

**BRIEF OF *AMICI CURIAE* FORMER COMMISSIONERS AND
COMMITTEE MEMBERS OF SOUTH AFRICA’S TRUTH AND
RECONCILIATION COMMISSION IN SUPPORT OF APPELLANTS**

We, former Commissioners and Committee members of South Africa’s Truth and Reconciliation Commission (“TRC” or the “Commission”), urge this honourable Court to reverse the decision of the district court below and to permit this litigation to proceed.

In our collective opinion, formed of years of intimate experience in shaping and carrying out the mission of the TRC, litigation seeking individual compensation against multinational corporations for aiding and abetting the commission of gross human rights abuses during apartheid does not conflict, in any manner, with the policies of the South African government, or the goals of the South African people, as embodied in the TRC. To the contrary, such litigation is entirely consistent with these policies and with the findings of the TRC.

I. INTRODUCTION: THE TRUTH AND RECONCILIATION COMMISSION

The Truth and Reconciliation Commission was established under the Promotion of National Unity and Reconciliation Act, 1995, Act 95-34 (the “Act”), enacted by the South African Parliament, as required by the South African Constitution. The Commission was charged with investigating and documenting human rights violations committed under the South African apartheid regime from March, 1960 to May, 1994. The TRC was to take “measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights.” *Preamble to Act*. As discussed further

below, the TRC had the power, through its Amnesty Committee, to grant amnesty from civil and criminal prosecution to qualifying applicants.

The Commission also was charged with making recommendations to the South African President and Parliament regarding specific reparation and rehabilitation measures. *See Act § 4(f)*. It issued its report (the “TRC Report”) to the President and Parliament in phases, beginning in October, 1998.

More generally, the TRC continued the process of assessing and healing the damage inflicted by apartheid upon the people of South Africa, using an approach built on the principle of reconciliation and linked to the healing values of truth and confession. Two points are crucial: First, the TRC was the continuation of a long process, not an end. It was not meant to be, nor was it, an exhaustive effort to redress and repair the ravages of apartheid. This effort continues. As the undersigned Archbishop Desmond Tutu, former TRC Chairperson, has observed elsewhere: “The objective of the TRC was to promote reconciliation and not to achieve it.”¹ It was always contemplated that additional measures would be necessary, and as we explain herein, this litigation is one such additional measure.

Second, the South African approach, as embodied in the TRC, did not rest upon the *unilateral* release by victims of apartheid-era abuses of the claims and grievances against those who had caused them harm. Nor were those responsible for abuses passively freed of the obligation to provide redress or compensation. Rather, our approach to reconciliation required bilateral efforts, if release or amnesty was to be obtained, and the obligation of truth was imposed

¹A Long Night’s Journey Into Day: South Africa’s Search for Truth & Reconciliation (California Newsreel 2000).

not just on victims, but on those responsible for harm. Indeed, such bilateral responsibilities are inherent to the very concept of reconciliation.²

The Commission was well aware of the virtues of providing amnesty for deserving parties, and a framework was crafted for granting amnesty from civil and criminal liability to qualifying applicants. However, none of the multinational corporations named as defendants in this litigation were granted amnesty by the Commission; indeed, none participated in the TRC hearings – not even in those hearings specifically investigating the role of business in supporting apartheid-era abuses. Their attempt now to invoke the TRC, or the policies underlying it, as a shield from a civil damages action must rest on one of two claims: that the TRC was meant to provide the exclusive remedies to victims of apartheid-era abuses, or that these non-participating corporations are entitled to amnesty from civil liability because of the TRC process. Both claims are transparently false.

II. THE CLAIM THAT THIS ACTION CONFLICTS WITH THE TRC DOES NOT WITHSTAND SCRUTINY.

We are aware that the United States Supreme Court in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), observed in a footnote that, in certain circumstances, United States courts may limit the availability of relief in federal court for violations of customary international law out of deference to the political branches' views that relief would interfere with governmental policies. *See id.* at 2766 n.21. We are further aware that the U.S. Supreme Court referred to the class actions consolidated as *In Re South Africa Apartheid Litigation*, 238 F.Supp.2d 1379 (J.P.M.L. 2002) and to the claim of Penuell Mpapa Maduna, Minister of Justice and Constitutional

²In this way, the concept of *reconciliation* may be said to differ from its lesser-known relative *conciliation*, which might favor unilateral approaches to conflict resolution and healing.

