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English Edition

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PRESENTATION



It is a great pleasure for us to present the 12 issue of the Sur Journal. As previously announced, this edition is the beginning of our collaboration with **Carlos Chagas Foundation (FCC)** that will support the Sur Journal in 2010 and 2011. We would like to thank FCC for this support, which has guaranteed the maintenance of the printed version of the Journal.

This issue of Sur Journal is edited in collaboration with Amnesty International.* On the occasion of the UN High-level Summit on the Millennium Development Goals (MDGs) in September 2010, this issue of Sur Journal focuses on the MDGs framework in relation to human rights standards. We are thankful to Salil Shetty, Amnesty International Secretary General, who prepared an introduction to this discussion. The first article of the dossier, also by Amnesty International, **Combating Exclusion: Why Human Rights Are Essential for the MDGs**, stresses the importance of ensuring that all efforts towards fulfilling all the MDGs are fully consistent with human rights standards, and that non-discrimination, gender equality, participation and accountability must be at the heart of all efforts to meet the MDGs.

* *Disclaimer.* With the exception of the foreword and 'Combating exclusion: Why human rights are essential for the MDGs', the opinions expressed in this collection of articles are those of the authors and do not necessarily reflect Amnesty International policy.

Reflections on the Role of the United Nations Permanent Forum on Indigenous Issues in Relation to the Millennium Development Goals, by Victoria Tauli-Corpuz, examines the relationship of the MDGs with the protection, respect and fulfillment of indigenous peoples' rights as contained in the UN Declaration on the Rights of Indigenous Peoples.

Alicia Ely Yamin, in **Toward Transformative Accountability: Applying a Rights-based Approach to Fulfill Maternal Health Obligations**, examines how accountability for fulfilling the right to maternal health should be understood if we seek to transform the discourse of rights into practical health policy and programming.

Still addressing the issue of MDGs, Sarah Zaidi, in **Millennium Development Goal 6 and the Right to Health: Conflictual or Complementary?**, explores how MDGs fit within an international law framework, and how MDG 6 on combating HIV/AIDS, malaria, and tuberculosis can be integrated with the right to health.

This issue also features an article by Marcos A. Orellana on the relationship between climate change and the MDGs, looking into linkages between climate change, the right to development and international cooperation, in **Climate Change and The Millennium Development Goals: The Right to Development, International Cooperation and the Clean Development Mechanism.**

We hope that this issue of the Sur Journal will call the attention of human rights activists, civil society organisations and academics to the relevance of the MDGs for the human rights agenda. The articles included in this edition of the Sur Journal show not only a critique of the MDGs from a human rights perspective, but also several positive proposals on how to integrate human rights into the MDGs.

Two articles discuss the impact of corporations on human rights. The first, by Lindiwe Knutson (**Aliens, Apartheid and US courts: Is the Right of Apartheid Victims to Claim Reparations from Multinational Corporations at last Recognized?**), analyses several cases brought before U.S. courts that have alleged that major multinational corporations were complicit in and benefited from human rights violations committed by agents of foreign governments. The article examines the most recent decision of *In re South African Apartheid Litigation* (commonly referred to as the *Khulumani* case) in the Southern District Court of New York.

The second article, by David Bilchitz (**The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?**), seeks to analyze the John Ruggie framework in light of international human rights law and argues that Ruggie's conception of the nature of corporate obligations is mistaken: corporations should

not only be required to avoid harm to fundamental rights; they must also be required to contribute actively to the realization of such rights.

There are two more articles in this issue. The article by Fernando Basch, Leonardo Filippini, Ana Laya, Mariano Nino, Felicitas Rossi and Bárbara Schreiber, examines the functioning of the Inter-American System of Human Rights Protection in, **The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions**. The article presents the results of a quantitative study focused on the degree of compliance with decisions adopted within the framework of the system of petitions of the American Convention on Human Rights (ACHR).

Finally, Richard Bourne's paper, **The Commonwealth of Nations: Intergovernmental and Nongovernmental Strategies for the Protection of Human Rights in a Post-colonial Association**, discusses how membership rules for the Commonwealth became crucial in defining it as an association of democracies and, more cautiously, as committed to human rights guarantees for citizens.

We would like to thank Amnesty International's team for its contribution. Their timely input in the selection and edition of articles has been vital.

The editors.

FOREWORD



Amnesty International's recently released report, *Insecurity and indignity: Women's experiences in the slums of Nairobi, Kenya* (July 2010) documents how women and girls living in informal settlements are particularly affected by lack of adequate access to sanitation facilities for toilets and bathing. Many of the women told Amnesty International that they have experienced different forms of physical, sexual and psychological violence, and live under the ever-present threat of violence. The lack of effective policing and due diligence by the government to prevent, investigate or punish gender-based violence and provide an effective remedy to women and girls results in a situation where violence goes largely unpunished.

We also recorded testimonies from a high number of women and girls who have experienced rape and other forms of violence directly as a result of their attempt to find or walk to a toilet or latrine some distance away from their houses. Women's experiences show that lack of adequate access to sanitation facilities and the lack of public security services significantly

contribute to the incidence and persistence of gender-based violence.

Yet, Kenya has committed to the international Millennium Development Goal (MDG) target on sanitation to reduce by half, between 1990 and 2015, the proportion of people without sustainable access to basic sanitation. The country adopted water and sanitation policies that aim to fulfill MDG targets and also the rights to water and sanitation. These policies do reflect many human rights principles. But our research shows that there are still key gaps between Kenya's MDG policies and ensuring consistency with Kenya's international human rights obligations. It also starkly illustrates how the MDG policies of governments cannot ignore gender-based violence or the specific barriers faced by women and girls living in informal settlements in accessing even basic levels of sanitation.

This is why the discussion in this issue of *Sur - International Journal on Human Rights* is so important and timely. These concerns are not unique to Kenya and around the world there are examples

illustrating how MDG efforts are most effective when they address underlying human rights issues and are truly targeted at groups facing discrimination and marginalization.

In September 2010, UN Member States will meet to agree an action plan to ensure the realization of the MDGs by 2015. With only five years left to go, it is more important now than ever that human rights are put at the centre of this action plan, in order to make the MDG framework effective for the billions striving to free themselves from poverty and to claim their rights.

The articles in this issue focus on a range of issues related to the MDGs. They illustrate the gap between the current MDG targets and existing requirements under international human rights law. They also briefly outline some of the essential elements that must be incorporated into any revised or new global framework to address poverty after 2015. I hope it will contribute to discussions on the relationship between human rights and the MDGs and be a useful resource for human

rights practitioners and others who are concerned with these issues.

Another great challenge facing governments across the world is human rights abuses committed by or in complicity with corporations. Two articles in this issue address some of the challenges as well as opportunities related to human rights in the context of corporate activities.

The issue also includes two general articles, which examine the role of the Inter-American System of Human Rights and the Commonwealth of Nations in the promotion and protection of human rights.

I had the privilege of speaking at the International Human Rights Colloquium, organized by Conectas, in 2004 and of contributing to the second issue of the SUR journal. I am extremely pleased to have the chance to collaborate again with Conectas and that they agreed to produce this edition of SUR jointly with Amnesty International.

We would like to thank them for giving us this opportunity and also thank all the authors who have contributed to this issue.

I hope you enjoy reading it.

Salil Shetty
Amnesty International
Secretary General



LINDIWE KNUTSON

Lindiwe Knutson was born in South Africa in 1986. She completed a Bachelors of Social Sciences degree and a Bachelor of Laws (L.L.B.) degree at the University of Cape Town in 2009. She is currently working at a large law firm in Johannesburg to complete her compulsory 2 years of articles to become an admitted attorney in South Africa. She hopes to further pursue her passion in international human rights law.

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ABSTRACT

Over the last decade a growing number of cases brought before U.S. courts have alleged that major multinational corporations were complicit in and benefited from human rights violations committed by agents of foreign governments. These cases concern one of the most disputed questions in international human rights litigation, namely, the availability of secondary or indirect liability and aiding and abetting liability in particular. While the U.S. Supreme Court has yet to address the issue, many District and Circuit Courts have held that aiding and abetting liability is available under the Alien Tort Claims Act ('ATCA').

This paper aims to examine the most recent decision of *In re South African Apartheid Litigation* (commonly referred to as the *Khulumani* case) in the Southern District Court of New York and argue in favour of the court's opinion that aiding and abetting liability is available, necessary and desirable and does not conflict with the political question and international comity doctrines. It will be argued that submissions against recognizing this kind of liability, such as those by the Bush administration and South African Mbeki government, are misguided, illogical and damaging and that without the threat of liability, which the ATCA can afford, multinational corporations face no consequences for aiding or abetting the very abuses which U.S. foreign policy claims it seeks to prevent.

Original in English.

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KEYWORDS

Alien Tort Act/Statute – Aiding and abetting liability – Apartheid victims – Reparations – Multinational corporations – Political question – International comity



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ALIENS, APARTHEID AND US COURTS: IS THE RIGHT OF APARTHEID VICTIMS TO CLAIM REPARATIONS FROM MULTINATIONAL CORPORATIONS AT LAST RECOGNIZED?

