and, despite the reluctance of the Khulumani plaintiffs, all the actions were transferred to the Southern District of New York. In July 2003, 35 of the defendant corporations in all the actions filed a motion to dismiss.<sup>26</sup>

To the dismay of human rights activists in South Africa, Mr Penuell Maduna, then Minister of Justice and Constitutional Development in the South African government under Thabo Mbeki, submitted an *ex parte* declaration to the District Court on 11 July 2003, setting out the South African government's opposition to the US litigation and asking for the cases to be dismissed.<sup>27</sup> The late Judge Sprizzo of the Southern District of New York then solicited the views of the US State Dept., which submitted a 'Statement of Interest' asserting that the adjudication of the cases risked 'potentially serious adverse consequences for significant interests of the United States', that it would cause tension between the US and South Africa and that it would hamper the US policy of encouraging positive change through economic investment.

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<sup>26</sup> As a result of overlap between defendants in the various actions, the applicant corporations constituted 31 of the 55 defendants in the Ntsebeza and Digwamaje lawsuits and 18 of the 23 defendants in the Khulumani lawsuit. Some of the defendants in the three actions did not join the motions to dismiss because they said they had not been served with complaints, and some indicated that they planned to contest personal jurisdiction.

<sup>27</sup> The declaration is available at <http://www.nftc.org/default/ussabc/Maduna%20Declaration.pdf>. The reasons for the South African government's objections are discussed further below.

On 29 November 2004, Judge Sprizzo dismissed the plaintiffs' claims in their entirety, for lack of subject matter jurisdiction under ATCA and for failing to state cognizable claims under the TVPA and RICO. The judgment is notable for the zeal with which Judge Sprizzo embraced the task of 'vigilant doorkeeping' against the expansion of ATCA jurisdiction advocated by the Supreme Court in *Sosa*. In Judge Sprizzo's view, 'it would have been unquestionably preferable for the lower federal courts if the Supreme Court had created a bright-line rule that limited the ATCA to those violations of international law clearly recognised at the time of its enactment' in 1789.<sup>28</sup> Citing with approval the comments of Justice Scalia in his separate concurring opinion in *Sosa*, Judge Sprizzo regretted that the consequences of the Supreme Court's decision were not only to make the task of lower federal court judges 'immeasurably more difficult', but also 'to invite the kind of judicial creativity that has caused the disparity of results and differences of opinion that preceded the decision in *Sosa*.'<sup>29</sup>

Strikingly, whilst Judge Sprizzo expressed concern in his Opinion for his fellow judges, for the governments of his own country and those of foreign states, and for the defendants who might become the objects of ATCA actions, he did not evince any concern for the victims of human rights abuses who might be deprived of an avenue for justice if ATCA jurisdiction were to be severely limited in the way he favoured. Moreover, whilst he mentioned the possibility that a policy of 'constructive engagement' through investment might serve to improve the human rights records of foreign states, he did not mention the countervailing argument that encouraging accountability for human rights abuses might also serve the same end. A major concern appears to have been what he saw as the potential impact of ATCA cases against corporations on international trade:

'In a world where many countries may fall considerably short of ideal economic, political and social conditions, this Court must be extremely cautious in permitting suits here based on a corporation's doing business in countries with less than stellar human rights records, especially since the consequences of such an approach could have significant, if not disastrous, effects on international commerce.'<sup>30</sup>

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<sup>28</sup> Sprizzo J., 346 F. Supp. 2d 538, at p.547.

<sup>29</sup> Ibid, p.547.

<sup>30</sup> Ibid, p.554.

Judge Sprizzo concluded that the defendants did not engage in ‘state action’, and that neither aiding and abetting violations nor doing business in *apartheid* South Africa were sufficient as a matter of law to found an ATCA claim. In view of this legal finding, he did not need to consider whether the plaintiffs’ factual allegations were sufficient to found a claim for aider and abettor liability; but, in a footnote, he opined that it seemed ‘unlikely that the defendants would be liable as aiders and abettors here’.<sup>31</sup>

In reaching his conclusion that aiding and abetting violations of international law was not itself a recognised international law violation, Judge Sprizzo found that neither the Nuremberg trials, nor the judgments of the International Criminal Tribunals for the former Yugoslavia and Rwanda, nor the International Convention on the Suppression and Punishment of the Crime of Apartheid (‘the Apartheid Convention’) established a clearly-defined norm for ATCA purposes. He dismissed the judgments of the various international tribunals – including Nuremberg - as irrelevant because they dealt with criminal rather than civil law, and further found that they did not constitute binding international law. The Apartheid Convention was in his view ‘not binding international law’, because it was not ratified by ‘a number of major world powers’.<sup>32</sup> He declined to follow a previous decision of his own District Court in the *Talisman* case, in which the court found that aiding and abetting liability was recognised under ATCA.<sup>33</sup>

Judge Sprizzo noted the objections of the South African and US governments to the Court’s jurisdiction. In the light of his other findings, Judge Sprizzo did not need to deal with these objections, but he was clearly inclined to defer to the executives of both countries. He noted the Supreme Court’s reference to the apartheid litigation in *Sosa* and appears to have interpreted this ‘aside’ by the Supreme Court as an indication that it considered that the apartheid litigation should be dismissed.<sup>34</sup>

Despite the interpretative choices he clearly made in reaching his legal conclusions, Judge Sprizzo resorted to the familiar argument that he had, in effect, no choice: ‘it is this court’s job to apply the law and not some normative or moral ideal’.<sup>35</sup> The remarkable outcome of his judgment was that a set of claims alleging

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<sup>31</sup> Ibid, p.551, footnote 14.

<sup>32</sup> Judge Sprizzo listed a number of Western countries and Japan in this context. Ibid, p.550.

<sup>33</sup> *Presbyterian Church of Sudan v Talisman Energy, Inc* 244 F. Supp. 2d 289 (SDNY 2003).

<sup>34</sup> *Sosa*, 124 S. Ct. at 2766, footnote 21, set out in the text, above.

<sup>35</sup> Sprizzo J. note 28 above, p.548.

corporate liability for some of the abuses of one of the most widely condemned repressive regimes of the twentieth century was struck out in its entirety at the first opportunity – without any expression of judicial regret or concern.