Development, Republic of South Africa, that those class actions “interfere with the policy embodied by” the TRC. *Id.*

We are compelled to make clear our collective view that it is simply fallacious to assert that actions for individual damages against corporations that participated in or aided and abetted violations of international law interfere with the policies embodied in the TRC. We respectfully submit that this assertion does not withstand even a cursory inspection.³

**A. THE TRC GRANTED AMNESTY TO QUALIFYING APPLICANTS,
BUT NOT TO THE DEFENDANTS.**

The TRC, through the Amnesty Committee, was given the power to grant civil and criminal amnesty to natural persons who applied for it and satisfied certain obligations. *See* Act § 20; TRC Final Report, (6th Vol. 2003) (“TRC Final Report”) at 84. The possibility of amnesty was central to South Africa’s model of reconciliation as a means of moving into the post-apartheid era. The granting of amnesty, in turn, obliged the government to pay reparations to victims of apartheid. Since the grant of amnesty to qualifying individuals denied victims the ability to seek redress from those individuals in court, the government became obligated to make

³We are also aware the U.S. Supreme Court referenced the view of the U.S. Department of State relating to Minister Maduna’s statement, but we observe that the State Department urged deference to Minister Maduna’s claim of interference only to the extent it was valid. In the *Sosa* case, the State Department wrote: “The State Department has determined that, *to the extent that the pending apartheid litigation 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).

We take this to mean, quite naturally, that to the extent this litigation does not impede South Africa’s domestic objectives – and it does not – the U.S. State Department would not have the same foreign policy concerns.

reparations counterbalancing the amnesty grant.⁴

In the end, in light of the amnesty that was granted to various perpetrators of abuse and other factors, the TRC recommended to the President and Parliament that a financial grant of reparations in the amount of \$375 million be awarded to 22,000 victims identified through the TRC process. Unlike the grant of amnesty, however, the TRC did not have the power itself to make this award but could merely recommend it to government. In April, 2003, President Thabo Mbeki announced a one-time payment of approximately \$74 million (approximately \$300 million less than recommended) to 19,000 victims whose needs had been characterized as urgent.

Two points regarding the financial reparations are essential: First, the payment of reparations was linked to the grants of amnesty, and the receipt of reparations by victims did not amount to a release of their claims for compensatory damages against those who had not been granted amnesty. Second, the reparations actually paid to victims were far less than the TRC determined appropriate in light of the amnesty actually awarded, and some victims received no financial reparation at all.

Many applicants received amnesty. However, no corporation was given amnesty – neither South African corporations, nor the multinational corporations named as defendants herein. The notion then that defendants are entitled to any amnesty from civil suit because of a policy embodied in the TRC is simply mistaken. A means of amnesty was established, but defendants were not entitled to it. The ability of the TRC to grant amnesty to qualifying applicants belies the notion that some policy embodied in the TRC amounted to an implicit grant

⁴*See, e.g.*, TRC Final Report at 110 (“[B]ecause the South African amnesty process deprives victims of access to the courts, its international legitimacy depends on the provision of adequate reparations to the victims of gross violations of human rights.”).

of amnesty to multinational corporations that aided and abetted the apartheid regime.⁵

Simply put, the TRC never contemplated that victims would be precluded from seeking compensatory damages from perpetrators of abuses, unless the TRC had granted that perpetrator amnesty. To the contrary, the Commission recognized that victims and their families have a right to institute civil proceedings unless the defendant applied for and was granted amnesty. TRC Final Report at 100.

B. THIS LITIGATION IS CONSISTENT WITH, AND FLOWS FROM, THE TRC'S FINDINGS REGARDING THE ROLE OF BUSINESS DURING APARTHEID.

In addition to identifying human rights violations and victims by government actors, the TRC held hearings directed at determining the nature and extent of involvement of various sectors of civil society in supporting the apartheid regime. As part of its information-gathering function, the TRC investigated how various institutions aided and abetted gross violations of human rights:

The Commission was obliged to identify all persons, authorities, institutions and organizations involved in gross violations of human rights. This meant that it had to go beyond the investigation of those that had actually committed gross violations of human rights and include those who had aided and abetted such acts. This is consistent with the definition of gross violations of human rights, which includes attempts, conspiracy, incitement, instigation, command or procurement to commit such acts.