Lindiwe Knutson

1 Introduction

Can multinational corporations be held liable for helping foreign governments commit human rights abuses? Should such indirect liability be available? Could policy arguments be employed to dismiss such cases?

Over the last decade a growing number of cases brought before U.S. courts have alleged that major multinational corporations were complicit in and benefited from human rights violations committed by agents of foreign governments.¹ Plaintiffs in these cases have relied, at least in part, on the Alien Tort Claims Act ('ATCA') (UNITED STATES OF AMERICA, 1992)² which allows U.S. courts to hear cases brought by 'aliens' or foreigners for violations of established and defined international law norms.³ Some of the most fascinating and disputed questions in international human rights litigation concern the availability of secondary or indirect liability and aiding and abetting liability in particular. While the U.S. Supreme Court has yet to address the issue (STEPEHNS, 2005, p. 535; HOFFMAN; ZAHEER, 2003, p. 47) many District and Circuit Courts have held that aiding and abetting liability is available under the ATCA.⁴ However, these lower courts have failed to lay down a clear doctrine and so it remains controversial as to whether such liability should be available, how it should be defined and whether it should be based in federal common law or international law.

On 8 April 2009 in the case of *In re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a)⁵ (commonly referred to as the *Khulumani* case) Judge Shira Scheindlin of the Southern District Court of New York in a 144 page opinion refused to dismiss civil damages claims brought under the ATCA by a class of South African citizens alleging that Ford, General Motors, IBM, Fujitsu

Notes to this text start on page 193.

Ltd., Barclays National Bank Ltd. and the Union Bank of Switzerland aided and abetted torture and other atrocities committed by the Apartheid regime (UNITED STATES OF AMERICA, 2009a, p. 28).⁶ The *Khulumani* case and the highly technical debate which surrounds it illustrates the complex task judges are faced with when litigation involves foreign plaintiffs, multinational corporations, federal and foreign governments and domestic and international law. ATCA cases require a court to balance the need to promote justice with the duty to uphold the separation of powers and not interfere with executive decisions and foreign policy (NEMEROFF, 2008, p. 286). It is argued that establishing a clearer doctrine for aiding and abetting liability under the ATCA will go a long way in assisting judges to decide such cases and would also assist victims in deciding whether they can bring such claims and how to structure them as well as send a message to U.S. and foreign corporations that they could be held liable and on what bases (NEMEROFF, 2008, p. 286).

This paper aims to examine these issues in light of the most recent *Khulumani* decision by Judge Scheindlin and argue in favour of the court's opinion that aiding and abetting liability is available, necessary and desirable in contributing 'to ensure that laws govern the behavior of non-state actors in a world where, more than ever before, they have the power, and sometimes the interest, in enabling mass violations of human rights.' (UNITED STATES OF AMERICA, 2009a). In advancing this argument it will be shown that the submissions by the Bush administration and South African Mbeki government against recognizing such liability were misguided, illogical and damaging and that without the threat of liability, which the ATCA can afford, companies face no consequences for aiding or abetting the very abuses which U.S. foreign policy claims it seeks to prevent.

Part II presents a brief overview of the background to and evolution of the ATCA focusing on the availability of aiding and abetting liability under the statute and its use against corporations in U.S. courts.

Part III outlines the procedural background to the *Khulumani* case and the most recent ruling by Judge Scheindlin in the Southern District Court of New York. It recounts the arguments against imposing liability made by the Bush administration that the potential of aiding and abetting liability will discourage investment in developing countries, which conflicts with their foreign policy of 'constructive engagement' and that of the South African Mbeki government that a ruling would infringe upon their sovereignty and discourage foreign investment.

Part IV examines the level of judicial deference required when governments submit policy arguments as grounds for dismissal. It outlines the doctrines of judicial deference, political question and international comity as understood in the context of ATCA litigation as well as Judge Scheindlin's reasons for finding that they do not merit dismissal of the *Khulumani* case.

Part V evaluates how U.S. courts in general have treated executive submissions and argues in favour of a more substantive analysis in looking at why the foreign policy, foreign investment and sovereignty arguments fail. Such an analysis seeks to go beyond a factual examination of the submission itself to assess the wider legal and practical implications liability could have. Doing so, demonstrates that aiding and abetting liability under the ATCA actually supports, rather than undermines

U.S. foreign policy, encourages positive investment and does not infringe on the principle of sovereignty. The analysis also shows aiding and abetting liability under the ATCA to be a necessary and valuable tool.

Part VI outlines recent developments since Judge Scheindlin's opinion. These include drastic turnabouts in the views' submitted by the respective governments. In September 2009, the South African government submitted a letter to the District Court now seeming to support the litigation. Similarly in November 2009, the United States government submitted an amicus brief to the Court of Appeals for the Second Circuit in favour of the plaintiffs' dismissal of the defendants' appeal. Some conclusions are drawn as to what this means for the *Khulumani* case and the development of the doctrine of aiding and abetting liability generally. The paper concludes with an overview of the doctrine's subsequent success or lack thereof and stresses the significance of the outcome of the *Khulumani* case in light of this.

2 Background to the ATCA

The ATCA was enacted in 1789 and remained largely unused for almost two hundred years until 1980 (BRADLEY, 2002, p. 588).⁷ The case of *Filartiga v. Pena-Irala* (UNITED STATES OF AMERICA, 1980, p. 887)⁸ was the first to use the ATCA to hold human rights abusers accountable for torture and murder through civil claims for 'a tort...committed in violation of the law of nations.' However, its use against corporate defendants was first granted in 1997 by a District Court in the case of *Doe I v. Unocal* (UNITED STATES OF AMERICA, 1997). The plaintiffs were Burmese villagers alleging that Unocal was complicit in gross human rights violations, such as rape and torture, committed by the Burmese military tasked on behalf of Unocal to secure the natural gas pipeline project there (UNITED STATES OF AMERICA, 2004a, p. 729-732).⁹ This case paved the way for similar corporate defendant claims in Federal and District Courts where plaintiffs relied on the ATCA to pursue litigation based on indirect liability.¹⁰

Finally, in 2004, the U.S. Supreme Court addressed the ATCA in the case of *Sosa v. Alvarez-Machain* (UNITED STATES OF AMERICA, 2004a) (referred to as *Sosa* below). The court affirmed the preceding line of cases in so far as it held that violations of international norms which were 'specific, universal and obligatory' would be actionable under the ATCA (UNITED STATES OF AMERICA, 2004a, p. 732). The court went on to note that 'practical consequences' could be considered as part of 'the determination [of] whether a norm is sufficiently definite to support a cause of action.' (UNITED STATES OF AMERICA, 2004a, p. 732-733). It was also stated in a footnote that a 'possible limitation' upon the application of the ATCA could be 'case-specific deference to the political branches' so as to avoid interference with U.S. foreign policy (UNITED STATES OF AMERICA, 2004a, p. 733, footnote 21).¹¹ Critically, the court did not consider whether the statute encompassed aiding and abetting liability specifically.

Numerous District and Circuit Courts have held that corporate aiding and abetting liability is available under the ATCA. However, a clear doctrine has yet to be established for the definition of and basis for such liability, which remain

controversial. This paper does not seek to add to the debate, however, a brief summary is warranted highlighting the conclusions reached by Judge Scheindlin.

In terms of the *basis* for aiding and abetting liability the debate is whether it should be governed by federal common law or international law or whether it even makes a difference (BRADLEY; GOLDSMITH; MOORE, 2007, p. 120). The Supreme Court created uncertainty by stating that while ATCA claims are 'claims under federal common law'; to be actionable 'a specific, universal and obligatory' norm of international law had to be violated (UNITED STATES OF AMERICA, 2004a, p. 729-732). Judge Scheindlin, acknowledging uncertainty in the law, interpreted the Supreme Court's statement as requiring courts to look to international and not federal law as the basis for liability in determining both the 'existence of substantive offences' and the 'contours of secondary liability as well.'¹² Some writers argue that courts should apply international law through the ATCA cautiously and incrementally (DHOOGE, 2009, p. 280).