The plaintiffs successfully appealed Judge Sprizzo’s order of dismissal. By a majority, the Court of Appeals 2<sup>nd</sup> Circuit held in October 2007 that the prohibition on aiding and abetting the commission of recognised violations of human rights was itself a recognised norm that provided a basis for jurisdiction under ATCA.<sup>36</sup> The contrast between the majority and minority opinions delivered by the Appeals bench is a striking illustration of the different judicial viewpoints on ATCA and of the tensions provoked by its invocation against corporate defendants. In his dissenting opinion, Judge Korman declined ‘to join in this peculiar disposition, by which my colleagues desperately seek to avoid the easiest ground on which to resolve this appeal – that of deference to the judgment of the Republic of South Africa, supported by our State Department, that these cases are none of our business’.<sup>37</sup> He later accused his colleagues of contemplating a remand to the District Court ‘that would subject a foreign democratic nation to the indignity of having to defend policy judgments that were entrusted to it by a free people against an attack by private citizens and organisations who have lost the political battle at home.’<sup>38</sup>

The defendant corporations, supported by an *amicus* brief from the Bush administration, appealed to the Supreme Court; but, in an unusual development, the Court found itself unable to hear the case because of its inability to reach a quorum. Four of the nine justices had to recuse themselves because of their investments in or family connections with the defendant companies. As a result, the Supreme Court decided in May 2008 that the decision of the Court of Appeals must stand.

In accordance with that Court’s decision, the case was remitted to the District Court for reconsideration and the case was reassigned to Judge Shira Scheindlin. By the time of the hearing, the plaintiffs had attempted to maximise their prospects of success by dropping their claims against all but a handful of the original defendants. No South African defendants remained in the proceedings, but the claims against the Swiss and British-based banks were maintained.

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<sup>36</sup> *Khulumani v Barclays International Bank Ltd.* 504 F. 3d. 254.

<sup>37</sup> *Ibid*, p.311.

<sup>38</sup> Order denying defendants’ motion to stay the mandate pending appeal, 2007 WL4180152 (2d. Circuit, 27 Nov.2007), p.8.

On 8 April 2009, Judge Scheindlin delivered an Opinion allowing the case to proceed, but in a restricted and amended form. She applied the judgment of the majority in the Court of Appeals 2<sup>nd</sup> Circuit that ‘a plaintiff may plead a theory of aiding and abetting under the ATCA’, holding that the standards for such secondary liability must be drawn not from federal law but from customary international law, which requires ‘that an aider and abettor know that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the law of nations.’<sup>39</sup>

Proceeding to a close claim-by-claim analysis of the plaintiffs’ case, Judge Scheindlin struck out a number of claims and allowed others to stand. She found that the Ntsebeza plaintiffs had adequately pled allegations against Daimler, Ford and General Motors (the ‘automotive defendants’) to sustain claims for aiding and abetting apartheid, torture, extrajudicial killing, and cruel, inhuman or degrading treatment, whilst the Khulumani plaintiffs had pled adequately in relation to Daimler but not the other two automotive companies.<sup>40</sup>

In relation to the ‘technology defendants’, she dismissed the Ntsebeza plaintiffs’ claim that IBM aided and abetted cruel, inhuman or degrading treatment, but found that they had adequately pled allegations that IBM had aided and abetted both arbitrary denationalization and apartheid. She also found that the Khulumani plaintiffs had adequately pled that IBM and Fujitsu ‘aided and abetted the commission of apartheid by the Government of South Africa’, based on specific allegations that these companies provided ‘the means by which the South African Government carried out both racial segregation and discrimination’ and a ‘strong inference that the technology companies knew that use of the computer hardware and software they supplied would inexorably support the commission of the crimes of apartheid.’<sup>41</sup> On the other hand, she contended that ‘not every computer system provided to the Government of South Africa or South African defense contractors is sufficiently tied to violations of customary international law’, and dismissed the Khulumani plaintiffs’

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<sup>39</sup> Scheindlin J., note 16 above, p.262. On the issue of the requisite standard of knowledge in aiding and abetting cases, see Doug Cassel, ‘Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts’ (2008) 6 NW. U. J. Int’l Hum. Rts.304. I am grateful to him for his helpful comments on this paper.

<sup>40</sup> Judge Scheindlin dismissed the Khulumani plaintiffs’ claims against Ford and GM, but gave them leave to re-plead in line with the Ntsebeza complaint.

<sup>41</sup> Scheindlin J, note 16 above, p.268.

claims that the technology defendants aided and abetted extrajudicial killing, torture, prolonged unlawful detention and cruel, inhuman or degrading treatment.

In relation to the ‘banking defendants’, Judge Scheindlin dismissed both the Ntsebeza plaintiffs’ and the Khulumani plaintiffs’ rather different claims against Barclays Bank PLC, as well as the Khulumani plaintiffs’ claims against UBS.

In relation to the arms exporter Rheinmetall Group A.G., she accepted that the Khulumani plaintiffs had pled allegations that would be sufficient, if proved, to amount to aiding and abetting apartheid and extrajudicial killing. Other pleaded allegations were held insufficient to found liability.

Judge Scheindlin also considered and rejected the defendants’ claims that the actions should be dismissed on the basis of the prudential doctrines of ‘comity’ and ‘political question’. In relation to the footnote on the apartheid litigation in the *Sosa* case, she commented that it merely provided guidance and did not mandate summary dismissal; that the views of the Executive Branch were only to be given serious consideration insofar as they related to a case’s impact on foreign policy; and that the views of the Executive Branch, even in relation to foreign policy, were only one factor to be considered by the court, and were not dispositive.<sup>42</sup> In striking contrast to Judge Sprizzo, she cited with approval the comment of the Second Circuit in the *Kadic* case, that ‘judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights.’<sup>43</sup> Moreover, the Executive Branch’s views, even on foreign policy, would not prevail if ‘presented in a largely vague and speculative manner’.<sup>44</sup>

Judge Scheindlin displayed an equally robust approach to the arguments presented by the South African government. Preferring the testimony of Archbishop Tutu to the arguments advanced by former Minister of Justice Penuell Maduna, she concluded that South Africa had never instituted a policy of blanket immunity for corporations and that there was no inconsistency between the mandate of the TRC and the apartheid litigation. In fact, the goals of the TRC and the lawsuit were ‘closely aligned’, in that both sought ‘to uncover the truth about past crimes and to confront their perpetrators’.<sup>45</sup> This was fatal to any argument based on international comity. The Defendants had chosen not to appear at the TRC, and neither they nor the South

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<sup>42</sup> Scheindlin J., note 16 above, p.281.

