

Justice for Apartheid Crimes

Corporations, States, and Human Rights

REPORT OF A SYMPOSIUM HELD AT
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Introduction

This symposium explored issues surrounding post-apartheid justice and redress in South Africa for human rights abuses in which corporations are allegedly implicated. In close collaboration with the Khulumani Support Group, a South African membership-based organization comprising approximately 55,000 survivors of apartheid human rights violations, the symposium considered broader questions around corporate accountability, post-conflict redress, and international relations through the lens of the *Khulumani et al v. Barclays et al* lawsuit currently underway in the New York Southern District Court. Highlighted by commentators such as John Pilger as a critical action by citizens against the abuses of corporations, this lawsuit is one of the most provocative and controversial currently before the United States courts.¹

The original lawsuit brought by Khulumani in 2002 constituted a damages claim against twenty-three corporations with headquarters in the United States, which were charged with aiding and abetting human rights violations committed by the apartheid regime. The 2002 claim and an amended claim in 2008 invoked the provisions of the Alien Torts Claim Act, which grants jurisdiction to US Federal Courts over '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'.² The amended claim in 2008 identified Khulumani and the following thirteen individual direct victims of apartheid or their representatives as the plaintiffs in the case: Sakwe Balintulo, Dennis Brutus, Mark Fransch, Elsie Gishi, Lesiba Kekana, Archington Madondo, Mpho Masemola, Michael Mbele, Catherine Mlangeni, Reuben Mphela, Thulani Nunu, Thandiwe Shezi, and Thobile Sikani. The amended claim also reduced to eight the

number of accused corporations: Barclays National Bank Ltd, Daimler AG, Ford Motor Company, Fujitsu Ltd, General Motors Corporation, International Business Machines Corporation, Rheinmetall Group AG, and Union Bank of Switzerland AG. The named plaintiffs represent six categories of human rights violations committed by the apartheid regime, namely forced labour, arbitrary detention, torture, indiscriminate shooting, extrajudicial killing, and sexual assault. Central to the Khulumani case is the claim that the defendant corporations were instrumental in encouraging and furthering apartheid abuses and that the system of apartheid relied crucially on the corporations' financial and logistical support.

The Khulumani case encapsulates numerous interlocking issues regarding the 'post-apartheid moment, as well as having global implications. On the one hand, it confronts the question of reparations for apartheid victims, the alleged complicity of corporations in the conduct of the apartheid government, and the ways in which South Africa continues to grapple with its past. On the other, the lawsuit asks questions concerning the legitimacy of the use of US law to prosecute corporations for crimes committed in South Africa, the foreign relations implications for both the US and South African governments, and the related question of the avenues through which corporations as transnational institutions can be held accountable in the absence of a supra-territorial legal framework.

The symposium assembled experts from the fields of law, human rights, transitional justice, politics, international relations, and history; representatives from Khulumani and the law firm handling their case, Michael Hausfeld LLP; as well as 100 academics, students, and practitioners to discuss the key issues emanating from the case and the broader questions it exposes. Although none of them attended, representatives from the US and South African governments and all of the corporations named in the 2002 and 2008 claims were invited to the symposium. The purpose of this report is

1. Pilger, J. (2009) 'Apartheid's Legacy', *Mail and Guardian Online*, 28 January 2009, available at <http://www.mg.co.za/article/2009-01-28-apartheids-legacy>.

2. United States Code, Section 1350, 'Alien Torts Claim Act'.

to reflect the discussions at the symposium and to contribute to ongoing debates regarding corporate accountability, transitional justice, post-apartheid redress, and the use of domestic and international law in responding to human rights violations.

Opening Remarks

Professor Colin Bundy, Principal of Green Templeton College and former Vice Chancellor of the University of the Witwatersrand, opened the symposium by placing the *Khulumani et al v. Barclays et al* case in the broader context of South Africa since the establishment of the Truth and Reconciliation Commission (TRC). While the TRC was vital in highlighting the country's destructive divisions of class and race, one of its major shortcomings was the failure to compel multinational corporations (MNCs) to testify regarding their actions during

apartheid, particularly the financing and supply of technology to the apartheid state. This failure to hold the aiders and abettors of apartheid accountable continues to resonate in present-day South Africa, not least among the victims of apartheid, many of whom seek redress directly from the backers of the former regime.

Professor Bundy questioned whether, at the broader level, there is sufficient international will – perhaps even scope for the creation of a specialized international court – to address violations of human rights committed by transnational corporations, given that South Africa is not an isolated example of this phenomenon. Such international support would greatly aid the quest for reparations by activist groups such as Khulumani and the broader promotion of human rights in South Africa and elsewhere.