TRC Report (Vol. 1 1998) at Ch. 4 ¶137.

One hearing focused on the business sector. *See* TRC Final Report at 150-155. As a result of the hearing, the TRC concluded that business involvement in gross violations of human

⁵Many of the factors favoring the award of amnesty to natural persons – central among them, the avoidance of civil unrest – do not similarly favor the award of amnesty to multinational corporations.

rights during the apartheid era fell within a broad range of complicity. Notably, the Commission found that some businesses were directly implicated in the human rights abuses of the apartheid regime, including by having “direct involvement in shaping government policies or engaging in activities directly associated with repressive functions.” TRC Final Report at 140.

Indeed, the TRC considered that, in principle, a private corporation might be liable to victims of apartheid as a matter of civil law, quite independently of the TRC process – just what this litigation seeks to achieve.⁶ For example, the Commission found that “[c]ertain businesses . . . were involved in helping to design and implement apartheid policies.” TRC Report (Vol. 4 1998) at Ch. 2 ¶161. It concluded that, “To the extent that business played a central role in helping to design and implement apartheid policies, it must be held accountable.” *Id.* at Ch. 2 ¶23. The Commission also found that Swiss Banks, including some of the defendants in this litigation, “played an instrumental role in prolonging apartheid from the time of debt crisis in

⁶In its initial report, the TRC had emphasized that non-state entities could be *criminally* liable for crimes against humanity under international law, irrespective of whether their conduct was related to crimes by state actors:

Earlier definitions of crimes against humanity presumed that such crimes could only be committed by a government or those acting on behalf of a government. Implicit in this approach was an assumption that only an institution with the power and resources of a government would have the capacity to commit crimes on the scale necessary to qualify as crimes against humanity. Over the past fifty years, it has become clear that certain organizations or groups outside government are capable of committing crimes on a large scale or in a systematic manner. The Commission therefore endorsed the definition of crimes against humanity contained in the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind which includes acts committed by non-state actors.

TRC Report (Vol. 1 1998) at Ch. 4, appendix ¶26.

1985 and onwards.”⁷ *See* TRC Final Report at 146. And it noted that it could be argued that “banks that gave financial support to the apartheid state were accomplices to a criminal government that consistently violated international law.” *Id.* at 146-47. Thus, the TRC expressly recognized bases for civil liability of certain businesses for their actions, including the aiding and abetting of the apartheid regime.

In investigating the role of business in apartheid-era abuses, however, the Commission was hampered by business’s lack of active and forthcoming participation. It is troubling now to encounter the claim that either the TRC or the policies embodied in it could somehow relieve businesses such as defendants from civil liability, because the TRC was disappointed both by the lack of participation of business in the hearings and the unwillingness of businesses that did participate to accept accountability. In fact, *not one* of the corporations that are defendants in this litigation came forward to participate in the TRC’s hearings, and many of the businesses expressly invited to participate did not. For example, the multinational oil corporations did not even respond to their invitation to participate in the business hearings. *See* TRC Report (Vol. 4 1998) at Ch. 2 ¶5. Moreover, those businesses that did participate (not defendants) failed to accept accountability for their complicity in apartheid-era abuses. Rather, to the extent business participated at all in the TRC process, it claimed to do so only “to promote understanding of the role of business under apartheid and to explore areas where business failed to press for change,”

⁷The TRC observed in its Final Report: “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 at 144.

but not to admit or take responsibility for any contribution to gross human rights violations.⁸ *Id.* at Ch. 2 ¶13. This led the Commission to conclude, for example, that: “Business failed in the hearings to take responsibility for its involvement in state security initiatives specifically designed to sustain apartheid rule.” *Id.* at Ch. 2 ¶166.

Thus, the corporations named as defendants herein did not participate in the central forum established for truth and reconciliation in South Africa. We have already noted that release from liability for the gross human rights violations of the apartheid era requires more than passive measures. Defendants in this litigation were not granted amnesty, they did not appear at TRC hearings, and they have not acknowledged any complicity with the gross human rights violations of the South African apartheid-era government. What is more, the Commission’s hearings indicated the potential for the liability of business for civil damages.