In terms of the *definition* of aiding and abetting liability the debate is whether the required mental or subjective element is knowledge or intent. The uncertainty in the law is evident as three judges of the Second Circuit Court hearing the *Khulumani* case had different views on the issue.¹³ It is argued that Judge Hall's opinion requiring 'knowledge' would open the door more widely for liability to be imposed while Judge Katmann's opinion requiring 'purposeful' conduct would make liability difficult to prove but discourage suits against corporations for merely doing business in countries where human rights abuses are committed (NEMEROFF, 2008, p. 283-284). Judge Scheindlin emphasized that 'knowledge' was required for aiding and abetting liability under the 'vast majority' of international law.¹⁴ She concluded that in the absence of other relevant legal materials requiring specific intent, customary international law required 'that an aider or abettor know that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the law of nations' and that this was the standard to be applied in deciding whether conduct amounted to aiding and abetting liability under the ATCA.¹⁵

3 Background to the *Khulumani* Case

The preceding section outlined the history of ATCA litigation and the points of contention surrounding aiding and abetting liability. The next section summarizes the procedural background to the *Khulumani* case as well as the arguments against liability submitted by the U.S. and South African governments. The case originally comprised of ten separate actions by three groups of plaintiffs against about fifty major multinational banks and corporations that did business with the Apartheid government. The plaintiffs instituted their initial claims under the ATCA, Torture Victims Protection Act and Racketeer Influenced and Corrupt Organizations Act.¹⁶ The bases for their allegations are summarized as follows: the defendants knew of the racist policies of the Apartheid government and the human rights violations committed as a result but never the less did business there, the defendants made a profit from cheap labour and provided the government with resources such as technology, oil, money and vehicles which were used to maintain and enforce

Apartheid policies; had the defendants not done this Apartheid would have ended sooner and the plaintiffs would not have suffered some or all of their injuries.¹⁷

In 2004 the claims were consolidated before Judge John E. Sprizzo in the Southern District Court of New York who dismissed all the claims and contrary to a large body of law held that the ATCA did not provide a basis for aiding and abetting liability (UNITED STATES OF AMERICA, 2004c, p. 550). The plaintiffs appealed the dismissal upon which the Second Circuit Court partially vacated the dismissal in terms of the ATCA claim, finding that aiding and abetting liability may be pleaded under the statute and allowing the claim to proceed.¹⁸ The defendants appealed to the U.S. Supreme Court, which issued an order on 12 May 2008 affirming the Second Circuit's decision (UNITED STATES OF AMERICA, 2008). The circumstances of the affirmation were that four justices had recused themselves and so the court lacked the necessary quorum to issue an opinion.¹⁹

The Supreme Court order affirmed the Second Circuit's order vacating the denial of leave to amend and declining to dismiss the case on the policy grounds of international comity and political question and directed that the District Court consider these doctrines in light of the amended pleadings.²⁰ Before the District Court, the defendants again sought to rely on these doctrines together with the submissions of the South African government and Bush administration calling for dismissal of the claims.²¹ In short, the U.S. government argued aiding and abetting liability would discourage investment in developing countries and that this conflicted with their foreign policy of constructive engagement. The South African government argued the litigation would infringe upon their sovereignty and discourage foreign investment. These arguments are outlined below.

3.1 The submissions of the United States government

In 2003, under the Bush administration, the Department of State advised the District Court that 'continued adjudication of the above-referenced matters risks potentially serious adverse consequences for significant interests of the U.S.'²² It also argued that South Africa 'is broadly representative of the victims of the Apartheid regime [and] is uniquely charged with a popular mandate to deal with the legacy of Apartheid.' (UNITED STATES OF AMERICA, 2009a).

The submission also stated that such litigation would hamper foreign investment in South Africa and other developing countries, a goal which was central to the U.S. foreign policy of 'constructive engagement' (UNITED STATES OF AMERICA, 2009a).

The U.S. government similarly argued in an amicus brief submitted to the Second Circuit Court that '[o]ne of the practical consequences of embracing aiding and abetting liability under ATCA claims would be to create uncertainty that would in some cases interfere with the ability of the U.S. government to employ the full range of foreign policy options when interacting with regimes with oppressive human rights practices. One of these options is to promote active economic engagement as a method of encouraging reform and gaining leverage. Individual federal judges exercising their own judgment after the fact by imposing

aiding and abetting liability... would generate significant uncertainty regarding private liability, which would surely deter many businesses from such economic engagement.²³

3.2 The submissions of the South African government:

In 2003 former president Thabo Mbeki in a public announcement stated ‘we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our Constitution of the promotion of national reconciliation.’²⁴ He further stated that the litigation interfered with the ‘sovereign right to determine, according to internal political and constitutional order, how best to address Apartheid’s legacy.’ (UNITED STATES OF AMERICA, 2009a, p. 91). Shortly after, the Minister of Justice at the time, Penuell Maduna filed a declaration with the U.S. District Court stating the litigation had the potential to discourage foreign investment in South Africa and that the court should not hear the case as doing so would ‘interfere with [a] foreign sovereign’s efforts to address matters in which it has predominant interest.’²⁵

3.3 The submissions of the Truth and Reconciliation Commission (‘TRC’):

The arguments advanced by the South African government were not supported by the TRC Commissioners. The chairman of the TRC, Desmond Tutu, submitted an amicus brief to the Second Circuit Court stating: ‘[t]here 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. To the contrary, such litigation is entirely consistent with these policies and with the findings of the TRC.’ (UNITED STATES OF AMERICA, 2009a, p. 94). This is so because nothing in the TRC Act or Commission Reports amounted to the explicit or implicit granting of amnesty to corporations. The Promotion of National Unity and Reconciliation Act 34 of 1995 which established the TRC stated in its preamble that amnesty could be afforded to ‘persons who make full disclosure’ the implication being that corporations did not qualify for amnesty under the Act nor did any apply for such amnesty (UNITED STATES OF AMERICA, 2009a, p. 95). In light of this, in its final report, the TRC stated that business ‘must be held accountable’ outside of the amnesty mechanisms of the TRC (UNITED STATES OF AMERICA, 2009a).²⁶

4 Policy considerations as a basis for dismissal

The next section considers whether, and if so on what bases, the arguments outlined above merit dismissal of the case and whether such policy arguments should preclude aiding and abetting liability under the ATCA in general. This was the issue on remand for Judge Scheindlin to decide. The task is a complex one as a judge is not only faced with questions surrounding the relationship between

international and domestic law but also the relationship between the judiciary and the executive branches of government. This is further complicated by executive submissions requesting dismissal or expressing disapproval. The submissions in the *Khulumani* case outlined above are an example of this. Courts have had to address the question of how to treat executive submissions in human rights litigation and in doing so have relied largely on the political question doctrine and to a lesser extent the international comity and act of state doctrines.²⁷ In applying them a court is tasked with balancing the need to preserve judicial independence while giving executive submissions due deference and being mindful not to ‘undermine the constitutional balance of power’ (STEPHENS, 2004, p. 170). The following section will outline the political question and international comity doctrines as understood in the context of ATCA litigation followed by Judge Scheindlin’s opinion as to their application in the *Khulumani* case.

4.1 Deference and the Political Question Doctrine

The political question doctrine seeks to uphold the separation of powers and operates when ‘a court declines to hear a case that deals with issues more properly belonging before one of the “political” branches of government’ (BAXTER, 2006, p. 826). The Supreme Court in *Baker v. Carr* (UNITED STATES OF AMERICA, 1962) held that its application involves a ‘case by case’ inquiry of whether one or more of six factors are present.²⁸ It was stated in *Kadic v. Karadzic* (UNITED STATES OF AMERICA, 1995, p. 249)²⁹ that the first three factors did not apply to litigation dealing with international law but the latter factors could be applicable where the impact of litigation on foreign relations needed to be assessed (SUTCLIFFE, 2009, p. 301). It has been noted that executive submissions on how litigation will impact policy decisions on foreign relations fall within at least one of the required factors and so trigger the application of the doctrine. Despite the Supreme Court’s warning that not ‘every case or controversy which touches on foreign relations lies beyond judicial cognizance’ (UNITED STATES OF AMERICA, 1962, p. 211) lower courts initially applied the doctrine automatically where executive submissions against litigation were presented. The first ATCA case involving the evaluation of executive submissions was *Sarei v. Rio Tinto* (UNITED STATES OF AMERICA, 2002b, p. 1208-1209)³⁰ where the District Court automatically dismissed all the claims under the political question doctrine. The courts’ deference to the views of the executive has been attributed to a lack of case law on the issue and the vague and ambiguous factors laid down in *Baker v. Carr* (UNITED STATES OF AMERICA, 1962; BAXTER, 2006, p. 836).

In response to the growing number of ATCA cases and the ambiguity surrounding the proper treatment of executive submissions against such litigation the Supreme Court attempted to offer some guidance. First in *Republic of Austria v. Altmann* (UNITED STATES OF AMERICA, 2004d, p. 701-702) where the court distinguished between questions of law and policy stating that questions of statutory interpretation ‘merit no special deference’ but submissions by the executive on a question of foreign policy ‘*might* well be entitled to deference [emphasis added]’.

Second in *Sosa v. Alvarez-Machain* (UNITED STATES OF AMERICA, 2004a) the court noted two possible limitations on the statute's application the one involving a question of law, the other a question of policy. First that the recognition of an actionable norm (that is a tort in violation of customary international law) involved 'an element of judgment about the practical consequences of making that cause available to litigants' that is 'whether a norm is sufficiently definite to support a cause of action.' (UNITED STATES OF AMERICA, 2004a, p. 732-733). Second (as stated in footnote 21) that certain cases may require 'a policy of case-specific deference to the political branches' and that 'courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy.' (UNITED STATES OF AMERICA, 2004a, footnote 21). However, it must be noted that in both these cases, the question of deference was not an issue the court had to decide and so the statements are not binding on lower courts. While the two possible limitations rightly affirmed the principle that courts and not the executive should decide questions of law and that the application of the doctrine requires evaluation and not automatic application no guidance was provided to lower courts on how to conduct such an assessment.