SESSION ONE:

Khulumani et al v. Barclays et al: The Court Case in Context

Chair: **Dr Phil Clark** (University of Oxford)

In this session, the speakers introduced the *Khulumani et al v. Barclays et al* court case and situated it in the wider context of the pursuit of post-apartheid justice, accountability, and human rights in South Africa. They emphasized the importance of the case in addressing major structural problems, principally political and socio-economic inequalities that defined the apartheid era and continue to affect ordinary South Africans.

Background to Khulumani et al v. Barclays et al

Dr Marjorie Jobson (*Khulumani Support Group*)

Dr Jobson began by asserting that the *Khulumani* case concerned more than reparations; that it was fundamentally about justice and accountability for human rights violations committed under apartheid. This type of case is crucial in a globalized context, in which corporate power increasingly competes directly with the state and governments are increasingly reluctant to regulate corporations for fear of obstructing the flow of global capital. Groups such as *Khulumani* recognize the importance of utilizing the powerful potential for humiliation offered by globalization, by naming and shaming corporations that violate human rights in order to alter corporate behaviour and deliver justice and accountability for the victims of corporate violations.

In 2007 judges in the New York Southern District Court were forced to recuse themselves because several judges held shares in one or more of the corporations named in the lawsuit.

Jobson outlined the nature and evolution of the *Khulumani* case, which now involves litigation only against corporations that held direct and exclusive contracts with the apartheid state. In other words, the case targets corporations that had full knowledge of the implications of their actions in supporting apartheid policies. This underscores the role of corporations in encouraging and furthering apartheid abuses and also the reliance of the state on corporate assistance. In 1960, international banks, including Barclays and UBS, gave a US\$40m rolling loan to the South African government, while motor vehicle manufacturers such as Daimler Chrysler provided police and military vehicles that were used in crackdowns in black townships.

The *Khulumani* case began in 2002 with eighty-seven individual claimants seeking damages from the corporations in question, but over time it evolved into a class action. From the outset, the South African government opposed the *Khulumani* litigation, initially by arguing that the TRC had dealt sufficiently with the issues of financial support for apartheid, and then, when the *Khulumani* case shifted to the US courts under the Alien Torts Claim Act, stating that the move violated national sovereignty. The *Khulumani* case has increasingly won support from prominent South Africans such as Archbishop Desmond Tutu and representatives of the Council of Churches, while key international figures such as Joseph Stiglitz have also supported the lawsuit and helped increase the media coverage of the case.

The *Khulumani* case has faced significant legal challenges, not least in 2007 when the 2nd Circuit judges in the New York Southern District Court were forced to recuse themselves because several judges held shares in one or more of the corporations

named in the lawsuit. In the meantime, however, the newly elected governments in the United States and South Africa have raised hopes of a more favourable political environment for the Khulumani case and greater possibilities for transferring the gains of the lawsuit into broader corporate accountability and further recognition of the lasting legacies of apartheid.

The Court Case and the Future of Human Rights in South Africa

Professor Paul Gready (University of York)

Professor Gready focused on the importance of the Khulumani case for the promotion of economic and social rights in post-TRC South Africa. He cited Mahmood Mamdani's critique of the TRC that it had taken too narrow an approach to issues of human rights and, in focusing on direct perpetrators of human rights violations under apartheid, had failed to address the beneficiaries of apartheid policies.

In addressing human rights in periods of transition, Professor Gready explored the new relations that have developed between human rights groups and the South African state since 1994. This has involved significant negotiation of roles and micro-political repositioning. While human rights groups are often inherently opposed to states, the post-apartheid situation afforded greater possibilities for collaboration with government, but also produced a period of destabilization for human rights organizations, given the major change of approach required. Professor Gready argued that the promulgation of South Africa's state-of-the-art Constitution, with its emphasis on human rights, had produced challenges for human rights groups. In particular, the new Constitution had encouraged many human rights groups to focus on legal problems and remedies rather than the post-apartheid economic context, which continues to fuel crime across the country.

Professor Gready contended that businesses have flourished in South Africa's transitional period, benefiting from the country's neoliberal economic

policies, which promote economic growth without necessarily benefiting the majority of South Africans. Most economic dividends of the transitional period have remained in the hands of a few individuals and groups, resulting in insufficient economic transition in the country as a whole. Furthermore, the growing discourse of 'corporate citizenship' all too often is forward-looking, ignoring corporate responsibility and the need for redress for past violations. New political and economic realities in South Africa have created new realms of exclusion and erosion of public space and discourse – issues magnified during the xenophobic violence in South Africa in early 2008. The Khulumani case is important for highlighting many of these continuing structural issues, particularly in the economic realm.