<sup>43</sup> Ibid, p.282.

<sup>44</sup> Ibid, p.282, citing *Permanent Mission of India*, 44 F 3d at 373, n.17.

<sup>45</sup> Ibid, p.286.

African government had pointed to any forum now existing in South Africa that had, could or would adjudicate the Plaintiffs' claims; nor had the Defendants consented to the assertion of jurisdiction against them in South Africa.

'Claims that a corporation that aided and abetted particular acts could be liable for the breadth of harms committed under apartheid have been rejected', Judge Scheindlin said in conclusion. 'What survives are much narrower cases that this court hopes will move toward resolution after more than five years spent litigating motions to dismiss.'<sup>46</sup>

Whilst the narrowing of the ambit of these cases was probably correctly identified by Judge Scheindlin as the price that must be paid to enable the litigation to proceed in the post-*Sosa* era, it also had significant implications for the emergence of the truth referred to at the head of her Opinion. This issue will be examined in the next section.

### **Courts, History and Truth**

In foregrounding the issue of truth, Judge Scheindlin entered a long-standing debate about the role of courts in writing the history of mass atrocities. This debate has centered on the role of criminal prosecutions in democratic transitions, placing less emphasis on the conventional concerns with deterrence and retribution and more emphasis on the 'pedagogical purpose' which, some scholars have argued, must be kept in mind when conducting criminal trials 'in the aftermath of large-scale brutality sponsored by an authoritarian state'.<sup>47</sup> Mark Osiel, in his thoughtful exploration of criminal trials in transitional societies, argues that in the aftermath of such brutality, 'the need for public reckoning with the question of how such horrific events could have happened is more important to democratisation than the criminal law's more traditional objectives.'<sup>48</sup> At the same time, Osiel identifies a number of recurring problems that have arisen from efforts to employ criminal prosecution to influence a nation's collective memory, some of which, he argues, suggest the task's impossibility, while others suggest its undesirability. One of the recurring problems

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<sup>46</sup> Ibid, p.295.

<sup>47</sup> M. Osiel, 'Mass Atrocity, Collective Memory, and the Law' (2000), p.2.

<sup>48</sup> Osiel, p. 2.

highlighted by Osiel is that criminal prosecutions ‘can unwittingly distort historical understanding of the nation’s recent past’.<sup>49</sup>

Concerns about the distortion of historical understanding by criminal trials have not only been made of domestic trials. Lawrence Douglas has cogently criticised the International Military Tribunal at Nuremberg for its failure fully to do justice to traumatic history. He observed:

‘Central aspects of the Nuremberg case – the charter’s restricted view of 6(c), the attempt to use the conspiracy charge to reach pre-war atrocities, and the prosecution’s own uncertain parsing of the meaning and normative foundation of the concept of crimes against humanity – all compromised the trial’s effort to do justice to the history of the Holocaust. At times, the legal lens through which evidence of atrocity was filtered resulted in substantial distortions of the historical record. More often, the legal structure fashioned at Nuremberg failed in a more complex fashion to represent and make sense of traumatic history.’<sup>50</sup>

Lawrence concedes that not all evidence of the extermination of the Jews was misrepresented at Nuremberg, adding that, to their credit, ‘the prosecution and the court both struggled to present a detailed account of the Nazis’ campaign of Judeocide...’<sup>51</sup> Yet, he argued, ‘in spite of the prosecution’s redoubtable efforts to document the Nazis’ campaign to exterminate the Jews of Europe, these pedagogic efforts were importantly compromised by the legal grid in which unprecedented atrocities were framed, contributing to the serious shortcomings in the historical understanding of the Holocaust that emerged from Nuremberg.’<sup>52</sup> Moreover, since ‘the experiences of Holocaust survivors found restricted expression in the testimony of courtroom proxies’, such as non-Jewish political prisoners at Auschwitz, ‘even when the trial offered a reasonably reliable historical picture...it marginalised the experiences of victims of traumatic history.’<sup>53</sup>

Commenting on the treatment of victims at the International Criminal Tribunal for the Former Yugoslavia, Julie Mertus argued that, while survivors have the greatest need for a record, ‘the kind of record most survivors need to put the past at rest is one

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<sup>49</sup> Osiel, p.7.

<sup>50</sup> L. Douglas, ‘The Memory of Judgment: Making Law and History in the Trials of the Holocaust’ (2001), p.89-90.

<sup>51</sup> Douglas, p.66.

<sup>52</sup> Douglas, p.66.

<sup>53</sup> Douglas, p.79.

that a tribunal cannot provide.’<sup>54</sup> Their need for participation leading to healing is not, in her view, well-served by a court record which ‘merely presses the words of survivors into the language of law.’<sup>55</sup>

Some scholars have argued that it is positively undesirable for criminal courts to concern themselves with the writing of history. Hannah Arendt, after observing the criminal trial of Eichmann in Jerusalem, was moved to write that ‘the purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes – “the making of a record of the Hitler regime which would withstand the test of history”... - can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.’<sup>56</sup> Whilst her statement about the purpose of a criminal trial is expressed in general terms, it may perhaps more accurately be seen as a response to the particular way in which the Eichmann prosecution was conducted in Israel, which she called ‘bad history and cheap rhetoric’.<sup>57</sup> The prosecution’s attempts to put the history of anti-Semitism itself centre stage and to use the trial for Israeli nation-building resulted, in her view, in the sacrifice of justice and due process for the accused. In similar vein to Arendt, Ian Buruma has argued that ‘when the court of law is used for history lessons, then the risk of show trials cannot be far off.’<sup>58</sup>

