

Jubilee South Africa

Summary of and Response to the Opinion of Judge Sprizzo in the South African Apartheid Litigation given on 29 November 2004

Summary of the important points in the Opinion

Background

On 29 November 2004 Judge Sprizzo gave his opinion in the South African Apartheid litigation dismissing, amongst others, the Khulumani complaint. The other two complaints dismissed in the opinion were the Ntsebeza and Digwamaje complaints. The court found that, because these various complaints do not sufficiently allege that Defendants violated international law, the court lacks subject matter jurisdiction under the Alien Tort Claims Act (ATCA) and hence dismissed these complaints (p.5). In coming to this conclusion, the Court provides a general overview of the factual allegations contained in the three complaints (p.5-11) and in brief makes reference to the amicus brief filed in support of the Khulumani complaint (p.9).

Considering Motion to Dismiss

The Court notes that in considering a motion to dismiss it must accept all facts alleged in the complaint as being true and must draw all reasonable inferences in favour of the plaintiffs and should only dismiss if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle it to relief (p.11). The Court states that in motions to dismiss it is generally limited to examining the sufficiency of the pleadings, however, since in these particular cases a challenge is directed at the Court's subject matter jurisdiction, the Court may turn to materials outside the complaint to resolve jurisdiction issues (p.11). The court proceeds to consider whether the complaints complied with the Alien Tort Claims Act and in particular considers the three principal claims, aiding and abetting (Khulumani's legal basis) State Action and conducting business with Apartheid South Africa (non-Khulumani legal bases).

Consideration of the Alien Tort Claims Act (ATCA)

The Court refers to the recent ruling of the Supreme Court in the case of *Sosa v Alvarez-Machain* in which it was held that the Alien Tort Claims Act afforded the federal court jurisdiction over well-accepted and clearly defined offences under international law such as piracy and offences involving ambassadors (p.12-13). Whilst the Court acknowledges that the Supreme Court has left the door at least slightly ajar for the federal courts to apply ATCA to a narrow and limited class of international law violations, in the same breath it quotes Justice Scalia of the Supreme Court who noted that lower courts now have to grapple with and determine what offences against international law fit within the narrow class of offences (p.13-14).

The court states that it would have preferred the Supreme Court to have given to lower federal courts a bright-line rule that limited the ATCA to those violations of international law

clearly recognized at the time of its enactment (p.13) rather than having to grapple with it. In this regard the Court further quotes Scalia who remarked that the consequences of leaving the door open were not only to make the task of the lower federal courts immeasurably difficult, but also to invite the kind of judicial creativity that has caused the disparity of results and differences of opinion that preceded the decision in *Sosa* (p.14).

However, in consequence hereof the Court does consider the considerations set forth by the Supreme Court in the *Sosa* case in determining whether conduct should be found to be encompassed by the ATCA (p.14). These four considerations are:

1. Any new claim under the ATCA must rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms when the ATCA was enacted (p.14).
2. Courts must be mindful of the changed understanding of common law since the enactment of the ATCA in 1789 and should be averse to innovate without legislative guidance, especially when making the decision to exercise a jurisdiction that remained largely in shadow for much of the prior two centuries (p.15).
3. Courts should be wary of creating private rights of action from international norms because of the collateral consequences such a decision would have (p.15).
4. Courts must consider the foreign relations consequences of finding that conduct is encompassed by the ATCA, since entertaining such suits can impinge on the discretion of the legislative and executive branches of the United States as well as other countries (p.15)

Having regard to the four considerations the Court dismisses the three complaints. In so doing the Court has regard to the three principal legal bases of these Complaints, aiding and abetting (a Khulumani's legal basis) State Action and conducting business with Apartheid South Africa (non-Khulumani legal bases).

Aiding & Abetting (Khulumani's legal basis)

This is the principal basis of the Khulumani complaint. The Court, in considering this basis, holds that plaintiffs must show that aiding and abetting international law violations is itself a violation of the law of nations that is accepted by the civilized world and defined with specificity (p.18). The Court relied on a Second Circuit case, *Flores*, where the standard has been described as a violation of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern (p.19). According to the Court the complaints point to little that would lead the Court to conclude that aiding and abetting international law violations is itself an international law violation that is universally accepted as a legal obligation (p.19).

