

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KHULUMANI et al.,

Plaintiffs

vs.

Civil Action No. 1:03-CV-4524 (JES)

BARCLAYS NAT'L
BANK et al.,

Defendants.

**BRIEF OF AMICI CURIAE INTERNATIONAL HUMAN RIGHTS
ORGANIZATIONS, TRC COMMISSIONERS, AND OTHERS
IN SUPPORT OF PLAINTIFFS**

I. INTRODUCTION

In light of the recent decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 72 U.S.L.W. 4660 (June 29, 2004), amici curiae submit this brief in support of the Plaintiffs in this action. Amici include dozens of international human rights organizations throughout the world. Amici also include individuals who have figured prominently in efforts to ameliorate the lasting damage that the apartheid system inflicted upon its South African victims such as the Plaintiffs in this action. Among amici are the Chairperson of the Truth and Reconciliation Commission of South Africa (“TRC”), Archbishop Desmond Tutu, and several TRC commissioners.

The great promise of *Sosa* is the impetus for amici’s appearance. Though cautious in its approach, the Supreme Court made unmistakably clear in *Sosa* that the courthouse

door is open to “private causes of action for certain torts in violation of the law of nations.” *Sosa*, 124 S. Ct. at 2761. The claims brought before this Court by the *Khulumani* Plaintiffs are cognizable under the *Sosa* standard. Indeed, recognizing the validity of their claims would help define the contours of the *Sosa* holding and distinguish this “narrow class” of actionable “international norms,” *id.* at 2764, from the morally reprehensible, but nevertheless nonactionable, class of lesser harms such as the “single illegal detention of less than a day” presented in *Sosa*. *Id.* at 2769. And although the *Sosa* Court expressed particular concern with respect to the position of the South African government vis-a-vis other “apartheid cases” pending in this Court, *see id.* at 2766 n.21, those concerns would be misplaced if directed to the limited, individualized relief sought by each of the Plaintiffs in this action. This Court would further the principles announced in *Sosa* by examining the concerns of the South African government in a discriminating light, distinguishing between this action and other “apartheid cases” pending before this Court that might in fact invade the province of the South African government.

The decisions made by this Court in this action will shape the future of human rights litigation. They will reverberate beyond the courthouse walls to the ears of official and private actors across the globe. What happens in *Khulumani* matters not only to the victims of torture and murder who are Plaintiffs in the case, it matters to such victims worldwide whose rights and interests the amici have dedicated their existence to vindicating. Amici believe that the principles outlined in the *Sosa* decision, carefully

applied, will further not only the interests of the Plaintiffs in this case, but those of victims throughout the world whose fundamental human rights have been trampled. Plaintiffs in actions under the Alien Tort Statute (“ATS”) often have no other avenue of relief. The vindication of their rights promotes healing, both for them and for their communities, with the official recognition that the deprivations they suffered are universally condemned. *See Sosa*, 124 S. Ct. 2783 (recognizing “universal jurisdiction over claims of torture, genocide, crimes against humanity, and war crimes”) (Breyer, J., concurring). These cases often break down the walls of silence and fear, enabling survivors of unspeakable atrocities to find dignity and composure. These are not mere bromides; they are the realities that have made up the lives of tens of thousands of people across the globe, including those before this very Court. The ATS embodies the United States’ most laudable aspirations as a member of the world community. It is with pride that the United States courts should embrace the *Sosa* decision and the hope it offers to the all-too-often hopeless. Amici do not seek sympathy for the victims of human rights violations; they seek justice. *Sosa* affords it.