Lawrence Douglas agrees that ‘the primary responsibility of a criminal trial is to resolve questions of guilt in a procedurally fair manner’ and that ‘one must appreciate the potential tension between the core interests of justice and the concerns of didactic legality’.<sup>59</sup> But, he contends, Arendt’s insistence ‘that the *sole* purpose of a trial is to render justice and nothing else, presents... a crabbed and needlessly restrictive vision of the trial as legal form’.<sup>60</sup> He endorses Judith Shklar’s view that the ends of justice and pedagogy can be entirely compatible. All trials must, to a degree, resolve contested history – did the accused commit the acts, why, how? Whilst the ‘conventions of proof that guide the historian and the judge differ importantly’, in Douglas’ view, ‘these disparities do not prevent the law from playing

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<sup>54</sup> J. Mertus, ‘Truth in a Box: The Limits of Justice through Judicial Mechanisms’, Ch.8 in I. Amadiume etc, p.158.

<sup>55</sup> Mertus, p.159.

<sup>56</sup> Arendt, ‘Eichmann in Jerusalem’, p.233.

<sup>57</sup> Arendt, p.19.

<sup>58</sup> I. Buruma, ‘Wages of Guilt: Memories of War in Germany and Japan’ (1995), p.142.

<sup>59</sup> Douglas, p.2.

<sup>60</sup> Douglas, p.2.

a valuable role in clarifying the historical record.’<sup>61</sup> He points out that, at Nuremberg, ‘it was not the pursuit of didactic history that ultimately eroded the legal integrity of the proceeding conventionally conceived; rather, it was the strenuous efforts to secure formal legal integrity that often led to a failure fully to do justice to traumatic history.’<sup>62</sup> He does not, however, conclude from this that the criminal trial should be shunned as a tool for responding to traumatic history.

Richard Wilson’s 2005 article on the work of the International Criminal Tribunal for the Former Yugoslavia notes Arendt’s view that courts *should* not assume the responsibility of writing history and contrasts it with the view, associated particularly with the Critical Legal Studies Movement, that ‘the law, even if it tries, *cannot* produce a comprehensive historical account of a period’.<sup>63</sup> ‘Like it or not’, Wilson argues, ‘there has been a global trend for ensuring greater accountability for mass crimes, and national and international courts and commissions are increasingly the places of choice for victims, perpetrators and bystanders to tell their stories about past atrocities.’<sup>64</sup> He suggests that the problems associated with courts and the writing of history are less pressing in the case of international tribunals, which are free from the pressures national courts experience in transitional or post-conflict societies. As a result of its autonomy from nation-states, Wilson argues, ‘the ICTY has resisted being drawn into constructing facile collective representations (the suffering of all Bosnian Muslims, the guilt of all Serbs, etc.) necessary for nationalist mythology.’<sup>65</sup> Unlike the Israeli and French courts in the Holocaust trials, the international criminal tribunals established by the UN are ‘separated from the wider project of nation building in the aftermath of authoritarianism.’<sup>66</sup> As a result, in his view, the International Criminal Tribunal for the Former Yugoslavia has left a ‘qualitatively distinctive historical record of the origins and contours of mass atrocity’ and, he contends, international tribunals such as the ICTY are ‘altering the relationship between law and history’.<sup>67</sup>

Whilst the debate continues about both the proper purposes of criminal trials and the ability of criminal courts to write ‘good history’, no similar literature yet

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<sup>61</sup> Douglas, p.2, footnote 4.

<sup>62</sup> Douglas, p.260.

<sup>63</sup> Richard A Wilson, ‘Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia’ (2005) 27 HRQ 908, at p.909.

<sup>64</sup> Wilson, p. 917.

<sup>65</sup> Wilson, p.921.

<sup>66</sup> Wilson, p.922.

<sup>67</sup> Wilson, p.940-1.

exists in relation to *civil* proceedings. The apartheid litigation, if it proceeds to trial, will provide an interesting case study of the willingness and capacity of civil courts to contribute to clarifying the historical record. It will also provide an opportunity to explore the strengths and weaknesses of foreign as opposed to domestic courts in this endeavour.

It is already clear from the apartheid litigation that different US judges involved in the case to date have embraced differing conceptions of their role. On the basis of the Sprizzo and Scheindlin Opinions, it is clear that Judge Scheindlin is open to a more expansive conception of her task than her colleague, and her decision to place Desmond Tutu's comment at the head of her Opinion suggests that she is more sensitive and receptive to the wider implications of judging cases of this nature.

It is also evident that some of the issues which have arisen in the context of criminal trials will also arise, *mutatis mutandis*, in relation to civil proceedings. Some of Lawrence Douglas' observations in relation to the Nuremberg trial have already found an echo in the apartheid litigation. The legal structure of ATCA jurisprudence – the 'legal grid' to which Douglas alluded - suggests that any truth which emerges from the apartheid litigation can only be a partial or diminished truth. The need (recognised both by the plaintiffs and, it seems, by Judge Scheindlin) to 'narrow' the number of claims and defendants in order to ensure that the litigation was able to proceed at all in the post-*Sosa* era has also narrowed the prospects for producing a nuanced version of history that historians of apartheid – and, perhaps more importantly, the South African public - would recognise.

Thus, for example, the current absence from the proceedings of any South African companies, such as Anglo-American Corporation and De Beers (originally defendants in the Ntsebeza action), means that the role of South African business in relation to apartheid will not be explored. Omitting them was probably perceived by the plaintiffs to have strategic value in terms of the ATCA, reducing the prospect of successful objections to jurisdiction on the basis of prudential doctrines or *forum non conveniens*. Yet South African mining companies were closely involved in the development of discriminatory legislation and practices, before and during apartheid, and enjoyed an intimate relationship with the apartheid regime. Any attempt to uncover 'the truth' about the causes and effects of apartheid which leaves them out of account will inevitably be unsatisfactory. Similarly, Judge Scheindlin's dismissal of the claims against the banking defendants means that those who bankrolled apartheid

will also be conspicuous by their absence. Whilst this may make some sense in narrow legal terms, and may also have strategic value in the difficult political climate in which the ATCA currently operates, it is nonsensical from the point of view of exposing the truth and confronting perpetrators.