Judge Scheindlin made three comments in this regard: 'First, footnote 21 merely provides guidance concerning the need for deference with regard to foreign policy matters; it does not mandate summary dismissal...[s]econd, the Executive Branch is not owed deference on every topic; rather this court will give serious consideration to the Executive's views only with regard to the case's 'impact on foreign policy', [t]hird, deference does not mean delegation; the views of the Executive Branch - even where deference is due - are but one factor to consider and are not dispositive.' (UNITED STATES OF AMERICA, 2009a, p. 99). Further, 'judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights.' (UNITED STATES OF AMERICA, 2009a, p. 102).³¹

Regarding the *Baker v. Carr* (UNITED STATES OF AMERICA, 1962) factors courts have more recently held that they 'appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests.' (UNITED STATES OF AMERICA, 2009a, p. 100).³² As noted by Judge Scheindlin courts have generally moved away from an automatic application of the doctrine to instead assess the executive submission itself (UNITED STATES OF AMERICA, 2009a, p. 102). In doing so courts have dismissed submissions 'presented in a largely vague and speculative manner [or not] severe enough or raised with the level of specificity required to justify...a dismissal on foreign policy grounds.' (UNITED STATES OF AMERICA, 2009a).³³

4.2 The International Comity Doctrine:

The international comity doctrine has been understood differently in different contexts and is thus difficult to define (RAMSEY, 1998, p. 893). In the context of ATCA litigation it is generally understood as 'the recognition which one nation

allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.’ (UNITED STATES OF AMERICA, 2009a, p. 103).³⁴ In its narrowest sense the doctrine operates as a basis for dismissal ‘only when there is a true conflict between American law and that of a foreign jurisdiction.’ (UNITED STATES OF AMERICA, 2009a, p. 104).³⁵ This strict formulation has since been relaxed as in addition to looking at whether a conflict would arise; courts have assessed the degree of offense to the foreign sovereign, steps taken by them to address the issue in dispute and the U.S.’s interest in the issue (UNITED STATES OF AMERICA, 2009a, p. 104-105). Thus understood, the application of the doctrine is a matter of discretion requiring the court to weigh the interests of the foreign nation and the international community in deciding whether adjudication would be improper (RAMSEY, 1998, p. 894).

The political question and international comity doctrines differ in that the former aims to uphold the separation of powers while the latter focuses more directly on international relations. However, the two are similar as both can and have been used to assess the impact of litigation on foreign affairs (SUTCLIFFE, 2009, p. 326).

Commentators in favor of the flexibility of the more relaxed international comity doctrine and the ‘balancing test’ it requires, have argued it should be used to inform the application of the political question doctrine to assist in avoiding undue deference (SUTCLIFFE, 2009, p. 326).

4.3 Application by the court:

In the *Khulumani* case the issue on remand by the Supreme Court was whether the political question and international comity doctrines merited dismissal in light of the submissions of the U.S. and South African governments. Judge Scheindlin held that the political question doctrine did not provide a basis for dismissal for three reasons. First the claims did not contradict U.S. foreign policy in a way that ‘would seriously interfere with important governmental interests’ and so the latter three *Baker v. Carr* (UNITED STATES OF AMERICA, 1962) factors did not apply (UNITED STATES OF AMERICA, 2009a, p. 105). Second the claims did not challenge the political branch’s foreign policy of ‘constructive engagement’ with Apartheid-era South Africa nor seek to hold defendants liable for acting in line with this policy (UNITED STATES OF AMERICA, 2009a, p. 105). Third the argument of the U.S. government as relied on by the defendants was based on the false premise that the plaintiffs sought to allege ‘wrongful commerce’ as a basis for liability and that the political question doctrine was automatically invoked (UNITED STATES OF AMERICA, 2009a, p. 105). For these reasons Judge Scheindlin noted that the submissions required ‘considerably less deference.’ (UNITED STATES OF AMERICA, 2009a, p. 105).

On the other hand, to survive dismissal the plaintiffs had to claim ‘that the defendants “substantially assisted” violations of the law of nations and knew that their assistance would be substantial’ as merely engaging in commerce did not

attract liability (UNITED STATES OF AMERICA, 2009a, p. 106). Liability properly understood as ‘knowingly providing substantial assistance to violations of the law of nations’ would only compromise foreign policy in so far as it actually deterred investment (UNITED STATES OF AMERICA, 2009a, p. 106-107). In this regard no real evidence was found to have been presented (UNITED STATES OF AMERICA, 2009a, p. 107).³⁶

Lastly, it was noted that the case did not involve allegations against the acts of the U.S. government itself as ‘[a]t no point did the Government instruct or authorize the defendant’s conduct’ and that ‘resolution of the case neither requires this court to pass judgment on the policy of constructive engagement or the United State’s relationship with apartheid-era South Africa.’ (UNITED STATES OF AMERICA, 2009a, p. 108).³⁷ Thus the political question doctrine did not require dismissal of the suit.

It was also held that international comity did not provide a policy basis for dismissal based on ‘[t]he absence of conflict between this litigation and the TRC process.’ (UNITED STATES OF AMERICA, 2009a, p. 109-110). The reasons advanced included that the defendants did not appear before the TRC nor were they granted amnesty and ‘a policy of blanket immunity for corporations’ was never given by the South African government (UNITED STATES OF AMERICA, 2009a, p. 109-110). There was found to be no bar to holding the defendants legally liable under civil law with the TRC Report itself calling for corporate liability outside the TRC Process (UNITED STATES OF AMERICA, 2009a, p. 109-110). Further neither the defendants nor the South African government argued that ‘an adequate forum existed in the objecting nation.’ (UNITED STATES OF AMERICA, 2009a, p. 109-110). Lastly the litigation did not conflict with the goals of the TRC and so would not require dismissal even in the absence of an alternative forum (UNITED STATES OF AMERICA, 2009a, p. 109-110). Judge Scheindlin concluded that ‘the purposes of the TRC and this lawsuit are closely aligned: both aim to uncover the truth about past crimes and to confront their perpetrators.’ (UNITED STATES OF AMERICA, 2009a, p. 109-110). Therefore the international comity doctrine did not require dismissal of the suit.

Since neither doctrines provided a basis for dismissal Judge Scheindlin held that the views of the U.S. and South African governments did not require resoliciting for the case to proceed (UNITED STATES OF AMERICA, 2009a, p. 111).

5 The evaluation of Executive submissions

The decision by Judge Scheindlin to dismiss the views of the executive has formed part of an emerging trend in U.S. courts particularly in the context of ATCA litigation (STEPHENS, 2008, p. 773). Since the first case of *Doe I v. Unocal* (UNITED STATES OF AMERICA, 1997) in 1997 allowing the use of the ATCA against corporations, approximately fifty ATCA cases have been filed against corporate defendants (STEPHENS, 2008, appendix B). The Bush administration has filed letters or amicus briefs in ten of them stating such litigation would undermine U.S. foreign policy (STEPHENS, 2008, p. 773-774, appendix C).³⁸ In eight of these the objections

were considered by the court.³⁹ In only two cases was the foreign policy argument accepted as a basis for dismissing the suit.⁴⁰

This trend shows that despite a historically deferential approach, in the context of ATCA litigation U.S. courts have since permitted almost all the cases to proceed despite arguments that it would interfere with foreign policy or deter investment. This shift indicates that courts do not find the submissions reasonable or convincing. Reasons for rejection include undue claims for deference, unfounded predictions of harm, unsupported economic claims and perceived bias toward corporations (STEPHENS, 2008, p. 802). Judge Scheindlin similarly based dismissal of the submissions upon a lack of evidence as well as the presence of incorrect assumptions. The reasons given by the courts support the argument that ‘the shift is not the result of a change in the way the courts have exercised their authority, but rather a judicious recognition that the Bush Administration’s views are unreasonable, and therefore undeserving of deference.’ (STEPHENS, 2008, p. 809).

Most courts have focused largely on the text of the submission itself and engaged in a factual enquiry as to its correctness, specificity and the evidence submitted to support it.⁴¹ In favour of this approach some commentators have argued that courts are under a constitutional duty to assess the credibility of the executive’s factual claims and to reject them where not supported by the evidence (STEPHENS, 2004, p. 170). Others have argued that this can be problematic as courts are ill-equipped to make factual findings as to the correctness of policy decisions as they have limited access to evidence and could be vulnerable to manipulation in this regard (SUTCLIFFE, 2009, p. 315). It is agreed that an assessment which focuses only on the factual validity and specificity of submissions is undesirable and too superficial. Indeed the Supreme Court’s view that executive submissions need to be ‘weighed’ implies that a range of factors and not just the submission itself should be taken into account.

In this regard, some commentators have argued that the problem lies in the fact that the political question doctrine is too limited and vague a standard by which to assess executive submissions and that ‘a more fluid balancing test’ should be developed by the courts (SUTCLIFFE, 2009, p. 320). Multi-layered guidelines or standards for assessing whether a submission merits deference have been proposed. These includes that ‘in order to merit deference, an administration submission must: (1) articulate the relevant policy interests; (2) explain how the litigation could harm those interests; (3) tie the anticipated harm to one of the recognized foreign policy justiciability doctrines; and finally, (4) offer explanations that are reasonable, drawing conclusions that are well-founded and supported by the facts.’ (STEPHENS, 2008, p. 775). While such a doctrinal discussion is beyond the scope of this paper the next section takes this criticism into account by undertaking a more substantive analysis in looking at how the foreign policy, foreign investment and sovereignty arguments raised in favour of dismissal of ATCA suits have failed. This approach goes beyond the submission itself to look at some of the legal and practical implications aiding and abetting liability could have. Doing so demonstrates just how unconvincing and unreasonable the arguments against such liability in fact are.