The Khulumani case highlights other crucial issues that are currently in flux in South Africa, as Professor Gready proceeded to demonstrate, particularly questions of national sovereignty and the responsibility of non-state actors in committing and aiding past human rights violations. At the heart of the Khulumani case is the statement that South Africa's national sovereignty is threatened more by corporate violations against citizens than by seeking redress for these actions through foreign courts. As the increasingly important principle of the 'responsibility to protect' emphasizes, state sovereignty not only implies control over territory and peoples but state responsibilities toward citizens, not least protection from harm and respect for human rights. Where states show themselves to be unwilling or unable to protect their own citizens, there is scope for international intervention.

Although the Khulumani case frames its legal demands modestly and strategically, it amounts to a request for more law in the pursuit of redress for the victims of human rights violations. This represents a view of courts as important political and economic tools – and spaces for social action – rather than objects of veneration. Amid such developments, the challenge for human rights groups is how to use the law and the language of human rights to deal with the causes rather than symptoms of past violations.

Discussion

The audience discussion centred on two principal themes: the African National Congress's (ANC) opposition to the Khulumani lawsuit and the implications of the case for citizenship and human rights in South Africa. Some participants asked why the ANC did not view the Khulumani case as continuing the post-apartheid struggle for black empowerment. Others expressed a related concern, namely whether cases such as Khulumani's placed too much emphasis on the role of average citizens, rather than state structures, in seeking accountability for past violations.

The ANC saw the Khulumani case and similar social movements as a threat to prosperity during tenuous economic times after apartheid.

Jobson argued that the ANC had been heavily influenced by business interests and, to a large extent, had succumbed to sustained corporate lobbying. Consequently, the ANC saw the Khulumani case and similar social movements as a threat to prosperity during tenuous economic times after

apartheid. Professor Gready concurred that the ANC's own economic interests were central to its opposition to the Khulumani case. Furthermore, like many other transitional governments, the South African state now seems intent on 'moving on' from a fractured past, preferring to emphasize themes of prosperity and progress, in the process wilfully ignoring historical wrongs that require redress.

Regarding the questions of citizenship and human rights, Jobson emphasized the importance of the Khulumani case in empowering the organization's members, who view the lawsuit as central to their ongoing struggle for civic recognition and socio-economic advancement. The court case – and Khulumani's training of members – continue to aid survivors of apartheid violations in their efforts to keep the government accountable and pressure it to work on their behalf. Professor Gready argued that a major challenge for strong citizenship in South Africa is growing public disillusionment with, and disengagement from, current political issues. An important virtue of movements such as Khulumani is their potential to reconnect citizens with civic processes, placing ordinary South Africans at the heart of issues of empowerment and protection of human rights, even when the state may be failing in these regards.

SESSION TWO:

Post-Apartheid Redress and Restitution

Chair: **Dr Phil Clark** (University of Oxford)

In this session, speakers examined attempts to achieve different forms of restitution within the broader project of pursuing transitional justice. Tshepo Madlingozi situated the *Khulumani et al v. Barclays et al* case in the context of Khulumani's broader struggle for post-apartheid social justice. Professor William Beinart evaluated the process of land reform in South Africa and related it to other efforts and opportunities for redress.

Both speakers provided insights into the role of material restitution in transitional justice, suggesting that it is often an adjunct to other more fundamental objects of struggle. This approach also suggests that efforts to achieve material restitution may be viewed strategically and evaluated not only in terms of the direct achievement of a specific end, but also in terms of their contribution to the broader aims of achieving social justice. Both speakers also highlighted the importance of the rise of new social movements in post-apartheid South Africa for this continuing struggle.

Khulumani: 'Bad Victims' Empowering Themselves

Tshepo Madlingozi (*Khulumani Support Group*)

Tshepo Madlingozi began by emphasizing that Khulumani is not merely a reparations movement but also a broader struggle to empower victims of apartheid to achieve reconciliation through recognition, justice, and satisfaction of material needs. He highlighted the profile of Khulumani's 55,000 members, the majority of whom are over forty years old and sixty per cent of whom are female. Ninety per cent of Khulumani's members experienced gross human rights violations under apartheid but received no compensation from the TRC. These members created a Charter for Redress, demanding a more just

economic system that would provide resolution of land claims, assistance with housing, education, medical care, and access to skills training. To work towards this, Madlingozi explained, Khulumani runs a variety of projects: community reconciliation, recovery of social history, healing from sexual violence, and community sustainable livelihoods. Khulumani also advocates for individual and community reparations and broader social justice, and provides advocacy and counselling around issues of forced disappearances.

Equally problematic is the decoupling of black poverty from white privilege, and prevalent notions that asserting status as a victim perpetuates dependency.