In addition, the attempt to bring the plaintiffs' claims squarely within post-*Sosa* ATCA jurisprudence means that they have become increasingly focused on the obvious physical manifestations of the brutality of apartheid – killings, torture, etc. – rather than on the inherent, structural violence of the system, so corrosive in all its aspects of human dignity and wellbeing. Judge Scheindlin rejected claims 'that a corporation that aided and abetted particular acts could be liable for the breadth of harms committed under apartheid'; but, in her delicate balancing act, she also arrived at the historically baffling conclusion that some of the defendant companies aided and abetted apartheid but were not thereby responsible for torture or cruel, inhuman or degrading treatment. The plaintiffs, it seems, must prove detailed causal links between the defendants' actions and the tip of the iceberg of apartheid violence. As at Nuremberg, the 'legal grid' referred to by Douglas has already compromised efforts to represent and make sense of traumatic history.

Writing of the 1994 French prosecution of Nazi collaborator Paul Touvier, Mark Osiel notes that the law's need for an offence with which the accused could still be charged after so many years resulted in an overemphasis in the eyes of many Frenchmen on Touvier's action in ordering the death of seven Jewish hostages. Moreover, in seeming to challenge the importance of the French Resistance, the legal proceedings became 'highly unlikely to find a sympathetic national audience'.<sup>68</sup> Osiel concludes that 'when collective memory has already become comfortably entrenched, the law's efforts to excavate and scrutinise it are only likely to discredit the law and its professional spokesmen.'<sup>69</sup>

If this result is to be avoided in the apartheid litigation, the US courts will need to be sensitive to memories and beliefs already 'comfortably entrenched' in the minds of many South Africans. One such entrenched belief is that apartheid was a crime against humanity. In contrast, Judge Sprizzo in his Opinion seemed at pains to find that apartheid was neither a crime against humanity – because not enough 'major powers' had ratified the Convention on the Suppression and Punishment of the Crime

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<sup>68</sup> Osiel, note 47 above, p.112.

<sup>69</sup> Osiel, p.113.

of Apartheid - nor in any other way a breach of any fundamental principles of international law. Judge Scheindlin too dismissed the Apartheid Convention because it had not been ratified by Western European and North American countries, and because ‘a substantial proportion of the nations that have ratified the Apartheid Convention have poor human rights records’.<sup>70</sup> She declared state-sponsored apartheid ‘indisputably a tort under customary international law’; but she concluded that the international legal system had not thus far ‘definitively established liability for non-state actors who follow or even further state-sponsored racial oppression’.<sup>71</sup> These distinctions, familiar enough to lawyers, may unfortunately only serve to discredit the law in the eyes of those who have survived such oppression.

Another memory, entrenched (if not ‘comfortably’) in the minds of black South Africans, is of the undignified ways in which they were treated by their employers in the apartheid era. Moreover, although there may be no opinion poll evidence to prove it, most South Africans probably believe that business was complicit in the design and implementation of apartheid and that it benefited financially from the exploitation of black workers. Of course, no court can be compelled to make legal findings in line with public opinion; but where courts are perceived as writing history, as courts in these cases surely must, they would be wise to explain and justify most carefully any conclusions that are at odds with popular conceptions of the past, if the law is not to be discredited, as Osiel warns.

Linked to this is the issue of the meaning attributed to success or failure in litigation. As the apartheid litigation has already shown, plaintiffs’ civil claims under ATCA may be dismissed, in whole or in part, even before the case reaches trial. When this happens, either at or before trial, what impact does this have on the historical record? In relation to criminal trials, as Osiel noted, the media plays a role in conveying messages about what the court’s decision signifies. For example, when the prosecution fails to discharge the burden of proving guilt beyond reasonable doubt, the accused may be misleadingly presented by the media as ‘innocent’ or ‘cleared’. In the apartheid litigation, the case against the banking defendants was dismissed for the technical legal reason that ‘merely’ providing funds to a repressive regime was not enough, in the court’s view, to found liability under ATCA. While this does not, of course, mean that international banks had no responsibility for apartheid, the court’s

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<sup>70</sup> Scheindlin J., note 16 above, p.250.

<sup>71</sup> Ibid, p.251.

decision may all too easily be portrayed in this light, and the public may be left bemused by the idea that computer companies and vehicle manufacturers were ‘more responsible’ for apartheid and its attendant evils than the banks.

It is not only the court or the media that may do violence to history. The Sprizzo Opinion contains an example of the distortions sometimes introduced by lawyers in the hope of bolstering their clients’ prospects of success. The lawyers for the defendant corporations apparently contended that apartheid had ended in 1990 – this despite the fact that violence raged in South Africa after that time, that the negotiations for a new (interim) constitution were only concluded at the end of 1993, and that the first democratic elections did not take place until April 1994!<sup>72</sup>

None of the court decisions rendered so far in the apartheid litigation has succeeded in conveying a real flavour of the apartheid era. A young person innocent of the events and debates of that time would be only slightly better informed for having read the Opinions handed down to date. In the Sprizzo Opinion, apartheid and the activities of the corporate defendants became simply the short ‘background’ section for an extensive legal discussion. The picture briefly sketched by Judge Sprizzo was of foreign corporations which simply passively benefited from apartheid policies which provided them with cheap labour, cheap power and high levels of government services to white areas. This account of the defendants’ passive or reluctant acceptance of apartheid contrasts with some of the vivid contemporaneous newspaper reports of the time. The Los Angeles Times, for example, reported in 1986 that Revd. Leon Sullivan, a GM board member, was ‘concerned’ that GM (a defendant in the apartheid litigation) ‘had used police guard dogs and whips to suppress a strike at a GM plant in South Africa’.<sup>73</sup>

In the Court of Appeals, two of the judges omitted any discussion of the factual background to the case or the nature of apartheid. The third judge, commenting on this omission, set out his view of the facts of the case, but apparently

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<sup>72</sup> The defendants apparently based their contention on the fact that the US ended sanctions against apartheid South Africa in 1990. The significance for the defendants of arguing for this date appears to have been that it bolstered their case that the plaintiffs had been too slow in bringing their lawsuits and that the lawsuits should be rejected on that ground. It is, of course, true that the edifice and legal underpinnings of apartheid were gradually dismantled and repealed over a period of time, starting before 1994; but the idea that apartheid ended in 1990 and that (mainly) poor black South Africans could even have considered bringing lawsuits of this nature in the US (or anywhere else) before 1994 is risible. Nevertheless, the defendants have continued to assert this position to date.