II. SOSA KEEPS THE DOOR OPEN TO CLAIMS BASED ON THE VIOLATION OF BINDING INTERNATIONAL NORMS.

Dr. Humberto Alvarez-Machain alleged that his “relatively brief detention,” at the hands of U.S. agents amounted to a violation of international norms actionable under the ATS. *Id.* at 2768. The Supreme Court disagreed. *See id.* at 2767-69. In doing so, however, the Court definitively answered the lingering question whether the ATS

encompasses a right of private action. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (recognizing a right of private action under the ATS for violation of the international norm against torture). Following its discussion of the Act’s historical underpinnings, the Court concluded that the federal courts may “recognize private causes of action for certain torts in violation of the law of nations.” *Sosa*, 124 S. Ct. at 2761. Given that “[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations,” said the Court, “[i]t would take some explaining to say now that the federal courts must avert their gaze entirely from any international norm intended to protect individuals.” *Id.* at 2764-65. The Court left no uncertainty that the door to the United States federal courts is “open to a narrow class of international norms today.” *Id.* at 2764. The important question now becomes *what* international norms comprise that class. The Court gives guidance.

III. THE CLAIMS BROUGHT IN THIS ACTION SEEK REDRESS FOR THE VIOLATION OF NORMS COGNIZABLE UNDER *SOSA*.

Although the Court urged “judicial caution” in applying internationally generated norms, *id.* at 2762, it recognized that any number of binding international norms might give rise to a cause of action under the Alien Tort Statute. *See, e.g., id.* at 2766 (endorsing the recognition of “a handful of heinous actions—each of which violates definable, universal and obligatory norms) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)). The Second Circuit has accepted this principle for years. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir.

1995) (recognizing ATS claims arising from a “campaign of murder, rape, forced impregnation, and other forms of torture” as well as “murder, rape, torture, and arbitrary detention of civilians” constituting war crimes); *Filartiga*, 630 F.2d 876, *passim*. See also *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) (recognizing claims for families of victims of torture, summary execution, and forced disappearances).

How are we to determine which specific norms belong to this class? Any newly recognized norms should be as definite in content and acceptance among civilized nations as the historical paradigms (such as piracy) familiar when the ATS was enacted. *Sosa*, 124 S. Ct. at 2765; see also *id.* at 2759 (discussing the paradigms alluded to above). To determine whether the violation of a given norm is actionable, the resulting claim “must be gauged against the current state of international law.” *Id.* at 2766. Critically important is the Court’s observation that lower courts must, in the absence of any treaty or “controlling executive or legislative act” look to “the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.” *Id.* at 2766-67 (quoting *The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 44 L. Ed. 320 (1900)). Notably, the *Sosa* Court, in addressing Dr. Alvarez-Machain’s specific claim for relief, looked to the Restatement (Third) of Foreign Relations Law of the United States (1987) (hereinafter “Restatement”). Following the Supreme Court’s guidance, this Court will find that the claims raised by the *Khulumani* Plaintiffs rest upon binding international norms, the violation of which

supports a claim under the ATS.

Torture & Extrajudicial Killing. The *Sosa* Court itself cited “torture and extrajudicial killing” as exemplary norms, the violation of which provides an “unambiguous and modern basis for’ federal claims” *Id.* at 2763 (quoting H.R. Rep. No. 102-367, pt. 1 at 3 (1991)); *see also id.* at 2783 (recognizing “universal jurisdiction exists to prosecute torture, genocide, crimes against humanity, and war crimes”) (Breyer, J., concurring) (emphasis added); *Filartiga*, 630 F.2d at 890 (holding actionable under the ATS torture perpetrated under color of official authority: “[F]or purposes of civil liability, the torturer has become like the pirate and the slave trader before him *hostis humanis generis*, an enemy of all mankind.”); *see generally* Restatement § 702 (“A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . torture”).

Thus actionable are torture claims by *Khulumani* Plaintiffs like Micheal Mbele who in 1986, because of his political activism, was shocked, beaten, and choked for three days, resulting in the loss of his hearing; and Nomkhango Phumza Slolweni Dyantyi, who in 1983 was tortured for three consecutive weeks by the South African police to the point that she was nearly blinded and from which she carries bullet fragments in her legs today; and Thandiwe Shezi, who in 1988 was abducted, repeatedly raped and electrocuted, and who had acid poured over her head. (Complaint ¶¶ 59, 47, 102.) Likewise actionable are the claims of extrajudicial killing brought by Elsi Guga, the mother of James Guga, 19, who was shot in the back by the South African security police while singing freedom

songs and peacefully marching in the streets; and Joyce Ledwaba, the mother of Samuel Ledwaba, who was lured to a farm house where he was summarily executed by South African security police; and Elizabeth Sefolo, the surviving wife of Harold Sefolo, who was abducted by the South African police in 1986 and was forced to witness the torture murder of two acquaintances before he too was electrocuted to death. (Complaint ¶¶ 20, 23, 42.)