Madlingozi explored the challenging social and political context in which Khulumani operates. Khulumani struggles against perceptions that the TRC has 'dealt with' the past, and that healing and nation building require people to simply 'move on'. Equally problematic is the decoupling of black poverty from white privilege, and prevalent notions that asserting status as a victim perpetuates dependency and degrades people to the level of begging for handouts. These positions represent a bizarre contradiction, as the newly privileged economic and political elites (especially in the ANC) mobilize the past and their 'disadvantaged status' to justify newfound advantage while denying such considerations to others.

Madlingozi stated that Khulumani has reached several conclusions about transitional justice. The most important transitional objectives (at least in South Africa) have to date been peace, the rule of law, national unity, and reconciliation among political elites.

In this predominantly top-down process, it is apparent that victims' demands will not all be met. Transitional justice can be profoundly disempowering for victims, and dominant transitional justice actors may re-victimize people. For instance, political parties demand unquestioning support because of their role in the liberation struggle; the TRC demanded that victims be grateful but left them without reparations and sufficient public acknowledgement of their suffering; and NGOs legitimize their existence by speaking on behalf of victims, thus robbing them of their agency. Ultimately, the lesson is that there are 'good victims' who can be paraded during special functions to tell a story and act as catharsis for a nation that puts its past behind it, and 'bad victims' who continue to struggle for reparations and social justice and denounce the elite compromises of the new political settlement.

The *Khulumani et al v. Barclays et al* lawsuit is best seen in this framework. It is a tool used as part of this broader struggle on the part of 'bad victims' to empower themselves and strive for social justice. More specifically, it posits three principles: the right to legal redress anywhere in the world; the need for accountability for individuals and organizations responsible for aiding and abetting human rights abuses; and the need to prevent immunity by taking specific measures to ensure non-recurrence. The lawsuit itself prefigures alternative types of politics that bypass the state and directly empower citizens.

The new state was concerned about the possibility of armed conflict, rebellion, and white flight if land reform was more extensive.

Land Restitution in South Africa and its Implications for General Debates on Restitution

Professor William Beinart (University of Oxford)

Professor William Beinart argued that the legal nature of restitutionary processes (including land

reform) provides advantages and disadvantages for individuals and groups seeking redress. Unlike political processes, which are mediated by interest groups, legal processes operate under clear guidelines. On the other hand, challenges remain in terms of defining beneficiaries, discerning policy implications, and addressing individual rather than structural problems. Land reform has been one such restitutionary process in South Africa, operating alongside affirmative action in the bureaucracy and the TRC as a form of moral restitution. Such processes cannot be understood alone: restitutionary arguments have a complex relationship with redistribution arguments, and therefore the processes must be understood strategically within a discussion of costs and benefits.

Land reform is an obvious area of response to apartheid, as the unequal distribution of land was a central feature of the apartheid system, with more than 75 per cent of agricultural land in white hands. However, the resulting Land Act of 1994 was quite limited in scope: it addressed only land confiscated since 1913 (excluding most of the land that was alienated earlier) and included protection of property rights and a 'willing buyer-willing seller' policy. Land reform in South Africa has worked slowly since then, with the chief beneficiaries being people who had been forcefully removed from their land. Relatively little land has been redistributed, with more land in fact being transferred under apartheid for political reasons to support the homelands policy than has been transferred since apartheid ended.

Professor Beinart outlined the reasons why land reform was, and likely had to be, so limited. In the context of transition, with the global collapse of socialism, collectivization did not appear a viable option. The new state was concerned about the possibility of armed conflict, rebellion, and white flight if land reform was more extensive. Furthermore, the state was conscious that white farmers were responsible for nearly all of the country's food production. There was also concern about the possible negative consequences of construing land claims in collective terms and organizing redistribution along

ethnic lines, culminating in a strong desire to disband, not strengthen, the homelands. Discerning who had claim to particular lands when there had been massive population increase since dispossession was incredibly difficult; very large groups of legitimate claimants to particular land would preclude effective agricultural use. Finally, without a clear cut-off date the complex history would provide competing claims based on different historical periods.

Therefore, Professor Beinart argued that other forms of restitution and redistribution may hold greater promise than land reform. The TRC certainly should have paid out the money available for reparations, even if it was only for symbolic reasons. Furthermore, the structural reform of increasingly progressive taxation, especially higher corporation taxes, would be sensible. Government arguments against such measures, which amount essentially to concerns about destabilizing growth or discouraging investment, are not borne out by evidence. In that context, the Khulumani case is helpful and can potentially be effective. Such strategic, high-profile legal actions can help the reassertion of citizenship and are less likely than other avenues, such as comprehensive land reform, to cause conflict.