<sup>73</sup> ‘Sullivan Warns Withdrawal of US Firms in South Africa Could Snowball’, LA Times, 22 Nov. 1986.

with the principal aim simply of demonstrating the hopelessness of the plaintiffs' cause. In Judge Scheindlin's Opinion, the factual background to the case, though more sympathetically expressed, occupies only a couple of paragraphs.<sup>74</sup> Lawyers and judges are socialised through their legal training in to understanding and practising the technique of transforming traumatic events in to the meat of dry legal debate; and, especially in ground-breaking cases, most lawyers would probably view the foregrounding of legal argument as inevitable. Yet, to some extent at least, this professional tendency sits uneasily alongside the importance of the emergence of 'truth' identified by Judge Scheindlin. It is fair to note, however, that if the case ultimately proceeds to trial, a more extensive treatment of the facts may be expected.

One grey area at present is the extent to which discovery of documents in the apartheid litigation may produce new or revealing information about the defendant corporations' involvement with the apartheid regime and its activities. Whilst discovery can often be crucial, it remains to be seen how much relevant documentation has survived to the present day, as the defendants may quite legitimately have disposed of old documents from the apartheid era. In contrast with the Nuremberg trial, at which the Allies were famously able to 'hang' the accused by reference to Nazi documentation, or with civil proceedings dealing with more recent events (such as the *Trafigura* litigation in the High Court in London, in which documentary evidence from the defendants' own files appears to have been a factor in prompting a pre-trial settlement in September 2009), civil proceedings dealing with more distant events may be relatively limited in their ability to uncover the past or clarify the historical record. The apartheid litigation, if it proceeds, will be a fascinating test.

## **Conclusion**

As discussed above, the apartheid litigation has obliged the US courts to consider objections to jurisdiction from the democratically elected government of South Africa based on the policies the 'new' South Africa has adopted and the institutions it has created – especially the South African Truth and Reconciliation Commission – in its attempt to navigate the difficult waters of accountability for past abuses and the

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<sup>74</sup> Judge Scheindlin does, however, provide more detail about the kinds of projects and activities in which the defendants were allegedly involved. The reader of her Opinion is left to piece together some sense of the nature of the apartheid past from these scattered details.

construction of a more prosperous future. Despite earlier judicial indications that the US courts should defer to the views of the US and South African governments in these circumstances, Judge Scheindlin in her recent Opinion declined to do so. Her decision implies that US courts will not automatically defer to the new democratic governments of transitional societies, even in the sensitive and difficult circumstances of political transition.

The ANC had itself, in its submissions to the Truth and Reconciliation Commission, emphasised the need for the corporate sector to acknowledge its complicity with the apartheid regime and to make reparation. Whilst it was clear from the terms of the transition that the ANC hoped to keep litigation about accountability for the apartheid past to a minimum within South Africa itself, the concern to protect the stability of a fledgling democracy which might have made protracted *domestic* litigation undesirable – especially criminal proceedings against the security forces - did not obviously apply to civil litigation instituted in *foreign* courts against *foreign* companies.

Despite the arguments later made by the South African government, the mandate of the TRC clearly could not and did not preclude the bringing of criminal or civil suits, except in the very limited number of cases in which amnesty was granted on individual application. No corporations applied for amnesty, and they were probably ineligible for it.<sup>75</sup> Had they applied, they would, importantly, have had to acknowledge the commission of a legally wrongful act – either delictual or criminal - and to make full disclosure of their actions.<sup>76</sup>

Even if foreign or multinational corporations had successfully applied to the TRC for amnesty, amnesties granted in South Africa could not legally have precluded an ATCA claim in the US, though it might have made the opposition of the South African government to the hearing of such a claim more understandable.

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<sup>75</sup> Under the Promotion of National Unity and Reconciliation Act, amnesty was available for offences or delicts associated with a political objective which were ‘advised, planned, directed, commanded, ordered or committed’ by members or supporters of the liberation movements in furtherance of the struggle against the State, or by employees of the State or members of the security forces in the course and scope of their duties *bona fide* with the object of countering the struggle. Whilst it might have been possible to construct an elaborate argument to bring corporations within this framework, this would clearly have strained the language of the Act and, as far as the author is aware, was never contemplated.

<sup>76</sup> The South African Criminal Procedure Act (51 of 1977) s.332 provides for the prosecution of companies. Where *mens rea* is a requirement for an offence, the criminal intent of the director or servant is attributed to the company. Only fines (including asset forfeiture) may be imposed on a company. In terms of civil liability, corporate employers can be held vicariously liable for a civil wrong committed by a servant in the course and scope of his/her employment.

The ANC, in its submission to the TRC ‘institutional hearing’ on business and labour in 1997, recognised that business was not a monolith. It conceded that ‘not all of the measures of apartheid were sought by business’ and acknowledged that ‘as the apartheid system became increasingly dysfunctional to business from the mid-1980s onwards, a number of historically privileged business organisations...began to grapple for solutions that reached beyond the parameters apartheid political leaders were then prepared to contemplate.’ It also recognised that the role played by a number of leading business personalities and organisations in promoting dialogue and negotiation at the end of 1980s was ‘a positive contribution to bringing about a transition to democracy in our country’. This could not, however, in the ANC’s view, ‘detract from the reality of a record of extensive collaboration by business with a system involved in gross violations of human rights.’ It concluded its submission with a plea to business to confront its past, to acknowledge its role in past injustices, and to recognise that genuine reconciliation required action to address ‘the inequalities, inequities and developmental backlogs that the system of discrimination, from which [historically privileged business] benefited in varying degrees’ had left as the heritage of the new democratic order. Most corporations did not respond to the invitation to attend the TRC hearing.<sup>77</sup>