The court refers to the case of *Central Bank of Denver v First Interstate Bank of Denver* where the Supreme Court stated that where Congress has not explicitly provided for aider and abettor liability in civil causes of action, it should not be inferred (p.20). For the Court, the Alien Tort Claims Act (ATCA) does not provide for aider and abettor liability and the Court will not write aiding and abetting into the ATCA (p.21). In this regard the Court relies on one of the *Sosa* considerations of not innovating without legislative guidance (p.21).

Remarkably, the Court states that the rulings of the International Criminal Tribunals (International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda) and the Nuremburg trials are not binding sources of international law. Furthermore, the Court states that since the Apartheid Convention was not ratified by such major powers as the United States, Great Britain, Germany, France, Canada and Japan, the Apartheid Convention is not binding international law (p.19-20).

Collateral consequences

The Court, relying on *Sosa* states that it must be aware of the collateral consequences that would result from finding a new international law violation that would support ATCA jurisdiction (p.27). **The court is of the view that the implication would not only have far reaching consequences but would also seriously impede the flow of international commerce (p.27).** In this regard, the Court refers to the South African government's position that it does not support the litigation as it would preempt the government's ability to handle domestic matters and would discourage needed investment in the South African economy (p.27). It also refers to the views expressed by the United States government that adjudicating this suit would cause tension between the United States and South Africa and would serve to hamper the policy of encouraging positive change in developing countries via economic investment.

Response to the Opinion

The opinion of Judge Sprizzo in the Apartheid litigation is disappointing in the following respects:

It acknowledges and confirms the decision of the Supreme Court in the case of *Sosa v Alvarez-Machain* that the door is left open to plaintiffs only in the case of a narrow and a limited class of international law violations. However, what the Court does not acknowledge is that this is precisely the basis of the *Khulumani* lawsuit. In its complaint *Khulumani* confines itself to a narrow and limited category of international law violations such as extra-judicial killings, torture, indiscriminate shootings, sexual assault and arbitrary detention. This narrow and limited category of international law violations has been recognized in previously decided cases such as *Kadic*, *Talisman* and *Tachiona*. The Court does not deal with these categories case by case but instead refers to it, amongst other, as a veritable cornucopia of international law violations.

The *Khulumani* complaint is and has always been different from the other two complaints that have, amongst other, included forced labour, genocide, war crimes and racial discrimination within the ambit of its complaint. *Khulumani* has always maintained that these categories in the context of this litigation, however abhorrent they may be, do not fit into the criteria of a narrow and limited category of universally accepted international law violations. However, without making the distinction between *Khulumani*'s narrow and limited focus the Court proceeded to put all the complaints together and tarnished it with the same brush of it being a veritable cornucopia of international law violations.

As to Khulumani's principal legal basis of aiding and abetting, the Court refuses to follow the judgment of the Presbyterian Church of Sudan v Talisman Energy where the Court recognized aiding and abetting under the Alien Tort Claims Act. Instead, the Court prefers to rely on the case of Central Bank of Denver v First Interstate Bank of Denver where it held that where Congress has not explicitly provided for aider and abettor liability in civil causes of action, it should not be inferred.

However the Court comes to further conclusions that may have far reaching implications for human rights cases around the world. It states that the rulings of the International Criminal Tribunals (International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda) and the Nuremburg trials are not binding sources of international law. Furthermore, the Court goes further to state that since the Apartheid Convention was not ratified by such major powers as the United States, Great Britain, Germany, France, Canada and Japan, the Apartheid Convention is not binding international law (p.19-20).

This conclusion has scant regard for the decisions of the International Criminal law tribunals as well as the important jurisprudence established by the Nuremburg trials. However, of serious concern is the Court's scant regard for all those developing states that have ratified the Apartheid Convention whilst all major countries refused to do so. However, because the major countries refused to sign the Apartheid Convention, according to the Court it is not binding international law.

The Court further notes that should it find in favour of a new international law violation that would support ATCA jurisdiction the consequence would not only be far reaching but would raise the prospects of serious impediments to the flow of international commerce. The Court relies on the view of the South African government that the litigation would discourage much needed investment in South Africa. The approach adopted by the Court can be interpreted as putting commerce ahead of human rights abuses and it could be further argued that the South African government lends its support to this approach.

For these reasons the Khulumani plaintiffs will appeal the opinion.

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