Discussion

The audience discussion of Madlingozi's presentation raised several concerns about the limitation of the courts in addressing the legacies of apartheid. One comment focused on the potential of the courts to

be disempowering, by forcing conformity with court procedures and performance of submissive rituals (such as addressing the judge as 'my Lord' in English courts). Madlingozi acknowledged these challenges, and the possibility for social movements to become co-opted by lawyers rather than responding to popular concerns, but he defended the strategic use of the courts in this case, pointing out that the lawsuit is part of a broader political mobilization for reparations and social justice. Another comment highlighted the problems that come with victory in a court case, in terms of the challenges of finding a fair way to divide any reparations.

Discussion of Professor Beinart's presentation centred on the importance of land as a post-apartheid issue. One such comment was that consultations on land reform were almost entirely attended by white farmers, with very few black voices represented. It was suggested that this could be because poor South Africans were more concerned with employment than land, as employment was a better guarantor of food security. Professor Beinart agreed that land was not at the heart of the struggle in South Africa and therefore had a lower profile than in Zimbabwe. However, he argued that there were still significant interests in land, and that his core concern was about how land was to be held after restitution. Does the state have a responsibility to protect property rights? If rights are prioritized, is it legitimate to also consider outcomes such as agricultural output?

SESSION THREE:

Courts, Acknowledgement, and Reconciliation

Chair: **Cathy Jenkins** (School of African and Oriental Studies, University of London)

In this session, the speakers explored the relationship between the Khulumani case and wider processes of social movements and democratic change in South Africa. The audience discussion of the papers focused on the relationship between the legal and the political, as well as the possibilities and limits of court cases in reference to wider transitional justice aims.

The Role of Courts in Achieving Reconciliation

Ingrid Gubbay (*Hausfeld LLP*)

Based on her work on the legal aspects of the Khulumani case, Ingrid Gubbay positioned court cases in their wider context, both in general and for the Khulumani case in particular. Her discussion pointed to the tension between an inclusive human rights discourse with its associated aims and expectations and the narrowness of court pleadings and what they are able to do. This raises the need for pluralistic solutions and for an understanding that what the law can foremost provide are expert documents and subsequent scholarly work on the legal and other issues under consideration. Gubbay argued that the six years of Khulumani litigation, which has involved the substantial gathering and archiving of documents, production of amicus curiae, and stimulating academic debates, shows the wide value of this type of legal process and the range of individuals and groups who could contribute to and own the pursuit of justice.

It is not possible for trials to restore victims to their previous individual and communal situations, and international law deals with a grey area with uncertain outcomes and many practical problems. As part of a broader movement involving activists, social

movements, and campaigners, it is important to find new ways of engaging the court case with these aspects and of managing expectations of what the law can do. Nevertheless, Gubbay argued that the Khulumani case was a natural extension of South Africa's TRC process; a point emphasized by Archbishop Desmond Tutu in his amicus curiae in support of Khulumani's case, in which he argued that the primary purpose of the TRC had been to promote, not achieve, reconciliation and that the Khulumani case represented another crucial step toward reconciliation after apartheid. Tutu also stated that the case pursued an end that the TRC had almost entirely ignored: highlighting the role of aiders and abettors in sustaining the apartheid regime.

Gubbay argued that, to maximize their impact, cases such as Khulumani's would ideally be brought in the jurisdictions where the harm occurred. To this end, she and her colleagues are working with various actors, including John Ruggie, the UN Special Representative of the Secretary General on human rights, transnational corporations, and other business enterprises, to pursue procedural reforms that would enable victims to more effectively gain access to domestic courts.

Examining the evolution of the Khulumani case, Gubbay explained the difficulty in finding law firms that did not have a conflict of interest through connections with the multinational corporations being sued. She also discussed the amended, and much reduced, Khulumani brief that now contains a complaint against eight companies and comprises four classes: extra-judicial killing; torture; detention; and cruel treatment. This case has the potential to clarify law in this area, and will raise the profile of Khulumani. Because of the active and informed work of Khulumani, it has been imperative that the lawyers engaged on this case also work with victims and their representatives, manage those relationships, and see their own work as part of a broader social movement.

Democratic Claim Making: The Khulumani Case

Dr Aletta Norval (University of Essex)

As a political theorist, Aletta Norval drew on democratic theory to explore the importance of the Khulumani case in terms of new ways of speaking, spaces for struggle, and novel claims by citizens. She argued that the material claims of the Khulumani case could suggest new ways of thinking about the relationships among states, individuals, and transnational corporations. It could, for example, draw new political and legal horizons by stressing the need for global standards of corporate accountability.