Commenting on the testimony presented to the TRC on the role of business under apartheid, Merle Lipton notes the conflicting views put forward. Some of those testifying argued that events since 1990 confirmed the argument that business had contributed to ‘the erosion of apartheid and the conversion of the ruling elite to the view that a negotiated ending to apartheid was desirable and possible’.<sup>78</sup> Others, however, ‘denied that the historical record gave support to this view and reiterated the argument...that business was the major supporter and beneficiary of apartheid, only switching its support at the last moment when the demise of apartheid became unstoppable.’<sup>79</sup>

As Lipton points out, in the apartheid era, the debate about the role of business under apartheid was ‘closely linked to questions of political strategy, such as whether

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<sup>77</sup> The TRC in its Final Report commented that ‘most notable’ amongst those who did not respond to the invitation were ‘the multinational oil corporations (which were the largest foreign investors in South Africa)’: TRC Final Report (1998), Vol. 4, p.18.

<sup>78</sup> M. Lipton, ‘The role of business under apartheid: Revisiting the debate’, Ch.15 in H. E. Stolten (ed.), ‘History Making and Present Day Politics’(2007), p.292.

<sup>79</sup> Lipton, p.292.

the international community should impose economic sanctions on SA.<sup>80</sup> It was therefore not surprising that these debates were highly charged and polarised before 1990. More surprising, in Lipton's view, was 'the continued acrimony over these issues in post-apartheid South Africa, and the persistence of the negative view of the role of business...'<sup>81</sup> The explanation, as she correctly observes, is that there are:

'close links between perceptions of the historical issues and current political issues, such as whether business should pay reparations to the victims of apartheid and whether South Africa should adopt an affirmative action or black empowerment policy. The past is constantly invoked in relation to claims/entitlements on the one hand and responsibilities on the other hand.

Thus, the history matters and is perceived by all parties as relevant.'<sup>82</sup>

As Lipton notes, some fear that any credit given to 'white' business would be used by corporations as an excuse to avoid contributing to reparations, to oppose social reform and redistribution, and to decline to take a political backseat in post-apartheid South Africa – an understandable concern in a country facing acute problems of poverty and inequality. While the sensitivity of the issue might lead some to conclude that digging up the past is unwise, Lipton contends that 'a fuller understanding of the messy, complex truth about the role of business under apartheid holds out the hope of improved relationships in post-apartheid SA.'<sup>83</sup> She believes that fuller understanding has the potential 'to provide a more realistic basis for building a common society than simplistic models of a society composed of demons and saints.'<sup>84</sup>

Lipton perceptively highlights the relevance of history to present-day politics in a society with 'an appalling inheritance that needs to be righted'.<sup>85</sup> This connectedness between past and present – and the massively important present-day consequences of re-interpreting the past – suggest that any court venturing into this terrain should do so carefully. The danger is obviously that a foreign court may be less sensitive than a domestic court to the significance and implications of its work. Yet if it proceeds thoughtfully, as Judge Scheindlin promises to do, there seems no reason in principle why a foreign court should not cope adequately with these admittedly sensitive issues. Moreover, a foreign judge may have the advantage that

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<sup>80</sup> Lipton, p.293.

<sup>81</sup> Lipton, p.293.

<sup>82</sup> Lipton, p.295.

<sup>83</sup> Lipton, p.295.

<sup>84</sup> Lipton, p.301.

<sup>85</sup> Lipton, p.300.

(s)he is not a member of a domestic judiciary carrying the baggage of its role in the repressive past, and that his/her views were not indelibly formed in the crucible of political struggle.

If courts in fledgling democracies are able and willing to deal effectively with class actions from the poor, the marginalised, or those seeking politically inconvenient truths about the past, there is, of course, no reason for the US courts to usurp that function. Given the difficulties of litigating in a foreign jurisdiction, most victims of human rights abuses would prefer to litigate at home, if – reluctantly - they must litigate at all. The fact that the apartheid litigation has still not reached the trial stage after nearly seven years proves that ATCA litigation against corporations is no easy road for plaintiffs. Yet, in transitional societies, the legal system is often experiencing a crisis of legitimacy – as has been the case in post-apartheid South Africa, with the exception of the new Constitutional Court - and may be ill-equipped to handle politically-sensitive litigation. In some transitional societies, the local legal profession may have been decimated by violence, as in Rwanda, may have left the country (as in East Timor), or may be tainted by association. Where local lawyers exist, they may feel at a professional disadvantage in relation to the highly-paid advisers of multinational corporations, and may not be permitted (or be able to afford) to accept clients on a contingency fee basis. The local legal system may not permit or be able to handle class actions.

In transitional justice literature, international criminal tribunals have been much criticised for being inadequately ‘rooted’ in local culture and excessively distant from their ‘audience’ in the traumatised society with which they are concerned. These tribunals were, of course, a valiant attempt to respond to the inadequacies of local criminal justice systems in the aftermath of repression and the pressures on new democratic governments. Nevertheless, the criticisms have prompted attempts to create ‘hybrid’ tribunals, situated in the new democracy, staffed by both ‘internationals’ and ‘locals’, and applying a combination of international and municipal law. There is, at present, no equivalent to these ‘hybrid’ criminal tribunals in relation to civil claims against non-state actors: victims/survivors must turn to municipal courts, at home or abroad.

Whilst there may be good reasons in terms of the rule of law to encourage the legal systems of new democracies to take on the challenge of dealing with their countries’ pasts, it will not serve the victims and citizens of those countries well if a

pretence of respect for the sovereignty of a new democracy is used to mask the inclinations of US conservatives to protect the interests of multinational corporations. The governments of countries emerging from long periods of conflict or repression often have good reason to be concerned about poverty and unemployment. Rightly or wrongly, they may well see foreign direct investment as vital to a more prosperous future, which in turn makes them fearful of antagonising the corporate sector. By providing an avenue for accountability and redress outside the jurisdiction of the new democracy, US courts can allow anxious governments to distance themselves strategically from litigation against corporations and thus help to quell their fears of corporate 'reprisals'. Equally, where the governments of new democracies are motivated by less honourable concerns, rule of law arguments probably do not support 'repatriating' the litigation.