5.1 The argument that liability would undermine U.S. foreign policy:

The argument is that the mere existence of aiding and abetting liability will deter investment in foreign countries and thereby undermine the U.S. foreign policy of 'constructive engagement'. To evaluate the merits of this argument and so also the correctness of its dismissal, it is necessary to outline the 'constructive engagement' model and examine the effect aiding and abetting liability would have on it. The model is largely based on the idea that foreign investment by corporations in countries with repressive regimes will encourage reform and promote democracy and human rights.⁴² The model is highly controversial and has generated much debate which goes beyond the scope of this paper. There have been contradictory empirical studies, one concluded that in some cases constructive engagement and investment actually had the opposite effect by encouraging and increasing repressive behavior (FORCESE, 2002, p. 10-17) while another concluded that foreign investment was associated with increased respect for civil and political rights (RICHARDS, 2001, p. 231-232).

What is of relevance is that since one of the purported goals of constructive engagement is to promote freedom and democracy; a corporation which aids or abets human rights violations would undermine the model and further the very abuses it claims to help eradicate. Moreover, complicit corporations may have huge legal and economic interests in maintaining or supporting oppressive regimes and without the threat of liability as incentive to encourage reform face no consequences.

In this regard aiding and abetting liability could be used as a tool to ensure that individual corporations who defy the policy of constructive engagement are held accountable. It could also encourage corporations to conduct business in ways which promote the goals of democracy and human rights in general. Thus aiding and abetting liability could actually facilitate rather than undermine the model and the argument of the U.S. government must fail.

The commentator Richard Herz has presented similar arguments and noted further inconsistencies. First, the U.S. government seems to be applying a 'double standard' by criticizing oppressive regimes but protecting corporations for aiding or abetting abuses committed by them and that this casts doubt on how committed the government in fact is to bringing about reform in advancing democracy and human rights.⁴³ Second, by protecting corporations from liability on foreign policy grounds the government may in fact 'encourage or subsidize' complicity. This is so as without the possibility of being held accountable corporations could decrease costs involved with taking measures to avoid complicity and without the possibility of litigation avoid being liable for compensating successful victims. Such corporations could have a competitive edge over other corporations who refuse to operate in countries with oppressive regimes.

It could be argued that the risks of litigation are too marginal to deter corporations from being complicit in abuses where comparatively huge economic profit is at stake. However, as Herz correctly points out, the U.S. government's argument is that the risk of liability under the ATCA would be so substantial so as to deter investment. Assuming that the risks of liability would be too marginal to

deter complicity, the underlying rationale of the government's argument would fall away. On the other hand if the risk of potential litigation were substantial enough to deter corporations from being complicit in abuses committed by oppressive regimes, the U.S. government's opposition of liability could reward and encourage investment which directly undermines the model upon which their foreign policy is based. These inconsistencies as noted by Herz provide additional convincing support for rejecting the views of the U.S. government (HERZ, 2008, p. 207).

The preceding section argued that aiding and abetting liability could promote rather than undermine U.S. foreign policy. By opposing liability corporations would be shielded and perhaps even encouraged to engage in practices which would undermine the purported goals of the 'constructive engagement' model. For these reasons Judge Scheindlin was correct in dismissing the argument that aiding and abetting liability would undermine U.S. foreign policy.

5.2 The argument that liability would deter foreign investment:

The argument is that corporations will refuse significant investment opportunities or pull out of existing projects, based on the possibility that they may be held liable for aiding or abetting human rights violations. Judge Scheindlin concluded that since no evidence was given to support this argument it had to be dismissed. Commentators have argued that liability would not deter foreign investment and could in fact encourage positive growth. Joseph Stiglitz, a Nobel laureate and former Chief Economist of the World Bank, filed a letter with the court rejecting the economic analysis relied on by the U.S. and South African governments (UNITED STATES OF AMERICA, 2009a, p. 88). He argues that corporations should be held liable and that doing so would contribute to confidence in the market system, create a more favourable business climate and encourage positive growth and development in South Africa.⁴⁴ Stiglitz is widely regarded as one of the world's foremost economists and since his views directly contradict those of the U.S. and South African governments they assist in presenting a stronger argument in favour of rejection.

The commentator Beth Stephens similarly argues that liability would promote rather than undermine positive investment (STEPHENS, 2008, p. 773). Since merely doing business in a country where abuses are being committed does not attract liability under the ATCA, the argument that liability will deter foreign investment only applies to corporations who may aid or abet violations of established international norms (STEPHENS, 2008, p. 806). There is also the possibility that companies will continue to invest and adopt policies and procedures which seek to avoid aiding and abetting such abuses (STEPHENS, 2008, p. 806). Stephens argues this kind of reform is more likely than deterrence as most ATCA cases have involved corporations in the extraction industry⁴⁵ who have already made large investments and are highly unlikely to pull out based on the possibility of liability (STEPHENS, 2008, p. 806). In other words the costs of litigation compared with the large profits multinational corporations are making will not likely deter or decrease investment (STEPHENS, 2008, p. 807).

The argument is not that no corporation will be deterred from investing; presumably only those with dubious human rights practices will refuse. As already stated this would promote the policy of constructive engagement and human rights in general. Thus even if some potentially beneficial investment is deterred this must be weighed against the greater benefits ATCA liability may achieve by assisting to deter the aiding and abetting of human rights violations. In short and as noted by commentators, over deterrence of the serious human rights abuses attracting liability under the ATCA surely outweighs the marginal possibility that innocent yet beneficial companies will refuse to invest. It has been argued that courts are left with two options: either under-deterrence which will allow more investment which encourages human rights abuses or over-deterrence which will discourage investments where corporations may run the risk of participating in human rights violations, even if the investments would not encourage abuses, given the seriousness of alleged offenses under ATCA cases the latter option is clearly preferable (HOFFMAN; ZAHEER, 2003, p. 81).

The preceding section demonstrates not only that the foreign investment argument lacks supporting evidence but suggests that aiding and abetting liability could be used to encourage positive investment and growth. Thus Judge Scheindlin was correct in dismissing the argument that aiding and abetting liability would deter foreign investment.

5.3 The argument that liability would infringe upon sovereignty:

The South African and U.S. government argued that the litigation would infringe upon South Africa's sovereignty. This argument falls broadly within the doctrine of international comity outlined above. As suggested in *Sosa* (UNITED STATES OF AMERICA, 2004a), a court should consider 'whether the exercise of jurisdiction under the ATCA is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.' (UNITED STATES OF AMERICA, 2004a, p. 73). However, as noted by the Second Circuit Court in *Khulumani* 'although the views of foreign nations are important under the doctrine of international comity, we have not held them to be dispositive.' (UNITED STATES OF AMERICA, 2007a, p. 265). In other words the weight given to the views of foreign governments under the comity doctrine is not as great as the weight given to the views of the U.S. executive under the political question doctrine. On the other hand the argument that judges must be careful not to act in ways which undermine legitimate political and legal process appears stronger in cases such as *Khulumani* where a democratically elected government decides not to allow similar liability claims domestically (NEMEROFF, 2008, p. 283).

What is fatal to the sovereignty argument is that the conduct being adjudicated is that of defendant corporations and not sovereign principals. In their submissions both governments failed to appreciate this distinction and in so doing confused the extraterritoriality argument with the doctrine of comity (KEITNER,

2008, p. 101). Since claims under the ATCA seek to hold corporations liable as accomplices, and not sovereign principals, the litigation does not directly infringe the principal's sovereignty under the Foreign Sovereign Immunities Act of 1976 (KEITNER, 2008, p. 102). Finally, while an agent of a foreign government would also be immune under this Act, courts cannot be deprived of jurisdiction over defendant corporations under this doctrine as they have no agency relationship with the foreign government in whose country they are operating (KEITNER, 2008, p. 102).

The preceding section demonstrates that the sovereignty argument while falling broadly with the doctrine of international comity was conceptually confused. Thus Judge Scheindlin was correct in dismissing the argument that aiding and abetting liability would infringe upon the sovereignty of South Africa.

6 The South African and U.S. governments' turnabout and subsequent developments

The preceding analysis reflects the recent trend in courts' dismissal of executive submissions upon finding their opposition to ATCA suits to be unreasonable and unfounded. Judge Scheindlin's opinion further solidified this by not only dismissing the submissions but allowing the suit to continue without requiring the government's views to be resolicited as requested by the plaintiffs.⁴⁶ While the plaintiffs may have requested resubmission in the hope that the new Zuma and Obama administrations would be more sympathetic to their cause, Judge Scheindlin effectively ruled that it did not matter what either government thought.