The Khulumani case seeks to establish a common platform where new claims can be heard. In doing so, it raises questions about the identities of actors on that platform, and partly constitutes the identities of claimants (for example, the 'good' or 'bad' victims that Madlingozi discussed in his presentation) and of those made to respond. The new terrain of struggle in which claims are made and defended in turn creates new political subjectivities. Thus, it is important to move away from a conception of politics that takes identities as given and towards a politics of acknowledgement that recognizes the malleability and evolution of identities over time. In this way, we also should avoid equating the law with dispassionate detachment and see it rather as deeply political and often constitutive of people's attachments and allegiances.

In doing something so novel, Norval said, the Khulumani case is daring to express what must be expressed – and such utterances constitute vital political action – but it does not yet have a clear institutional site for doing so. This new ground has important implications for a globalized world of impunity for MNCs. It also implies something important for democratic politics, namely that the act of speaking can lead to change and that contestation will not necessarily falter in the face of material interests. There is an articulation of 'we' in claim-making which creates new forms of identities, history, and shared spaces for dispute. Democratic

politics is open to claim and counter-claim, and the acknowledgement of such claims constitutes new political identities, imaginations, and spaces of possibility. Even if the Khulumani case is eventually unsuccessful in legal terms, it will have created crucial terrain for ongoing political and cultural struggle.

Discussion

The audience discussion centred on the relationship between the Khulumani political campaign and the legal campaign. In other sessions, Jobson and Madlingozi had highlighted the role of Khulumani beyond the court case and material restitution. They discussed the role of Khulumani as a social movement in empowering and training its members and as an organization creating a space for a more active and participatory model of citizenship for democratic South Africa. Further discussion with Gubbay developed this theme, as she argued that any political strategy needs to be formulated along with a legal strategy that facilitates a flourishing social movement without compromising litigation procedures. Thus, the legal campaign boosts the political campaign that continues after the court case has finished.

Any political strategy needs to be formulated along with a legal strategy that facilitates a flourishing social movement without compromising litigation procedures.

The discussion also addressed the Khulumani case as a new opportunity for shaping law and legal conventions. Questions from the audience challenged the 'determinacy' of the courts versus the 'indeterminacy' of politics. This relates to the first point of discussion on the relationship between the legal and the political. In her responses, Norval suggested that courts are not as immutable as we sometimes believe, and their behaviour changes over time. The political identities that are constituted in the claim-making process of court cases are contingent on a set of processes that bring people together, organize them

in particular ways, and thus shape their identities. These identities, even if contested and denied, are still part of a discursive space created through the process of claim-making.

Some participants raised concerns about the aspect of performance demanded by the courtroom, and the types of roles and identities it creates and reproduces. Gubbay and Norval responded that, indeed, courtrooms create legal subjects, which in turn shapes and limits subjects' action. However, actors' behaviour is not so constrained in the legal setting as to entirely depoliticize it. The legal terrain opens specific political opportunities while closing others.

In their response to the discussion, Jobson and Madlingozi pointed to the concrete and contextual nature of the law. What is important is not simply what the law is and does in the abstract but how it works at specific moments and in particular places. In the Khulumani case, Madlingozi said that the organization had established a unique database of the details of victims' claims which could be used for legal purposes as well as for training Khulumani members. He argued that this highlighted the strategic opportunities provided by a court case, which could be used for broader political mobilization.

SESSION FOUR:

Corporate Responsibility and the Challenges of Domestic and International Law

Chair: **Professor Paul Gready** (University of York)

In this session, the speakers focused on the legal elements of the Khulumani case and discussed the virtues and challenges of pursuing corporate accountability through either domestic or international courts.

Domestic Barriers to Accountability for Multinational Corporations

Richard Meeran (*Leigh Day and Co.*)

Richard Meeran began by agreeing with Ingrid Gubbay that, in an ideal world, the Khulumani case would be held in the South African courts, but for several important reasons the US courts are the only viable site for litigation like this. In cases where national law is available, seeking a domestic remedy increases access to evidence and obviates the need to prove links between the company committing the acts and another entity domiciled elsewhere. However, successful execution of a domestic redress strategy depends on a supportive legal environment in which crimes are recognized, lawyers can work to bring forth the cases, and the state supports the search for remedy.

These conditions are seldom present in the context in which MNCs are sued. Furthermore, MNCs have access to vast legal resources that can obstruct any efforts by plaintiffs in an affected country. This inequality of arms reduces the likelihood of a successful case. The current case of Khulumani, Meeran argued, is highly complicated and cannot be addressed domestically. Small firms do not have the resources to carry out a case like this and there are very few financial incentives for lawyers to get involved. Larger law firms are likely to be involved with the companies,

and thereby unable to take up the case. Legal proceedings in the United States, on the other hand, can provide for payment of plaintiffs' lawyers' costs and therefore represent a viable avenue for redress.