Prolonged Arbitrary Detention. Although the *Sosa* case involved a claim of arbitrary detention, it was by the Court’s own description “a single illegal detention of less than a day, followed by transfer of custody to lawful authorities and a prompt arraignment” *Sosa*, 124 S. Ct. at 2769. Understandably, the Supreme Court found that this act, though morally condemnable, “violate[d] no norm of customary international law so well defined as to support the creation of a federal remedy.” *Id.* However, the Court did not rule out the creation of such a remedy in the event of prolonged arbitrary detention. Indeed, the Court cited the Restatement in observing that “a ‘state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention.’” *Id.* at 2768 (quoting Restatement § 702). The Court recognized that a “credible invocation of a principle against arbitrary detention” was possible, but that it would require “a factual basis beyond relatively brief detention in excess of positive authority.” *Id.* at 2768-69.

“[A]rbitrary detention violates customary law if it is prolonged and practiced as state

policy.” Restatement § 702 cmt. h.¹ Arbitrary detention “is cited as a violation of international law in all comprehensive international human rights instruments.” *Id.* n.6. The United States government has officially described prolonged arbitrary detention as a violation of fundamental human rights. *See* 22 U.S.C. § 2151n(a) (barring U.S. assistance “to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including prolonged detention without charges”); 22 U.S.C. § 2304 (“encourag[ing] increased respect for human rights and fundamental freedoms throughout the world” and barring security assistance to any nation that engages in “gross violations of internationally recognized human rights” including “prolonged detention without charges and trial”); *see also Hilao v. Estate of Marcos*, 103 F.3d 789, 795 n.9 (9th Cir. 1996) (“Customary international human-rights law prohibits prolonged arbitrary detention.”); *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787, 795-96 (D. Kan. 1980), *aff’d*, 654 F.2d 1382 (10th Cir. 1981) (“Our review of the sources from which customary international law is derived clearly demonstrates that arbitrary detention is prohibited by customary international law.”). Breach of the international norm prohibiting arbitrary detention has been accepted widely as a basis for legal action under the ATS. *See Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1349 (N.D. Ga. 2002); *Eastman Kodak v. Kavlin*, 978 F. Supp.

¹ “A violation of rights . . . is committed as a matter of state policy when it is required or encouraged by law, clear custom, or usage, or by some official act or statement of a responsible high official.” Restatement § 702 n.2.

1078, 1092-95 (S.D. Fla. 1997); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-85 (D. Mass 1995); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994); *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 903 (N.D. Ga.1985).

Properly before this Court, therefore, are the claims of Elias Boneng, Dennis Vincent Frederick Brutus, Moraloki Kgobe, Reuben Mphela, and Lulamile Ralrala, all of whom were subjected to prolonged arbitrary detention as a matter of state policy. (Complaint ¶¶ 104-08.) Recognition of their claims furthers the principles enunciated in *Sosa* and thus advances the cause of all who have been or might in the future be arbitrarily detained.

Indiscriminate Shootings. Tragically common during the apartheid era was the indiscriminate infliction of violence upon the citizens of the South Africa. From the notorious Sharpeville massacre to the anonymous, routine drive-by shootings committed by the security police, state-sponsored shootings compose a baleful chapter in South Africa's history. Although "indiscriminate shooting" as such is not identified as a violation of binding international norms, customary international law does prohibit "cruel, inhuman, or degrading treatment" Restatement § 702. Likewise, a state "violates international law if, as a matter of state policy, it practices, encourages, or condones . . . a consistent pattern of gross violations of internationally recognized human rights." *Id.* Thus, a violation that, "committed singly or sporadically" might not derogate customary law, does so if state policy fosters a consistent pattern of gross violations. *Id.* cmt. m. A violation is "gross" if "it is particularly shocking because of the importance of the right or the gravity of the violation," such as where the state engages in "systemic