On 22 April 2009, the defendants filed a motion for reconsideration. This was denied upon which the defendants then filed a notice of appeal on 25 June 2009 with the Court of Appeals for the Second Circuit for the interlocutory review of Judge Scheindlin's decision to allow the litigation to proceed to trial.⁴⁷ The review was set for hearing on 11 January 2010.

On 1 September 2009, under the recently elected Zuma government, Justice Minister Jeff Radebe sent an unsolicited letter to Judge Scheindlin with a copy to the Court of Appeals for the Second Circuit. The letter in effect reversed the South African government's opposition of the litigation under former President Thabo Mbeki. In this regard, the Justice Minister observed that the suit no longer involved claims against corporations that merely did business in South Africa during that time and instead limited the claims to those 'based on aiding and abetting very serious crimes, such as torture, [and] extrajudicial killing committed in violation of international law by the apartheid regime.' (MATABOGE, 2009). The Minister also informed the court that '[t]he government of the Republic of South Africa, having considered carefully the judgment of the...Southern District of New York, is now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law.' (MATABOGE, 2009). However, the letter also stated that the government would be 'willing to offer counsel to the parties in pursuit of a settlement.' (MATABOGE, 2009). Justice Department spokesperson Tlali Tlali said the government's turnabout was based on the realization that there was no 'appropriate forum' in South Africa for such

litigation and that 'the US court is an appropriate forum to hear these matters' but that the 'government is, however, available to facilitate [out-of-court] settlements if the litigants are amenable to that option.' (MATABOGE, 2009).

On 30 November 2009, the U.S. government as *amicus curiae* submitted to the Court of Appeals for the Second Circuit a brief supporting the plaintiffs as appellees (UNITED STATES OF AMERICA, 2009e). In short, the brief argues that since the U.S. did not explicitly request that the case be dismissed on foreign policy grounds (UNITED STATES OF AMERICA, 2009e, p. 2)⁴⁸ and since Judge Scheindlin did not deny defendants' motion to dismiss despite such request, the collateral order doctrine was not satisfied and the court should dismiss the appeal by the defendants for lack of jurisdiction (UNITED STATES OF AMERICA, 2009e, p. 12).⁴⁹

Both recent submissions clearly indicate a drastic turnabout. The effect of these new submissions remains uncertain as judgment from the 11 January 2010 hearing by the Court of Appeals as to whether the litigation may proceed remains reserved until later this year. Another uncertainty is that while Judge Scheindlin's opinion effectively excluded executive submission on the issue, it is unclear whether the Supreme Court if faced to hear the case will follow a similarly undeferential approach. If not, the new statements issued by the Zuma and Obama administration may well assist the plaintiffs' case provided an out-of-court settlement does occur before the matter can be heard. It is argued that such an outcome would be disappointing and undesirable.⁵⁰

7 Conclusion

The possibility of indirect liability for aiding and abetting violations of international law under the ATCA not only has the potential to promote U.S. foreign policy and encourage beneficial investment but also to afford justice to litigants who are entitled claimants. Litigating in U.S. courts is particularly beneficial as many multinational corporations have sufficient ties with the U.S. allowing plaintiffs to establish jurisdiction (NEMEROFF, 2008, p. 251). Corporations are also more likely to have sufficient assets to pay successful claimants and are unlikely to abandon their operations in the U.S. to avoid paying damages (NEMEROFF, 2008, p. 251). Defendant corporations should be held liable where they have knowingly participated in a violation of an international norm. Upon Judge Scheindlin's formulation for imposing liability, which this paper supports, plaintiffs would bear the onus of showing that a corporation knowingly provided substantial assistance to a regime that committed human rights violations which infringed established international norms (UNITED STATES OF AMERICA, 2009a, p. 54). Under this standard it is highly unlikely nor has it ever been the case, that a company will be held liable for merely doing business in a country with a poor human rights record.⁵¹

Establishing a clearer doctrine for aiding and abetting liability under the ATCA will provide better guidance to potential plaintiffs as to whether they have a claim as well as how to structure it and thereby avoid unnecessary litigation. It has been noted that 'critics of ATCA suits have long complained that courts have used the statute to make decisions based more on personal preference than legal

principle. This critique has been fueled by most American lawyers' lack of familiarity with international law and by courts' failure to produce a clear methodology for adjudicating ATCA cases...courts can and should define a specific methodology for deciding issue of international law in U.S. courts...[as] a forum for the settlement of disputes involving foreigners...ATCA litigation need not consist of the application of amorphous standers and judicial fiat. Instead the litigation of international norms in U.S. courts can be grounded in well-established legal doctrine' (HOFFMAN; ZAHEER, 2003, p. 83). So too it could provide guidance to corporations in ensuring that they take preventative measures to reduce exposure to litigation. However, despite current uncertainty corporations are not left without defences (some not discussed in this paper), such as *forum non conveniens*, exhaustion of local remedies and properly founded arguments under the political question and international comity doctrines. The high evidentiary burden plaintiffs carry in such cases also operates in favour of corporate defendants (DHOOGHE, 2009, p. 289).

The doctrine of aiding and abetting liability under the ATCA appeared to be gaining momentum culminating in Judge Scheindlin's opinion however, since then; various federal courts have handed down decisions pointing the other way.⁵² Perhaps most significantly, the Second Circuit's ruling in *Presbyterian Church of Sudan v. Talisman Energy Inc* (UNITED STATES OF AMERICA, 2009e) that in order to establish aiding and abetting liability under the ATCA, a plaintiff must show 'that a defendant purposefully aided and abetted a violation of international law.' In changing the standard from mere knowledge to purpose, the Second Circuit has placed a heavier burden on plaintiffs bringing ATCA claims.

It should also be noted that despite the Bush administration's submissions, the U.S. Congress has never sought to amend the ATCA to either expressly include or exclude indirect liability. This congressional silence could be from a lack of interest or consensus or a desire to defer to the Supreme Court. It has been argued that Congress's failure to amend the ATCA to include aiding and abetting liability despite judicial precedent does not indicate legislative intention in favour of liability and that the lack of Congressional approval combined with the absence of explicit reference to aiding and abetting liability in the statute itself should prevent the imposition of aiding and abetting liability against corporate defendants (DHOOGHE, 2009, p. 282). The limited guidance provided by the Supreme Court in this regard has forced lower courts to make decisions as to the application of the ATCA. Since the more recent federal court decisions appear to be closing the door and limiting the statute's application in favour of defendants, the outcome of the *Khulumani* case will prove to be crucial.

In this regard, an out-of-court settlement would prevent the setting of further precedent and frustrate the process of crystallization set in motion by Judge Scheindlin at a most crucial period. While Judge Scheindlin provided much needed clarity to the political question and international comity doctrines as well as the standard of intent required, the issue of aiding and abetting liability under the ATCA still needs to be addressed by the Supreme Court. Whether the litigation is allowed to proceed and whether it will reach a Supreme Court with the necessary quorum to hear the matter remains to be seen.

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NOTES

1. The total number of such corporate defendant cases from 1960 to present is approximately 85 with 61 of these being brought after 1996. Alleged abuses include, for example, in *Doe I v. ExxonMobil* (UNITED STATES OF AMERICA, 2005a) that ExxonMobil in seeking to protect their natural gas facilities had abetted genocide and crimes against humanity by the Indonesian military and in *Presbyterian Church of Sudan v. Talisman Energy, Inc.* (UNITED STATES OF AMERICA, 2003) that Talisman Energy in seeking to clear areas surrounding their oil concessions had assisted the Sudanese government in committing genocide.

2. 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations...'. Also known as the Alien Tort Statute 'ATS'.

3. The U.S. Supreme Court finally affirmed this reading of the ATCA in *Sosa v. Alvarez-Machain* (UNITED STATES OF AMERICA, 2004a, p. 732).

4. See *Doe I v. Unocal* (UNITED STATES OF AMERICA, 2002a); *Khulumani v. Barclay National Bank* (UNITED STATES OF AMERICA, 2007a); *Presbyterian Church v. Talisman Energy, Inc.* (UNITED STATES OF AMERICA, 2005b); *In re Terrorist Attacks on September 11, 2001* (UNITED STATES OF AMERICA, 2005c); *Bowoto v.*

Chevron Texaco (UNITED STATES OF AMERICA, 2004b). Only two decisions have held that aiding and abetting liability is not actionable: *In re South Africa Apartheid Litigation* (UNITED STATES OF AMERICA, 2004c), (which was overturned by the Second Circuit decision in *Khulumani*) and *Doe I v. Exxon Mobil* (UNITED STATES OF AMERICA, 2005a) which in fact relied on the overturned 2004 decision of the Southern District court in *In re South Africa Apartheid Litigation*.

5. The case consists of two consolidated class actions. Plaintiffs in the first action, *Ntsebeza v. Daimler A.G. et al* brought a class action on behalf of 'themselves and all black South African citizens (and their heirs and beneficiaries) who during the period from 1973 to 1994 suffered injuries' as a result of the defendant's direct and secondary violations of the law of nations. Plaintiffs in the second action, *Khulumani v. Barclays National Bank Ltd. et al* (UNITED STATES OF AMERICA, 2005d) include *Khulumani* (a South African organization that 'works to assist victims of Apartheid-era violence') and other individuals.