Given the challenges faced by domestic lawsuits, the alternative often involves searching for settlement either in the United States under the Aliens Tort Claims Act, or in the country where the MNC or its parent company has its headquarters. Meeran argued that there are three principal justifications for filing a suit overseas against a foreign-based parent company: first, the headquarters shapes policy, and targeting the headquarters increases the likelihood of the lawsuit affecting the global practice of the MNC; second, headquarters often have better financial capacity for settlement than their subsidiaries; third, the difficulties of domestic prosecution, including corruption, inadequate legal aid, etc., make it less desirable to pursue legal action in the country in which the subsidiary is hosted.

Nevertheless, Meeran emphasized that many challenges exist in the pursuit of legal action in foreign jurisdictions. Perhaps the major barrier to seeking such recourse is the complicated structure of many parent companies, which are often designed to distance them from their subsidiaries. The parent company is technically a shareholder in the other companies, and shareholders are generally not criminally liable. To implicate the parent company in a lawsuit, one must prove that conduct of the parent company was in fact a significant factor in any damage caused.

Several cases pursued by Leigh Day and Co. demonstrate the difficulties that arise in attempting to hold MNCs to account, and the ways they can be addressed. In the case of *Connelly v. RTZ*

Corporation and Others, a uranium miner in Namibia was diagnosed with cancer as a result of his work for a subsidiary company of Rio Tinto. He was unable to bring a claim against his employer, however, because such lawsuits were barred by Namibian legislation. Instead, he brought the case against the parent company in the United Kingdom, after showing links between the subsidiary and Rio Tinto and proving that he could get neither substantial justice nor legal aid in Namibia. The case was addressed before the House of Lords in 1997, and the claimant's victory established a precedent for similar cases to be heard in the UK.

After protracted battles mainly over jurisdiction, Leigh Day won compensation for South African victims of mercury poisoning employed by Thor Chemicals, and from Cape PLC for 7500 South African miners affected by asbestos-related diseases. Both Thor and Cape were UK-based MNCs. A 2002 ruling of the European Court of Justice, on Article 2 of the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgements, which provides that European Union courts have mandatory jurisdiction over cases brought against home-domiciled parent corporations, regardless of the location of the actual wrongdoing, has greatly aided this type of litigation.

International Law and Corporations **Vuyelwa Kuuya (University of Cambridge)**

Vuyelwa Kuuya argued that although international human rights law provides the most important legal framework through which to address the negative effects of corporate activity, it does not recognize a regime of corporate criminality or responsibility for such action. Instead, it views corporate conduct through the medium of the state, which has the direct responsibility for monitoring corporate conduct. She highlighted instances in which this state responsibility has been reiterated in treaties and the pronouncements of treaty monitoring bodies. Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for the right to work. This has been

supported by a general comment requiring employers to ensure non-discrimination, decent working conditions, sufficient wages, and time off. Furthermore, Articles 11 and 12 of the ICESCR, which provide for the right to water, were reinforced by a comment requiring states to preclude MNCs from polluting water sources, and monopolizing the use of water in drought-prone regions. Kuuya also drew attention to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) which provides for workplace protection in Articles 11 and 13 and non-discrimination on the basis of gender. Finally, the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) addresses racial discrimination in the workplace, and its General Recommendation 23 (1997) offers protection for indigenous communities from MNC activities.

Kuuya then explored the challenge of state primacy in the context of international human rights law. Adherence of states to treaties is monitored by different bodies, including the European, Inter-American, and African Courts for Human Rights, which receive and adjudicate complaints from the public. In such rulings to date, it is evident that governments are legally bound to protect human rights from infringement by corporations. Kuuya argued that this structure of accountability means that states form a barrier between human rights obligations and the law.

Several key cases highlight the problematic state-centric process of accountability, which ultimately serves to support the indirect relationship between MNCs and international law. In *Velasquez-Rodriguez v. Honduras*, the Inter-American Court of Human Rights determined that the state must take reasonable steps to prevent human rights violations, as well as to use any resources available to investigate, impose punishment for, and ensure victims are compensated for harms suffered. Building on this ruling, in *Suma Indigenous Community v. Republic of Nicaragua*, a case against the Nicaraguan government for awarding a thirty-year concession to a Korean company for timber exploration and road building, the same court found that the government failed to protect the rights

of the indigenous community. Finally, in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, a case regarding the deposit of toxic waste in the Ogoni region of Nigeria, the African Commission on Human Rights found that the Nigerian state failed to discharge its responsibility toward the affected citizens. None of these landmark cases resulted in accountability for MNCs involved in violations of human rights.