harassment . . . grossly disproportionate punishment [or] invidious racial or religious discrimination.” *Id.* The United States government has given official expression to these legal principles. *See* 22 U.S.C. § 2151n(a) (describing as a “pattern of gross violations of internationally recognized human rights” the “cruel, inhuman, or degrading treatment or punishment . . . or other flagrant denial of the right to life, liberty, and the security of person”); 22 U.S.C. § 2304(d)(1) (defining the term “gross violations of internationally recognized human rights” to include “cruel, inhuman, or degrading treatment or punishment . . . and other flagrant denial of the right to life, liberty, or the security of person”). *See also* Restatement § 404 cmt. a (“Universal jurisdiction is increasingly accepted for certain acts of terrorism, such as . . . indiscriminate violent assaults on people at large.”).

South Africa’s apartheid government, aided and abetted by the Defendants in this action, violated these customary norms when, for example, it inflicted violence upon Plaintiff Elsie Gishi, who was shot six times in the back while passing by a demonstration on her way home from work; when it inflicted violence upon Plaintiff Nosipho Manquba, who was shot randomly by the security police when he was but 8 years old; and when it inflicted violence upon Plaintiff Mzuhlangena Nama, who was shot in the leg and hospitalized for four months when the security police fired indiscriminately into a crowd holding a commemoration march in 1982. (Complaint ¶¶ 76, 80, 84.)

Apartheid. At the root of the separately actionable violations discussed above was, of course, the state-sponsored systematically racist policies collectively referred to as

apartheid. The Restatement makes clear that “[r]acial discrimination is a violation of customary [international] law when it is practiced systematically as a matter of state policy, e.g., apartheid in the Republic of South Africa.” Restatement § 702 cmt. i. Beginning in the 1950s the United Nations General Assembly condemned apartheid. *See* G.A. Res. 820 (IX) (1954); 1016 (XI) (1957); 1178 (XII) (1957); 1249 (XIII) (1958); 1375 (XIV) (1959). In 1962 the General Assembly called for a boycott of South African goods and for member states to break all ties with the South African regime. *See* G.A. Res. 1761 (XVII) (1962). In 1968 the U.N. General Assembly declared apartheid to be a crime against humanity. *See* G.A. Res. 2396 (XXIII) (1968). This trend continued until the apartheid regime was dismantled. No one can seriously dispute that apartheid constituted a notorious and ongoing violation of customary law. Nor can the corporate Defendants in this action plausibly deny their knowledge of the mass human rights violations committed by the South African government during the apartheid era.²

Ultimately, although the *Sosa* Court counseled caution, it made clear that the violation of bona fide norms of customary international law will give rise to claims under the ATS. Amici welcome this development in American jurisprudence and join the *Khulumani*

² The *Khulumani* Plaintiffs allege that the multinational corporate defendants aided and abetted the apartheid regime and the human rights abuses perpetuated under the apartheid system. The Second Circuit has ruled repeatedly that private parties may be held liable under the ATS. *See Wiwa v. Royal Dutch Pet. Co.*, 226 F.3d 88, 104 (2d Cir. 2000) (“[T]he ATCA reaches the conduct of private parties provided that their conduct is undertaken under the color of state authority or violates a norm of international law that is recognized as extending to the conduct of private parties.”); *Kadic*, 70 F.3d 239 (“[W]e hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”)

Plaintiffs' efforts to vindicate their respective individual rights on the grounds outlined above.

IV. THE *SOSA* COURT URGED CAUTION WHERE FOREIGN SOVEREIGNTY IS JEOPARDIZED, BUT THE CONCERNS OF THE SOUTH AFRICAN GOVERNMENT EXPRESSED IN THE MADUNA DECLARATION ARE NOT IMPLICATED BY THIS ACTION.