The conclusion of the TRC’s mandate did not spell the end of efforts toward redress, reconciliation, and establishing the truth about apartheid. The victims of South African apartheid were never told that they would be able to obtain no compensation from anyone, whether those who had caused harm were granted amnesty or not – quite the contrary. They were told that certain individuals who acknowledged their accountability would be given amnesty. Truth and acknowledgment were exchanged for accountability. Defendants herein did not participate in that exchange; businesses in South Africa did so meagerly.⁹

⁸With regard to all civil society sectors, the TRC observed that their submissions were “generally characterized by defensiveness and a failure to come to terms with the role these sectors had played in supporting the *status quo*, whether by commission or omission.” TRC Report (Vol. 5 1998) at Ch. 6 ¶28.

⁹South African business did contribute some money to the President’s reparation fund, but, as the Commission observed in its Final Report, the small amount of money contributed was

The truth about apartheid – about its causes and effects, about how and why it was able to survive as long as it did, about who was responsible for its maintenance – continues to emerge. This litigation is one element of that emergence; it is not crude “victors’ justice.” It is just “justice.” It is frankly puzzling why determining through this litigation the accountability under international law of defendants – who did not participate in the TRC process, and who simply deny liability – could even arguably be foreclosed by the TRC, its processes, or the policies embodied in it. Although we are cognizant that it is not a perfect vehicle, we are well aware of the virtues of the United States’ adversarial system of justice: through it, truths do emerge, accountability under the law is established, redress (when warranted) can be made. There was absolutely nothing in the TRC process, its goals, or the pursuit of the overarching goal of reconciliation, linked with truth, that would be impeded by this litigation.¹⁰

**C. EQUITABLE ECONOMIC GROWTH IS NOT THREATENED
 BY THIS LITIGATION.**

We are also aware of the potential concern that individual litigation seeking compensatory damages against multinational corporations could somehow discourage equitable economic growth in South Africa and write briefly to counter this misconception. Businesses seeking to avoid civil liability certainly have the incentive to make this claim. However, based on our experience with the Commission, and for many of us our years active in the disinvestment

a “paltry amount when one considers the massive amount needed to repair the inequities and damage caused to entire communities.” TRC Final Report at 142.

¹⁰Indeed, practically speaking, the obtaining of compensation for victims of apartheid-era abuses from corporations liable for aiding and abetting those abuses could supplement the very modest amount per victim awarded as reparations from the TRC process, and thus promote reconciliation by addressing the needs of those victims under-served and dissatisfied by the small monetary value of the TRC reparations.

campaign against apartheid, this claim makes no sense.

The payment of compensatory damages to satisfy *past* liability should not affect a business's decision to make investment in the future. If there are sound investments in South Africa, if there are opportunities for profit, businesses will take advantage of them. Moreover, it is important to note that many businesses justified their investment in the apartheid regime based on narrow attention to their profit motive. The only way to ensure that business will not support and sustain regimes that are responsible for gross human rights violations in the future is to make it known that such conduct will not ultimately be profitable. This, of course, is one larger purpose, as we understand it, of this litigation.

This message – that supporting regimes inflicting gross human rights violations on its people is ultimately unprofitable – is one that is important to the people of South Africa, based on their concrete experiences. We have little doubt that apartheid would not have occurred as it did without the active and knowing support of certain businesses. The continuation of this litigation comports with this greater purpose of South Africa's post-apartheid era, and by giving voice to those harmed by multinational corporations aiding and abetting apartheid, it assists the healing and reconciliation process.

Thus, any concern that holding businesses liable for their past participation in or aiding and abetting of gross human rights abuses of the apartheid regime will frustrate equitable economic growth in South Africa is misplaced. Economic growth in South Africa would have been infinitely more equitable, and likely more abundant, if the apartheid regime had not persisted as it did. To the extent businesses did participate in or aid and abet that regime, holding them liable will only deter future threats to radically inequitable economic growth in South

Africa and elsewhere.

III. CONCLUSION

Even if viewed with deference, the claim that litigation seeking individual compensation against multinational corporations for aiding and abetting the commission of gross human rights abuses may impede the goals and policies embodied by the Truth and Reconciliation Commission cannot withstand scrutiny. We, former Commissioners and Committee members of the Commission, respectfully urge this honourable Court to reverse the decision of the lower court.