Kuuya concluded that, despite these shortcomings with international legal approaches, emerging 'soft law' in the form of international corporate standards of conduct could help regulate corporate behaviour. Over time, it is expected that these standards will harden into formalized and more general codes of corporate conduct, provided there is sufficient state compulsion. At present, the non-binding nature of most corporate standards means they are usually open to abuse and are easily abandoned. Furthermore, the proliferation of corporate standards means there is no universal code that would have the effect of levelling the playing field for all corporations internationally.

Two sectors provide examples of important soft law that has recently developed: in the extractive industry, the Kimberley Process of diamond certification seeks to exclude from the market diamonds from conflict areas, while the Ethical Trading Initiative in the clothing industry is an effort to eradicate sweatshops, child labour, and forced labour. However, current evidence suggests that such measures often fail to effectively regulate corporate behaviour. For instance, the OECD Guidelines for Multinational Enterprises were created to encourage respect for human rights, as well as to regulate corporate governance. Recent investigations concluded that several OECD MNCs – including Afrimex, which trades in coltan, and Das Air, which transports natural resources – had violated these Guidelines in the Democratic Republic of Congo, where they traded in conflict resources.

Kuuya argued that, because corporations respond more readily to perceptions of legal risk than to

human rights considerations, an important way to address the issue of negative corporate conduct is through the combination of soft law and legal proceedings. She cited several recent cases in which individuals and groups have litigated against corporations on the grounds of misrepresentation, namely their failure to abide by their own codes of conduct. The basis of such claims is that, by signing such documents, corporations inherently accept certain responsibilities and therefore can be held accountable for any failure to fulfil them.

Emerging 'soft law' in the form of international corporate standards of conduct could help regulate corporate behaviour.

Discussion

The discussion of Meeran's and Kuuya's presentations focused on issues of corporate versus individual responsibility and the ways in which corporations alter the 'cosmetics' of their behaviour in order to appear more ethical. Participants questioned whether, legally and normatively, it was appropriate to target particular corporations or actors within corporations, including shareholders.

Meeran responded that, under UK domestic law, individual directors of corporations can be held personally responsible for human rights violations where these have resulted from conduct over which the director 'assumed personal responsibility'. Shareholders cannot generally be held responsible for violations unless their conduct in relation to the company has significantly contributed to the harm. Nevertheless, both Meeran and Kuuya argued that shareholders are crucial to changing corporate behaviour as they have more power to affect companies' finances than the threat of litigation, which rarely involves payouts that corporations consider significant. While lawsuits such as Khulumani's are vital for acknowledging

victims of human rights abuses and providing some degree of reparation, we should be wary of expecting such cases to deter corporations from committing violations in the future.

Regarding corporations' sincerity when claiming to act responsibly, Kuuya acknowledged that this often amounts to little more than a public relations exercise. However, she stressed that, even if corporations are insincere in drawing up codes of conduct, they can be held accountable in a court of law for false statements issued in such codes. Kuuya cited the case of *Kasky vs. Nike* in the State of California, which found that Nike's social responsibility code falsely claimed that the company did not use child labour. The case was appealed to the California Supreme Court, which found that Nike had made false claims and therefore had violated sections of the US Business and Professions Code. Nike appealed the case to the US Supreme Court, which refused to rule on the appeal, forcing Nike to settle the case out of court.

Conclusion

The symposium highlighted the depth and complexity of the *Khulumani et al v. Barclays et al* case, which extends beyond the immediate claims of the plaintiffs – that eight corporations knowingly supported the apartheid regime and therefore should pay reparations to the identified victims of apartheid – and raises critical questions about

governance, citizenship, and human rights in South Africa and, at the global level, regulation of corporate behaviour and the challenges of seeking international or domestic legal redress for past human rights violations. Underpinning all of the presentations and discussions were the recognized shortcomings of the TRC as South Africa's primary transitional justice mechanism, which necessitated social movements such as Khulumani and motivated lawsuits such as its current one. Participants agreed that the TRC had highlighted the complicity of a handful of individuals in the apartheid regime but had failed to acknowledge the role of many others, including foreign governments and corporations that had knowingly supported apartheid. Furthermore, the TRC had failed to address the central issue of reparations for the survivors of apartheid and the ongoing socio-economic disparities between the victims and beneficiaries of the previous regime.

Until such structural problems have been addressed, calls for South Africans to 'move on' from the past will ring hollow and questions will persist around the current South African government's dedication to empowering its citizens. In this environment, the Khulumani lawsuit sustains public consciousness of the long-term impact of apartheid, the need for deep and lasting responses to past violations, and a general understanding of the role of MNCs as key socio-political actors in a globalized world.

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