The *Sosa* decision goes further than admonishing lower courts to exercise discretion in the recognition of private causes of action under the ATS. The Court also discussed in dicta the “possible limitation” of a “policy of case-specific deference to the political branches.” *Sosa*, 124 S. Ct. at 2766 n.21. As this Court undoubtedly is aware, the Supreme Court specifically discussed in footnote 21 a declaration sent to this Court by South African Minister of Justice Penuell Mpapa Maduna:

[T]here 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. *See In re South African Apartheid Litigation*, 238 F. Supp. 2d 1379 (JPML 2002) (granting a motion to transfer the cases to the Southern District of New York). 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 ‘victors’ 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.” Declaration of Penuell Mpapa Maduna, Minister of Justice and Constitutional Development, Republic of South Africa, reprinted in App. to Brief for Government of Commonwealth of Australia et al. as Amici Curiae 7a, ¶ 3.2.1 (emphasis deleted). . . . 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.

*Id.*³

³ In a similar vein, the interests of the United States government are cited as a concern. As the United States government advised the Supreme Court in briefing the *Sosa* case, however, “The State Department has determined that, *to the extent that the pending apartheid litigation*

Amici are interested in this issue for two reasons. First is the potential in cases other than those before this Court for interference in an ATS action by actors (or their cohorts) alleged to have committed the violations raised in the case. Because this action involves claims arising under a distinct, minority-controlled predecessor regime no longer in power, that concern need not be addressed in this action. There is, however, a more insidious peril arising from footnote 21—the potential for unquestioning and unwavering deference by a United States court to the expressions of an interested government, such as those in Minister Maduna’s declaration. *Sosa* requires that a court give serious weight to such expressions, but nothing in the *Sosa* opinion demands blind obedience to them. Amici strongly urge the Court to scrutinize Minister Maduna’s claims as they apply to the *Khulumani* action (as distinguished from the class-action reparations cases pending before this Court). This Court should not set a precedent of undiscerning adherence to an interested government’s general expressions of concern. It should instead provide an example to later courts of deliberation and scrutiny, of looking through the nominal into the substantive. Doing so here will reveal that the concerns expressed in Minister

impedes South Africa’s domestic efforts to promote both reconciliation and equitable economic growth, the litigation will undermine the United States foreign policy objectives of promoting both foreign investment in South Africa and redress for the wrongs of apartheid.” Brief for the United States as Respondent Supporting Petitioner at 43, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (Nos. 03-339, 03-485) (emphasis added). As will be seen, regardless of what may be said of the class actions pending in this Court, the *Khulumani* litigation does not to any extent whatsoever impede South Africa’s domestic efforts to promote reconciliation and equitable economic growth.

Maduna's declaration are not in fact implicated by this action.⁴

Failure to Redress Apartheid Abuses. Minister Maduna's initial concern is that "the litigation appears to suggest that the government of which I am a member, has done little or nothing about redressing the ravages of the apartheid system" (Exh. A ¶ 3.3.) The *Khulumani* action is premised exclusively on acts committed during the apartheid era. As Minister Maduna points out, the apartheid system was "formally and institutionally terminated by the election of the Mandela government on 27 April 1994." (Exh. A ¶ 3.3.) The Plaintiffs in this action have not impugned the efforts undertaken by the current South African government to redress the lingering effects of apartheid. The Plaintiffs seek no compensation from the current government of South Africa. This action involves corporate complicity in human rights abuses under a predecessor regime that Minister Maduna himself recognizes as illegitimate. The basis for this action in no way suggests that the current government "has done little or nothing about redressing the ravages of the apartheid system."