6. The court dismissed the claims seeking direct liability for the tort of apartheid by non-state actors, stating that 'although the establishment of state-sponsored apartheid and the commission of

inhumane acts needed to sustain such a system is indisputably a tort under customary international law, the international legal system has not thus far definitively established liability for non-state actors who follow or even further state-sponsored racial oppression.'

7. From 1789 to 1980, twenty-one cases asserted jurisdiction under the ATCA, with only two judgments for the plaintiffs.

8. The plaintiffs were the family of Joelito Filartiga, a seventeen year old Paraguayan citizen, tortured and murdered by a Paraguayan police Inspector General who the family then sued. The Second Circuit Court reversed the District Court's decision and allowed the claim, stating that modern international law clearly prohibits state-sponsored torture (UNITED STATES OF AMERICA, 1980, p. 884).

9. On the evidence presented the court concluded that Unocal: knew the military had a record of committing human rights abuses and using forced labour and hired them anyway to provide security for the project, benefited from the forced labour carried out and knew or should have known that abuses were and would continue to be committed by them. The court then dismissed the case concluding that Unocal could only be liable if they wanted the military to commit the abuses, which the plaintiffs had not shown. On 18 September 2002 the United States Court of Appeals for the Ninth Circuit reversed the decision on the basis that the plaintiffs need only show that Unocal knowingly assisted the military to commit the abuses. This having been shown, the case was found to have enough evidence to go to trial. A jury trial date was set for June 2005. However in March 2005 Unocal agreed to compensate the plaintiffs and thereby end the historic lawsuit. See *Doe v. Unocal* (UNITED STATES OF AMERICA, 2005e).

10. Since 1997, of the approximately 52 cases launched against corporations using the ATCA, only *Jama v. Esmor Corr. Serv* (UNITED STATES OF AMERICA, 2007b) resulted in a jury verdict in favour of the plaintiffs. Excluding the cases still pending, approximately 3 have been settled the most famous being *Doe I v. Unocal* (UNITED STATES OF AMERICA, 2002a), 32 have been dismissed including *Presbyterian Church v. Talisman Energy, Inc* (UNITED STATES OF AMERICA, 2005b) where the District Court held that the plaintiffs had failed to provide sufficient evidence showing Talisman had provided 'substantial assistance' to the Sudanese government in committing violations of international law.

11. Since this decision approximately 104 cases have asserted ATCA jurisdiction in federal courts. Approximately one-third of these involved claims against the U.S. government, its officials and/or government contractors all of which were dismissed, another one-third involved claims against foreign governments all of which were dismissed under the doctrine of sovereign immunity. The remaining third have involved corporate defendants.

12. In *re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 37-39) 'the ATCA is merely a jurisdictional vehicle for the enforcement of universal norms...[i]deally the outcome of an ATCA case should not differ from the result that would be reached under analogous jurisdictional provisions in foreign nations.'

13. *Khulumani* (UNITED STATES OF AMERICA, 2007a, p. 39). Judge Katzmann (held that aiding or abetting liability requires proof of purpose or intention to assist in the commission of the violation, relying on Article 25(3)(c) and (d) of the Rome Statute of the International Criminal Court. Judge Hall (at 60) held liability should be based on federal common law, not international law and could only exist by 'facilitating the commission of human rights violations by providing the principal with tools, instrumentalities, or services to commit those violations with actual or constructive knowledge that those, instrumentalities, or services will be (or only could be) used in connection with that purpose.' Judge Korman (UNITED STATES OF AMERICA, 2007a, p. 68-69) endorsed Judge Katzmann's view of intention as the test for liability and so similarly rejected Judge Hall's opinion that federal common law and knowledge were the determinants.

14. In *re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 45) relying on the ICTY decisions as reflecting international law on the issue, see fn 161 of the opinion for a list of the cases relied upon by the court.

15. In *re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 54 after acknowledging p. 49), that Article 25(3)(c) of the Rome Statute as interpreted by Judge Katzmann presents 'the most difficult question concerning the universality of the knowledge standard for aiding and abetting under customary international law' but that it should be interpreted to conform to pre-Roman Statute customary law, see *United States of America* (2009a, p. 50-53).

16. *Torture Victims Protection Act* (UNITED STATES OF AMERICA, 1991, p. 106 Stat. 73), enacted in 1992, ('TVPA') and *Racketeer Influenced and Corrupt Organizations Act* (UNITED STATES OF AMERICA, 1970), codified as Chapter 96 of 18 U.S.C. § 1961-1968 ('RICO').

17. As summarized by the Second Circuit in *Khulumani* (UNITED STATES OF AMERICA, 2007a, p. 294). The examples of assistance cited by the plaintiffs include automobiles by Daimler-Benz from which South African police shot at protestors, computers manufactured by IBM used to implement racist policies, and loans with favorable repayment terms from numerous financial institutions. See also *In re South Africa Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 544-545).

18. *Khulumani* (UNITED STATES OF AMERICA, 2007a, p. 260) (per curiam). The Second Circuit affirmed the dismissal of the TVPA claims on the same basis as the lower court namely, that the plaintiffs' failed to establish a connection between

the defendants' actions and the conduct of South African officials.

19. *American Isuzu Motors, Inc. v. Ntsebeza* (UNITED STATES OF AMERICA, 2008) the order being in terms of Supreme Court Rule 4(2) and 28 U.S.C. § 2109. The recusals undoubtedly were due to the four justices (Chief Justice Roberts and Justices Kennedy, Breyer and Alito) holding investments in or having family ties with some of the defendant corporations.

20. *Khulumani* (UNITED STATES OF AMERICA, 2007a, p. 260-264). Judge Sprizzo died on 16 December 2008 leaving Judge Scheindlin to hear the case.

21. The governments of Germany, Switzerland, Canada and Britain expressed similar views although not by formal submission to the court as no British, Canadian or Swiss defendants remained.

22. 10/30/03 Submission of Interest of the U.S. at 1, cited in *In re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 88).

23. Brief for the United States of America as amicus curiae supporting Respondents as cited in *Khulumani* (UNITED STATES OF AMERICA, 2007a, p. 13).

24. 4/15/03 Submission of Thabo Mbeki as cited in *In re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 91).

25. 7/23/03 Declaration of Penuell Mpapa Maduna, Minister of Justice, Republic of South Africa at para 3.3 as cited in *In re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 92).

26. See also Final Report of the Truth and Reconciliation Commission (TRC, 2003).

27. *In re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 262, footnote 10), both parties to the dispute 'agreed that Sosa's reference to 'case-specific deference' implicates either the political question or international comity doctrine.'

28. The six factors being: [1] textually demonstrable constitutional commitment of the issue to coordinate a political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due to coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; [6] potential embarrassment from multifarious pronouncements by various departments on one question (UNITED STATES OF AMERICA, 1962, p. 217).

29. Cited in *In re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 105).

30. The plaintiffs were a group of Bougainvillian

citizens alleging that the mining corporation was liable for human rights violations and environmental damage in the area. The court also dismissed claims under the international comity and act of state doctrines.

The decision was reversed on appeal in *Sarei v. Rio Tinto PLC* (UNITED STATES OF AMERICA, 2007b, p. 1205-1207) where the court held that although 'serious weight' had to be given to executive submissions which raised foreign policy concerns, this did not mean a court was bound to dismiss the case.

31. Citing *Kadic v. Karadzic*, (UNITED STATES OF AMERICA, 1995, p. 249).

32. Citing *Id. Accord Veith v. Jubelirer* (UNITED STATES OF AMERICA, 2004e).

33. Citing *City of New York v. Permanent Mission of India* (UNITED STATES OF AMERICA, 2006a, p. 376).

34. Citing *Hilton v. Guyot* (UNITED STATES OF AMERICA, 1895).

35. Citing *In re Maxwell Comm. Corp.* (UNITED STATES OF AMERICA, 1996).

36. The Submission of Interest never states that this litigation will necessarily deter such investment, and there is no reason to believe based on the pleadings that these cases – viewed in light of the applicable law – will have such an effect.

37. Citing *Baker v. Carr* (UNITED STATES OF AMERICA, 1962). In contrast, see the case of *Corrie v. Caterpillar Inc.* (UNITED STATES OF AMERICA, 2007d) where *Caterpillar Inc.* was sued for aiding and abetting extrajudicial killing by selling bulldozers to the Israeli Defense Force. The United States Government had in fact paid for the bulldozers. In light of this, the Ninth Circuit dismissed the case based on the political question doctrine, reasoning that a decision would amount to questioning the political branch's decision to provide military assistance.

38. The ten cases are the following: *Arias v. Dyncorp* (UNITED STATES OF AMERICA, 2007e), *Bowoto v. Chevron* (UNITED STATES OF AMERICA, 2004b), *Corrie v. Caterpillar* (UNITED STATES OF AMERICA, 2007d), *Doe v. Exxon Mobil Corp.* (UNITED STATES OF AMERICA, 2007f), *Doe v. Unocal* (UNITED STATES OF AMERICA, 2005e), *In Re Agent Orange Product Liability Litigation* (UNITED STATES OF AMERICA, 2005f), *Khulumani v. Barclay National Bank, Ltd.*, *Mujica v. Occidental* (UNITED STATES OF AMERICA, 2005d), *Presbyterian Church of Sudan v. Talisman Energy, Inc.* (UNITED STATES OF AMERICA, 2006b), *Sarei v. Rio Tinto*, (UNITED STATES OF AMERICA, 2002b, 2007b).