Human rights activists hope that ATCA litigation can be instrumental in persuading the corporate sector not to give succour to regimes that systematically commit serious human rights abuses. At the very least, the apartheid litigation may encourage corporations to cooperate after the event with domestic mechanisms, such as national truth and reconciliation commissions, which provide opportunities for acknowledgment of responsibility for past actions and a forum in which redress can be discussed. Simply ignoring the victims of ousted repressive regimes has become, as a result of the plaintiffs' persistence and Judge Scheindlin's Opinion, a more troublesome and dangerous option. The judgment of the US Court of Appeals (Second Circuit) in the *Talisman* case in October 2009 poses new difficulties for the plaintiffs in the apartheid litigation; yet, whatever the ultimate outcome of the apartheid litigation, there can be little doubt that such litigation strengthens the prospect that, at least in the longer term, corporations will be more stringently called to account for their conduct.<sup>86</sup>

The message of the apartheid litigation for the governments of new democracies must surely be to respond to the needs of victims in a timely and respectful manner, if such litigation is to be averted. The South African government created a truth and reconciliation commission with a mandate to recommend reparations for the victims it identified through its work. For reasons which will

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<sup>86</sup> On the *Talisman* case, see note 12 above. The judgment of the Court of Appeals can be found at [http://www.ca2.uscourts.gov/decisions/isysquery/fa0db23d-6de5-4fed-acdc-24b6911c7089/1/doc/07-0016-cv\\_opn.pdf](http://www.ca2.uscourts.gov/decisions/isysquery/fa0db23d-6de5-4fed-acdc-24b6911c7089/1/doc/07-0016-cv_opn.pdf).

probably never be entirely clear, the government continually delayed responding to the TRC's recommendations and regularly intimated that it would not endorse them. It also refused to consider the needs of those who would have been eligible to be declared victims by the TRC but who, for a variety of reasons including their difficult circumstances, learned of the existence of the TRC too late to make a claim. Whilst taking a tough line on reparations for victims, the government has appeared at times to be sympathetic to the demands of the security forces for a new amnesty deal. When some of the victims of apartheid ultimately turned to the US courts for redress from multinational corporations, it was a last resort. The apartheid litigation was eminently avoidable. Whilst the South African government may have been piqued by the move and concerned about the implications for its reputation abroad, for foreign investment and for jobs, it should have recognised that its own conduct had contributed to the initiation of the litigation, and that opposing it was inappropriate.

Interestingly, after renewed lobbying by Archbishop Tutu, Khulumani and others on behalf of the plaintiffs, the new South African government under Jacob Zuma has withdrawn its opposition to the litigation.<sup>87</sup> The previous government's objections, like its policy on HIV/Aids, will probably come to be remembered as another quirk of the Mbeki era. The claims of victims should not – as Judge Scheindlin appears to have appreciated - be subject to such political vagaries.

Whilst US courts may often be the last hope of redress for the victims of abusive pasts, it remains to be seen whether they will prove able to write 'good history'. As discussed above, the various ways in which plaintiffs must 'tailor' ATCA claims and the difficulties faced by progressive courts in the post-*Sosa* era are limiting factors. As discussed above, national and international criminal courts and tribunals dealing with responsibility for past abuses have also encountered difficulties caused

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<sup>87</sup> See e.g. 'South Africa does about-turn on US Apartheid case', Mail & Guardian, 3 September 2009, available at <http://www.mg.co.za/article/2009-09-03-sa-does-aboutturn-on-us-apartheid-case>. The letter from SA Justice Minister Jeff Radebe to Judge Scheindlin dated 1 September 2009 is available at [http://www.khulumani.net/attachments/343\\_RSA.Min.Justice\\_letter\\_J.Scheindlin\\_09.01.09.PDF](http://www.khulumani.net/attachments/343_RSA.Min.Justice_letter_J.Scheindlin_09.01.09.PDF). The letter suggests that the narrowing of the scope of the litigation in 2009 had 'addressed some of the concerns which the government of the Republic of South Africa had'. While this may be true, a more important factor in terms of South African politics is likely to have been the nature of President Zuma's political platform and his primary political constituency - the poorest members of South African society. Moreover, after a titanic political struggle for the leadership of the ANC with former President Mbeki, Zuma was apparently ready to distance himself from certain controversial policies associated with Mbeki. On this view, the narrowing of the apartheid litigation in 2009 simply provided a convenient hook on which to hang the change of policy. The apartheid litigation certainly offered Zuma a much easier opportunity to demonstrate a break with the Mbeki era than the main area of policy controversy: the management of the economy.

by the ‘legal grid’ within which they operate. Truth and reconciliation commissions, including the South African TRC, have also faced criticism for the partial nature of the truth they have exposed.<sup>88</sup> The trajectory of the apartheid litigation to date raises concerns that the truth revealed by the US civil courts may be a diminished truth: one that exonerates some corporations unjustifiably, focuses unduly on the activities of the few, excludes consideration of the role of South African business, and concentrates excessively on the brutal, physical manifestations of the violence of the apartheid regime.

At the time of writing, Judge Scheindlin’s Opinion was under appeal. Ultimately, the apartheid litigation, like other ATCA cases against corporations, may be settled out of court. This possibility further highlights the contingent nature of the ability of courts – including the US courts - to contribute to clarifying responsibility for past abuses. Judge Scheindlin’s recognition of the importance of this difficult task for transitional societies and her commendable willingness to attempt it open up new territory in transitional justice. The apartheid litigation, for all its shortcomings to date, has already served to stimulate debate in South Africa. The prospects for a US ‘jurisprudence of truth’ are in the balance.

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<sup>88</sup> See e.g. M. Mamdani, ‘The Truth According to the TRC’, Ch.10 in I. Amadiume and A. An-Na’im (eds.), ‘The Politics of Memory’ (2000), arguing that the TRC’s truth was ‘established through narrow lenses, crafted to reflect the experience of a tiny minority’ – perpetrators and political activists - and that it was a truth which artificially stifled social debate in the name of maintaining peace.