Surrogate Government. Minister Maduna stated that the "principal reason" for his declaration was that the litigation seeks "in effect . . . to set up the claimants as a

⁴ A copy of Minister Maduna's declaration is attached as Exhibit A. It warrants mention that footnote 21 discussed the Maduna declaration only in the context of "several class actions" pending in this Court and it cited the order consolidating three class-action reparations cases: *Frank Brown et al. v. Amdahl Corp.*, *Lungisile Ntzebesa et al. v. Citigroup, Inc. et al.*, and *Nyameka Goniwe, etc. v. IBM Corp. et al.* The Supreme Court placed the Maduna declaration against its proper backdrop—that of the far-reaching class actions which seek broad relief that may well invade the province of the current South African government.

surrogate government.” (Exh. A ¶ 7.) The *Khulumani* Plaintiffs are individuals who seek not reparations, but individualized relief tailored to the suffering each experienced.⁵ Unlike the other “apartheid cases” pending before this Court, the *Khulumani* action is not now and will not become a class action. Each *Khulumani* Plaintiff seeks only individualized traditional tort damages. The class-action reparations cases, such as the *Ntzebesa* and *Digwamaje* cases, purport to represent a class of virtually all black South Africans born during the period 1948 to 1994. Those suits seek to address every disparity and abuse associated with the apartheid regime, and accordingly seek global relief of the sort that raises genuine concerns about the power of a United States court to intervene in South African domestic policy. The *Khulumani* suit has no such pretensions and seeks no such relief.

Suing Domestic Corporations. Minister Maduna expressed grave concerns over the attempt to “impose liability and damages on corporate South Africa.” (Exh. A ¶ 7.) Accordingly, says Minister Maduna, the administration resolved to oppose “attempts to undermine South African sovereignty through actions such as the reparations lawsuit filed . . . by a US lawyer, Mr Ed Fagan, against two South African mining firms” (*Id.*) The *Khulumani* action does not include as a Defendant any South African mining firm. Indeed, this action is not brought against *any* domestic South African company. Nor is attorney Ed Fagan *in any way* associated with the *Khulumani* action. Thus, this case does

⁵ The organization Khulumani is a Plaintiff as well, but seeks only recovery of the costs incurred in assisting apartheid victims to recover from their injuries.

not implicate Minister Maduna's concerns in this regard.

Affirmative Action Programs. Of legitimate concern to Minister Maduna and the current South African government are the alleged intentions of the *Ntzebesa* and *Digwamaje* parties to “creat[e] a historical commission and [to] institut[e] affirmative action programs” in South Africa. (Exh. A ¶ 10.) The current South African government views these matters as “essentially political in nature.” (*Id.* ¶11.) Again, the *Khulumani* Plaintiffs seek no relief beyond individualized damages for specific, individual harms. At no time have the Plaintiffs in this action sought to create a historical commission or to institute affirmative action programs. Nor do the *Khulumani* Plaintiffs seek any form of political redress for the harms they suffered; they seek only the compensation available in traditional tort actions. Though the people of South Africa may deserve the broad-based relief described in Minister Maduna's declaration, that is indeed a matter of domestic policy that could not properly be sought through litigation in a foreign court. Accordingly, although Minister Maduna's distress is legitimate, it simply has no relation to the *Khulumani* action because this action seeks none of the relief that Minister Maduna describes.

Foreign Investment. Finally, Minister Maduna expresses concern that “reparations” lawsuits “would discourage much needed foreign investment” and undermine the nation's economic stability. (Exh. A ¶ 12.) Whether the broad-based class actions pending in this Court might discourage foreign investment may be subject to dispute. However, it is incredible at the least to suggest that claims by 82 Plaintiffs against a number of private

corporations would destroy South Africa's economy. As Nobel laureate and Columbia economics professor Joseph Stiglitz pointed out in his earlier attestation before this Court, this legal action says nothing about the South African government's attitude toward business. *See* Letter of Joseph E. Stiglitz (Aug. 6, 2003). As Professor Stiglitz points out (and as Americans have learned over the past few years), addressing corporate misconduct brings confidence to consumers and markets, creating "a more positive business climate." *Id.* Professor Stiglitz draws a convincing analogy:

Businesses . . . ask, what are the opportunities for profits today and in the future? If a firm has polluted in the past, making it pay for that *past* pollution may deter it from polluting in the future, but will not deter it from entering into profitable investments. No one would argue that one should not impose fines or penalties for past pollution because doing so would discourage future investment. Such arguments would imply that no firm would ever be held accountable for past misbehavior.