39. The two exceptions being: *Bowoto v. Chevron* (UNITED STATES OF AMERICA, 2004b) where the judge has not yet responded to the executive submission and *Doe v. Unocal* (UNITED STATES OF AMERICA, 2005e) where the parties settled before the court could address the issue.

40. *Corrie v. Caterpillar* (UNITED STATES OF

AMERICA, 2007d) and *Mujica v. Occidental Petroleum Corp* (UNITED STATES OF AMERICA, 2005g) in both, the political question doctrine was found to apply.

41. In *re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 105-107), see also for example *City of New York v. Permanent Mission of India* (UNITED STATES OF AMERICA, 2006a, p. 377, footnote 17) where the court stated that the foreign policy concerns were not sufficiently severe, lacked a sufficient 'level of specificity' and were too 'speculative'.

42. For an in depth discussion on the policy of constructive engagement and how it promotes freedom see USA Engage 'Economic engagement promotes freedom' (available at <<http://archives.usaengage.org/archives/studies/engagement.html>> Last accessed on 30 June 2010). The model posits that Western business officials and corporations impart democratic values through interaction with the government officials and local employees of that country and that Western governments can use such interactions to bring about reform. Further, that investments create a middle class in that country who then push for similar reform. South Korea is used as an example of the first test case for constructive engagement. The U.S. government claims that its decision to continue economic relations and engagement despite South Korean Special Forces killing 200 civilians on May 18, 1980 contributed to bringing about democracy.

43. See for example in *Doe v. Unocal* (UNITED STATES OF AMERICA, 2005e) the Bush Administration's criticisms of and imposition of sanctions against the Burmese military while at the same time arguing against liability for corporations complicit in human rights abuses committed there.

44. See also 'Nobel laureate endorses Apartheid reparations' (TERREBLANCHE, 2003).

45. Such as oil, gas or mining operations, which cost corporations large amounts to establish, *Doe v. Unocal* (UNITED STATES OF AMERICA, 2005e); *Wiwa v. Royal Dutch Petroleum* (UNITED STATES OF AMERICA, 2000); *Doe v. Exxon Mobil* (UNITED STATES OF AMERICA, 2005a); *Mujica v. Occidental Petroleum* (UNITED STATES OF AMERICA, 2005g); *Bowoto v. ChevronTexaco* (UNITED STATES OF AMERICA, 2004b); *Presbyterian Church of Sudan v. Talisman Energy, Inc.* (UNITED STATES OF AMERICA, 2003).

46. In *re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a, p. 111, 286) where the court explained that doing so was unnecessary in light of its 'determination that the political question doctrine and international comity do not require dismissal.'

47. Federal Rule of Appellate Procedure 4 requires filing a notice of appeal within 30 days of the 'judgment' appealed. The 30-day time period runs from the day that the district court denied defendants' reconsideration motion on May 27 2009, see Federal

Rule of Appellate Procedure 4(a)(4)(A) and so the notice of appeal on 25 June 2009 was timely.

48. Stating that 'when a defendant seeks dismissal of a suit predicated on the suit's interference with the United States' foreign relations, a district court's denial of the motion to dismiss is subject to interlocutory appeal under the collateral order doctrine only if the United States explicitly informed the court that the case should be dismissed on that ground. At no time in this litigation has the United States made such a representation to the courts. Because defendants' appeal therefore does not come within the limited reach of the collateral order doctrine, this Court should dismiss the appeal for lack of jurisdiction.' The statement acknowledged but distinguished that previous U.S. briefs in this litigation made legal arguments under the ATCA and supported dismissal on this basis at 10.

49. Citing the Supreme Court case of *Will v. Hallock* (UNITED STATES OF AMERICA, 2006c, p. 349), that for an order to qualify as a collateral order subject to immediate appeal, the order must '[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.' The Supreme Court went on to explain that the third criterion referred to an order that would impair a right to avoid trial (UNITED STATES OF AMERICA, 2006c, p. 350-351) and more specifically 'of a trial that would imperil a substantial public interest' (UNITED STATES OF AMERICA, 2006c, p. 353).

50. For the most recent and controversial settlement see *Doe v. Unocal* (UNITED STATES OF AMERICA, 2005e).

51. This is evident from what remains of the consolidated actions first filed in 2002 and 2003 in *re South African Apartheid Litigation* (UNITED STATES OF AMERICA, 2009a) at 134-135 now vastly different and much narrower after 5 years of litigating motions to dismiss. The most recent order dismissed claims against corporate defendants who merely did business with the Apartheid government (claims against Barclays Bank Ltd. and Union Bank of Switzerland) and dismissed claims that a corporation which aided and abetted particular acts could be held directly liable for the tort of apartheid.

52. Recent decisions contributing to the reining in of the application of the doctrine include *Turedi v. Coca-Cola Company* (UNITED STATES OF AMERICA, 2009b) (7 July, 2009) and *Aldana v. Del Monte Fresh Produce* (UNITED STATES OF AMERICA, 2009c) (13 August, 2009) where the courts have been willing to affirm ATCA dismissals on grounds on *forum non conveniens*. In *Sinaltrainal v. Coca-Cola Company* (UNITED STATES OF AMERICA, 2009d) (11 August, 2009) the court relied on heightened pleading standards enunciated by the Supreme Court in other cases to impose a higher standard of pleading on ATCA claimants.

RESUMO

Na última década, um crescente número de casos apresentados perante cortes dos EUA continha a alegação de que grandes empresas multinacionais foram cúmplices de violações de direitos humanos cometidas por agentes de governos estrangeiros, dos quais teriam se beneficiado. Estes casos relacionam-se a uma das questões mais controversas da defesa internacional dos direitos humanos, qual seja, a previsão da obrigação de reparação secundária e indireta e, em particular, a obrigação de reparação por cumplicidade. Enquanto a Suprema Corte dos EUA deverá ainda tratar do assunto, muitas Cortes do Circuito e Distritais decidiram que a obrigação de reparação por cumplicidade está incluída no escopo da Lei de Reclamação sobre Danos Estrangeiros (Alien Tort Claims Act, ATCA). Este artigo visa a examinar a decisão mais recente do caso *In re Apartheid da África do Sul* (usualmente conhecido como o caso *Khulumani*), decidido pela Corte Distrital Sul de Nova Iorque, e argumentar a favor da decisão da Corte de que a obrigação de reparação por cumplicidade está prevista, é necessária e desejável e não entra em conflito com questões políticas e doutrinas de convivência harmônica internacional. Argumentar-se-á que as propostas contra o reconhecimento deste tipo de obrigação, como as da administração Bush e do governo sul-africano de Mbeki, são baseadas em julgamentos errôneos, ilógicas e prejudiciais, e que, sem esta ameaça, prevista pela ACTA, empresas multinacionais não enfrentariam as conseqüências por colaborar com os mesmos abusos que a política externa dos EUA alega procurar evitar.

PALAVRAS-CHAVE

Lei sobre Danos Estrangeiros (ACTA) – Obrigação de reparação por cumplicidade – Vítimas do Apartheid – Reparação – Empresas multinacionais – Questão política – Convivência harmônica internacional

RESUMEN

En la última década, en una cantidad cada vez mayor de casos presentados ante la justicia de los Estados Unidos se afirma que grandes corporaciones multinacionales fueron cómplices y se beneficiaron de violaciones a los derechos humanos cometidas por agentes de gobiernos extranjeros. Estos casos tienen que ver con una de las cuestiones más debatidas en los litigios internacionales por los derechos humanos: la responsabilidad secundaria o indirecta, y en particular la responsabilidad por complicidad. Si bien la Corte Suprema de Estados Unidos aún debe abordar la cuestión, muchos tribunales de primera y segunda instancia han decidido que la responsabilidad por complicidad está prevista en la Alien Tort Claims Act - 'ATCA'.

El presente trabajo procura examinar el fallo más reciente en el caso *In re South African Apartheid Litigation* (comúnmente citado como el caso *Khulumani*) del Tribunal de Distrito Sur de Nueva York, y argumenta a favor de la opinión del tribunal en el sentido de que la responsabilidad por complicidad está prevista, es necesaria y deseable, y no entra en conflicto con las doctrinas de la cuestión política y la cortesía internacional. Se argumentará que las manifestaciones en contra del reconocimiento de esta responsabilidad, como las de los gobiernos de Bush y de Mbeki en Sudáfrica, son equivocadas, ilógicas y perjudiciales y que sin la amenaza de la responsabilidad, que puede ofrecer la ATCA, las empresas multinacionales no enfrentarán las consecuencias por ser cómplices de los mismos abusos que la política exterior de Estados Unidos dice querer evitar.

PALABRAS CLAVE

Alien Tort Claims Act (ATCA) – Responsabilidad por complicidad – Vítimas del Apartheid – Reparaciones – Corporaciones multinacionales – Cuestión política – Cortesía internacional

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