Id. Corporate responsibility and foreign investment are not mutually exclusive. If it is profitable to invest in South Africa, foreign corporations will do so regardless of whether other corporations are held accountable for *past* misconduct under a distinct and illegitimate predecessor regime. If it is not profitable to invest in South Africa, foreign corporations will not do so, regardless of how this legal action might turn out. Minister Maduna's concerns may be sincere, but they are misplaced.

The TRC Commission. Absent from Minister Maduna's declaration is any reference to the TRC's findings with respect to doing business under the apartheid regime:

➤ "Certain businesses . . . were involved in helping to design and implement apartheid policies." TRC Report, Vol. 4, Ch. 2 ¶ 161.

➤ “Business failed in the hearings to take responsibility for its involvement in state security initiatives specifically designed to sustain apartheid rule” TRC Report, Vol. 4, Ch. 2 ¶ 161.

➤ “After the Sharpeville massacre in 1960, the chairman of the largest Swiss bank, [Defendant] UBS, was asked: ‘Is apartheid necessary or desirable?’ His response was: ‘Not really necessary, but definitely desirable.’” TRC Final Report, Vol. 6, Sec. 2, Ch. 5 ¶ 18.

➤ “It is also possible to argue that banks that gave financial support to the apartheid state were accomplices to a criminal government that consistently violated international law.” TRC Final Report, Vol. 6, Sec. 2, Ch. 5 ¶ 26.

➤ “The recognition and finding by the international community that apartheid was a crime against humanity has important consequences for the victims of apartheid. Their right to reparation is acknowledged and can be enforced in terms of international law.” TRC Final Report, Vol. 6, Sec. 5, Ch. 1 ¶ 75.

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 Letter of June 27, 2003. Also relevant to this issue is a letter dated June 27,

2003, from the Office of the Presidency of South Africa to Khulumani. (Exhibit B.) The author of the letter, Frank Chikane, Director-General, addressed public comments he recently had made with respect to claims brought in the United States courts. The letter clarifies that Director-General Chikane's comments were directed toward "reparations claims" by persons who "claim to be representatives of South Africa or all of the victims of apartheid system" Letter of Frank Chikane (Rev), Director-General, The Presidency: Republic of South Africa (June 27, 2003), filed October 22, 2003. (Exh. B at 2.) This actually is in keeping with the concerns expressed in Minister Maduna's declaration. However, the *Khulumani* Plaintiffs do not seek "reparations;" nor do they claim to represent South Africa or all the victims of apartheid. They bring claims only on behalf of themselves for damages they suffered as individuals, or as representatives of deceased individuals. Director-General Chikane recognizes the legitimacy of such claims, stating that he "accept[s] that any individual South African or groups of South Africans have the right to choose the route of legal suits and claims against South African companies outside the country" *Id.* Although this action does not involve any South African companies, the principle of honoring the right to bring individualized claims remains intact. This Court should consider the remarks of Director-General Chikane alongside those of Minister Maduna.

Amici join the Plaintiffs in this action in urging the Court not simply to accept the declaration of Minister Maduna at face value, but instead to inquire into its merits, or at least its application to the facts of this specific case. Doing so reveals that it would be

erroneous and unjust to derail the *Khulumani* action based upon Minister Maduna's letter.

V. CONCLUSION

The United States Supreme Court has held open the doors of the American court system to those, such as Plaintiffs here, who have suffered denial of the most fundamental and universally recognized human rights. Though the Court counseled caution in recognizing claims under the ATS, it did not in any way suggest that the lower courts ought to close the door to meritorious claims involving binding international norms. This is such a claim. Despite the current South African government's legitimate concerns with respect to some claims pending before this Court, the *Khulumani* suit does not implicate those concerns. Careful consideration of these issues will set the standard of legal craftsmanship for future courts to emulate—one of enlightened fairness and basic justice, which is precisely the standard endorsed by *Sosa*.